

have said that the position of Mr Rothfield was that he had obliterated his private arrangement of March. But he ignored the agreement of May under which he so obliged himself, and in September he proceeded to bring a litigation founded on his separate engagement of the preceding March. It is perfectly manifest to my mind that these two agreements cannot stand together. I do not wish to attach the term fraud or swindle to it in the audacious manner suggested by one of the learned counsel for the appellant, but I will say this, that whatever may have been the relation of the agreement of March to the agreement of May, nothing more audacious could be conceived than Mr Rothfield in the following September proposing to ignore his agreement of May and his obligations made under it in fairness to other creditors, and to go back to the sopited secret arrangement of March.

What is the attitude which this appellant assumes at your Lordships' bar? The other creditors affected by the agreement of May, on this secret agreement being divulged, say, "But this is in plain breach of your obligation of May." To that he replies, "Oh, it may be in plain breach of your obligations and mine, but" (to use the language of his learned counsel) "we were all engaged in manipulating a swindle."

Audacity has its limits, and I think they have been reached in the present case. The idea that any person should approach this House and ask us to condemn as a swindle the document of May 1918, signed by the appellant himself, is an idea which fortunately we are not able to comply with, because in the opinion of all your Lordships the agreement of May was not a swindle. The agreement of May was a transaction which at the instance of the general body of creditors was challengeable, but which there might be many motives for their failing to challenge. An agreement covering an assignment of a certain portion of unassignable salary and getting that benefit divided amongst certain participants does not necessarily fail. It is almost in the region of comedy to think that the appellant has not reduced that agreement and does not propose to reduce it, but, on the contrary, is taking funds out of it. The situation accordingly is that he sought and obtained a decree in absence on one footing, the separate March footing, and he has the arrangement of eight creditors still remaining operative, under which he is drawing funds from this unfortunate debtor on another.

As your Lordships have observed, it is necessary always to see what is the exact effect of the words "fraudulent," "illegal," even "void," and to see whether in the particular transaction which is aimed at the agreement made was null and void or merely voidable. By its own nature this transaction was not void. By its nature I do not wish to cast any doubt on the proposition that at the instance of creditors aggrieved, and at their instance alone, it was a voidable transaction. That distinction being observed the case is simplicity itself.

§ Their Lordships dismissed the appeal with expenses.

Counsel for the Appellant—Wilton, K.C.—Zeffert—Garrett. Agents—Murray Oliver, S.S.C., Edinburgh—Lazarus & Son, London.

Counsel for the Respondents Bruce and Munro—Macmillan, K.C.—D. P. Fleming. Agents—Bruce & Stoddart, S.S.C., Leith—E. B. Gee & Company, London.

COURT OF SESSION.

Tuesday, May 25.

SECOND DIVISION.

[Lord Hunter, Ordinary.]

D. M'MASTER & COMPANY v.
COX, M'EUEN & COMPANY.

Contract—Sale—Condition—Impossibility of Performance—Supervening Legislation—Jute (Export) Order 1917, dated 27th November 1917.

The Jute (Export) Order 1917, dated 27th November 1917, provides, *inter alia*—"1. On any sale of any article or material manufactured or to be manufactured wholly or partly from jute, it shall be the duty of the vendor either to obtain from the purchaser a guarantee in writing that such article or material will not be exported from the United Kingdom, or if it is the intention of the purchaser that such article or material shall be exported from the United Kingdom, to obtain a permit issued by or on behalf of the Director of Raw Materials authorising the sale or manufacture as the case may be of such article or material as aforesaid. 2. No person shall sell or deliver any article or material of the description aforesaid for exportation from the United Kingdom without a permit issued by or on behalf of the Director of Raw Materials. . . ."

By verbal contracts confirmed by order-notes written and accepted by the parties, a firm of jute manufacturers contracted to sell to a firm of merchants certain quantities of jute goods, one-half to be delivered in January and the remainder in February 1918. Delivery was to be f.o.b. Dundee, the goods to be packed in twilled sheet and hoops, this being the packing usually required in the case of goods intended for export. The buyers, some days after the orders, verbally arranged with the sellers that in the event of their electing to take the goods loose, which would imply sale in the home market, they should get the reduction usually made in respect of the packing. On the passing of the Jute (Export) Order 1917 the sellers wrote the buyers asking for a guarantee, or permit to manufacture and deliver in terms of the Order. The buyers thereupon replied that the goods were for exportation to America. The buyers subsequently applied for a

permit to manufacture the goods for export purposes, and on the permit being refused they cancelled the orders. In an action of damages at the instance of the sellers against the buyers for breach of contract, held (*dis.* Lord Dundas) that the contract left the buyers free choice to sell either in the home or the foreign market, that their free choice in this respect was a condition of the contract which the subsequent passing of the Jute (Export) Order 1917 rendered impossible of exercise, and that in consequence thereof the buyers were released from the contract.

Opinion (per the Lord Justice-Clerk and Lord Salvesen) that the word "on" in section 1 of the Jute (Export) Order 1917 did not prevent the Order applying to sales taken place before the date of the Order.

The Jute (Export) Order 1917 is quoted *supra* in rubric.

D. M'Master & Company, jute merchants, spinners, and manufacturers, Dundee, pursuers, brought an action against Cox, M'Euen, & Company, merchants, Dundee, defenders, for payment of £520, 16s. 8d., being the amount of damages claimed by the pursuers in respect of the failure of the defenders to implement two contracts for the purchase of a certain quantity of jute goods from them.

The pursuers pleaded, *inter alia*—"1. The defenders being in breach of the said contracts, inasmuch as being purchasers thereunder they failed or refused to implement them by taking delivery, they are liable in damages to the pursuers."

The defenders pleaded, *inter alia*—"2. The execution of the contracts in question having become illegal by reason of the Jute (Export) Order 1917 and the refusal of a permit thereunder, the defenders should be assolizied. 3. The pursuers, having failed to implement their part of the contracts in question, are not entitled to require the defenders to fulfil their part of the same, and the defenders should be assolizied. 4. The defenders not being in breach of the said contracts should be assolizied."

