I trust that the general question may not be held as foreclosed.

The Court dismissed the appeal, and found the defender and his father as his curator jointly and severally liable to the pursuer in the whole expenses of the case.

Counsel for the Pursuer (Respondent)—Morton—R. Macgregor Mitchell. Agent—R. J. Calver, S.S.C.

Counsel for the Defenders (Appellants)—Macphail, K.C.—Dykes. Agent—James Scott, S.S.C.

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*Tuesday, January* 16.

## FIRST DIVISION.

[Lord Cullen, Ordinary.

## LORD ADVOCATE *v.* VAN WEEL.

*War—Emergency Legislation—Revenue—Customs (War Powers) Act* 1915 (5 *Geo. V, cap.* 31), *sec.* 5 (1)—*Declaration as to Destination of Goods—Defence Open to Exporter where Commissioners Express Dissatisfaction as to Goods having Reached Enemy.*

The Customs (War Powers) Act 1915, sec. 5 (1), enacts—"Where in pursuance of any order made by the Commissioners of Customs and Excise under section one hundred and thirty-nine of the Customs Consolidation Act 1876, a person in the course of making entry before shipment makes a declaration as to the ultimate destination of any goods, then, unless security has been given by bond, the exporter shall, if so required by the Commissioners of Customs and Excise, produce evidence to their satisfaction that those goods have not reached a destination in any territory which, under any Proclamation issued by His Majesty dealing with trading with the enemy for the time being in force, is or is treated as enemy country, and if he fails to do so he shall be liable to a penalty of treble the value of the goods or one hundred pounds at the election of the Commissioners, unless he proves that they reached such destination without his consent or connivance, and that he took all reasonable steps to secure that the ultimate destination of the goods should be the destination mentioned in the declaration."

*Held* that, where the exporter failed to satisfy the Commissioners, it was not a defence to prove that the goods had not in fact reached an enemy destination, but it must be established that the exporter had taken all reasonable steps to secure that the ultimate destination should be the destination in the declaration.

*Process—Proof—Revenue—Customs and Excise—Order of the Commissioners—Production and Proof of Order in a Subpœna and Information.*

*Held*, in a subpœna and information at the instance of the Lord Advocate on behalf of the Commissioners of Customs and Excise to recover penalties for an offence against the Customs (War Powers) Act 1915, sec. 5 (1), that it was unnecessary for him to produce and prove an Order issued by the Commissioners under the Customs Consolidation Act 1876, which made provision for a declaration as to the ultimate destination of goods about to be exported, unless it were challenged.

The Order of the Commissioners of Customs and Excise dated 26th April 1915 provides, section 3—"In the case of goods intended for exportation the entry shall contain particulars as to (1) the name and address of the consignor of the goods; (2) the name and address of the consignee of the goods; (3) the ultimate destination of the goods; and a declaration on the part of the person making entry that the particulars as aforesaid are correctly stated."

The Customs (War Powers) Act 1915 (5 Geo. V, cap. 31), sec. 5 (1), is quoted *supra in rubric*.

The Customs (War Powers) Act 1916 (5 and 6 Geo. V, cap. 102) enacts, section 2 (2)—"In the case of proceedings taken under the said sub-section" (*i.e.*, 5 (1) of the 1915 Act, *sup.*) "an averment in the information that the defendant has failed to produce evidence to the satisfaction of the Commissioners that the goods in question have not reached a person who is an enemy or treated as an enemy, or a country which is enemy or treated as enemy, under any law for the time being in force relating to trading with the enemy, shall be sufficient unless the defendant proves to the contrary."

The Lord Advocate, *pursuer*, brought an action against Johannes Jeronimus Van Weel, *defender*, by way of subpœna and information for the recovery of penalties.

