

herself in the same position as she had occupied on the previous 28th June. She repeated what she had done on the former date; but it so happened that the notarial apparatus would have completely failed—at least it was so feared—if the notary's son's appointment had been inserted in the codicil signed by the notary himself. Accordingly, still desiring confirmation, there was no question of revocation in her mind. She employed the confirming instrument that was at hand and employed it without destroying it by introducing any doubtful matter. In my view, accordingly, it is not a reasonable implication that she meant revocation, but the reasonable implication upon the contrary is that she meant confirmation. That is my view. She did not interfere with the nomination of Mr MacLaren junior, because, in the circumstances of the father being the notarial signatory, she could not. She left that matter where it stood, and as it turns out that the codicil of 28th June is good in law the nomination within it stands. I do not find that it is a necessary implication from the ignoring of a certain provision of the codicil of the 28th of June in that of the 10th July that the part so left out from the category of repetition was meant to disappear from the testamentary intentions of Mrs Thompson.

Their Lordships dismissed the appeal with expenses.

Counsel for the Pursuer (Appellant)—  
Condie Sandeman, K.C.—Normand. Agents—  
Alex. Morison & Company, W.S., Edinburgh—  
Beveridge & Company, Westminster.

Counsel for the Defenders (Respondents)—  
Lord Advocate (T. B. Morison, K.C.)—  
Walter Watson. Agents—Macpherson &  
Mackay, W.S., Edinburgh—John Kennedy,  
W.S., Westminster.

Friday, June 18.

(Before Viscount Haldane, Viscount Finlay,  
Viscount Cave, Lord Dunedin, and Lord  
Shaw.)

EISEN v. M'CAE LIMITED.

(In the Court of Session, November 29, 1919,  
57 S.L.R. 126.)

*Contract—Pactum Illicitum—War—Emergency Legislation—Timber—Timber Control Order 1918.*

The Timber Control Order 1918, Part I, section 2, provides—“ . . . No person shall . . . (b) sell or enter into any contract for the sale of any such timber” [i.e., imported] “ except to the holder of a permit granted by or on behalf of the Controller. . . .” *Held* (aff. judgment of the First Division) that an agreement to sell on the condition that the buyers should obtain a permit was void.

This case is reported *ante ut supra*.

The pursuer Lewis Eisen appealed to the House of Lords.

At the conclusion of the arguments on behalf of the appellant, counsel for the respondents being present but not being called upon, their Lordships delivered judgment as follows:—

VISCOUNT HALDANE—This appeal arises out of an action brought by sellers of timber under a contract, for damages for non-fulfilment of the contract by the buyer. The answer made is that the contract was illegal because the buyer was not a person provided with a permit, and under the law existing at the time there could be no contract excepting with a person provided with a permit from the Timber Controller.

The action came before the Lord Ordinary, who directed that there should be a proof before answer, taking the view that there was a conditional contract, and that it should be permitted to the pursuer to prove that if the buyer had chosen to take the proper steps to obtain a permit he might have got one, and consequently that the contract might have been implemented. The First Division, however, on appeal recalled that interlocutor and dismissed the action on the ground that there was no contract at all.

Now the contract itself was of this nature—Messrs Cant & Kemp, timber merchants, acting on behalf of the appellant, agreed to sell a quantity of timber lying in store at Glasgow, consisting of so many planks *ex such-and-such* ships at such-and-such prices, subject to the following conditions:—First, that the buyers obtained a permit from the Timber Controller to purchase; secondly, four weeks' free rent to be allowed to the buyers from the date of the permit; if incurred, then fire insurance to be for sellers' account; and payment to be made by cash in Glasgow in one month from date of permit less  $\frac{2}{3}$  per cent. discount.

Now I pause to observe that that contract on the face of it appears to be an actual contract subject to a resolutive condition, or condition-subsequent, which would put an end to it if not fulfilled. It is not in the form of a contract which had no existence at all until some condition which was preliminary to its existence as a contract should come into operation. Is such a conditional contract, resolvable by a condition-subsequent, one which at its date, the 22nd October 1918, the law allowed? Now the Timber Control Order 1918, which was then in operation, provided by Part I, paragraph 2 (b), that no one should “sell or enter into any contract for the sale of any such timber except to the holder of a permit granted by or on behalf of the Controller, and then only in accordance with the terms and conditions specified in such permit.” These words appear to me clearly to prohibit actual sale and the entering into any contract of sale equally, and they appear to me therefore to render the contract which purported to be entered into in the case before this House altogether inoperative in law. I agree entirely with the view taken by the First Division, and I move your Lordships accordingly that this appeal be dismissed, and dismissed with costs.