The contracts were made verbally, but confirmed by two written order-notes in similar terms, dated respectively 1st and 2nd November 1917. Of these the order-note of 1st November, with its acceptance, was as follows:—

- "W.J.W. 2/11/17.
- "Dundee, 1st November 1917.
- "No. 3791—o/4896.
- "Order from Cox, M'Euen, & Co.
- "To Messrs D. M'Master & Co., Dundee.
- "50 bales, 10 oz./40' chested Hessian @ 8½d. per yard.
- "f.o.b. Dundee, 3½° prompt.
- "Packed in twilled sheet and hoops.
- "Delivery 25 bales in January, 25 bales in February. Cox, M'Euen & Co., per John L. Rea.
- "Copy. Please sign and return.
- "No. 3791. Dundee, 2nd November 1917.
- "We have received Messrs Cox, M'Euen & Co.'s order of yesterday's date, which has

been entered in conformity with the particulars therein given.

"D. M'MASTER & Co."

The Jute (Export) Order 1917 having passed on 23rd November 1917, the following correspondence passed between the parties:—

"Dundee, 27th November 1917.

"Gentlemen—We beg to advise you that in accordance with the Jute (Export) Order 1917 we shall require a guarantee in writing that all goods on order will not be exported from the United Kingdom, and if such goods are for export a permit, issued by the Director of Raw Materials, will be required authorising the manufacture and delivery of goods aforesaid.—Yours respectfully,
D. M'MASTER & Co."

Dundee, 18th Decr. 1917.

"Dear Sirs—o/1st Novr.—50 Bales 10 oz./40' Hessians.—These goods are for exportation to America, and we will thank you to inform us that you have a permit from the Director of Raw Materials to manufacture the goods, after which we will make the usual application for export licences. Awaiting the favour of your reply.—We are, dear Sirs, yours faithfully,
Cox, M'Euen & Co., per John L. Rea."

"Dundee, 19th December 1917.

"Dear Sirs—50 Bales 10 oz./40.—Yours of y'day, so far as we are aware this is the first we have heard of these goods being for export to America. We do not require, so far as we are aware of, any licence to manufacture 10 oz./40' Hess., it is for you to get your export licence, and after you get it report to us and we will tell you what to do. . . .—Yours respectfully, D. M'MASTER & Co."

"Dundee, 19th Decr. 1917.

"Dear Sirs—50 Bales 10 oz./40' Hessians.—Your favour of this date is to hand. Home trade goods are never made up in bales of 2000 yards and packed in twilled sheet and hoops. As regards your licence to manufacture we have only to refer to the Jute (Export) Order 1917 where it reads—. . . (*sup.*) . . . Cox, M'Euen & Co., per John L. Rea."

Dundee, 21st Dec. 1917.

"Dear Sirs—10 oz./40 Hess.—As you are aware when we sold these goods you spoke about taking them loose for bags, and until we get your instructions we do not know which way they are wanted. If you visit Victoria Road depot and ask for Mr Elder you will find who has to apply for permit. He tells us distinctly it is buyers, and in every case yet with us it has been buyers.—Yours respectfully, D. M'MASTER & Co."

A permit was subsequently applied for by the defenders and ultimately refused.

The facts of the case and the import of the evidence appear from the opinion of the Lord Ordinary (HUNTER), who, after a proof, on 2nd July 1919 sustained the first plea-in-law for the pursuers, and decerned against the defenders for payment to the pursuers of £520, 16s. 8d.

Opinion.—"In this action the pursuers, who are a firm of jute merchants and manufacturers in Dundee, sue the defenders, who are large jute merchants,

buying jute goods both for home and foreign markets, for damages in respect of the defenders' failure to take delivery of a certain quantity of jute goods conform, as is alleged, to contract between the parties.

"Upon 1st November 1917 'the defenders ordered and purchased from the pursuers fifty bales of 10 oz./40 inch chested Hessian jute goods at the price of 8 and 1 sixteenth pence per yard,' each bale containing about 2000 yards. 'Delivery was to be f.o.b. Dundee, 25 bales in January 1918, and 25 bales in February 1918.' On 2nd November 1917 the defenders ordered and purchased a similar quantity of bales of somewhat different description but under similar conditions to those contained in the order of the 1st November.

"It appears from the correspondence and also from evidence that the defenders desired to export these goods. They had not any definite contract in view, but apparently they were in negotiation with a firm of merchants in New York to sell to them these goods which they had purchased from the pursuers.

"On the 23rd November 1917 the Jute Export Order was issued by the Army Council. That Order is in the following terms—[His Lordship here quoted the Order printed supra].

"The defenders put themselves in communication with the authorities with a view to obtaining, in the first instance, a licence for the pursuers to manufacture, and afterwards, no doubt, they would have endeavoured to obtain a licence for themselves to export. They were, however, unsuccessful in their application, a refusal being sent on 16th February. Thereafter on the 20th February 1918 they communicated with the pursuers in the following terms—'Dear Sirs—0/1st Novr.—50 Bales 10 oz./40' Hessians. 0/2nd Novr.—50 Bales 8 oz./40' Hessians. With reference to the above we have the following letter from the War Office, Raw Materials Department, London, of date 16th inst., reading—'The Director of Raw Materials presents his compliments to Messrs Cox, M'Euen & Co., and with reference to their letter of the 1st inst. regrets to inform them that their application for permit for the manufacture of 8 oz./40' and 10 oz./40' jute Hessian cannot be acceded to.' You will please therefore regard these orders as cancelled.'

"The pursuers refused to regard the orders as cancelled, because they contended that the purchase made by the defenders from them was independent altogether of their obtaining right to export the goods.

"The question between the parties is sharply enough raised on record, although the pleadings originally were extremely deficient from both points of view, and from the defenders' point of view were slightly improved by amendment after discussion in the procedure roll. They remain deficient, I think, so far as the pursuers are concerned, but the case is foreshadowed clearly enough in the following averments to which I am to make

reference: In the 2nd and 3rd answers put in by the defenders they say—'Explained that the goods thereby ordered were to be manufactured of jute, and that the terms of the said orders show that the goods were intended by the defenders for exportation from the United Kingdom. Anyone skilled in the said market would know, and the pursuers did know, from the directions as to the size of the bales and the packing of the said goods that the goods specified in the said contracts were for export.'

