

suffer an exception. Here, however, there was no such decree. The living apart of the spouses began by mutual consent. It is not clear that it ever changed its character in this respect. There is no evidence that the wife desired her husband's return or was willing to resume cohabitation. During the long period that they lived apart, whatever may have been the wife's view regarding the possibility of renewed cohabitation, it is clear enough that the husband treated his wife practically as if she were non-existent and entered into adulterous relations with another woman. Probably, however, such conduct is not unique in cases where spouses have agreed to live apart and continued to do so for the rest of their lives. The fact of its occurrence does not in itself alter the quality of the living apart as taking place by mutual consent.

Now I think it is good law that the general rule as to a wife taking her husband's domicile is not excluded by an agreement between the spouses to live apart. Accordingly I think that Mrs Mackinnon's domicile at the time of her death was in Queensland. Whether there may be other kinds of cases where without a judicial decree of separation the rule should suffer exception, I think it unnecessary to express an opinion.

The LORD PRESIDENT was absent.

The Court found that Robert Mackinnon died domiciled in Queensland, that Mrs Mackinnon's domicile at the date of her death was also in Queensland, and continued the cause.

Counsel for the Pursuers—Watson, K.C.—Dykes. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defender—Solicitor-General (Morison, K.C.)—R. C. Henderson. Agent—Stair A. Gillon, Solicitor of Inland Revenue.

Wednesday, July 9.

## SECOND DIVISION.

{Sheriff Court at Glasgow.

### TREVALION & COMPANY v. BLANCHE & COMPANY.

*Contract—Sale—Implied Condition—Clearance of Wine from Bond—Permit—Sale of Permit.*

A firm of wine shippers purchased from a firm of wine merchants a permit, which under certain emergency legislation was necessary for the clearance of wine from bond. In payment they sent a cheque. On the day previous to the receipt by the buyers of the permit, the restrictions which necessitated it were withdrawn, thereby rendering it useless. The sellers passed the cheque through the bank, which returned it to them marked "payment stopped." They thereupon raised an action against the buyers to recover the money. *Held* that, there being no implied condition

that at the time of performance a permit would be required in order to clear wine from bond, the buyer was, so far as this plea was concerned, bound by his contract.

### *War—Emergency Legislation—Intoxicating Liquor Orders—Contract—Illegality.*

Certain Orders were made which prevented wine merchants from obtaining subsequent to 1916 more than fifty per cent. of the amount of liquor supplied to them during 1916. An infringement of these was declared to be a punishable offence under the Defence of the Realm Regulations. *Held*, on a construction of the Orders, that it was illegal to transfer permits for the clearance of wine from bond, and that accordingly an agreement for the sale of such a permit was illegal.

F. W. Trevalion & Company, wine merchants, London, *pursuers*, brought an action in the Sheriff Court at Glasgow against J. J. Blanche & Company, wine growers and shippers, Glasgow, *defenders*, to recover the sum of £1750, with interest, the amount of a cheque sent to them by the defenders, which, having been presented to the bank, was returned marked "payment stopped."

The defenders made the following averments in a statement of facts—"(Stat. 1) The defenders on 31st May 1918 were desirous of obtaining some wine from bond, the output of which at that time was controlled by the Government authorities. (Stat. 2) On said date last mentioned the defenders offered to purchase from the pursuers a wine clearance certificate which they had advertised in *Wine and Spirit Gazette* newspaper as belonging to them, for sale. The price arranged to be paid for said wine clearance certificate is the amount sued for. (Stat. 3) Pursuers duly sent them on the wine clearance certificate, which, however, did not reach the defenders till the morning of 3rd June 1918, and on this date the defenders sent them their cheque for the £1750, the amount sued for. The authority to clear the wine from bond was not issued to pursuers but to Evans, Marshall, & Company, 62-63 Mark Lane, London, and was not a valid document which would have entitled the defenders to have obtained from bond the quantity of wine stated therein. The pursuers are called upon to produce said wine clearance certificate. The pursuers' statements in answer to the defenders' statement of facts are denied. Explained that the defenders' name which appears on the said wine certificate was adhibited by them with an indiarubber stamp for identification purposes, and that the pursuers had no right in said wine certificate which they could transfer to the defenders so as to enable them to obtain delivery of the quantity of wine from bond mentioned in the said wine certificate which had been issued by the Advisory Committee (Customs and Excise) under the authority of the Commissioners of Customs and Excise to the said Evans, Marshall, & Company for their business purposes and not for that of the defenders. (Stat. 4) The restriction by the Government authorities had been with-

drawn as regards the supply of wine from bond on the 2nd of June, the day previous to the defenders receiving the wine clearance certificate, in consequence of which it was of no value, even assuming that it was a document which would have entitled the defenders to get delivery of the wine before referred to. (Stat. 5) Owing to the withdrawal of the restrictions, the enforcement of said contract (assuming it is binding upon the defenders, which is denied) would be productive of serious hardship to the defenders, as the said wine clearance certificate was of no use to them, and their purpose in entering into said contract would be entirely defeated."

