Trading with the Enemy Proclamation No. 2 of 9th September 1914—Manual of Emergency Legislation 1914, p. 378—and the case has been argued on that assumption. The Lord Ordinary, in giving judgment on the incidental points, brought before this Division in March last, incidentally gave his opinion on this question, and he has rather assumed that he then disposed of it, for in the judgment pronounced when the case was sent back to him, and now under review, he does not again refer to it, but simply finds that the debt due by the arrestees to the common debtors should in this action be made forthcoming to the arresters in the currency of this country, on a basis of exchange which he has fixed, on what must be admitted is a novel and somewhat empirical basis, though, if other considerations did not prevail, having much in equity to recommend it.

The Proclamation in question, art. 5 (1), prohibits any person carrying on business in the King's Dominions from paying any sum of money to or for the benefit of an enemy. But this is subject to the proviso, art. 7, that it should not be deemed to prohibit payments by or on account of enemies to persons in the King's Dominions, "if such payments arise out of transactions entered into before the outbreak of war." But for certain considerations to be immediately mentioned I should agree with the conclusion which the Lord Ordinary set forth in his former opinion, to the effect that the above prohibition would not strike at the transfer, by legal diligence in execution followed by forthcoming, to his creditor in this country, of funds due to an enemy by his debtor in this country. But there are two considerations which, at present at least, may make it impossible that we should accede to the arresters' demand, and which cannot therefore be ignored.

In the first place the money was not payable prior to the outbreak of war, and it was payable in German money and not in sterling of this realm. By the time that the money was due there was no exchange between the two countries and no means of converting the mks. 27,453 into sterling money except by inventing a mode of striking the exchange to meet the situation. That I do not think that we can do without adding a term to the contract. This I am not altogether satisfied that equity does not require that we should do in the extraordinary circumstances, particularly having regard to the manifest intention of the proviso of art. 7. Whether we should adopt the method of the Lord Ordinary I do not find it necessary to consider.

For, in the second place, I think that the arrestees have an interest or countervailing equity to plead against such course. They are due, it is true, mks. 27,453. But the common debtor has, through the intervention of a state of war, failed to deliver to the arrestees timeously three-fourths of the quantity of plates contracted for. The arrestees' loss is unquestionable, looking to the urgent demand for the article in this country since the outbreak of war. What their remedy, if any, may be when normal business relations are resumed between this country and that of the common debtor it is not for us now to decide. But the arrestees are, I think, entitled in the meantime to hold on to the sum due by them to the common debtor, and cannot at present be called upon to part with it to the creditor of the common debtor.

I do not find that this ground of judgment is taken in the defences, but fortunately the arrestees have a plea which covers it, viz., that the action is premature, and though we cannot therefore dismiss it as we are asked to do, we ought, I think, to sist it for the duration of the war, so as to protect the arrestees, but at the same time give the arresters all the benefit they may in the end of the day take from their completed diligence.

LORD SKERRINGTON—I am of opinion that this action ought to be sisted for the reasons explained by your Lordship in the chair. The defenders plead that their liability to pay the debt in question is suspended by the war. I should rather say that in consequence of the war the debt never matured and became payable. If the debt had matured and become payable prior to the outbreak of the war the question would have been essentially different from that which we now decide.

LORD MACKENZIE was absent.

The Court recalled the interlocutor of the Lord Ordinary and sisted the action.

Counsel for the Arrestees (Reclaimers)—Macphail, K.C.—Ingram. Agents—J. K. & W. P. Lindsay, W.S.

Counsel for the Pursuers (Respondents)—Chree, K.C.—Scott. Agents—Gardiner & Macfie, S.S.C.

Wednesday, June 13.

FIRST DIVISION.

LUMSDEN'S TRUSTEES *v.* LUMSDEN.