"The position of the pursuers as disclosed on record is this—they say in condescendence 3—'The goods in both cases were at purchaser's option, whether for home or foreign use.' I think that is an unfortunate expression, because their real case is that the purchase was an unconditional purchase and that it was immaterial to them whether the defenders chose to sell in the home or the foreign market. In their condescendence 4 they also say—'In any event it was both an implied and an express term of the verbal bargains of sale in these cases that the buyers had an option to take the goods either 'loose' or 'made up,' and a commercial order in the terms of the present contracts is not understood and is not in fact an order or sale for export, nor is delivery thereunder a delivery for export.'

"It is admitted by the parties—and this is of vital importance in the case—that there was an agreement between them that if the goods were taken in the condition in which they were ordered the price was to be as fixed; but if the purchasers chose to take them not packed but in loose form (which would indicate their intention to sell them in the home market) there was to be an allowance made in the price.

"The pursuers are not themselves calendarers, and they do not do finishing and packing in connection with these goods, but entrust that work to another firm. However that may be, it is clearly enough brought out in the proof and was admitted quite frankly by the defenders' representative in the box that such an arrangement as I have indicated was come to between the parties. I do not think it is material to consider whether that arrangement was made at the same time as the written orders or whether it was come to at a subsequent date. In either case it was, or might be, a modification of the written contract.

"It does not appear to me that the effect of the arrangement was that an option was given to the defenders; it was merely an indication as to the variation there would be in the price according as the defenders desired to sell in the home or the foreign market.

"It was contended by Mr Watson that on the terms of the orders it was quite clear that the goods were for export. I do not think that has been established on the evidence. It is quite true that a purchaser in the ordinary case, if he wants to sell in a foreign market, will arrange for terms that will include packing and so on; if he wants to sell in the home market he will not so arrange. But it is quite a common thing,

apparently, in the jute market, that a price is fixed upon the footing that it includes packing; if packing is not desired by the purchaser, then an allowance is made by the seller. I think one of the witnesses went so far as to say this—that if in purchasing goods he was not certain whether he was going to sell at home or abroad, he would stipulate for a price for the goods in such a form as would enable him, if he desired, to sell in a foreign market, and he would expect an allowance to be made if he did not so sell.

“All that goes to contradict the defenders’ theory that these goods were intended for export at the time when these contracts were entered into. And certainly, on the evidence, I am satisfied that the defenders have failed to prove that the pursuers—and Mr M. Master in particular—knew at the time when they entered into the contracts that the goods were destined for export and export alone. I think, as Mr M. Master explained, he was quite uncertain and that he really waited until he received instructions from the defenders as to the state in which they desired to receive the goods in order to know whether they were intended for the home or the foreign market.

“In the view I take, therefore, the pursuers are entitled to say that the defenders have failed to take delivery as they were bound to do. There was no impossibility of the fulfilment of the contract brought about by the issue of the Orders under the Defence of the Realm Act. The only impossibility was as to the defenders selling in the foreign market. It was still open to them, if they chose to do it, to sell in the home market, and in view of the terms of the contract I think they were bound to take the goods. . . .”

The defenders reclaimed, and argued—it was an implied condition of the contract that the goods were for export, and this condition having been rendered impossible of performance by supervenient legislation, viz., the Jute (Export) Order 1917, dated November 23, 1917, which was not confined to sales subsequent to its date, the defenders were thereby relieved from the contract—*F. A. Tamplin Steamship Company, Limited v. Anglo-Mexican Petroleum Products Company, Limited*, [1916] 2 A.C. 397, 54 S.L.R. 433; *Metropolitan Water Board v. Dick, Kerr, & Company*, [1918] A.C. 119, per Lord Dunedin at p. 127, and per Lord Atkinson at p. 135, 55 S.L.R. 531. The present contract so far as it was in writing was one for export. This did not necessarily mean that the seller could compel the buyer to export. It was a contract for exportation subject to the additional term, added verbally, that the buyer might get a slight rebate if he took the goods unpacked for the home market. This, however, did not mean that if exportation became impossible the seller could compel the buyer to take the goods for the home market. Even if the contract contemplated an option the buyer had exercised it for export. This was a fundamental part of the contract, and its frustration by supervenient legislation rendered the con-

tract void—*Horlock v. Beal*, [1916] 1 A.C. 486, per Lord Shaw at p. 512, 53 S.L. 795; *Krell v. Henry*, [1903] 2 K.B. 740; *F. A. Tamplin Steamship Company, Limited v. Anglo-Mexican Petroleum Products Company, Limited* (cit. sup.), per Lord Haldane at p. 406, foot; *Anglo-Russian Merchant Traders v. Batt*, [1917] 2 K.B. 679. In the present case the pursuers sought to adject to the contract a novel condition which they were not entitled to adject, viz., that the defenders should give a guarantee that the goods would not be exported. Further, this could be regarded as an instalment contract with deliveries in January and February 1918, and in that case the date for the first instalment having passed without either party having done anything that instalment was at an end—*Ireland & Son v. Merryton Coal Company*, 1894, 21 R. 989, 31 S.L.R. 834. As to the February instalment the pursuers, no doubt, refused to cancel the contract, but they should have gone further and tendered the goods.

Argued for the respondents—The defenders must show that it was a necessary inference from the terms of the contract that the goods were for export only, and that parties made it an implied condition that if the buyer could not export he was released. It was not sufficient from certain expressions in the orders to say that the pursuers should have known that the goods were for export. The defenders must show that this was the necessary inference from an order for goods in a certain packing, but there was no such universal practice as to packing as to justify such an inference. In *In re Anglo-Russian Merchant Traders and John Batt & Company (London)*, cit. sup., the parties could not dispute that the goods were for export. The only reason given for breaking the contract was the impossibility or illegality of performance attached to it by the Jute (Export) Order 1917. The only reason given by the defenders was the first paragraph of that Order, which dealt only with sale. Even assuming paragraph 2 to apply, it was not an absolute prohibition, but only a prohibition in the event of failure to get a permit. The defenders never asked the pursuers to get a permit to deliver, which was something quite different from a permit to manufacture. But all that could be asked in the present case was a permit to deliver, because the goods were already in process of manufacture. There was always a presumption against the retrospective effect of a statute interfering with contracts. ‘Sale’ in the Order meant sale to a foreign buyer and not to a purchaser in this country, and applied to sales effected after the date of the Order. There was a distinction between the illegality of a contract and the frustration of an adventure, and in the present case there was no frustration and the only defence made was illegality. In any event restriction of market did not amount to frustration, and there was no case of frustration in the books where both parties were engaged in an executory contract. Further, the defenders were not entitled to found on article 2 of the Order, because they cancelled the contract on

certain facts before the time for delivery arrived.