The pursuers averred in answers thereto—“(Ans. 3) Admitted that the wine clearance certificate was duly forwarded to the defenders, and that defenders sent pursuers their cheque, dated 3rd June 1918, for the sum of £1750 in payment thereof, and of the rights contained therein. The certificate is herewith produced and referred to for its terms, beyond which no admission is made. *Quoad ultra* denied. Explained that the pursuers offered and the defenders agreed to purchase the rights contained in said wine clearance certificate, which was duly delivered to and accepted by the defenders, and their name as proprietors thereof stamped on the face thereof. On receipt of said wine clearance the defenders forwarded to the pursuers their cheque in payment, and the transaction was completed. The wine clearance is valid, and would have entitled the defenders to have obtained from bond the quantity of wine stated therein, and the said wine clearance was sold by the pursuers and bought by the defenders in accordance with a well-known and recognised practice in the trade. (Ans. 4 and 5) The question raised by the defenders as to the value or use to the defenders of the said certificate after the completed purchase of same does not concern the pursuers. At the time the contract was entered into the wine clearance was of great value to the defenders, and no question would have been raised by the defenders as to the validity of the wine clearance but for the withdrawal of the restriction referred to, and no difficulty would have been experienced in obtaining the wine specified therein. In point of fact, immediately on receipt of said wine clearance the defenders sent the same to the bonded storekeeper to clear wine required by them, and it was only after having so used the wine clearance that they discovered the withdrawal of the restriction.”

The pursuers pleaded, *inter alia*—“(2) The defence stated being irrelevant, decree for the sum sued for should be granted as craved.”

The defenders pleaded, *inter alia*—“(2) The defenders' obligation to accept delivery of said wine clearance certificate and to pay for same being conditional that it was a necessary document for the purpose which pursuers and defenders contemplated when entering into the transaction, the pursuers are not entitled to decree. (3) *Estō* that a contract of sale was concluded between the parties, the pursuers being unable to, and

not having in point of fact tendered delivery of a certificate valid and legal for use by the defenders, are in breach of the agreement, and are not entitled to sue the defenders for the price. (4) The pretended sale having been entered into, and the offer made by the defenders, under essential error induced by the false and reckless representations of the pursuers, the sale is void or voidable, and ought to be set aside.”

On 20th January 1919 the Sheriff-Substitute (CRAIGIE) sustained the second plea-in-law for the pursuers and granted decree.

Note.—“In this action the pursuers Messrs F. W. Trevallion & Company are a firm of wine merchants carrying on business in London, and the defenders Messrs J. & J. Blanche & Company are a firm of wine growers and shippers, &c., carrying on business in Glasgow. The pursuers seek £1750 from the defenders, who deny liability for any part of that sum.

“In the issue of *The Wine and Spirit Gazette*, dated 25th May 1918, there appeared an advertisement (among advertisements of a similar kind) in these terms:—‘5000 wine clearance offered at 8s. per gallon on one sheet. 4314 C/o Harper & Company, 39-40 Crutched Friars, London, E.C.3.’ The defenders do not dispute that the advertisement related to the wine authority in process.

“This authority is entitled ‘Authority to obtain delivery granted under the Defence of the Realm Acts,’ and authorises Messrs Evans, Marshall, & Company, 5 Mark Lane, E.C.3, to obtain delivery from ship's side or a warehouse during the half year ending 30th September 1918 of such quantity of wine not exceeding five thousand (5000) gallons as they desire for home consumption. The authority bears to be issued by the Advisory Committee (Customs and Excise) under the authority of the Commissioners of Customs and Excise, and is signed by their secretary.

“Noticing that the authority was not in favour of the pursuers, I asked their agent Mr Ballantine how his clients came into possession of it. He answered that the information which he had was that the business of Evans, Marshall, & Company, Mark Lane, was purchased by Edward Young & Company, distillers and wine shippers, of Liverpool and Mark Lane; that the authority was included in this purchase; that Edward Young & Company advertised the authority for sale, and that his clients (*i.e.*, the pursuers) purchased it at £1250; and that there had been no curtailment of supplies to the customers of Evans, Marshall, & Company. Now what I have just said, if it is consistent with fact, gives at least an explanation why Trevallion & Company—not Evans, Marshall, & Company—are the pursuers in the action. Mr Wilson, the agent for the defenders, was not in a position to say whether the information given by Mr Ballantine to me was consistent wholly or partly with fact. Mr Wilson's attitude was that even if the information supplied by the pursuers to Mr Ballantine was well founded in fact, it did not affect the defence which his clients had set forth on record.