Succession—Entail—Entail (Scotland) Act 1914 (4 *and* 5 *Geo. V, cap.* 43), *sec.* 2—*Effect of Entail Act* 1914 *upon Directions to Trustees to Execute a Strict Entail of Heritable Subjects.*

A testator, who died subsequent to the Entail (Scotland) Act 1914 coming into force, directed his trustees to convey his landed estates to his eldest son and a series of heirs-substitute by deed of strict entail. *Held* that the trustees were bound to execute a conveyance in favour of the testator's eldest son and the series of heirs, and containing all the provisions and burdens set forth in the settlement other than the provisions rendered null and void by section 2 of the Act.

The Entail (Scotland) Act 1914 (4 and 5 Geo. V, cap. 43), which came into operation on 10th August 1914, enacts—Section 2—"The

Entail Act 1685 shall not apply to any deed relating to land in Scotland dated after the passing of this Act, the effect of which would be to entail such land, and no such deed shall be recorded in the Register of Entails; and any prohibition of alienation, contracting debt, or altering the order of succession, and any clause of consent to registration in the Register of Entails in any such deed shall be null and void: Provided that (*a*) where at the passing of this Act any Act of Parliament, deed, or writing is in operation whereby any money or other property, heritable or moveable, is held or invested for the purpose of purchasing land to be entailed, or whereby any land is directed to be entailed, but the direction has not been carried into effect, the date at which such Act of Parliament, deed, or writing first came into operation shall, for the purposes of this section, be held to be the date of any entail to be made in execution of the trust or direction whatever be the actual date of such entail; and (*b*) for the purposes of this section any testamentary or *mortis causa* deed or writing made and executed before the passing of this Act by a person alive at the passing of this Act shall be deemed to be dated after the passing of this Act, except in the case where such person dies within twelve months after such passing, or in the case where such person ceases or has ceased to be of sound disposing mind before the expiry of the said twelve months."

Mrs Maria Magdalena Gordon or Lumsden, widow of Hugh Gordon Lumsden of Auchindoir, and others, the testamentary trustees of the said Hugh Gordon Lumsden, *first parties*, and Hugh Patrick Henry Lumsden, elder son of the said Hugh Gordon Lumsden, *second party*, brought a Special Case for the determination of questions as to the effect of the Entail Act 1914 upon directions contained in the trust-disposition and settlement to convey landed estates to the second party by a disposition and deed of strict entail.