The *information* set forth—"*First Count.*—That of date 26th April 1915 the Commissioners of Customs and Excise made an Order under section 139 of the Customs Consolidation Act 1876 (39 and 40 Vict. cap. 36) requiring the exporter or shipper of any goods of whatever description intended for exportation to make due entry and obtain clearance of the goods before shipment, and further requiring every such entry to contain a declaration as to the ultimate destination of the goods so entered for exportation; that Johannes Jeronimus Van Weel, residing at No. 2 Darnell Road, Trinity, Leith, being about to export on board the steamship 'Professor Buys' certain goods, namely, 743 bags of onions, consigned or purported to be consigned to Haddas Van Reek, Nieuwehaven, Rotterdam, did, in course of making entry, pursuant to the said Order, of the said goods, declare in a specification dated 10th May 1915, and delivered by the said Johannes Jeronimus Van Weel to Herbert James Calcutt, specification officer at the custom house at the port of Hull, that the said goods would be exported to Haddas Van Reek, Nieuwehaven, Rotterdam, as their ultimate destination; that the said Johannes Jeronimus Van Weel thereupon exported the said goods without any security being given by bond in respect of the same or the exportation thereof; that

thereafter, on or about 26th May 1915, the said Commissioners of Customs and Excise, pursuant to section 5 of the Customs (War Powers) Act 1915 (5 Geo. V, cap. 31), required the said Johannes Jeronimus Van Weel, being such exporter of the said goods, to produce evidence to the satisfaction of the said Commissioners that the said goods had not reached a destination in any territory which, under any Proclamation issued by His Majesty dealing with trading with the enemy for the time being in force, was, or was treated as, enemy country; and that the said Johannes Jeronimus Van Weel did, notwithstanding such requirement, fail to produce evidence to the satisfaction of the said Commissioners that the said goods had not reached a destination in such territory as aforesaid; contrary to the said Customs (War Powers) Act 1915, section 5; whereby the said Johannes Jeronimus Van Weel is liable in a penalty of £1551, being treble the value of the said goods, or such other sum as may be ascertained in the proceedings to follow hereon to be treble the value of the said goods, and which sum the said Commissioners of Customs and Excise have elected to sue for instead of the penalty of £100.'

The second count was exactly similar to the first except that it related to 1601 bags of onions exported on 26th May 1915 by the "Kirkham Abbey," and the penalty claimed was £3420.

The Lord Ordinary (CULLEN) allowed a proof and appointed the defender to lead therein.

The *facts* established at the proof were—The defender, a Dutch subject, was employed by Van Reek to buy and forward vegetables to him to Rotterdam, where he had a factory in which the vegetables were dried and made into powder. The defender bought the onions in question for Van Reek. On 17th April 1915 he had written to Van Reek as follows:—"Mr H. Van Reek, Rotterdam. Dear Sir,—As the authorities are getting very particular who is shipping onions and carrots you might send me declarations that the onions and carrots I ship you are not destined for a country at war with England. Whenever they want that declaration I can produce same and will have no difficulty in shipping. If they want declarations before I have got yours I shall get your letter translated that the onions are getting dried in Holland and come back to here. Whereafter, I suppose, I shall have no difficulty in shipping regularly. However, send your declarations soonest. . . . Yours truly, J. J. VAN WEEL." He received the following declarations:—"I, the undersigned H. Van Reek, declare on oath that the bags of onions bought from J. J. Van Weel at Hull are not destined for shipment to any country at war with England. H. VAN REEK. Sworn at the British Consulate General, Rotterdam. This 23rd day of April 1915. Before me—HENRY TOM, *Vice-Consul.*" "I, the undersigned H. Van Reek, declare on oath that the bags of Egyptian onions bought from Mr J. J. Van Weel at Hull are not destined for shipment to any country at war with England, but will solely be used in my factories at Breda and Schiedam. H. VAN REEK. Sworn at the British Consulate General, Rotterdam. This 8th day of May 1915. Before me—J. W. MULL, *British Pro-Consul.*" In making entry prior to shipment the defender produced those declarations to the Customs officials, who stated that the declarations were not required, and the defender retained the declarations into which he had inserted the number 743 and 1601, being the numbers of the bags. As required by the order of the Commissioners of Customs and Excise, dated 26th April 1915, the defender entered the ultimate destination of the goods, and acting on the above declarations stated it to be Van Reek, Rotterdam. The onions were shipped to Rotterdam without any security by bond being given. On 26th May 1916 the Customs authorities served two notices upon the defender calling on him to produce evidence in terms of the Customs (War Powers) Act 1915, section 5 (1). The defender did not reply to these notices, as prior to their receipt he had written to Van Reek asking him for a final declaration that none of the onions had reached an enemy country. He received the following declaration signed by a duly authorised employee of Van Reek:—"*Rotterdam, July 19th*, 1915.—I, the undersigned H. Van Reek, herewith assure on oath that all the bags of Egyptian onions arrived here from Hull, bought from Mr J. J. Van Weel of Hull, have not been exported but have been used in my own factory in Holland.—*p.* H. VAN REEK, H. F. BOSMAN. Sworn at the British Consulate General, Rotterdam, this 19th day of July 1915. Before me—J. W. MULL, *British Pro-Consul.*" He did not consider that declaration satisfactory and wrote for a further declaration. He received the following:—"*Rotterdam, July 27th*, 1915.—I, the undersigned H. Van Reek, declare on oath that all bags of onions sent from Hull this season by Mr J. J. Van Weel to my address have not reached an enemy's country but have been used in my factory. The onions are destined to be dried. Of these I have sold a good lot to the War Office, London. Remainder of the dried onions are for making onion powder, of which I sold partly to several firms in England, remainder to be stored in my warehouse awaiting further orders.—*p.* H. VAN REEK, H. F. BOSMAN. [2/6d. Consular Service Stamp.] Sworn at the British Consulate General, Rotterdam, this 27th day of July 1915. Before me—G. S. MACLEAN, *British Vice-Consul*, Rotterdam." The defender, on the Custom House officials calling upon him, submitted the whole of his correspondence with Van Reek to them, including the declarations. He thereafter did nothing further.

