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.

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-

tive Committee on Housing of the Corporation of the City of Glasgow, *defenders*, craving decree quashing a closing order of the defenders, a question of law arose, and the Sheriff-Substitute (THOMSON) at the request of the pursuer stated a Special Case for the opinion of the Court.

The *Closing Order* was as follows:—

"CORPORATION OF GLASGOW.

"CLOSING ORDER under section 17 (2) of the Housing, Town Planning, &c., Act 1909.

"To Mrs Catherine M'Diarmid, 38 Steven Parade, Glasgow, and Miss Pennycook, bondholder, per Messrs Mackenzie Roberton & Co., 176 St Vincent Street, Glasgow, and others, owner or owners of the 'dwelling-house' being a front tenement at 26 Claythorn Street, Calton, Glasgow.

"Whereas under sub-section (2) of section 17 of the Housing, Town Planning, &c., Act 1909 it is the duty of the local authority, if, on the representation of the medical officer of health or of any other officer of the local authority, or other information given, any dwelling-house appears to the local authority to be in a state so dangerous or injurious to health as to be unfit for human habitation, to make a closing order, that is to say, an order prohibiting the use of the dwelling-house for human habitation until in the judgment of the local authority the dwelling-house is rendered fit for that purpose:

"And whereas it appears to the Executive Committee on Housing of the Corporation of the City of Glasgow, acting as local authority for said city for carrying out certain provisions of the Housing of the Working Classes Act, 1890 to 1909, including therein sections 17 and 18 of the Housing, Town Planning, &c., Act 1909, on the representation of the junior medical officer of health and the junior sanitary inspector of said city that the above-mentioned dwelling-house is in a state so dangerous or injurious to health as to be unfit for human habitation in respect of the defects set forth in the accompanying memorandum:

"Now therefore we, the said Executive Committee on Housing, as local authority foresaid in pursuance of sub-section (2) of section 17 of the Housing, Town Planning, &c., Act 1909, do, by this our order, prohibit the use of the said dwelling-house for human habitation until in our judgment it is rendered fit for that purpose.

"Dated this third day of December 1915.

"(Signed) J. LINDSAY,

"*Clerk to the Local Authority.*"

The *memorandum* referred to in the closing order set out the subjects in detail and the defects in each.

The Case set forth — "2. Mrs Catherine M'Diarmid, the pursuer, is proprietrix of a tenement at 26 Claythorn Street, Glasgow, consisting of eighteen dwelling-houses and a store. 3. The defenders on 3rd December 1915 made a closing order in regard to said property under section 17 (2) of said Act. 4. The pursuer on 6th January 1916 raised an action under section 17 (3) of said Act craving the Court to quash said closing order. 5. I heard the parties, but before judgment was given the pursuer lodged the minute craving a Special Case."

The *question* for the opinion of the Court was—"Whether the closing order is *ultra vires* and inept in respect it prohibits the use for human habitation of the eighteen separate dwelling-houses in the tenement therein referred to until in the judgment of the defenders each and every one of said eighteen dwelling-houses is rendered fit for that purpose?"

Argued for the pursuer—The closing order was *ultra vires*. It was legitimate for the purposes of identification to describe a tenement consisting of eighteen separate dwelling-houses as a dwelling-house — *Kirkpatrick* v. *Maxwelltown Town Council*, 1912 S.C. 288, *per* Lord President Dunedin at p. 297, 49 S.L.R. 261. But the present order went further. It prohibited the use of the dwelling-house until it was rendered fit for human habitation. The effect was that no house in the tenement could be used though one or two or even seventeen of them were in perfectly good condition. Such a result was not contemplated by the Housing, Town Planning, &c., Act 1909 (9 Edw. VII, cap. 44). The moment the order became operative the tenants had to leave their houses (section 17 (4)), and the subjects could not be let till the order was determined, *i.e.*, till the whole tenement was rendered fit for occupation (section 17 (5)). Further, if the tenement was to be regarded as a dwelling-house, then if the whole of the separate houses except one in it were put right within three months after the closing order became operative the defenders would still be bound to pronounce a demolition order—*Lancaster* v. *Burnley Corporation*, 1915, 1 K.B. 259—or at least if that course was not practicable they would have to keep closed the whole tenement. The Act conferred drastic powers on the defenders and should be construed against them. No doubt the pursuer if the order became operative could apply for a determination of it (section 17 (6)), or could raise the question when the demolition order came to be dealt with (section 18 (1) and (2)), but in the meantime her hands were tied by the order, and that gave her a right to have the order put in proper form before it became operative. An appeal by Special Case was competent up to the moment when the Sheriff-Substitute granted decree but not later, so that the present case was competent—Housing, Town Planning, &c., Act 1909 (*cit.*), sec. 39 (1) (*a*); *Johnston's Trustees* v. *Glasgow Corporation*, 1912 S.C. 300, 49 S.L.R. 269.

