His Lordship refused the appeal.

Counsel for the Pursuers (Appellants)—Lippe. Agent—R. H. Miller, S.S.C.

Counsel for the Defenders (Respondents)—Mitchell. Agents—Winchester & Nicholson, S.S.C.

Saturday, October 23.

FIRST DIVISION.

[Sheriff Court at Glasgow.

GUYOT-GUENIN & SON *v.* THE CLYDE SOAP COMPANY.

*War—Process—Trading with the Enemy—Action for Payment of Debt Admitted by Defenders, who Aver that Pursuers are Agents for Alien Enemies—Trading with the Enemy Proclamation No.*2, *9th September* 1914 (*Statutory Rules and Orders* 1914, *No.* 1376,) 5 (1).

The Trading with the Enemy Proclamation No. 2, dated 9th September 1914, declares, *inter alia*—"5. From and after the date of this Proclamation the following prohibitions shall have effect . . . and we do hereby accordingly warn all persons resident, carrying on business, or being in our dominions—(1) not to pay any sum of money to or for the benefit of an enemy."

A firm carrying on business in London brought an action in the Sheriff Court against a British firm carrying on business in Glasgow for the price of goods supplied to the latter. The defenders admitted their liability to pay, but averred that the pursuers were agents for a German firm, and that they were precluded from making payment to the pursuers by the Trading with the Enemy Proclamation No. 2, dated 9th September 1914. They consigned the sum sued for in Court. The defenders' averments were denied by the pursuers.

The Court *recalled* the interlocutors of the Sheriff and Sheriff-Substitute, who had on the documents incorporated in the record refused decree, and *allowed* a proof, but *ordered intimation* to the Lord Advocate.

Per Lord President—"Having quite properly raised the question I do not consider that it is incumbent on the defenders to incur further expense by appearing at the proof."

In the Sheriff Court at Glasgow Guyot-Guenin & Son, wholesale merchants, 67 Southwark Bridge Road, London, S.E., *pursuers*, brought an action against the Clyde Soap Company, soap manufacturers, Petershill Road, Glasgow, *defenders*, for payment of £341, 1s., being the price of goods supplied by the pursuers to the defenders.

The following *narrative* is taken from the opinion of the Lord President—"In this action the pursuers, who are designed as wholesale merchants, 67 Southwark Bridge Road, London, S.E., seek payment from the defenders, who are British subjects, a soap company carrying on business in Glasgow, of a sum of £341, 1s. The defenders do not dispute their liability to pay, and have consigned the sum sued for in the hands of the Clerk of Court. They, however, resist *in hoc statu* a decree passing against them lest it may involve them in a criminal charge for the violation of the 1st sub-section of the 5th section of the Trading with the Enemy Proclamation, No. 2. They allege that in the transaction to which the action relates the pursuers acted as agents of Hoffman's, starch manufacturers, Salzuflen, Germany; that the pursuers designate themselves as sole agents for Hoffman's; that Hoffman's and the pursuers hold themselves out respectively as principal and agent; that when Hoffman's advertised their goods they stated their address Hoffman's, 67 Southwark Bridge Road, London, which is the same address as the pursuers; that Hoffmann's are alien enemies, and accordingly that, owing to this country being in a state of war with Germany, the defenders are precluded from paying the amount of the debt. The pursuers on record deny these averments, and allege that they (the pursuers) themselves are principals in the transaction sued on, and further that the sole partner of pursuers' firm is Emile George Guyot, a British subject resident in London."

On 25th January 1915 the Sheriff-Substitute (LYELL) pronounced this interlocutor—"Finds in fact (1) that it is admitted that the defenders purchased from the pursuers the goods as set forth in the account annexed to the initial writ, the price of which is sued for in this action; (2) That the sum sued for has been consigned in the hands of the Clerk of Court; (3) That in the transactions in question the pursuers acted as agents for the firm of Hoffman, starch manufacturers, Salzuflen, Germany: Finds in fact and law that payment of the sum sued for would be payment for the benefit of an enemy within the meaning of the Trading with the Enemy Proclamation No. 2 (9th September 1914); and Finds in law that in the meantime the defenders are neither bound nor entitled to make payment of the said sum as craved: Therefore sists procedure herein till further orders of Court, and decerns."

Note.—"This is an action by a London firm who designate themselves in the instance as 'wholesale merchants' directed against The Clyde Soap Company, Glasgow, and concluding for payment of £341, 1s. with interest, being the price of goods sold and delivered to the defenders at various dates from April 14th to July 16th 1914. The defenders admit the resting-owing of the debt, but plead that the pursuers were acting in the transactions in question as agents for Hoffman, starch manufacturers, Salzuflen, Germany, and as any payment to the pursuers for the goods in question would thus be payment for the benefit of an enemy, the defenders would be guilty of a crime and punishable accordingly did they pay the sum concluded for to the pursuers.