VISCOUNT FINLAY—I am of the same opinion. If there was any contract at all it was a conditional contract of sale, and it appears to me to be clear that there is no foundation for the view taken by the Lord Ordinary that the Order does not strike at conditional contracts of sale but only at absolute contracts of sale. The words are perfectly plain—"No person shall (a) buy or enter into any contract for the purchase of any timber imported into the United Kingdom except under and in accordance with the terms and conditions of a permit granted by or on behalf of the Controller," and then the words under (b) are to the same effect, only if possible clearer. That seems to me to show beyond all doubt that before entering into any contract for the purchase of timber imported into the United Kingdom there must be an existing permit, and that you cannot enter into a contract until you have got that permit. A conditional contract of sale or purchase is none the less such a contract on account of the condition which exists in it. It seems to me that the order of the Lord Ordinary cannot be sustained on any reading of the effect of the Order.

There is another view, of course, which may be taken of the effect of the clause in this contract, but it would be even more fatal to the pursuer's case. The words of the note are—"Sold 1892 planks cypress . . . at 19s. 6d. per foot cube, *ex store* in Glasgow. This contract is issued subject to buyers obtaining permit from the Timber Controller to purchase." That may mean that it is to be taken as "issued" only after that permit is obtained, and that it does not form a contract at all until the permit is obtained. Then, of course, if that be so, it is absolutely fatal to the pursuer's case, because on that reading until the permit is obtained there is no contract of any sort or kind. If it is regarded as a conditional contract of sale it is hit by the Order; if the document is read in the way I have suggested, then there is no contract at all and no action could possibly be brought, because the event on the happening of which there was to be a contract of any kind has never happened.

VISCOUNT CAVE—I agree. Adopting and slightly varying the language of Lord Cullen, I think the meaning of the Order was that a buyer of timber should obtain a permit before he proceeded to buy or to enter into a contract to buy. I also think that a conditional contract to buy is a contract to buy. Accordingly this contract, which was entered into without any permit, was a breach of the Order and was illegal and void.

LORD DUNEDIN—I concur.

LORD SHAW—I concur.

Their Lordships dismissed the appeal, with expenses.

Counsel for Pursuer (Appellant)—Stuart Bevan, K.C.—Cooper. Agents—Turnbull & Findlay, Solicitors, Glasgow—Macpherson & Mackay, W.S., Edinburgh—Charles Nordon & Company, London.

Counsel for Defenders (Respondents)—  
Condie Sandeman, K.C.—Normand. Agents—  
Crawford & Laird, Solicitors, Glasgow—  
Simpson & Marwick, W.S., Edinburgh—  
Deacon & Company, London.

Friday, July 16.

(Before Viscount Haldane, Viscount Finlay,  
Viscount Cave, Lord Dunedin, and Lord  
Shaw.)

MACKINNON'S TRUSTEES v. INLAND  
REVENUE.

(In the Court of Session, July 16, 1919,  
56 S.L.R. 559, and 1919 S.C. 684.)

*Domicile—Husband and Wife—Succession  
—Revenue—Wife's Domicile stante matri-  
monio.*

In 1893 a Scotsman, who had contracted dissipated habits, executed a voluntary deed of separation and, with his wife's approval, went to Australia. He lived in Brisbane from 1899 till his death in 1918. In 1902 he contracted in that city a bigamous marriage. His wife continued to live in Scotland till the date of her death, September 1915. *Held (aff. judgment of the First Division)* that as the husband had at the date of her death acquired a domicile in Australia the wife's domicile was also in Australia.

*Question*, would it have been otherwise had she obtained a judicial separation?

*Dolphin v. Robins*, 1859, 3 Macq. 563, per Lord Cranworth at p. 576 *et seq.*, considered.

This case is reported *ante ut supra*.

The defenders, the Inland Revenue, appealed to the House of Lords.

At delivering judgment—

VISCOUNT FINLAY—The question in the present case is whether the late Mrs Isabella Watson or Mackinnon, the testatrix, was at the time of her death domiciled in Queensland, and the liability of her estate in respect of legacy duty and succession duty depends upon the answer to this question.

The inquiry falls under two heads—1. Had Robert Mackinnon, the husband of the testatrix, acquired at the date of her death a domicile in Queensland? 2. If he had, was the testatrix as his wife also domiciled in Queensland?

Robert Mackinnon was born and brought up in Scotland. He served in the Royal Navy for twenty-four years. In 1878 he married the testatrix, and from 1886, when he retired from the navy with a pension, until 1893 he resided with her in Scotland. He had contracted drunken and dissipated habits, in consequence of which arrangements were made by the testatrix through her law agent for his leaving this country and going to Australia, the expense of his passage being paid by his mother-in-law. He landed at Sydney, and after some time