Argued for the defenders—At the present stage the order was competent, for none of the houses was in fact in a fit state for human habitation—*Kirkpatrick's* case (*cit.*), *per* Lord President Dunedin (*cit.*). Accordingly the question of law did not arise upon the facts, as it could not arise until one or other or several of the houses was fit for human occupation. Consequently the Special Case was not competent (section 39, proviso (*a*)).

LORD PRESIDENT—I am of opinion that the question with which this Stated Case concludes arises now and ought to be decided

now, for if the closing order pronounced by the local authority means what the question implies it means, then I am of opinion that this notice is inept, because it is contrary to the statute.

It appears that the pursuer is the proprietrix of eighteen separate dwellings all in one tenement, that the local authority had been advised that all these eighteen separate dwellings are in an insanitary condition and therefore unfit for human habitation, and accordingly that under the recent statute a closing order ought to be pronounced until these dwellings are put in a proper state of repair and rendered fit for human habitation.

Now I cannot conceive of any real difficulty arising in the expression of an order designed to give effect to that view. If the pursuer is the proprietrix of these eighteen dwellings, why not say so? If these dwellings are in an insanitary condition, why not say so? And if and when any one of them is put in a condition in which the medical officer of health thinks it quite fit for human habitation again, why not say that the order will be recalled, as it must be recalled, when that state of affairs arises?

Instead of expressing the order in plain and direct language which would be easy and intelligible to everybody, the local authority have taken advantage of a judicial opinion expressed in the case of *Kirkpatrick*, 1912 S.C. 288, at p. 297, 49 S.L.R. 261, to describe the cluster of eighteen dwellings as a dwelling-house "being the front tenement at 26 Claythorn Street, Glasgow," and then in the order they describe it as a dwelling-house. So far so good. It appears to me that on the decision in the case of *Kirkpatrick* (*cit.*) they are well founded in so designating the eighteen dwellings, for the Lord President in that case distinctly says—"I am of opinion that the expression 'dwelling-house'" in this very statute "may include a whole tenement, even although that tenement comprises four" or eighteen "dwelling-houses," as the case may be. "The whole question is one simply of identification." Of course if the local authority took advantage of this mode of expression, then they must also face certain risks. They are confronted with the peril of finding that one or two, or it may be more, are in a state fit for human habitation, and in that case their order goes by the board.

In the present case, however, and for the purpose of our judgment to-day, we must assume that the whole eighteen dwellings are in a state unfit for human habitation. That being so, if the proprietrix puts one or two or three in order, it appears to me that there is an imperative duty on the part of the local authority, by virtue of the 6th subsection of section 17, if application is made to them, to determine the closing order so far as regards that dwelling-house which the sanitary authority say is now fit for human habitation. But according to the terms of the order and its interpretation by counsel on both sides of the bar the dwelling-house, although perfectly fit for human habitation, would require to remain closed until the whole remaining seventeen had been put in a state fit for human habitation. That appears to me to be directly contrary to the Act of Parliament, and accordingly if that be (as I assume) the correct interpretation of the order—and undoubtedly it is in accordance with the expressions used in the order—I am of opinion that it was *ultra vires* for the local authority to pronounce it, and that we ought to answer the question put to us in the affirmative.

LORD SKERRINGTON—The first point for consideration is, whether the closing order has the effect which the learned Sheriff-Substitute attributes to it in the question of law. In regard to that I have no difficulty. The closing order treats this tenement of eighteen houses as one and prohibits the use of it—that is, of the whole and every part of it—until every part has been rendered fit for human habitation.

The next question is whether the statute authorises the closure of eighteen separate dwelling-houses until such time as the whole eighteen have been rendered fit for human habitation. I have been unable to find any clause in the statute which bears that interpretation, and the matter was not really very seriously argued to us by the learned counsel for the Corporation. His argument, as it seemed to me, depended upon certain observations by Lord Dunedin in the case of *Kirkpatrick*, 1912 S.C. 288, 49 S.L.R. 261. With these observations I respectfully agree. In ordinary language, and in the language of this statute, it is quite legitimate to describe, for purposes of identification, a tenement consisting of eighteen dwelling-houses as a single dwelling-house. But if one is to proceed to the operative portion of the order that circumstance does not entitle us to extend the powers of the local authority as has been here done. In the actual circumstances I do not think that anything is gained either in shortness or clearness by taking advantage of Lord Dunedin's observation, because if the order begins by treating the whole tenement as one it is all the more necessary in the final portion of the order (which defines the period of time for which the closing order is to be maintained) to show that this is a separable matter depending on the condition of each separate dwelling.

For these reasons I agree that the question in this Stated Case must be answered in the affirmative.