They have accordingly consigned the money in Court to await its orders. In view of some of the observations that were made at the debate I desire to say that in my opinion the attitude taken up by the defenders is strictly correct. The pursuers maintained that the defenders must accept the responsibility of averring definitely and proving as matter of fact that the payment here sought is for the benefit of an enemy, and as the record contains no specific averment to that effect they maintained that the whole defence is irrelevant, and decree must pass as matter of right. With all deference I do not agree in that view. If a defender has reasonable grounds for belief that a payment demanded from him is for the benefit of an alien enemy, I think he is bound to state these reasonable grounds of belief to the Court, not only in his own interest but in the interest of the State, and it is for the Court and not for the litigants to decide whether an alien enemy is to be entitled to take benefit from the King's Courts (see the opinion of Lord Skerrington in *Orenstein & Koppel* v. *The Egyptian Phosphate Company, Limited*, 1915 S.C. 55, 52 S.L.R. 54, and cases there quoted and discussed).

"The record here has been drawn with considerable care on both sides, and numerous documents and letters have been produced and admitted. The conclusions that I have drawn from a consideration of these may be shortly stated thus: — The pursuers aver that they are an English firm who have for many years carried on business in this country. In the words of their English solicitor in one of the letters founded on, they 'are not and never have been agents for Hoffman's.' They received orders from the defenders, and themselves invoiced the goods which were despatched from German ports to the defenders, and, most important of all, the goods so despatched to the defenders had all been previously paid for by the pursuers to Hoffman's. In other words, the pursuers represent themselves as independent merchants, who buy starch from Hoffman's at a price and resell to the defenders. If that be so, then *cadit quæstio*. No payment now made to the pursuers for the goods in question could be for the benefit of Hoffman's, and they are entitled to decree *de plano*.

"An examination of the documents produced, however, seems to me to present the facts in a very different aspect.

"It is true that the pursuers now call themselves 'wholesale merchants,' but their designation as given on their invoice headings and letters is 'sole consignees in England and Colonies for Hoffman's Starch, the largest makers in the world.' Then in contradiction of their English solicitor's assurance I find that on the post cards produced they designate themselves 'sole agents for Hoffman's rice starch.' In the trade journal the 'Power Laundry,' a copy of which is produced, there is an advertisement of Hoffman's Cat Brand Starch, and the address of the advertiser is 'Hoffman's, 67 Southwark Bridge Road, London, S.E.,' which is the address of the pursuers, and in the correspondence we find the pursuers identifying themselves with Hoffman's by writing of 'our works' and the like. All this was enough to put the defenders on their guard, and to cause them to hesitate before paying money to the pursuers at the present juncture. But I quite agree that the presumption that the pursuers are agents for Hoffman's and nothing else, undoubtedly raised by the consideration of this formidable accumulation of documentary evidence, may be overcome if it be shown that in spite of it all the pursuers were independent traders, buying and paying for starch from Hoffman's on the one hand and selling it to the defenders on the other.

"Now the pursuers' averments in that regard are specific enough. They say in condescendence 1 — 'It is explained and averred that the pursuers purchased and paid for all goods received from Hoffman's Starch Factories, Salzuflen, and in particular that they purchased and paid for the goods sued on to Hoffman's Starch Factories and resold them to the defenders on the dates particularly specified on the account . . . payment by the defenders to the pursuers for said goods involves no transaction with and no payment of money to Hoffman's Starch Factories, Salzuflen, in respect that as at 16th July 1914 (since which date no money transaction has taken place between pursuers and Hoffman's) the said Hoffman's have been and still are indebted to pursuers in the sum of £4352, 8s. 9d., being the balance brought out in the account No. 7/33 of process.' Now in ordinary circumstances this averment must necessarily have been remitted to probation; but on being asked to produce vouchers for payments made by them to Hoffman's, the pursuers frankly state that they have no receipts over and above two contract letters produced, 'all the starch received from Hoffman's being credited in the account No. 7/33 of process.'

"The contract letters referred to are as follows. The first is from Hoffman's to the pursuers, and is in these terms:—

"'Messrs Guyot-Guenin & Son,
'London. 'Salzuflen,
'10th September 1913.
'*Rice Shipment.*

"'Dear Sirs,—We take leave to ask you whether you could hold an amount of £15,000 at our disposal towards the end of October at the then current rate of interest, the amount to be refunded as usual by the monthly starch sales.'

"The pursuers' reply to this letter on 12th September 1913 is headed somewhat significantly 'Bookkeeping,' and goes on to say, 'We shall be pleased to hold £15,000 at your disposal towards the end of October at the current rate of interest (not below 4 per cent), the amount to be refunded as usual by our monthly starch sales.'