At advising—

LORD JUSTICE-CLERK (SCOTT DICKSON)—The decision of this case depends to some extent on the construction and effect of the Jute Export Order 1917, dated 23rd November 1917, and published in the London Gazette 27th November 1917. That Order was cancelled by Army Council Notice of 17th December 1918, published on that date.

Jute was the subject of several other orders and notices in 1917-1918. But with the particulars of these other orders we need not in my opinion concern ourselves. So far as this case is concerned I only refer to them as indicating in some measure the general policy and intention of the Order more particularly in question in this case.

The agreements between the parties so far as they were reduced to writing are set out in the appendix to the reclaiming note. In the argument before us it was, I think, assumed by both parties that by these documents a sale, or rather two sales, were constituted, in which the pursuers were the sellers and the defenders were the buyers. I think that would have been so according to the law of Scotland prior to the Sale of Goods Act 1893, but having regard to the terms of that Act it would be more correct to say that by these documents there were constituted two agreements to sell, and that what in the eyes of the law are now completed sales never followed on these orders and acceptances.

I think the Lord Ordinary substantially states this position accurately in the two following paragraphs of his note so far as they go—"It is admitted by the parties—and this is of vital importance in the case—that there was an agreement between them that if the goods were taken in the condition in which they were ordered the price was to be as fixed, but if the purchasers chose to take them not packed, but in loose form (which would indicate their intention to sell them in the home market), there was to be an allowance made in the price. The pursuers are not themselves calenderers, and they do not do finishing and packing in connection with these goods, but entrust that work to another firm. However that may be, it is clearly enough brought out in the proof, and was admitted quite frankly by the defenders' representative in the box, that such an arrangement as I have indicated was come to between the parties. I do not think it is material to consider whether that arrangement was made at the same time as the written orders or whether it was come to at a subsequent date. In either case it was or might be a modification of the written contract." But the Lord Ordinary rejects the view that the result of the arrangements was that the defenders had an option. In this I am unable to agree with the Lord Ordinary.

In my opinion the pursuers' case on record is that the defenders had an option. The Lord Ordinary in his note says—"The position of the pursuers as disclosed on record is this—They say in condescendence 3—'The goods in both cases were at the purchasers'

option, whether for home or foreign use.'" As to this averment the Lord Ordinary says—"I think that is an unfortunate expression, because their real case is that the purchase was an unconditional purchase, and that it was immaterial to them whether the defenders chose to sell in the home or the foreign market." I do not follow this reasoning. It was, I think, just because it was immaterial to the pursuers that they agreed to give the defenders the option which I think the proof clearly established was given. The second of the pursuers' averments is in condescendence 4, and is in these terms—"In any event it was both an implied and an express term of the verbal bargains of sale in these cases that the buyers had an option to take the goods either 'loose' or 'made up,' and a commercial order in the terms of the present contracts is not understood and is not in fact an order or sale for export, nor is delivery thereunder a delivery for export." Here again the pursuers expressly state that "the buyers had an option," though different from, and perhaps of an immaterial character compared with, the option referred to in condescendence 3. If there had been any ambiguity as to what that option was on the pursuers' averments the matter is in my opinion made clear by the proof. It was an option to declare that the goods were either for the home or foreign market, and to have them delivered to them by the pursuers suitably packed for whichever of those two markets the defenders elected to ask them. This matter was "immaterial" to the pursuers at the time of the contracts being made, because being only manufacturers and not calenderers or packers, it was a matter of indifference to them whether the foreign and more costly packing was adopted, the cost of which they paid to the calenderers and recovered from the defenders, or whether no packing or less costly packing was required, and no expense or charge or a smaller charge was incurred therefor. In either case the pursuers got their price for the manufactured goods. If there was packing the defenders paid for it, and if there was no packing no charge was made.

The buyers, then, had this option—if it is correct to speak of their having an option—that they were under the contracts entitled to declare to the pursuers, if they so pleased, that the goods were for export, and to require them to be manufactured, packed, and delivered f.o.b. by the pursuers for export. In any event the goods were to be delivered by the pursuers f.o.b. This contract in my opinion entitled the defenders to say to the pursuers—"We have sold these goods to an American buyer, and we ask you under your contract with us to pack them in terms of that contract in a way suitable for transport to America, and to put them free on board any steamer named by us for direct transport to New York."

But on 23rd November 1917 the Jute Export Order was issued, and certain questions affecting the rights of parties under the said contracts thereafter arose in consequence of its terms.

I note in the first place that this Order did not make the sale or manufacture for export or the export of jute goods illegal. It only prescribed certain conditions which had to be observed as regards such sale or manufacture or export, these conditions requiring in certain events "permits" from the Director of Raw Materials, which the Director could give or refuse apparently at his discretion. There was also, it appears, an export licence required to be obtained by the exporter from the War Trade Department.

It was contended by the pursuers that section 1 of this Order of 23rd November 1917 did not apply to the contracts in question because they had been constituted on 1st and 2nd November, and therefore before the Order came into existence. This argument proceeded on the footing that the foresaid documents of 1st and 2nd November constituted "sales" within the meaning of the Order, and further, on the footing that the proper interpretation of the word "on" excluded sales concluded before 23rd November 1917 from the scope of the section. Unless both of these views are sound the pursuers' argument fails. In my opinion neither of them is sound. I do not think the said orders or acceptances constituted sales. They merely created agreements to sell. To adopt the pursuers' contention would to a large extent make the Order ineffectual, and would in my opinion be contrary not only to the letter of the Order but to its object and intention. But further, I think the construction which the pursuers seek to put on the word "on" is not legitimate. Of course, the word "on" is open to construction. But as Tindal (C.J.) said in *The Queen v. Humphrey*, (1839) 10 Ad. & E., 335 at p. 370—"The word 'upon' in different cases may undoubtedly either mean *before* the act done to which it relates, or *simultaneously with* the act done, or *after* the act done, according as reason and good sense require the interpretation, with reference to the context and the subject-matter of the enactment." I agree with Bovill (C.J.) when, after quoting Tindal (C.J.), he said, *Paynter v. James*, 1867, L.R., 2 C.P. 348, at p. 354—"That is a very clear statement of the various meanings of the words 'on' or 'upon'—accepting those two words as synonymous. In my opinion the word "on" in the section of the Order in question does not exclude these transactions with which we are now concerned from the scope of the Order, so as to free the parties to them from the necessity of procuring permits or licences if the goods were ultimately to be exported and otherwise observing the provisions of the Order.