In the course of the proof the defender tendered evidence to show that the whole of the onions were converted into powder and were in that form sent back to this country. That line of evidence was objected to, and the Lord Ordinary sustained the objection.

No evidence was led for the pursuer.

On 30th November 1916 the Lord Ordinary

found for the pursuer on each count and adjudged and decerned against the defender for the penalties.

*Opinion.*—"I think this information is well laid against the defender, and that on the facts I must hold that he has incurred the penalties sought for by the Crown. It is not necessary that there should have been any deliberate intention on the defender's part to infringe the law, and the Solicitor-General said that he did not impute any such guilty intention to him, and in particular absolved him from having consented or connived at the goods here in question having reached an enemy country. But as regards the condition which the statute says must be satisfied in order that the defender may avoid the penalties, namely, that he should have taken all reasonable steps to secure that the ultimate destination of the goods should be the destination mentioned in the declarations produced by him, it appears to me that on the evidence I must hold that the defender here did not take all such reasonable steps. It is impossible to lay down any abstract definition of what reasonable steps are to be. The question is one of fact on the circumstances of each case, and my verdict on the facts of this case is that the defender was decidedly loose and careless in the way he went about the matter of the two exportations in question and that he cannot claim to have exercised the reasonable care which the statute requires. In the first place I think he did not exercise reasonable care in his letter of 17th April 1915 asking declarations from Van Reek. To my mind that letter was written far too much as if these declarations were purely matter of form, and the consequence of his having written in that way was that he got back from Van Reek declarations which were signed by Van Reek's clerk and which themselves treated the matter as one of form, because not only were they left blank as regards the dates but they were left blank as regards the subject-matter to which the declarations in them were intended to be used. In these the defender filled in the dates, and filled in at his discretion the blank as regards the goods in each declaration, and it was upon the force of these declarations, so completed by him, that the exportations of 10th and 17th May 1915 took place.

"As regards the terms of the declarations, such as they were, as to destination, I think it is impossible to say that the defender was right in being satisfied with them. The first declaration only excluded the case of 'shipment' of the goods to some enemy country. The second carried the matter no further because it ended up with what appears to me to be the evasive statement that the goods were to go to Van Reek's factory. Now Van Reek's factory was a factory for the purpose of converting the form of the goods merely from onions in bags into onion powder, and it was quite consistent with these declarations that the whole of the onion powder so made in his factory should have been intended for transport across the frontier into Germany. Accordingly I think the defender was not reasonably careful in being satisfied with these declarations and in making the shipments in question on the strength of them. I think corroboration of that view is to be found in the fact that before he had made these shipments and acted on the declarations he had written to Holland requesting Van Reek to send more careful declarations in the future."