“I now draw attention to the terms of the note which is appended to the authority. The note is couched in these words:—‘*Note.*—This authority is granted on condition that the holder thereof (if a dealer) shall, as far as his licensed customers, if any, are concerned, distribute the wine obtained under the authority fairly among them, having regard to the quantity delivered to each in the year 1916. Failure to observe this condition *may* involve cancellation of the authority and refusal of its renewal in addition to any penalty to which the holder may be liable under the Defence of the Realm regulations.’

“The authority was granted under a notice issued by the Commissioners of Customs and Excise dated March 1917. In that notice the Commissioners state that under the Defence of the Realm Acts, from the 2nd April 1917 inclusive, no spirits or wine will be delivered from ship’s side or from a warehouse (including a distiller’s spirit store) for home consumption on payment of duty, *except on production* to the proper officer of Customs and Excise at the ship’s side or warehouse *of an authority granted by an Advisory Committee* appointed by the Treasury (Article 1). Article 8 of the notice reads as follows:—‘Every authority will be granted on the express condition that the holder, if a licensed dealer, will, so far as his licensed customers, tied or free, are concerned, distribute the spirits or wine obtained under the authority fairly among them having regard to the quantity delivered to each in the year 1916, so that no trader shall gain an unfair advantage over another, and failure to observe this condition *may* involve forfeiture of the authority and refusal of its renewal.’ The concluding article (10) of the notice bears—‘Where a dealer who has given up business since the 31st December 1915 has no successor the Committee, on production of satisfactory evidence of the clearance by him of spirits or wine from bond, and of the sale of such spirits or wine in the year 1916, will be prepared to grant an authority to enable any person who purchased the spirits or wine, either to clear spirits or wine himself from bond or to pass on the authority to another dealer who may be willing to supply him. Applications in such cases should be sent to the Committee through the local Customs and Excise officials, giving full particulars and evidence of clearances and purchases.’

“Having drawn attention to the contents (a) of the wine authority in favour of Messrs Evans, Marshall, & Company, and (b) of the notice under which it was issued, I come now to facts which are admitted by both parties. These facts are (1) that after becoming aware of the advertisement which the pursuers had inserted in the *Wine and Spirit Gazette* the defenders began negotiations for the purchase of the authority on 29th May 1918; (2) that on 31st May the pursuers wired the defenders ‘Can accept 5000 authority seven shillings,’ and that on the same day the defenders both wired and wrote to the pursuers accepting their offer, and asking them to send forward the authority, on receipt of which they would send

their cheque; (3) that on 1st June the pursuers posted the authority to the defenders; (4) that on 3rd June the defenders wrote to the pursuers in these terms—‘We are obliged for yours of 1st inst. enclosing wine clearing authority for 5000 gallons, and enclosed herewith we have pleasure in sending you our cheque’ (the cheque being for £1750, the sum sued for) ‘covering amount of your statement, which kindly return discharged’; (5) that on 4th June the defenders stopped payment of their cheque and wrote to the pursuers—‘You will observe that the clearing restrictions on wine have been withdrawn, and as this arrangement came into operation prior to our cheque being issued we contend that we are entitled to cancel the transaction. Meantime we have asked our bankers to stop payment of the cheque. We take it, however, that you will quite see the reasonableness of the position that we take up, as it would simply mean that you would be asking us to pay for something that is of no value.’ Hence the present action at the instance of the pursuers.

“All the facts stated in the preceding paragraph are taken from the telegrams and the letters that passed between the pursuers and the defenders. No oral communications it is admitted took place between them.

“The pursuers and the defenders are agreed that in June an Order was issued relating to the delivery of wine. That Order, *inter alia*, declares—‘On and after the 3rd June 1918 the delivery of wine from ship’s side or warehouse for home consumption, on payment of duty, shall be free from any restriction imposed by or under the principal order, and accordingly the principal order shall be revoked in so far as applies to wine, and in sub-clauses (1), (2), (3), and (5) of clause 4 of the principal order, the words “wine or” shall be deleted.’

“Before I go to the law applicable to the admitted facts it is perhaps expedient that I should state the position taken up on record by the pursuers on the one side and the defenders on the other.

“The pursuers found on the defenders’ cheque for £1750, and there is no doubt—at least no doubt is suggested by the defenders—that the pursuers came into possession of the cheque for £1750 without any fraud, actual or constructive, on their part. The position on record of the defenders is that the pursuers could not transfer to them the wine authority, because it was conceived in favour of Evans, Marshall, & Company for their business purposes alone. The position of the defenders is, I assume, that the authority in favour of Evans, Marshall, & Company was not transferable by them to any other firm or person. It is, however, difficult for me to see that the Order can be so read, at least as long as the customers of Evans, Marshall, & Company make no complaint against them. The notice of March 1917, to which I have already referred, may have been intended to stipulate that the authority was not transferable to any other firm by the pursuers, to whom it was granted, but I do not see my way so to read it.