Whether these goods were to be so exported or not was, in my opinion, entirely within the option of the buyers in a question between them and the sellers. The sellers' circular letter of 27th November 1917 was quite properly expressed as regards the goods in question. Anyone receiving it would be entitled to read it, as the defenders did, as applying to the goods with which this case is concerned, and the evidence given by Mr M'Master as to his state of

knowledge and understanding when he caused the circular letter to be issued is, in my opinion, irrelevant and quite beside the point, which is—How would the receiver understand it? As to this the correspondence leaves no doubt, and I think the pursuers acquiesced in the defenders' interpretation thereof as to the most material part. For when the defenders on 18th December intimated that the goods were for exportation to America, and indicated that the pursuers should apply for a permit to manufacture them, after which the defenders would apply for export licences, the pursuers on 19th December replied that they required no licence, but that it was for the defenders to get their export licence. Two days afterwards, on 21st December, the pursuers altered their position and merely put it that it was not the seller but the buyer on whom lay the duty of applying for the permit—the permit referred to being, it seems to me, a permit to manufacture.

The defenders apparently acquiesced in this view, and having seen Mr Elder made application for a permit to manufacture, proceeding on the view that no permit to sell was required, and on 16th January 1918 they wrote to the pursuers saying—"We have not yet got any permit to make the above goods." The defenders' intimation that the goods were for export was communicated formally to the pursuers on 18th December 1917, before any difficulty or questions as to the permit had been raised, and no exception was taken to the defenders exporting. No such exception could, in my opinion, have been justly or effectively taken. The defenders were, as I have said, in my opinion entitled to call on the pursuers to deliver the goods free on board for export.

After their application for a permit the defenders seem to have on several occasions pressed to have it granted, but ultimately on 16th February the Director of Raw Materials wrote intimating that the applications "cannot be acceded to," whereupon the defenders "cancelled the orders." The pursuers refused to agree to this, and correspondence between the parties followed. In that correspondence the pursuers on 13th May 1918 said—"On 17th January we had nearly all your January portion made and were waiting your instructions before asking the calenderer to go on finishing"; and in my opinion, it is clear that the pursuers never appropriated any specific goods towards implement of the defenders' orders—at anyrate they have not proved that they ever did.

The right of the Government to refuse the necessary permit has not been questioned except in so far as such a challenge is to be inferred from the argument based on the fact that the agreements to sell were entered into before the Jute Order was made. As already stated, that argument, in my opinion, is unsound. It was urged by the pursuers that the defenders were at fault in respect that in their application they did not give the date of the agreement. In my opinion that was immaterial, and the letters between the parties seem to show

that this argument was an entire afterthought on the part of the pursuers. Their circular letter of 27th November 1917 related to all goods on order, and they took no exception to the defenders' answer in the memo. of 16th January 1918.

I think, assuming it was the duty of the defenders to apply for a permit, they did all that was required of them. The pursuers sent to the defenders the memo. of 15th January 1918, to which the defenders replied on the following day saying they had "not yet got any permit to make the goods." The Government thereafter having refused to grant a permit to manufacture the goods the defenders were, in my opinion, entitled to treat that as absolving them from any further duty in the matter.

The defenders had declared, as they were, in my opinion, entitled to do under the contracts, that they wanted the goods for export, and that having been rendered impossible of execution by Government interference, they were, in my opinion, entitled to treat the orders as "cancelled." The defenders asked the pursuers to deliver the goods for export, but the pursuers could neither manufacture nor sell nor deliver the goods to the defenders for export. Performance of the contract, as the defenders were entitled to ask that it should be performed, was thus rendered impossible by the Jute Order, and in my opinion the defenders are not in breach of the contract, and are not liable for damages as if they had committed any breach of contract. If the defenders had sought to compel the pursuers to deliver the goods for export to New York, the latter, in my opinion, would have had a perfectly good answer to such a demand, or to any claim for damages in respect of non-compliance therewith, in respect of the Jute Order and the refusal of a permit thereunder, and I think the defenders have an equally good answer on the same grounds to the claim now made by the pursuers. To use Lord Finlay's language in the *Metropolitan Water Board* case, [1918] A.C. 119, at 126, that order and refusal "vitaly and fundamentally changes the conditions of the contract, and could not possibly have been in the contemplation of the parties to the contract when it was made," or as Lord Dunedin said in the same case (p. 130), these circumstances would have made "a new contract; and as the respondents are only bound to carry out the old contract and cannot do so owing to supervenient legislation, they are entitled to succeed in their defence to this action." In the same case Lord Atkinson puts the principle thus, that if the freedom of action of the parties to the contract, as to the exercise of their rights under the contract and the discharge of their obligations thereunder, was taken away by *vis major*, they were entitled to be absolved from further performance, and in this view he practically repeated what he had already said in the *Tamplin* case ([1916] 2 A.C. 397) as to a substantial invasion of the freedom of parties.

In my opinion the defenders are entitled to be assolizied.

In addition to the cases cited to us in the argument I refer to the case of *Brightman v. Tate* ([1919] 1 K.B. 463).

It was strongly contended on the part of the defenders that the terms of the orders made it clear in themselves that the goods were intended for export. But I agree with the Lord Ordinary that this has not been established on the evidence.

LORD DUNDAS—I regret that I am unable to concur in the opinion just delivered.

In my judgment the interlocutor reclaimed against is right.

One must at the outset determine what truly were the terms and conditions of the contracts of sale, or, as I agree with the Lord Justice-Clerk in thinking they should more accurately be termed the agreements to sell, here in question.