The defender reclaimed, and argued—(1) The pursuer had failed to prove his case, for he had not produced or proved the Order of the Commissioners of Customs and Excise, dated 26th April 1915. That Order did not prove itself as an Act of Parliament did, and consequently must be produced and proved—*Todd* v. *Anderson*, 1912 S.C. (J.) 105, 6 Adam 713, 49 S.L.R. 1002; *Brander* v. *Mackenzie*, 1915 S.C. (J.) 47, 7 Adam 609, 52 S.L.R. 660; *Cameron* v. *M'Avoy*, 1916, 54 S.L.R. 28. *Sharp* v. *Leith*, 1892, 20 R. (J.) 12, 3 White 351, 30 S.L.R. 34, was distinguishable, for there the Order was produced. No doubt those were decisions on statutory rules of criminal procedure, but those rules were, like the Order in question, relaxations of the common law, and the law was that only Acts of Parliament proved themselves, and an Order must be produced and proved—Dickson on Evidence, sec. 1105. Further, the present case was criminal in nature, for if imprisonment might follow in default of payment of the penalties the case was criminal—*Simpson* v. *Glasgow Corporation*, 1902, 4 F. 611, 39 S.L.R. 371. Here imprisonment was competent—Customs Consolidation Act 1876 (39 and 40 Vict. cap. 36), sec. 232. But if under the Court of Exchequer (Scotland) Act 1856 (19 and 20 Vict. cap. 56), sec. 10, the action was civil, it was not subject to the ordinary rules of procedure, for the pursuer had proceeded by subpœna and not by summons. And if the ordinary rules of procedure applied the discretion of the Court to relax the ordinary rule that such an Order must be produced before proof had to be exercised with great care—*Liquidator of Universal Stock Exchange* v. *Howat*, 1891, 19 R. 128, 29 S.L.R. 119—and should not be exercised in the present case, in which such heavy penalties were involved. (2) The Customs (War Powers) Act 1916 (5 and 6 Geo. V, cap. 102), sec. 2 (2), did not apply to the present case, as it only applied (section 2 (1)) to proceedings under the Customs (War Powers) Act 1915 (5 Geo. V, cap. 51) as amended by the Customs (War Powers) No. 2 Act 1915 (5 and 6 Geo. V, cap. 71), which was passed after the date of the alleged offence. Accordingly the pursuer's case depended solely on the Customs (War Powers) Act 1915, sec. 5 (1), but that section applied only to a case where the goods had in fact reached an enemy country. Accordingly the evidence excluded should have been accepted; it showed that the goods had not reached an enemy country. It accordingly would have established a complete defence. The interpretation placed upon that section by the pursuer was absurd, as it resulted in making the defences in section 5 (1) available to one whose goods had reached an enemy coun-

try, and not to one whose goods had not reached an enemy country. Further, section 2 (2) of the Act of 1916 was enacted to relieve the pursuer of the duty of proving facts which he was prior thereto bound to prove. He in this case was bound to, but had not proved those facts, so that the case failed. If, however, the Act of 1916, section 2 (2), applied, then the defender could exonerate himself by "proof to the contrary." That meant proof that the goods had not reached an enemy destination, and that was the evidence excluded by the Lord Ordinary. "Proof to the contrary" did not mean proof that the Commissioners had been satisfied, for unless the Commissioners were not satisfied no information would ever have been brought. But in any event it was admitted that there was no consent or connivance on the part of the defender if the goods had reached an enemy destination, and the facts showed that he had taken all reasonable steps to prevent the goods reaching such a destination. Upon that point proof that the goods had not in fact reached an enemy country was very relevant. *Macfarlane* v. *Commissioners of Inland Revenue*, 1859, 22 D. 266, was distinguished, for in tendering proof that the goods had not reached an enemy country the defender was not attempting to review a matter on which there was any determination of the Commissioners.