"My information is that such an authority for the delivery of wine as I have to construe was the subject of sale and transfer until the need for such authorities came to an end as from the 3rd of June 1918. My information may either be correct or incorrect, and I quite understand that my information, even if it is correct, does not entitle me to say that in law the authority with which I am dealing was transferable. But it seems to me that those who issued the Order under which the authority was granted, could have used, if that had been their intention, words similar to those used in the Order dated 13th August 1918 (which admittedly does not apply to wine)—'A person shall not sell or buy, or offer to sell or buy, an authority for the delivery of spirits from bond granted or to be granted by the Commissioners of Customs and Excise' (Regulation 11).

"If I read the correspondence correctly the contract entered into between the pursuers and the defenders was concluded on the 31st May, or at least not later than 1st June.

"The contention of the defenders' agent was founded on plea 3, which reads—'Esto that a contract of sale was concluded between the parties, the pursuers being unable to, and not having in point of fact tendered delivery of a certificate valid and legal for use by the defenders, are in breach of the agreement and are not entitled to sue the defenders for the price.'

"If I understand the argument for the defenders, it comes to this, that although there was a concluded contract *ex facie* valid in every way for the transference of the authority for the delivery of the 5000 gallons of wine to the defenders, and although the pursuers divested themselves of the authority by posting it on the 1st of June to the defenders, yet as the authority became unnecessary as from the 3rd of June, the day on which the defenders sent their cheque for £1750 to the pursuers, the contract with its obligation to pay the £1750 came to an end.

"I have already indicated that in the defences it is not alleged that when the contract for the transfer of the authority was concluded the pursuers knew that it was to be made unnecessary as after the 3rd June. It therefore seems to me that, as the record stands, the fourth plea-in-law for the defenders has no foundation.

"It seemed to me that the defenders thought the best foundation for their defence was on the law laid down in the cases which arose on account of the postponement of the coronation of Edward VII in 1902. The defenders cited one of these cases to me—*Chandler v. Webster*, [1904] 1 K.B. 493, and I have read the other cases.

"I think that the decisions in the Coronation cases amount to this—(1) Where two parties to a contract have based their contract on the continued existence of some particular specified thing, then in the absence of any express or implied warranty that the thing shall exist, the contract is subject to an implied condition that the parties shall be excused in case before breach perform-

ance becomes impossible from the perishing of the thing without default of the contractor; but (2) where a room had been let for the purpose of viewing the procession, and by the terms of the contract the price of the room was payable before the time at which the procession was abandoned, the whole price could nevertheless be recovered, the right thereto having accreted before the abandonment of the procession.—See *Addison on Contracts* (11th ed.) pp. 149-150, and *Gloag on Contract*, pp. 641-643, where the cases are cited.

"It has been said (see *Gloag on Contract*, p. 643) that the Coronation cases decided in England have extended the principle which one associates with the expression *rei interitus* further than the Scotch cases, and probably the writer who says so is right. But I think, not without hesitation, that the grounds of decision in the Coronation cases do not apply to the present case. In the Coronation cases the hirer was not put into possession of anything; all his rights were to get the use, e.g., of a room or of a window from which he might view the procession. In this case the defenders got possession of what they purchased; and it seems to me, as our law stands, they had to follow the fortunes, good or bad, of the authority which they bought.

"Neither party craved a proof on any part of their record.

"It seems to me that I should sustain plea 2 for the pursuers and grant decree as craved, with expenses."

The defenders appealed, and argued—The very basis of the contract in question was an implied condition that the permit should, at the time the contract fell to be performed, be a necessary document in order to obtain a clearance of wine from bond. The Order of 2nd June withdrawing the necessity of such permits brought into existence a completely new set of circumstances which, affecting as they did the basis of the contract, were amply sufficient to excuse the appellants from performance of the contract. Where, as in the present case, an event occurred which was not contemplated by the parties, and which was directly contrary to their intention, then the contract was dissolved. Counsel quoted the following cases:—*William Morton & Company v. Muir Bros. & Company*, 1907 S.C. 1211, at p. 1224, 44 S.L.R. 885; *Taylor v. Caldwell*, (1863) 3 B. & S. 826, per Lord Blackburn at pp. 833 and 839; *Baily v. De Crespigny*, (1869) L.R., 4 Q.B. 180, per Hanen (J.) at p. 185; *Jackson v. Union Marine Insurance Company*, (1873) L.R., 8 C.P. 572, and (1874) L.R., 10 C.P. 125; *Nickoll & Knight v. Ashton, Edridge, & Company*, [1901] 2 K.B. 126, at p. 132; *Krell v. Henry*, [1903] 2 K.B. 740, at pp. 749 and 754; *F. A. Tamplin S.S. Company v. Anglo-Mexican Petroleum Products Company*, [1916] 2 A.C. 397; *Metropolitan Water Board v. Dick, Kerr, & Company*, [1918] A.C. 119, at pp. 135 and 138; *Blackburn Bobbin Company v. Allen*, [1918] 1 K.B. 540, at p. 542; *Gloag on Contract*, p. 642. The defenders' contract, moreover, was illegal, and therefore not enforceable. They could only have desired to purchase the permit in order to obtain more