The defenders maintained on record and in argument that "the terms of the said orders show that the goods were intended by the defenders for exportation from the United Kingdom. Anyone skilled in the said market would know, and the pursuers did know, from the directions as to the size of the bales and the packing of the said goods, that the goods specified in the said contracts were for exportation." These averments are not, in my opinion, established by the evidence. I think, however, that the contracts certainly left to the defenders, as Lord Salvesen puts it in his opinion, which I have had the advantage of reading, "full liberty to sell either at home or abroad." But much confusion seems to me to have been introduced into the case by the dispute, keenly maintained, whether or not the defenders had what counsel termed an "option" in this matter. The only "option," as I think, which the defenders had under the contract was to dictate whether the goods should be delivered to them "packed" or "loose," a matter in which the pursuers had no pecuniary interest whatever. For the rest, there were in my judgment simply agreements to sell goods at a stipulated price. The introduction of the term "f.o.b." was applicable to coastal shipment for home market as much as to shipment for some overseas port. The pursuers had no concern, and could not have dictated, as to the disposal, in home or foreign market, of the goods by the defenders after delivery and payment had been made. It may be that the pursuers were aware that the probability was that the defenders would wish to export the goods; but even if they had known that such was the defenders' definite intention, there was nothing so far as I can see in the contracts to bind the defenders to adhere to that intention or to affect the pursuers with any concern, still less control, in the matter. I do not think that under the contracts the defenders had any "option," in the proper sense of the term, as to the disposal of the goods. I agree with the Lord Ordinary when he says that it does not appear to him "that the effect of the arrangement was that an option was given to the defenders; it was merely an indication as to the variation there would be in the price

according as the defenders desired to sell in the home or the foreign market." This point is of vital importance in the case, for if the view I have expressed is correct it carries one a long way towards a decision in the pursuers' favour.

The Jute (Export) Order 1917 came into force in November of that year. On 18th December the defenders wrote to the pursuers that "the goods" (*i.e.*, those ordered on 1st November) "are for exportation to America, and we will thank you to inform us that you have a permit from the Director of Raw Materials to manufacture the goods, after which we will make the usual application for export licences." After some demur it appears that on 24th December the defenders, with the knowledge and assent of the pursuers, applied for a permit in favour of the latter to manufacture the whole goods in question. On 16th February 1918 the Director of Raw Materials announced that the application could not be acceded to, and on 20th February the defenders informed the pursuers of the refusal, adding—"You will please therefore regard these orders as cancelled." The question is whether or not the defenders were entitled so to cancel the contracts. The Lord Ordinary has held that they were not, and I think he was right in so holding.

The Jute (Export) Order and the refusal of a permit to manufacture had not, in my judgment, the effect of voiding the contracts. It is true that the defenders were by the operation of this new law prevented from selling these goods in a foreign market, but the home market was still open to them, and the fact that it was (as I assume) a less profitable one could not by itself afford a sufficient ground for setting the contracts aside. I am unable to see that there was in these agreements to sell any contractual term, express or implied, as to the market in which the goods were to be disposed of. The doctrine as to reading into contracts a term which, though not expressed, must in the Court's judgment be held as implied, has been considerably developed by the House of Lords of later years, but I think that if it were applied in this case we should be carrying its application distinctly further than has yet been done, and should indeed be applying the doctrine in a way inconsistent with the guiding rules laid down by the Court of last resort.

This doctrine and the limits within which it may properly be applied are explained in recent and authoritative opinions, some of which I may briefly refer to. Thus in *Horlock v. Beal* ([1916] 1 A.C. at p. 512) Lord Shaw of Dunfermline said—"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." In the *Tamplin* case ([1916] 2 A.C. 397, at p. 403) Earl Loreburn stated (the italics are mine) 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. In applying this rule it is manifest that such a term can rarely be implied except where the *discontinuance is such as to upset altogether the purpose of the contract.*" A little later Earl Loreburn pointed out that "in most of the cases it is said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them I think that was at bottom the principle upon which the Court proceeded. It is, in my opinion, the true principle, for no Court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a *foundation on which the parties contracted.*" Now I am unable to see how the exclusion—as a result of the Export Order and subsequent refusal of permit—of a foreign market for these goods—be it that the foreign market was the more advantageous one for the defenders—can be held to "upset altogether the purpose of the contract"; or how the continued availability of such a market could be held to have been "a foundation on which the parties contracted" or "at the basis of the contract in the mind and intention of the parties." At the time these contracts were entered into the sellers had no definite knowledge of the buyers' intentions as to re-sale in one market or the other; the determination of that matter was one entirely for the buyers, and outwith the contract as well as the knowledge of the sellers. It formed, as I think, no part or term of the contract; still less could it be its "basis" or foundation. One may further observe in passing that the Order here in question was by no means the first of its kind; and the parties must have been well aware that jute was liable to be dealt with by Emergency Orders, Notices, and the like. They can hardly be supposed to have relied as a contractual term upon the certainty that freedom to export would continue until the contracts in question were performed—*cf. Trevalion & Company v. Blanche*, 1919 S.C. 618, 56 S.L.R. 567. Now what is the implied condition which it is said must be read into the contracts here before us? I take it to be this, that the complete freedom which the defenders possessed at the time the contracts were made as to the market in which the goods should be disposed of should continue to exist until they were disposed of. I cannot understand how any such implication can be justly made. The defenders' freedom in this matter did not arise out of the contracts; it existed apart from the contracts; and was not, to my mind, in any sense a term, express or implied, of the contracts. Lord Salvesen cites certain passages from the opinions of noble and learned Lords in the case of *Metropolitan Water Board v. Dick Kerr & Company, Limited*, [1918] A.C. 119; but I am unable, with respect, to accept his application of them to the case before us.