Argued for the pursuer (respondent)—(1) There was no necessity to produce or prove the Order of 26th April 1915, for the offence charged was failure to satisfy the Commissioners in terms of section 5 (1) of the Act of 1915. Further, the case was civil in nature, and subject to the ordinary rules of civil procedure—Court of Exchequer (Scotland) Act 1856 (*cit.*), sec. 10—and the defender admitted that the Order existed and applied to his goods, for he made a declaration under it. No further proof of the Order was necessary—Court of Exchequer (Scotland) Act 1856 (*cit.*), sec. 7. Further, the present objection came too late, for it was not stated to the Lord Ordinary. *Sharp* v. *Leith* (*cit.*) was in point, and was not cited in *Todd's* case (*cit.*). In any event the cases cited by the defender being criminal cases decided upon statutory rules of procedure were not in point. Further, by the Customs (War Powers) Act 1916 (*cit.*), sec. 2 (2), the mere averment that the Customs officers were not satisfied was sufficient for a decision against the defender unless he proved to the contrary, which he had not done. (2) The object of the Customs (War Powers) Acts was to suppress carelessness or negligence in the export of goods, and to compel the exporter to secure that the goods did not go to an enemy destination. Accordingly the Act of 1915 enacted that the exporter should be liable in penalties if he failed to convince the Customs officials that the goods had not reached an enemy destination. The defender had failed to satisfy the Commissioners as to that, and his only defences were those set forth in section 5 (1), *i.e.*, proof that he had not consented or connived at the goods going to an enemy destination if they did do so, and that he had taken all reasonable steps to prevent their reaching an enemy destination. Proof that they had not in fact reached an enemy destination was not a defence, because that might quite well happen though the defender was grossly careless and negligent and took no precautions at all. The Commissioners could not be reviewed by the Court on the matter entrusted to their jurisdiction—*Macfarlane's* case (*cit.*). The Lord Ordinary was therefore right in excluding evidence as to the ultimate destination of the goods. Further, the Customs (War Powers) Act 1916 was purely a procedure Act, and evidence that the goods had returned to this country was not proof "to the contrary" in the sense of section 2 (2) thereof. The defender had failed to satisfy the Commissioners, and he had also failed to take all reasonable steps to prevent the goods reaching an enemy country, for he had not taken a bond, and the declarations which he had produced merely gave an undertaking against shipment to an enemy country and not against other modes of transport. The Lord Ordinary had rightly decided against him.

LORD PRESIDENT—This is an information laid at the instance of the Lord Advocate against a native of Holland resident in Leith who some time ago exported a cargo of goods mentioned in the information to a former employer of his own, by name Van Reek, a merchant in Rotterdam. He declared that the ultimate destination of the goods was Rotterdam, but he did not give any bond in security. He was quite entitled to do so, but having failed to give a bond the Commissioners of Customs and Excise invited him to satisfy them that the goods had not found their way to an enemy country. He failed to satisfy the Commissioners, and accordingly he is here charged with having failed to produce evidence to the satisfaction of the Commissioners that the goods had not reached a destination in enemy teritory. It is common ground that he did so fail. It is quite true that if he had been able to do so it was open to him to show that he had satisfied the Commissioners, or that he had never had an opportunity of satisfying them and he could not therefore have failed to give them satisfaction; but that was not the defence. Accordingly we must take it that the defender here has incurred the penalties prescribed by the statute unless he can excuse himself as the statute prescribes.

There is one avenue of escape, and one only, for the defender. On the assumption that the goods did reach an enemy country it is open to him to show that they did not arrive there by his connivance or consent, and that he took all reasonable steps to secure that their destination was not an enemy country. Now the Lord Ordinary having heard the evidence, came to the conclusion, which the Lord Advocate does not ask us to disturb, that Van Weel did not connive at or consent to these goods reaching, if they did reach, an enemy country, but his Lordship has found that the defender did not take all reasonable steps to secure that end, and it would be difficult indeed to question that decision, for the

only justification which the defender advances in support of the view that he took all reasonable steps was the production of two declarations which are now before us. These declarations have been subjected to severe criticism by the Lord Ordinary, and I think not unjustly, for they indicate very plainly an attempt on the part of the merchant in Rotterdam to evade the obligation which Van Weel sought to put upon him of making an honest declaration that these goods would not reach an enemy country but would find their final home in Rotterdam. Accordingly it appears to me that the defender has failed entirely to excuse himself on the only ground on which it was open to him to do so. In the course of the proof he tendered evidence to the effect that the goods had *de facto* not reached an enemy country, and the Lord Ordinary rejected the evidence and refused to allow any witnesses to be examined in support of that allegation. I think the Lord Ordinary was right. From the information now laid before us it appears that the evidence was tendered for the purpose of setting up a complete defence to the complaint. It was suggested by counsel for the defender that if he could show that *de facto* these goods never reached an enemy destination the information was at an end. The Lord Ordinary, very properly as I think, rejected that view. It was neither here nor there whether or not the goods reached an enemy destination. The defender had committed an offence and was liable to the penalty if he failed to excuse himself in the only way which the statute prescribes. It is not a sufficient excuse that the goods had not found their way to an enemy or to a place within the enemy country. No tender of evidence was made for a purpose suggested in the course of the discussion, namely, in order to buttress up the excuse that all reasonable steps had been taken to secure that the goods did not reach an enemy destination. If evidence had been tendered for that purpose, in my opinion it ought to have been rejected on the ground that it was entirely irrelevant, and if it is suggested that it might have been relevant, it is obvious that it would have imposed upon the prosecutor the duty of laying evidence before the Court for the purpose of showing that the goods had reached an enemy destination—an obligation which I think in the highest degree inexpedient.