Hugh Gordon Lumsden of Auchindoir died on 9th April 1916, leaving a *trust-disposition and settlement*, which, after conveying his whole estate, heritable and moveable, to the first parties, provided as follows:—"(*Fourthly*) After the whole debts, legacies, and provisions before mentioned shall have been paid and discharged or provided for, as the case may be, I direct and appoint my trustees to convey and make over, with entry thereto as at the term of Whitsunday or Martinmas first occurring four months after my death, my said landed estates hereinbefore particularly disponed (hereinafter referred to as the entailed lands) by a valid and formal disposition and deed of strict entail to and in favour of my eldest son Hugh Patrick Henry Lumsden and the heirs-male of his body, whom failing to the heirs-male of the body of my younger son Carlos Barron Lumsden, whom failing the heirs-female of the body of the said Hugh Patrick Henry Lumsden, whom failing the heirs-female of the body of the said Carlos Barron Lumsden, excluding in each and every case heirs-portioners, the eldest heir-female throughout the whole succession always succeeding without division; and such disposition and deed of entail shall be granted, as aforesaid, under burden of existing feu rights and leases, and of the heritable securities and other real burdens and annuities, servitudes, and other restrictions affecting the entailed lands, or any part or parts thereof, as aforesaid, and under the following further real and other burdens, namely, . . . And upon such disposition and deed of entail being executed and delivered by my trustees, and completed in manner after directed, the trust hereby created shall cease and determine, and the institute or heir of entail entitled to and receiving delivery of the said disposition and deed of entail of the entailed lands shall be bound to grant and deliver to my trustees a full ratification and discharge of their actings, intromissions, and management in the execution of the trust hereby created, which ratification and discharge shall bind and be good against all the succeeding heirs of entail and all concerned, and it is hereby provided that the disposition and deed of entail to be executed by my trustees as aforesaid shall be so framed as to bind the institute as well as the substitute heirs of entail, and shall contain all clauses, conditions, and provisions proper and necessary for constituting a valid and strict entail according to the law of Scotland, and shall further contain a clause or clauses whereby the institute and heirs of entail, without prejudice to and in addition to the powers competent to institutes and heirs of entail by common law or under statute, shall have the following further powers, namely, . . . Moreover, the said disposition and deed of entail shall also contain an obligation binding the institute and all heirs of entail, and the husbands of such of them as are females, to assume, use, and constantly retain in all time after the succession to the entailed lands shall open to the said institute and heirs of entail respectively the surname (which shall be used always as a proper or last surname) of Lumsden, and the arms and designation of Lumsden of Auchindoir, and shall also contain a provision that the said institute and heirs of entail shall take and possess the entailed lands under said disposition and deed of entail only and upon no other title whatsoever, and that they shall use any other title thereto, or to any part or parts thereof which they may acquire as collateral thereto only and for no other purpose, and shall also contain a provision that the institute and heirs of entail foresaid shall be bound to pay and keep down the interest on all debts and sums of money affecting, or that may be made to affect, the fee of the entailed lands or any part or parts thereof, and also pay all annuities, feu-duties, casualties, multures, and rents affecting the same, and also a provision and declaration that the entailed lands shall not be affectable by or be subject to any terce or courtesy of any wife or husband of the institute or any of the heirs of entail, and an express exclusion of all such rights of terce and courtesy, and the said disposition and deed of entail shall, so

far as the terms and conditions thereof are not hereby expressly prescribed, be framed in such terms and under such conditions as my trustees shall direct and appoint; declaring that in the event of the said Hugh Patrick Henry Lumsden claiming his legal rights in the trust estate, and thus forfeiting all his right and interest under these presents as provided for in article seventhly hereof, my trustees shall in the said disposition and deed of entail omit him from the hereinbefore specified destination; and said disposition and deed of entail shall contain an express clause authorising its registration in the Register of Entails; and my trustees within six months of the date of entry hereinbefore specified of the institute or heir of entail shall cause the same to be recorded accordingly in said register and also in the Books of Council and Session, and the title of the institute or heir under the same to be feudalised by registration thereof in the appropriate Division of the General Register of Sasines."

The testator was survived by his wife Mrs Lumsden, an elder son the second party, and by the son and daughter of his younger son who predeceased him. The second party, besides being institute of the entail directed by the testator, was heir in heritage and residuary legatee.

The first parties *contended* "that their primary duty is to carry out the express instructions of the testator, whatever may be their legal effect and validity, and that they are consequently bound to execute, and the second party is bound to accept, a deed of strict entail of the testator's said landed estates, containing all the clauses, conditions, and provisions as well prescribed by the testator as essential and appropriate to such a deed according to the law of Scotland prior to the passing of the Entail Act of 1914, in favour of the second party as institute of entail, and the series of heirs-substitute called in the destination prescribed in the testator's trust-disposition and settlement as aforesaid. Alternatively, they contend that having in view the provisions of the said Entail (Scotland) Amendment Act 1914, they are bound to execute, and the second party is bound to accept, a disposition of the said estates in favour of the second party and the same series of heirs-substitute specified in the testator's trust-disposition and settlement, and containing the provisions and burdens (other than the clauses and instructions providing for a deed of strict entail) set forth in the testator's trust-disposition and settlement."