"I confess I see nothing inconsistent with the contract of agency existing between the pursuers and Hoffman's in the contract so expressed, granting that it was only a method of bookkeeping, as the pursuers acknowledge it to be. They did not advance the £15,000 to Hoffman's but merely 'held

it at his disposal.' In other words, they debited him with that amount in their books, and the interest which they charged on the sums so debited represented part at least of their profit on the sales of Hoffman's starch. For instance, as at October 16th, 1913, the account produced shows a debit balance against Hoffman of £6732. On October 22nd he is further debited with the 'advance' of £15,000. Interest on these amounts is charged at the sum of £82, 0s. 2d. up to November 16th, and during that period the pursuers have sold £2234, 13s. 2d. worth of Hoffman's starch. In other words, for selling £2234, 13s. 2d. worth of starch the pursuers have earned £82, 0s. 2d., and so the account goes on from month to month. It is, of course obvious that as the sales also go on from month to month, the interest payable to the pursuers becomes gradually less. But according to the parties themselves that is the 'usual' way in which they conduct business. It is quite fallacious for the pursuers to put it that as at July 16th 1914 Hoffman's were in their debt to the amount of £4352, 8s. 9d.—at any rate in the sense that they have a claim against Hoffman for payment of that sum. According to their contract with Hoffman they can charge him current interest on that amount until it is wiped out by their sales of his starch, and the result of a present payment to them by the defenders would simply go towards wiping out Hoffman's liability to the pursuers, and would thus be a payment for the benefit of an enemy."

The pursuers appealed to the Sheriff (MILLER), and on the 10th May 1915 the Sheriff pronounced this interlocutor—"The Sheriff allows the minute of amendment for the pursuers to be received . . . : Allows the productions tendered therewith also to be received: Opens up the record, allows the pursuers to amend the same in terms of the said minute, and that having been done of new closes the record, and having heard parties' procurators and considered the cause, adheres to the interlocutor of 25th January 1915, and remits the cause to the Sheriff-Substitute for further procedure: Finds the appellants liable in the expenses of the appeal."

Note.—". . . So far as the case was presented to the learned Sheriff-Substitute, together with the productions then before him, I agree with the view that he has taken in his judgment and with the views expressed in his note, and it is not necessary for me to recapitulate them. With regard to the productions that were made when the case came on for appeal, they seem to me to emphasise the position that the pursuers were really agents for the German firm of Hoffman's. The original contract between the parties is now produced, and the heading of it is similar to the headings of the documents referred to by the learned Sheriff-Substitute. It is 'Guyot-Guenin & Son, sole consignees in England and Colonies for Hoffman's Starch, the largest makers in the world," and the contract is made with Guyot-Guenin & Son under that heading. None of the other documents are such as one would expect from a firm which was acting as independent merchants and not as agents for disclosed principals. In these circumstances, and adopting the views of the learned Sheriff-Substitute without repeating them, I am of opinion that the pursuers were really the agents for Messrs Hoffman in Germany.

"The question that really gave me most difficulty was that the pursuers strongly maintained that they were not agents but independent merchants, and they asked to be allowed to lead proof upon that question. It appears, however, that the case that they intended to present at the proof was that in accordance with an arrangement which had been entered into many years ago between Hoffman's and the pursuers, they in 1913 entered into an arrangement whereby the pursuers advanced to Messrs Hoffman the sum of £15,000, as they say, in prepayment of goods to be afterwards supplied; that the pursuers then catered for orders for Messrs Hoffman's goods, sent the orders to Germany, Messrs Hoffman sent the goods to the pursuers' customers, taking the bills of lading in the pursuers' name, and that the pursuers when they received the price credited it to Messrs Hoffman's account, with the result that the £15,000 of debt was gradually paid off. They aver that at the beginning of the war there was still a balance of the £15,000 due by Messrs Hoffman amounting to over £4000, and that the sum that was received from the defenders would go to still further reduce that balance. Now if that is the real state of affairs it seems to me to fall under the case of *Rex* v. *Kupfer*, [1915], 2 K.B. 321, 31 T.L.R., 223, because the defenders in making payment would be paying an alien enemy's debt in this country and so increasing his credit. Therefore the payment of the sum due by the defenders would be a payment for the benefit of an alien enemy. In these circumstances I do not see why the defenders should be called upon to enter into a proof with the same result as has already been arrived at. Accordingly I think the judgment of the learned Sheriff-Substitute should be affirmed and the case remitted to him for further procedure."

The pursuers appealed to the First Division of the Court of Session.