There was only one further objection taken to the Lord Ordinary's judgment—a highly technical objection—that the Order upon which the whole proceedings were founded had not been produced and proved. It seems to me that it was wholly unnecessary that the prosecutor should prove this Order, that if any challenge was made he could produce it, but in the absence of any such challenge the Act puts the prosecutor under no obligation to prove or produce the Order. I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD JOHNSTON—Upon the incidental point I quite agree with your Lordship. I do so also upon the main question.

I think it is desirable to keep in view what was the necessity for and what the object of this legislation. There is no doubt that the policy of the British Government in at once endeavouring to make effective their blockade of the German coast, and at the same time dealing fairly and justly with friendly neutrals, was a very difficult one to carry out successfully. They had one of two courses to follow—either to stop all export to a neutral country having a frontier conterminous with Germany, or to allow export upon one condition. That condition involved reliance upon the good faith of the exporter, and required that as the exporter in his turn must place reliance on the good faith of the consignee, so the exporter would take steps to secure that good faith would be kept with him by the consignee. That being the situation and the object, what the Government did was to make use of the 1876 Act and to pass an Order under section 139 thereof. Nothing has been said against the validity of that Order. It commences first of all with a section regarding the making entry of goods which are going to be exported. And then it proceeds by section 3 to provide—[*his Lordship quoted the section*]. Now in the matter with which we are dealing the ultimate destination of the goods was the all-important matter. Then the Government having enacted that Order, Parliament passed two Acts in 1915—one the Act of 1915, cap. 31, and the other the Act of 1915, cap. 71. The Act of 1915, cap. 31, is, I think, the Act which we have to apply in the present case so far as creating the offence, because when the goods were exported it alone was on the statute book. Section 1 of the second Act, that of 1915, cap. 71, is from its date to be read into the Act of 1915, cap. 31, and to be substituted for a section of the Act of 1915, cap. 31. But so modified the Act of 1915, cap. 31, is and continues to be the operative Act. I do not think that this substitution affects the present question, for the offence here was committed before the passing of the Act of 1915, cap. 71. Then in the beginning of 1916 there was passed the Act of 1916, cap. 102, which, so far as we are concerned, is a mere procedure Act. As a procedure Act I think it applies to any prosecution instituted after its date notwithstanding that the offence may have been committed before it came into force.

[*His Lordship referred to the terms of the information and read section* 5 (1) *of the Act of* 1915, *cap.* 31, *down to the words "at the election of the Commissioners."*] Now at this point it must be noted that you pass from the jurisdiction of the Commissioners of Customs and Excise to the jurisdiction of the Court, because while the jurisdiction of the Commissioners entitles them to say that the defender has failed to produce evidence to their satisfaction, &c., when you come to the practical question of enforcing the resulting penalties the matter then passes into the jurisdiction of the Court. If this section 5 (1) stood alone, the Court would have to consider, first, has the defender failed to satisfy the Commissioners? That is answered in the affirmative by the

tabling of the information. If, then, he has so failed, the penalty enacted by the section must follow "unless he proves"—that is, the exporter proves to the Court—"that they [the goods] reached such destination without his consent or connivance, and that he took all reasonable steps to secure that the ultimate destination of the goods should be the destination mentioned in the declaration." That is the only defence which can be received, and I agree with your Lordship that the defender has failed to establish it. The terms of the section under which the information proceeds (section 5 (1)) require this Court to assume that the goods did in point of fact reach an enemy destination. That being so, the defender has failed to remove the responsibility which attaches to him, because he has not proved that they reached that destination without his consent or connivance and after he had taken all reasonable steps to secure that the ultimate destination should be the destination mentioned in his declaration. We do not require to deal with the question of consent or connivance, because we have it clearly upon the proof that if he took reasonable steps at all, which I think is very doubtful, the respondent certainly did not take *all* reasonable steps to secure that the ultimate destination should be the destination mentioned in his declaration.