than 50 per cent. of their supply of liquor in 1916, and this was under the existing Defence of the Realm Regulations a punishable offence. Such permits were issued under the Intoxicating Liquor (Output and Delivery) Order 1917, dated 29th March 1917, and made by the Food Controller under Regulation 2F of the Defence of the Realm Regulations (1917, No. 270, as amended by 1917, No. 1213, and the Customs Notice, March 1917, as to restriction of deliveries of spirits and wine from bond to 50 per cent. of 1916 deliveries). These permits were not transferable, and accordingly an agreement for the sale of a permit was illegal and not enforceable—*Sykes v. Bridges, Routh, & Company*, (1919) 35 T.L.R. 464.

Argued for the respondents—The circumstances of the liquor trade were very fluctuating, and this was well known to the defenders. A permit for the clearance of wine from bond was at the date of entering into the present contract an absolute necessity, and the defenders were quite aware that the authorities might vary the restrictions at any time. The defenders ran the ordinary risks attendant on such uncertain and changing conditions. It was only after the defenders' cheque had been posted and the contract thereby made complete that the restrictions had been removed. Accordingly the stopping of the cheque came too late—*M'Laren's Trustee v. Argylls Limited*, (1915) 2 S.L.T. 241. The sending of the cheque constituted payment, and the contract had thus been actually completed—*Leggat Bros. v. Gray*, 1908 S.C. 67, 45 S.L.R. 67. The defenders had failed to state upon record that the contract was illegal. An exact precedent was necessary where a party attempted to show that something had been done against public policy—*Earl of Caithness v. Sinclair*, 1912 S.C. 79, per Lord President Dunedin at p. 84, 49 S.L.R. 29. A wine merchant was entitled, in addition to 50 per cent. of his 1916 supply of liquor, to obtain more from a person who had given up business but had still a portion of his supply to dispose of. The case of *Sykes v. Bridges* was distinguishable on the facts, a proof having there preceded judgment.

At advising—

LORD JUSTICE-CLERK—When this case was before the Sheriff the decision of Mr Justice Darling in *Sykes v. Bridges* had not been pronounced, and the point therein raised seems not to have been very fully argued before the Sheriff, the main contention for the defenders being based on what have been termed the Coronation cases. Before us the case of *Sykes* was referred to and founded on, but the main argument for the appellants was again based on the Coronation cases.

I am not prepared to adopt the argument founded on such cases as *Krell*. I do not think the withdrawal of the restrictions is a sufficient basis for the application of the legal principles which have been given effect to in the series of cases on this point to which we were referred.

But I have come to be of opinion that the argument that a wine clearance or permit

is not assignable, though the point was not as fully developed in the argument before us as I would have liked, is sound. This point depends on the import and effect of the Order 1917, No. 270, as amended by 1917 No. 1213 and the notice.

By that Order and notice no spirits or wine are to be delivered except to the holder of an authority under said Order, and any person who either himself cleared spirits or wine or had them cleared on his behalf in 1916 may apply for such an authority.

In his application the applicant must give full particulars of what was cleared by or for him in 1916, and he can only get authority for delivery of 50 per cent. of the quantity of spirits or wine delivered to him during the year 1916. If the whole quantity authorised is not cleared in each half-year, the advisory committee may provide for the balance being cleared.

Article 8 of the said notice further provides that the holder of an "authority," if a licensed dealer, must distribute the wines obtained under the authority fairly among his licensed customers who obtained supplies from him in 1916, having regard to the quantity delivered to each of them in that year.

Article 9 of the notice makes provision for the case of a dealer to whom an "authority" has been granted declining or being unable to supply his former customers by entitling such customer to get a certificate from the dealer "of the quantity he fails to supply," in which case the supply to the dealer will be decreased accordingly.

Article 10 of the notice provides that where a dealer has given up business since 1915 and has no successor, a certificate will be given to his customers to enable them to clear wines for themselves or to obtain the quantity to which they would be entitled from another dealer.

In applying for a clearance or permit the applicant must give full particulars of the spirits cleared, &c., by or for the applicant in 1916. By the Order penalties are provided for non-compliance with its terms.

The clearance or permit bears to authorise the applicant who is named to obtain delivery of the quantity therein stated during the particular period named in the permit.