The second party contended "that having in view the provisions of the Entail (Scotland) Amendment Act 1914, the first parties are bound to execute and deliver to the second party a disposition of the said estates in favour of the second party and his heirs and assignees either (1) as residuary legatee under the testator's trust-disposition and settlement, or (2) as heir-at-law of the testator upon his establishing his title by service as such heir-at-law, or (3) as the person entitled to take the said lands under the destination contained in the said trust-disposition and settlement of the testator, as modified by the said Entail (Scotland) Amendment Act 1914; or, alternatively, that the first parties are bound to execute and deliver, and the second party is bound to accept, a disposition of the said estates in favour of the second party, and the same series of heirs-substitute specified in the testator's trust-disposition, and containing the provisions and burdens other than the clauses and instructions providing for a deed of strict entail set forth therein."

The *questions of law* as amended were—"1. Are the first parties bound to execute, and is the second party bound to accept, a disposition and deed of strict entail of the testator's said landed estates in favour of the second party as institute of entail and the series of heirs-substitute called in the destination prescribed in the testator's trust-disposition and settlement? Or 2. Are the first parties bound to execute, and is the second party bound to accept, a disposition of the said landed estates in favour of the second party and the same series of heirs, and containing the provisions and burdens (other than the provisions for a strict entail) set forth in the testator's settlement? Or 3. Are the first parties bound to execute a disposition of the said landed estates in favour of the second party and his heirs and assignees, either (*a*) as residuary legatee under the testator's trust-disposition and settlement, or (*b*) as the testator's heir-at-law, or (*c*) as the person entitled to take the said lands under the destination in the testator's trust-disposition and settlement, as modified by the said Entail Act?"

Argued for the first parties—The Entail (Scotland) Act 1914 (4 and 5 Geo. V, cap. 43) was passed on 10th August 1914, since when the cardinal prohibitions had ceased to be effective—section 2. The deed contemplated by the testator could not enter the Register of Entails, and if executed, whatever its effect *inter hæredes*, it would not be effectual against creditors. The result would be that the second party would take in fee-simple—*Scott* v. *Scott*, 1855 18 D. 168; *Duke of Hamilton* v. *Lord Hamilton*, 1868, 7 Macph. 139, 6 S.L.R. 111, 1869, 8 Macph. (H.L.) 48, 7 S.L.R. 456. Though it would be defective the first parties were bound to execute such a deed, for it was a condition of their discharge that they should carry out the testator's intention, and there was no intestacy—*Gordon* v. *Gordon's Trustees*, 1866, 4 Macph. 501, 1 S.L.R. 69 and 195; *Sandys* v. *Bain's Trustees*, 1897, 25 R. 261, 35 S.L.R. 211; *Baillie's Trustees* v. *Whitney*, 1910 S.C. 891, *per* Lord President Dunedin at p. 894, 47 S.L.R. 684. The second party could then evacuate the destination; it was for him to do so, and not for those parties to execute a deed not authorised by the testator. Alternatively those parties should execute a tailzied destination in favour of the second party and his heirs-male, but omitting the clauses now void—*Sandys'* case (*cit.*) *per* Lord Kinnear at p. 277. That would carry out the testator's intention so far as possible, and would not be entirely without effect—*Fleeming* v. *Howden*, 1868, 6 Macph. (H.L.) 113, 5 S.L.R. 511; *Earl of Caithness* v. *Sinclair*, 1912 S.C. 79, 49 S.L.R. 29.

Argued for the second party—Question 3 (c) should be answered in the affirmative. Under the Act of 1914 the entail contemplated was defective in one at least of the cardinal clauses, and therefore the whole entail was invalid—Entail Amendment Act 1848 (11 and 12 Vict. cap. 36) section 43. The deed could have no effect *inter hæredes*, and as it was impossible to execute the deed as contemplated by the testator, no such deed should be executed—*Gordon's* case (*cit.*) *per* Lord Jerviswood at p. 534. Alternatively the first party's alternative argument should be sustained.