Argued for the appellants—They were entitled to a proof of their averments on record. The question whether payment to them would be payment to an alien enemy, or in reduction of an alien enemy's debt to them, was matter for proof, and could not be decided by inference from documents lodged in process and incorporated in the record by joint minute when the parties had not renounced probation.

Argued for the respondents—The documents incorporated in the record showed payment to the pursuer would be payment to an alien enemy, or at least in reduction of the debt of an alien enemy to the pursuers. In either case payment would be "to or for the benefit of an enemy"—*Rex* v. *Kupfer*, 1915, 2 K.B. 321—and the Sheriffs were right in refusing decree *in hoc statu*.

At advising—

LORD PRESIDENT—[*After the narrative above quoted*]—I am of opinion that the defenders' averments disclose a *prima facie* case in support of the defenders' plea which it is incumbent on the pursuers to rebut, and that they ought to have an opportunity of doing so. Without hearing evidence, but on a consideration of the documents in process, the learned Sheriffs came to the conclusion that the averments of the defenders were proved and the averments of the pursuers disproved.

I cannot agree, for here is a pure issue of fact to the determination of which I think it is essential that there should be an investigation into the facts. I propose therefore that we should allow parties a proof of their averments upon record.

It will be for the defenders to consider whether they will take any part in the investigation of the facts, because it is apparent that it is immaterial to them which way this issue of fact is decided—whether decree passes against them or not, they will be safe from any charge of violating the Royal Proclamation. Having quite properly raised the question I do not consider that it is incumbent on the defenders to incur further expense by appearing at the proof.

It is, however, equally obvious that the public interest is here involved, for a decree for payment of this money might result in a breach of the Royal Proclamation. I think therefore that the papers in this case ought to be laid before the Lord Advocate in order that he may consider whether or no he should intervene. It is, of course, entirely within his discretion whether he takes part in the subsequent proceedings in this case or not. This Court has no right and certainly no desire to dictate to the public prosecutor what course he should take. That would be a matter entirely within his discretion. But I ought to point out that the determination of a question such as is raised here would be unsatisfactory if it were decided in the absence of a proper contradictor in the field. Accordingly, if the defenders decide that they ought to take no further part in the investigation of the facts and the discussion which may follow, then obviously it is in the public interest and for the public advantage that the Crown should be represented.

The course which I propose has, as your Lordships are aware, been determined on after consultation with the other Division of this Court.

LORD MACKENZIE—I am of the same opinion. I take the view that the course adopted by the Court in this case may be taken as a notification to all litigants throughout the country who may be placed in a position similar to that of the defenders here that there is not an obligation upon them to litigate in the way in which they would be called upon to do if their private interests were involved. If there is a doubt as to whether they are in safety to pay to a pursuer on the ground that he is an alien enemy, they discharge their duty if they consign the money in the hands of the Court. They are not called upon, in my opinion, to undertake to litigate a question which truly is one for those responsible for the management of public affairs. If there appears to the Lord Advocate to be a question which ought to be litigated, in my opinion the expense of that should not be cast upon the private litigant but should be undertaken by the public authorities.

LORD SKERRINGTON—I concur.

LORD JOHNSTON was absent.

The Court pronounced this interlocutor—

"Recal the interlocutors of the Sheriff of 10th May 1915 and of the Sheriff-Substitute of 25th January 1915: Allow the parties a proof of their averments on record: Appoint the proof to proceed before Lord Mackenzie on a day to be afterwards fixed by his Lordship: Meantime appoint the record and relative print of documents to be laid before the Lord Advocate in order that he may consider the same, and, if so advised, compear in the subsequent proceedings in the cause: Reserve all questions of expenses."

Counsel for the Appellants—Horne, K.C. —Gentles. Agent—E. Rolland M'Nab, S.S.C.

Counsel for the Respondents—Wilson, K.C.—J. R. Gibb. Agents—D. M. Gibb & Sons, S.S.C.

Tuesday, November 2.

SECOND DIVISION.

DAWSON *v.* GIFFEN.

Expenses—Jury Trial—Certificate of Presiding Judge—Vindication of Character—Publication of Slander—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 40.

A brought an action of damages against B for slander contained in a letter written by B to A in reply to three letters written by A to B. Three months after the action was raised B brought an action of damages against A for slander contained in the three letters written by A to B. The two actions were tried together before a jury, who found for the pursuers in each case, awarding £180 damages to A and one farthing damages to B. B having moved the presiding Judge for a certificate that the action at his instance was one for vindication of character in terms of the Court of Session Act 1868, sec. 40, A opposed the motion on the ground that B had himself given publicity to the letters by raising his counter action. The presiding Judge granted the certificate. Thereafter B moved in the Second Division for expenses in the action at his instance, and A opposed the motion.