I am of opinion that the permit is personal to the applicant who applies for and obtains the same, and is not transferable by him by sale or otherwise. In my opinion it was not intended to be marketable, so that by acquiring a number of permits from those to whom they were originally issued, any person could acquire control of a quantity of wines or spirits in excess of what he had disposed of in what I may call the standard year, viz. 1916. I think this was contrary to the policy and intention of the measures and orders which the Government thought it necessary to adopt and make in the public interest for regulating the traffic in wines and spirits during the time when the restrictions were in force. In my opinion such an authority as we are now dealing with created reciprocal or mutual obligations between the Government and the person to whom

the authority was issued so as to make it not assignable. It was intended only to enable the receiver of it to carry on his own personal business and was not meant to be nor in law capable of being made the subject of sale by him to any other person.

I am therefore of opinion that the appeal should be sustained and the defenders assoilzied.

**LORD DUNDAS**—The defenders (appellants) took two separate points in argument at our bar—(1) that it was an implied condition of the contract that at the date of its performance the restriction against getting wine out of bond without a permit should still be in force, and that this condition having failed through the removal of the restriction they were no longer bound to fulfil their part of the contract; (2) that the sale and purchase of the authority or permit being illegal, the contract was *ab initio* null and void. Although the points were argued in this order, it seems to me that the second must have priority in point of logical sequence. If it is well founded the point first stated does not arise.

I think the contract founded on was *funditus* illegal. The defenders' third plea-in-law, designed to raise this point, is not very well framed, but when read along with the averment at the end of article 3 of their statement of facts it may be sufficient for the purpose. The defenders explain that "the pursuers had no right in said wine certificate which they could transfer to the defenders so as to enable them to obtain delivery of the quantity of wine from bond mentioned in the said wine certificate which had been issued by the Advisory Committee (Customs and Excise) under the authority of the Commissioners of Customs and Excise to the said Evans, Marshall, & Company for their business and not for that of the defenders." Even if illegality of the contract was not pleaded at all, it might, I think, be the duty of the Court in a case of this sort to take the objection—*Montefiore*, [1918] 2 K.B., *per* Shearman, J., at p. 245, and cases there cited. It appears to me that the document No. 8/2 of process was not a subject of legal sale. The Intoxicating Liquor (Output and Delivery) Order 1917, dated 29th March 1917, and made by the Food Controller under Regulation 2 F of the Defence of the Realm Regulations (1917, No. 270), provided by section 4, *inter alia*, (1) that no wine should be delivered out of bond to any person (a) unless he was the holder of an authority for the time being in force under this provision, (b) in excess of the amount which is authorised to be delivered to him under that authority; (3) that authority should be granted only to persons to whom or on whose behalf wine or spirits were delivered during the year 1916, and so that the total amount delivered to that person during the year beginning on the first day of April should not exceed the amount delivered to that person during the year 1916 reduced by 50 per cent.; and (5) that a person should not procure or attempt to procure the delivery of wine in contravention of this provision. The Customs' notice relative to this Order is No.

10 of process. The authority or permit dated 1st April 1918 is in favour of Evans, Marshall, & Company, and bears on its face a note in terms of article 8 of the said notice—"This authority is granted on condition that the holder thereof (if a dealer) shall, as far as his licensed customers, if any, are concerned, distribute the wine obtained under the authority fairly among them, having regard to the quantity delivered to each in the year 1916. Failure to observe this condition may involve cancellation of the authority and refusal of its renewal, in addition to any other penalty to which the holder may be liable under the Defence of the Realm Regulations." We were referred to a case (*Sykes*, 29th April 1919, 35 T.L.R. 464), where it was decided by Darling, J., under circumstances substantially identical with these before us, that a contract for the sale of such a permit as No. 8/2 of process is illegal. The decision is not of course binding upon us, but I think it is sound, and am prepared to follow it. The scheme of the Government authorities underlying the Orders seems clear enough. Permits to get wine out of bond were to be granted only to certain persons (in this case to Evans, Marshall, & Company) upon a basis of rateable proportion, with a view to fair rateable distribution by them in their turn to their customers, and by them to the consumers. Darling, J., observes that the Order 1917, No. 270, under the Defence of the Realm Act "was made to ensure three things—that the wholesaler should receive his proper proportion, that the retailer should receive his, and that the consumer should also receive his proper share." It seems to me obvious that if such permits could be made the subject of traffic the whole scheme would be futile; the permits might be bought up by a relatively small number of persons, and all idea of fair and equal distribution would be at an end. The learned Sheriff-Substitute, who had not before him the case of *Sykes*, which was decided after the date of the interlocutor now under review, seems to argue that because an Order dated in 1918 expressly prohibits the sale and purchase of permits for getting spirits out of bond it must be inferred that no similar prohibition was intended by the Order 1917, No. 270, in regard to wines, not being expressly enacted by it. I do not appreciate this argument; I gravely doubt whether it is legitimate to infer the intention and import of one Order from the language of another (*cf. Mackenna v. M'Millan*, 56 S.L.R. 251), but if such inference were permissible it would seem to me to point in a direction contrary to that indicated by the Sheriff-Substitute. I do not think that the permit issued to Evans, Marshall, & Company could be the subject of legal traffic. The pursuers aver that this sale was "in accordance with a well-known and recognised practice in the trade"; but assuming this to be so I agree with Darling, J., in holding that the practice was illegal, and could in no way validate such a transaction. In my opinion therefore the defenders are entitled to succeed upon the ground which I have indicated.