Lord Atkinson (at p. 135) read into the contract which he had to consider an implied condition, which he thought must have been in the contemplation of the parties as the very foundation of it at the time they entered into it, viz., "that they should, without any default on their respective parts, be each left substantially free to exercise the rights and discharge the obligations the contract conferred and imposed upon them" (the italics are mine) until the contract was performed. Lord Salvesen considers these views to be "precisely applicable to the present case. *By the contract*" (the italics are again my own) "the defenders had complete freedom of disposal of the goods contracted for, and the continued existence of that freedom till the contract was performed must therefore have been in their contemplation as the very foundation of the contract at the time they entered into it." With deference I cannot accept this application of Lord Atkinson's opinion, because, as I have already indicated, I am unable to see that the defenders' freedom to dispose arose from or was constituted by the contract, or was in any sense a term thereof. In my opinion the defenders' original liberty to dispose of the goods in what market they pleased depended, to use Lord Parker's words in the *Tamplin* case (*supra cit.* at p. 422), not on "some term or condition to be implied in the contract itself" but on "something entirely *dehors* the contract."

I have not overlooked a difficulty which might be said to arise from the peculiar wording of the Jute (Export) Order 1917. The object and intention of that Order seem plainly to have been to prevent exportation of jute from the United Kingdom except so far as the Government authorities thought fit in the public interest to permit it. But the Order is so framed as to place upon the *seller* the duty either to obtain from the purchaser a written guarantee that the goods should not be exported, or, if the purchaser's intention was to export, to obtain a permit authorising the sale or manufacture, as the case might be, of the goods. This was after all mere matter of machinery, and I do not think that the peculiar but quite intelligible method by which the Government chose to secure its end makes the situation materially different from what it would have been if the Order had simply prohibited any export without a Government permit. The pursuers were unable to obtain either a guarantee from the defenders, because they refused to give it, or a permit from the authorities, because that was declined. In my judgment the defenders were not entitled to refuse the guarantee merely because it would have been more to their advantage to sell in a foreign than in the home market, and then make their refusal a ground for declining to accept delivery at all and declaring the contracts at an end. The guarantee amounted to no more than a declaration that they would conform with the law enacted by the Order, and I do not think the defenders were justified in founding on their refusal to

grant it as rendering the contracts impossible of performance. The impossibility, so far as it existed, was of their own creation.

I have found this case to be a difficult one, but for the reasons stated I am for adhering to the Lord Ordinary's interlocutor.

LORD SALVESEN—The material facts in this case are not in controversy. On 1st and 2nd November 1917 the pursuers contracted with the defenders to sell to them certain quantities of Hessian jute goods, one-half of which were to be delivered in January and the remainder in February 1918. Delivery was to be f.o.b. Dundee, and it was expressly specified that the goods were to be packed in twilled sheet and hoops. Such packing is usually required in the case of goods intended for export. In the case of goods intended for the home market they are packed loose, and a small sum, equivalent to $\frac{1}{16}$ th of a penny per yard, is thus saved.

The contracts in question were verbally negotiated, but were confirmed by order-notes written by the defenders and accepted by the pursuers.

The defenders' main business consists in exporting such goods to foreign markets, one of the chief being America. They had not, however, sold the goods contracted for at the date of the contracts and, being desirous in the event of their selling same at home to get the benefit of the reduction usually made when packing in twilled sheets and hoops is not required, they verbally agreed with the pursuers some days later that they would receive the usual allowance if they elected to sell in the home market. Under the contracts so far as reduced to writing they were, in my opinion, not taken bound either expressly or impliedly to sell the goods for export only, but, apart from the verbal agreement subsequently made, had full liberty to sell either at home or abroad. The only importance of the subsequent verbal arrangement was that the allowance in respect of the above mode of packing was made matter of express bargain, instead of resting on custom and the assent of the sellers, which might perhaps have been withheld, although in the case of the pursuers, who do not themselves pack the goods they manufacture, it was a matter of indifference whether they received the contract price for the goods packed as specified or $\frac{1}{16}$ th of a penny less if loose packing was all the buyers required.

On 23rd November 1917 the Jute Export Order came into operation, and it is on the meaning and effect of that Order that the decision of the case mainly turns. It was contended by the pursuers that article 1 of the Order has no application to sales entered into before its date even if the manufacture of the goods sold had not commenced. In my opinion that contention is unsound. I think the Order applies not merely to sales after its date, but to the manufacture of goods under sales previously made but not implemented, so far at least as the goods sold had not already been manufactured. If

it were otherwise the Order could not have operated so as to stop or control the export of goods which presumably were needed for national purposes, except to a very limited extent. All goods contracted for prior to the date of the Order could on the pursuers' contention have been exported by the buyers at their own pleasure, and, no doubt, in view of the limitation affecting future sales and restricting them to the home market would have been so exported. This appears to me to be plain enough on the construction of article 1 by itself, but is made still more plain by article 2, which enacts "that no person shall sell or deliver any article or material of the description aforesaid for exportation from the United Kingdom without a permit issued by or on behalf of the Director of Raw Materials." The two articles must in my opinion be read together, and so read they cover every conceivable case. They forbid sales of jute materials after the date of the Order unless the seller obtains from the purchaser a guarantee in writing that such materials will not be exported from the United Kingdom or obtains a permit authorising the sale. They forbid the manufacture of such goods after the Order except on the same terms, and finally, in the case of goods previously sold and manufactured they forbid their delivery for exportation without a permit. From the date of the Order therefore the Director of Raw Materials became the sole judge whether it was consistent with the national interest that any goods to which the Order applied should be exported. Without his permit in the first instance such exportation would be illegal, and would subject parties contravening in serious penalties.

The pursuers at first adopted this construction of the Order, and on 27th November wrote to the defenders that they would require the guarantee referred to, or if the goods were for export, a permit authorising the manufacture and delivery. On 18th December the defenders replied that the goods were for exportation to America, and inquiring whether the pursuers had a permit to manufacture the goods, after which the defenders would make the usual application for export licences. In reply the pursuers stated that they did not require any licence to manufacture goods of the description sold, and that it was for the defenders to get an export licence, after which the pursuers would tell them what to do. The defenders while repudiating this construction of the Order ultimately agreed to make the necessary application for a permit for manufacture, and lodged the same on 24th December. The usual departmental delay took place, and it was not till 16th February 1918 that they were informed that their application for permit could not be acceded to. In these circumstances the defenders proposed to cancel the orders, but the pursuers refused to agree to this, and they have brought the present action of damages for breach of contract.