Now pass to the Act of 1916, cap. 102, section 2, sub-section (2). That, so far as we are concerned here, is only a procedure section and it applies to the other part of section 5 (1) of the Act of 1915, cap. 31, to which I have just adverted. It says that in proceedings under that sub-section a statement by the Commissioners that the defender has not satisfied them that the goods in question have not reached an enemy person or enemy country shall be sufficient, unless the defender "proves to the contrary." Now I can only read that as importing that as a question of procedure it is to be taken by this Court that the statement that the Commissioners are not satisfied, &c., is sufficient warrant for them enforcing the penalties unless the respondent comes forward and shows that there has been some mistake, and that it is not true that the Commissioners have not been so satisfied. That I think does not in any way impinge upon the operative part of section 5 (1) of the Act of 1915, cap. 31, which stands just as it did before. The defender is left with his one means of escape, and one only. If he cannot show that there has been some mistake, and that it is not true that the Commissioners were not satisfied, &c., he must prove that the goods reached their assumed enemy destination without his consent and connivance, and that he took all reasonable steps, &c., as in the last paragraph of section 5 (1).

Under these circumstances I agree that the Lord Ordinary's interlocutor should be adhered to.

LORD MACKENZIE—I have come to be of opinion that the conclusion reached by the Lord Ordinary is sound. The difficulty which I have encountered in the case is upon a construction of section 5 (1) of the Act of 1915 (5 Geo. V, cap. 31), but the view that I take of this section is this. In the circumstances which have emerged here there is no doubt that the leading provision of the section applies, because the exporter has failed to produce evidence to the satisfaction of the Commissioners of Customs and Excise that the goods have not reached a destination in any territory which, under any Proclamation issued by His Majesty dealing with trading with the enemy for the time being in force, is or is treated as enemy country, and the consequence of that failure is that he is liable to the penalty. The difficulty arises upon the construction of the proviso, which has two limbs. The first limb deals with the case in which the goods "reached such destination." I construe that as meaning an enemy destination. If the goods reached an enemy destination, the whole case necessarily proceeds on that assumption. Then the *onus* is upon the exporter to prove that the goods "reached such destination without his consent or connivance." That is the first condition that he has to satisfy. But then follows a second condition which he also has to satisfy; he must also prove "that he took all reasonable steps to secure that the ultimate destination of the goods should be the destination mentioned in the declaration." According to my reading of the section, when you come to the second limb you have nothing to do with "such destination," which only deals with the first part of the proviso, and therefore as the Crown in the present case say that no question arises here at all about consent or connivance, we do not need to trouble about the meaning to be put upon "such destination," because the part of the statute to which we have to address ourselves runs thus, "that the exporter is in the circumstances of this case to be liable to a penalty unless he proves that he took all reasonable steps to secure that the ultimate destination of the goods should be the destination mentioned in the declaration." Therefore we are here not concerned with the question whether the goods did or did not reach an enemy country, whether they came back to this country, or whether they stayed in Rotterdam. So construing the statutory provision in regard to the *onus* which the exporter has to discharge, I have no hesitation in saying that on the merits he has failed to discharge the burden of proof which is put upon him.

There is only one other point I think it fair to mention in justice to Mr Brown's argument, because I understood him to maintain that the Crown had here failed to prove the averment in their information, and the way in which he attempted to make that out was by an argument of this character; he said, "It is only if the Crown avail themselves of the provision of sub-section (2) of section 2 of the Act of 1916 (5 and 6 Geo. V, cap. 102) that they can say that the averment is sufficient without bringing evidence to prove it," and his argument proceeded upon the view that the prosecutor was only entitled to pray in aid sub-section (2) of section 2 if his infor-

mation was laid as provided by sub-section (1) of section 2—that is to say, that it required to libel that it proceeded upon section 5 (1) of the Act of 1915 (5 and 6 Geo. V, cap. 31), as amended by section 1 of No. 2 Act of 1915 (5 and 6 Geo. V, cap. 71). Well, in the present case it would have been impossible for the prosecutor to libel the later statute, for the simple reason that the offence was committed before it became law, and, following the ordinary principle — it applies to all criminal legislation, and applies to this, which although of a civil character certainly involves penalties and is of a quasi-criminal character—it is impossible to hold that the later Act was retrospective so as to impose a greater obligation upon the exporter than there was upon him under the existing law at the date at which the alleged offence was committed. It accordingly could not be libelled under section 5 (1) of the Act of 1915 (5 and 6 Geo. V, cap. 31) as amended. But I cannot see why the provisions of sub-section (2) of section 2 of the Act of 1916 (5 and 6 Geo. V, cap. 102) should not apply on the principle that the greater includes the less, because it enables the Crown to say that the averment in the information is sufficient where the provision merely deals with enemy territory although the legislation is not in force with regard to the enemy person.