If this view be correct there is an end of the pursuers' case. But it seems proper that I should express an opinion upon the contrary assumption regarding the other point which was argued. We had an interesting debate upon it, accompanied by a copious citation of English authorities, most of which are referred to and commented on in the able and elaborate judgment of M'Cardie, J., in *Blackburn Bobbin Company* ([1918] 1 K.B. 540). That learned Judge at the outset of his opinion states the question "When will a change of circumstances (not due to the default of either party) cause a dissolution of contract?" and adds that "the law upon the matter is undoubtedly in process of evolution." I do not think it necessary to investigate closely the mass of authority to which we were referred, because it appears to me that in this case there are not present the elements which, according to the judicial views expressed in the cases, might justify non-performance of this contract, assuming it to be a legal one. Thus, for example, it has been laid down that "a court can and ought to examine the contract and the circumstances in which it was made, not of course to vary but only to explain it in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied though it be not expressed in the contract" (*per* Lord Loreburn in *Tamplin Steamship Company, Limited*, [1916] 2 A.C. at p. 403); and again that "the underlying ratio is the failure of something which was at the basis of the contract in the mind and intention of the contracting parties," *per* Lord Shaw in *Horlock v. Beal*, [1916] 1 A.C. at p. 512. The defenders invite us to examine the circumstances and to affirm that from the nature of this contract parties must have made their bargain on the footing that the restrictive conditions anent getting wine out of bond would continue to exist, and that this was at the basis of the contract in the minds and intention of both parties. I am quite unable so to affirm. The parties must, I think, be taken to have known that from their very nature orders and regulations of this sort, issued for the protection and well-being of the nation under the abnormal and fluctuating conditions of the times, were subject to variation, addition, or repeal, as in fact they were. One must distinguish in such a question between what may in a sense be "contemplated" and what is truly the subject of contract or bargain. If the continued existence of the necessity for a permit was, apart from mere contemplation or expectation of what might appear probable, a condition in the minds of both parties as the basis of the contract, it would have been easy to express it. But I do not know and cannot assume that if the defenders had demanded the insertion of a clause providing that if this temporary restriction should be removed the bargain should fall the pursuers would have assented to their request. I should think their terms of

sale would in that event have required readjustment; in any view the point must be one for speculation only. In my judgment therefore there is here no room for holding that there was an implied condition that at the time of performance a permit would still be necessary to get the wine out of bond. I find nothing in the nature of the contract to justify that view. In the absence of express stipulation I think the defenders were bound to implement the bargain they had made. If, therefore (contrary to the opinion I have already expressed), that bargain was legal, I should add that the Sheriff's interlocutor is right and the appeal must fail. But for the reasons explained I am for sustaining the appeal, recalling the interlocutor appealed against, finding that the contract founded upon was illegal and *ab initio* null and void, and assailing the defenders.

LORD GUTHRIE—I think the case of *Sykes* (29th April 1919, 35 T.L.R. 464) was rightly decided by Mr Justice Darling. If so, the question raised, although inaccurately, in the defenders' third plea-in-law, falls to be decided in their favour, and the pursuers are not entitled to sue for the sum claimed.

But if I am wrong in this, then I think that the defenders' only other case, which is based on their second plea, is not well founded, and that the pursuers would in that case be entitled to decree. The result of the Scots and English cases seems to be, first, that a contract may be avoided by reading in a condition which the Court holds to be necessarily implied; second, as Lord Justice Vaughan Williams put it in the case of *Krell* ([1903] 2 K.B. 748), such a condition will be held implied not only in "cases where the performance of the contract becomes impossible by the cessation of existence of the thing which is the subject-matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things, going to the root of the contract." In this case the defenders propose to read in "provided the restrictions continued at the date when the contract fell to be performed and the money paid." As has been said in more than one of the cases, each case must be judged by its own circumstances, admitted, within judicial knowledge, or proved. No proof has been asked in this case, and no express admissions have been made as to the national circumstances surrounding this contract, and the different orders imposing or withdrawing prohibition or restriction of wholesale and retail trafficking in wine. But I think these circumstances are sufficiently within judicial knowledge to enable the Court to say yes or no to the defenders' contention that although the withdrawal of the restriction which has led to this action was only a return to the normal state of affairs in this country, yet it must be reasonably supposed that neither of the parties contemplated that this return to a normal condition might take place at any time, and it must be presumed that at the basis of the contract was the implied condition that if

the wine restrictions were withdrawn before the date of fulfilment and payment the contract was to be at an end. Such an implication seems to me unnatural and inappropriate to the circumstances. I cannot tell what these particular parties might have done had it been proposed to make the alleged implied condition express, but I should think it probable that any proposal by the defenders to this effect would have been refused by the pursuers. It is clear that continuance of the wine restriction at the date of fulfilment and payment was contemplated by both parties when they entered into the contract. It is quite a different matter to hold that the continuance of the restriction at such date was a *sine qua non* to the fulfilment by the defenders of the pecuniary obligation undertaken by them. I am unable to hold that it was, and accordingly had I been against the defenders on the question of illegality I should have held the pursuers entitled to decree.