In my opinion the action fails. On a sound construction of the Order I think it was the pursuers' duty to obtain the permit, and until it was obtained it was illegal for

them to tender the goods for delivery. That they were unable to do so was due to legislation and not to any fault on their part, and accordingly I hold that neither party was in breach of contract. It is quite true that no permit was required for the manufacture of the goods, for these were equally suitable for the home market, but after the pursuers were informed that the defenders intended the goods for export they could not legally manufacture the goods, still less deliver them to the defenders for export. I agree with the Lord Ordinary that under the contract as originally framed the defenders could have demanded delivery f.o.b. Dundee, and that the pursuers could not have refused to deliver to them on the ground that the defenders proposed to sell them in the home market. It follows, however, from this that the pursuers could not impose as a condition of delivery that the defenders should sell only for the home market. Apart from the Order, the pursuers would have been in breach of the contract if they had refused to deliver except upon such a condition. The Lord Ordinary has held that because no permit could be obtained for export the defenders were in breach of their contract, because they refused to take delivery on the footing that they must dispose of the goods in the home market, thus depriving them of the right, which under contract they possessed, of disposing of the goods by sale abroad. It may be that if the Order had not affected the purchasers until after delivery to them this would have been the legal result, but if I am right in holding that the pursuers were prohibited by law from manufacturing goods for export by the defenders, or of delivering to them for export, they were disabled from performing their contract. This would have been clear enough if the contract had expressly stipulated that the goods were for exportation only, but it seems to me that the result is the same where, as here, the buyers had a contractual right to dispose of the goods either at home or abroad. In one sense it is true that the contract was not made absolutely impossible of performance. For the defenders might have elected to have taken delivery on the footing that they would not export the goods, but as Lord Dunedin points out in the *Metropolitan Water Board* ([1918] A.C. p. 128) "a subsequent law may be the cause of an impossibility, whether by actually forbidding an act undertaken in the contract—which is the direct meaning of illegality—or whether by means of taking away something from the control of the party, as to which thing he has contracted to do or not to do something else." Here the pursuers had contracted to deliver for export if the defenders so desired, but the subsequent Order deprived them of their power to make such delivery. In the case already referred to Lord Atkinson (at p. 135) lays down what I take to be the same principle as that expressed in the quotation from Lord Dunedin's opinion—"That being so, I have no doubt that it was the manifest intention of both parties to this contract that they should,

without any default on their respective parts, be each left substantially free to exercise the rights and discharge the obligations the contract conferred and imposed upon them; that the continued existence of that freedom of action till the contract was performed must have been in their contemplation as the very foundation of it at the time they entered into it; and that to give effect to that intention a condition should by implication be read into the contract to the effect that the obligation to perform it should cease if by *vis major*, such as the action of the Executive Government of this country, they should be deprived to a very substantial extent of their freedom of action."

Now I think that this passage is precisely applicable to the present case. By the contract the defenders had complete freedom of disposal of the goods contracted for, and the continued existence of that freedom till the contract was performed must therefore have been in their contemplation as the very foundation of the contract at the time they entered into it. As they were deprived to a very substantial extent of their freedom of action by *vis major*, it follows that, if one reads into the contract an implied condition that their rights under it would not be interfered with, the obligation to perform the contract on the occurrence of that event came to an end.

I am therefore for recalling the interlocutor of the Lord Ordinary and assoilzieing the defenders.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defenders from the conclusions of the action.

Counsel for the Pursuers and Respondents—A. M. Mackay, K.C.—Gentles. Agents—Douglas & Miller, W.S.

Counsel for the Defenders and Reclaimers—MacRobert, K.C.—Dykes. Agents—Guild & Shepherd, W.S.

Thursday, May 27.

FIRST DIVISION.

[Sheriff Court at Glasgow.]

M'NIVEN v. GLASGOW CORPORATION.

Process—Summons—Time—Limitation of Action—Commencing Action—Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61), sec. 1 (a).

An accident took place on 2nd May. The 2nd November was a Sunday; and on 3rd November the person injured obtained a warrant to cite the defenders, a burgh corporation, in an action in the sheriff court for damages on the ground that the accident was caused by the fault of their servants. *Held* that the action had not been commenced in the sense of the Act of 1893, sec. 1 (a), within six months after the act complained of, and action *dismissed*.

The Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61) enacts—Section 1—

"Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect:—
(a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of. . . ."

Mrs Christina Connell or M'Niven, with consent, *pursuer*, brought an action against the Corporation of Glasgow, *defenders*, concluding for decree for £500 in name of damages for personal injuries alleged to have been sustained by the pursuer owing to the negligence of the defenders' servants on one of their tramway cars on 2nd May 1919.

The *warrant to cite* the defenders was dated 3rd November 1919, and the summons was served on that date.

The defenders *pleaded, inter alia*—"1. This action not having been commenced within six months after the default complained of, it ought, under and in pursuance of the Public Authorities Protection Act 1893, to be dismissed."

On 9th March 1920 the Sheriff-Substitute (BOYD) sustained the first plea-in-law for the defenders and dismissed the action.

Note.—"The pursuer sues the Corporation of Glasgow for damages in respect of an accident which she says was caused by the fault of a servant or servants of the defenders on 2nd May 1919. The first deliverance in the action is dated the 3rd November, and the defenders plead—"This action not having been commenced within six months after the default complained of, it ought, under and in pursuance of the Public Authorities Protection Act 1893, to be dismissed." The pursuer replies that the six months expired on the 2nd of November, but that day was a Sunday, which must be counted as a *dies non*, and the six months must be held to include Monday 3rd November till 12 midnight.

"A similar question arose in the case of *Taylor v. Corporation of Glasgow*, A 1062/1918, in which I sustained a similar plea for the defenders by interlocutor dated 21st March 1919, and I drew the attention of parties to it. But the agent for the pursuer desired to be heard, and argued that in deciding that case sufficient weight had not been given to the case of *Hutton v. Garland*, June 13th, 1883, 10 R. (J.) 60, and *M'Vean v. Jameson*, January 8th, 1896, 23 R. (J.) 25.

"In *Hutton*, under the Summary Prosecution Appeals Act 1875, an appellant within three days after the determination of the inferior judge required to lodge in the hands of the Clerk of the Inferior Court a bond of caution to abide the judgment of the Superior Court and pay the costs of that Court, or in the discretion of the inferior judge to consign certain sums to meet the penalty of Superior Court costs.