LORD SKERRINGTON—The Customs (War Powers) Acts of 1915 and 1916 are not models of good draftsmanship. Accordingly I am not surprised that the reclaimer's counsel in their endeavour to free their client from the very heavy penalties to which he is subjected did all they could to emphasise the careless draftsmanship to which I have referred. After carefully listening to all they had to say on the subject I cannot say that they have suggested any real doubt as to what these statutes meant. Accordingly I agree with your Lordship that the reclaiming note must be refused in so far as it is founded upon the theory that under section 5 of the Customs (War Powers) Act 1915 (5 and 6 Geo. V, cap. 31) and under section 2 (2) of the Customs (War Powers) Act 1916 (5 and 6 Geo. V, cap. 102) a person who is prosecuted for a penalty may exonerate himself by proving that in point of fact the goods in question did not find their way into an enemy country. That I think is a misconstruction of the statutes.

On the merits I agree with the Lord Ordinary. I admit that I felt some difficulty as to his excluding evidence in regard to the actual fate of these goods. In many cases what happened to the goods might have a material bearing on the question whether the consignor had acted in good faith or had taken all reasonable steps to secure that the goods should not be taken to an enemy country. In the actual circumstances of the case, however, I think that the Lord Ordinary was right in excluding the evidence, in the first place because no notice of this line of defence was given in the pleadings, and in the second place because the negligence of which the Lord Ordinary held that the defender had been guilty would not have been affected by evidence as to the ultimate fate of the goods. The Lord Ordinary decided, rightly as I think, that the declaration which the defender took from his consignee was worthless for securing the object which these statutes have in view.

The Court adhered.

Counsel for the Pursuer (Respondent)—Lord Advocate (Clyde, K.C.)—R. C. Henderson. Agent—R. Pringle, W.S.

Counsel for the Defender (Reclaimer)—C. H. Brown—Jamieson. Agents—Beveridge, Sutherland, & Smith, W.S.

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*Friday, February* 16.

## FIRST DIVISION.

[Sheriff Court at Glasgow.

## M'DIARMID *v.* GLASGOW CORPORATION (EXECUTIVE COMMITTEE ON HOUSING).

*Local Authority—Public Health—Housing, Town Planning, &c. Act* 1909 (9 *Edw. VII, cap.* 44), *sec.* 17 (2)—*Closing Order—Validity—Form of Order.*

A local authority issued a closing order narrating that a dwelling-house was unfit for human habitation, and prohibiting its use until in their judgment it was rendered fit for that purpose. The dwelling-house was a tenement containing eighteen separate dwelling-houses, and none of them was fit for human occupation. *Held*, in a special case under the Housing, Town Planning, &c. Act 1909, section 39, that the closing order was inept and *ultra vires* in respect that there was no statutory warrant for what was effected by the order, viz., to prohibit the use of the tenement as a whole until each and every dwelling-house in it had been rendered fit for human habitation in the judgment of the local authority—*Kirkpatrick* v. *Maxwelltown Town Council*, 1912 S.C. 288, 49 S.L.R. 261, *commented on*.

The Housing, Town Planning, &c. Act 1909 (9 Edw. VII, cap. 44), enacts, section 17—"(1) It shall be the duty of every local authority . . . to cause to be made from time to time inspection of their district, with a view to ascertain whether any dwelling-house therein is in a state so dangerous or injurious to health as to be unfit for human habitation. . . . (2) If . . . any dwelling-house appears to them to be in such a state, it shall be their duty to make an order prohibiting the use of the dwelling-house for human habitation (in this Act referred to as a closing order) until in the judgment of the local authority the dwelling-house is rendered fit for that purpose."

In the course of an action in the Sheriff Court at Glasgow by Mrs Catherine M'Diarmid, *pursuer*, against the Execu-