LORD ANDERSON—I agree. It seems to me that the vice of the closing order consists in the manner in which the executive or operative part of the order has been expressed. I have no quarrel with the preamble in so far as it describes the whole congeries of houses as a "dwelling-house" in conformity with the view of Lord Dunedin in the case of *Kirkpatrick*, 1912 S.C. 288, 49 S.L.R. 261. But I think it should have been made plain in the order that as each house was made fit for habitation the closing order for that house would be terminated.

The Court answered the question in the affirmative.

Counsel for the Pursuer—Mackenzie, K.C. —Maconochie. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for the Defenders—M. P. Fraser. Agents—Campbell & Smith, S.S.C.

Wednesday, February 21.

SECOND DIVISION.

(SINGLE BILLS.)

[Sheriff Court of Aberdeen.

CAMPBELL *v.* FARQUHAR.

Poor—Poor's Roll—Process—Printing—Dispensing with Printing—Reporters on probabilis causa Equally Divided in Opinion.

An appellant from the Sheriff Court, who had against him a judgment of the Sheriff-Substitute and Sheriff, applied for admission to the poor's roll of the Court of Session in order to prosecute the appeal. Opinion of the reporters as to whether the pursuer had a *probabilis causa litigandi* was equally divided. *Held* that, notwithstanding this, the fact that the case turned upon the question of contributory negligence justified the Court in dispensing with printing.

George Campbell, *pursuer*, aged fifteen, residing with his mother Mrs Helen Fraser or Campbell, Aberdeen, brought an action in the Sheriff Court at Aberdeen against Arthur W. Farquhar, *defender*, to recover damages for personal injuries sustained in consequence of his being knocked down by a motor car belonging to the defender. The Sheriff-Substitute (LOUTTIT LAING) having assoilzied the defenders, and the Sheriff (LORIMER) having adhered, the pursuer appealed to the Court of Session.

Both the Sheriff-Substitute and the Sheriff found that there was negligence on the part of the defender, but that negligence on the part of the pursuer had contributed to the accident, the Sheriff intimating that on the question of contributory negligence the case was a narrow one.

On 30th November 1916 the pursuer applied for admission to the poor's roll of the Court of Session in order to be enabled to prosecute the appeal. The reporters on the *probabilis causa litigandi* reported that they were equally divided in opinion on the question whether the pursuer had a *probabilis causa litigandi*.

The defender enrolled the cause and moved the Court, in view of the reporters' report, to refuse the application and to order prints to be lodged within fourteen days.

The pursuer moved the Court to dispense with printing, and argued—Where as in the present case there were averments of serious injury, and the question turned on a fine point of law, the pursuer should be given an opportunity of laying his case before the Court. The fact that the reporters were equally divided in opinion strengthened this pursuer's position. Under the circumstances printing therefore should be dispensed with, and for this purpose a dispensation was necessary. In the case of *Walker* v. *Smith*, 1912 S.C. 1149, 49 S.L.R. 863, the pursuer was, no doubt, refused admission to the poor's roll, and was ordered to print where he had an adverse judgment of the Sheriff-Substitute and Sheriff to meet. In this case, however, serious injuries had undoubtedly been sustained and the question of law was narrow. Because of that a dispensation of printing was asked for.

LORD SALVESEN delivered the opinion of the Court:—I think this is a special case. If the reporters had been of opinion that there was no probable cause I should not have been for granting this request. But where the reporters are equally divided in opinion, and where the Sheriffs have indicated that there is proof of fault, and the matter turns on the question of contributory negligence, I think we have such special circumstances as would justify us in granting the request to dispense with printing.

The Court granted the request to dispense with printing.

Counsel for the Pursuer—R. Macgregor Mitchell. Agent—T. M. Pole, S.S.C.

Counsel for the Defender—D. R. Scott. Agents—Lindsay, Cook, & Dickson, W.S.

HOUSE OF LORDS.

Thursday, March 8.

(Before Viscount Haldane, Lord Kinnear, Lord Shaw, and Lord Parmoor.)

SIMPSON *v.* SINCLAIR.

(In the Court of Session, November 10, 1915, 53 S.L.R. 94, and 1916 S.C. 85.)

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—"*Arising out of*"—*Fall of Wall on Adjoining Property upon Roof of Building where Workman Employed.*

A brick wall in course of erection on an adjoining property fell on to a building where fishcurers were employed at work. It brought down the roof of the building, the fishcurers were buried in the wreckage, and they suffered serious injuries. *Held* (*rev.* judgment of the Second Division) that the accident did arise out of the employment.

Per Lord Haldane—". . . if injury has been inflicted on the workman by any accident, such as something falling on him, which would not have happened to him if his employment had not caused him to be in the place at which the accident occurred at the time of its occurrence, the place and time having thus been conditions of the result brought into existence by the employment . . ., is too vague. It would cover the case of a farm labourer struck by lightning while walking across a field in the farm on which he was employed. Yet he