LORD SALVESEN was not present.

The Court recalled the interlocutor of the Sheriff-Substitute and assoizied the defenders.

Counsel for Pursuers and Respondents—Constable, K.C.—T. G. Robertson. Agents—J. Miller Thomson & Company, W.S.

Counsel for Defenders and Appellants—Sandeman, K.C.—Douglas Jamieson. Agents—Whigham & MacLeod, S.S.C.

## HIGH COURT OF JUSTICIARY.

Monday, July 14.

(Before the Lord Justice-Clerk, Lord Dundas, and Lord Guthrie.)

ANDERSON *v.* ROSE.

*Justiciary Cases — Statutory Offence — Defence of the Realm—Knowledge—Live Stock (Sales) Order, 8th May 1918, sec. 14.*

A farmer, who sold for slaughter a heifer in calf, was charged with a contravention of the Live Stock (Sales) Order, 8th May 1918. He pleaded ignorance of the heifer's condition of pregnancy, and after proof had been led was found not guilty. On an appeal by stated case, held that ignorance of the fact of the heifer's pregnancy was not a sufficient defence to the contravention libelled, and appeal *sustained*.

The Live Stock (Sales) Order, 8th May 1918, enacts, *inter alia*—"1. (a) No person shall bring or send or cause to be brought or sent to any market for sale for slaughter, or sell or buy for slaughter or cause or permit to be slaughtered, any . . . in-calf heifer . . . 14. Infringements of this Order are summary offences against the Defence of the Realm Regulations."

William Rose, Mid-Coull, Inverness-shire, was charged in the Sheriff Court at Inverness on a summary complaint which set

forth "that you did on 3rd March 1919, in the saleyard of Messrs Hamilton & Company, Limited, Inverness, bring, send, or cause to be brought or sent, to a market or sale there for slaughter a heifer in calf, and did there cause or permit said heifer when in calf to be sold or disposed of for slaughter to James M'Lauchlan, butcher, Kingussie, by whom it was slaughtered, in contravention of the Live Stock (Sales) Order 1918, dated 8th May 1918, made by the Food Controller under the Defence of the Realm Regulations, whereby by section 14 of said Order you have committed a summary offence against the Defence of the Realm Regulations, and are liable to the penalties imposed by section 58 of said Regulations."

On 22nd April 1919 the Sheriff-Substitute (GRANT), evidence having been led, found the accused not guilty.

William Anderson, Procurator-Fiscal of Court, appealed by Stated Case to the High Court of Justiciary.

The Case stated—"It was proved that the respondent bought a heifer in July 1918 to feed for slaughter in the belief that she was not in calf. That the heifer was grazed until the end of September with other feeding cattle on some grass parks rented for the season by the respondent, when she was removed to the farm of Mid-Coull. Early in October she was taken up for stall feeding, and on 3rd March 1919 she was sent into an auction mart at Inverness to be sold as fat. The heifer was not served by the respondent's order or to his knowledge while she was in his possession, and he was ignorant of the fact that she was in calf. The heifer was graded for slaughter under the existing Regulations by two experts, a butcher and farmer, and placed in grade I, the highest grade for quality. She was sold by an experienced cattle auctioneer, and allocated to the witness James M'Lauchlan, who has been 36 years a butcher. Not one of these—neither the grading officers, auctioneer, or butcher—had any suspicion she was in calf. On being slaughtered by the witness M'Lauchlan she was proved to be in an advanced stage of pregnancy, with a fully developed bull calf in her womb which weighed 46 lbs. That the heifer was a well-bred beast, and her shape, as indicating where she had laid on flesh, tended to conceal the external appearance of pregnancy. That she would have been of equal if not greater value to the respondent as a breeding and milking animal.

"I hold that the respondent had proved to my satisfaction his complete ignorance of her condition of pregnancy, and on these facts I found the respondent not guilty."

The *question of law* for the opinion of the Court was—"Whether the ignorance of the fact of pregnancy that I found to be proved is a sufficient defence to the contravention libelled?"

Argued for the appellant—Guilty knowledge on the part of the accused was not an essential element of his offence—*Pearks Dairies Company v. Tottenham Food Control Committee*, (1918) 35 T.L.R. 114. Ignor-