LORD PRESIDENT—The recent statute has made a serious inroad upon the intentions of this testator as expressed in the trust-disposition and settlement before us. It appears to me that it is the duty of this Court to give effect as far as possible to the intentions of the testator as they stand modified by the provisions of the statute. That duty I think we shall best discharge if we answer the second question of law in the affirmative. But it appears to me that if we are to go to the utmost limit to which we are entitled to go in giving effect to the testator's intentions, there ought to be inserted in that question the word "strict" so as to make the words in parenthesis read "other than the provisions for a strict entail," and then I think we shall be giving full effect to the testator's intentions.

LORD JOHNSTON—The statute on the application of which this case arises, namely, the Entail (Scotland) Act of 1914, in the principal enactment of section 2, does two things. It says that "The Entail Act 1685 shall not apply to any deed relating to land in Scotland dated after the passing of this Act, the effect of which would be to entail such land, and no such deed shall be recorded in the Register of Entails." That is, I think, equivalent to repealing the Act of 1685, and as a sequel abolishing the Register of Entails. So far I do not think there is anything in the enactment to prevent a deed which was intended to entail land, with the usual features of entail, even if executed after the passing of the Act of 1914, from being still recorded, and properly recorded, as a conveyance in the Register of Sasines notwithstanding the passing of the Act. But then the Act goes on to say, "and any prohibition of alienation, contracting debt, or altering the order of succession, and any clause of consent to registration in the Register of Entails in any such deed, shall be null and void."

In respect that the Act declares that such clauses shall henceforth be null and void, I think that we should be justified in saying that in executing the conveyance which the testator has directed the clauses which the Act would make null and void need not be inserted. But beyond that I am not prepared to go.

LORD SKERRINGTON—One can figure a case where a direction to execute a strict entail forms an indispensable condition of a bequest, but it was not argued that the present case comes within that category. Assuming then that a conveyance falls to be granted in favour of the second party, it must necessarily be a conveyance with a tailzied destination, but without those clauses which the recent Act of Parliament declares to be null and void, and without those other clauses which though mentioned in the will are merely consequential upon a strict entail. I accordingly agree with your Lordships that the second question as amended should be answered in the affirmative.

LORD MACKENZIE was absent.

The Court answered the second question of law as amended in the affirmative.

Counsel for the First Parties—Chree, K.C.—J. H. Millar. Agents—Mackenzie & Kermack, W.S.

Counsel for the Second Party—Macphail, K.C.—C. H. Brown. Agents—Macpherson & Mackay, W.S.

HIGH COURT OF JUSTICIARY.

Friday, June 22.

(Before the Lord Justice-General, the Lord Justice-Clerk, Lord Dundas, Lord Johnston, Lord Salvesen, Lord Skerrington, and Lord Anderson.)

MACMILLAN *v.* M'CONNELL.

Justiciary Cases — Procedure — Proof — Liquor Control Regulations—Production of Regulations and Order of Central Control Board (Liquor Traffic) — Summary Jurisdiction (Scotland) Act 1908 (8 *Edw. VII, cap.* 65), *sec.* 38 (2).

A publican was charged with various breaches of the Defence of the Realm (Liquor Control) Regulations 1915 and the Order of the Central Control Board (Liquor Traffic) for the Scotland West Central Area, dated 12th August 1915, Articles 2 (1) (*a*), 2 (2) (*a*), 3 (*c*), and 6. The charges were found not proven on the ground that the Regulations and the Order although handed to the Clerk of Court were not brought to the notice of either the judge or the accused, and were accordingly not properly produced in terms of the Summary Jurisdiction (Scotland) Act 1908, sec. 38 (2). *Held* that production of these Regulations and Order was unnecessary.

Cameron v. *M'Avoy*, September 1916, 54 S.L.R. 28, *overruled.*

The Summary Jurisdiction (Scotland) Act 1908 (8 Edw. VII, cap. 65), section 38 (2), enacts—"Any order by any of the Departments of State or Government or any local authority or public body, made under powers conferred by any statute, or a print or copy of such order, shall, when produced in any proceedings under this Act, be received in evidence of the due making, confirmation, and existence of such without being sworn