

fori to determine. We are to consider whether there is a good preference over the money in the hands of the Court where the sale takes place, and that must be determined according to our own law.

On the second point I agree with the doctrine by which it is held that when anyone in a foreign port is asked by the master of a ship to advance money for the payment of the wages of the crew, and agrees to do so, he is to be put into the shoes of the seamen whose wages he has paid so as to have the same rights and remedies against the ship as they would have had, because he is presumed to make advances upon the credit of the ship, which is the only fund of credit that *ex hypothesi* he knows anything about. He does not know the master nor the owners, and he makes the advances upon the credit of the ship. But it is consistent with that doctrine to hold that when a shipbroker is invited by the shipowners themselves to make advances, he may make what contract with them they choose to agree upon, and whatever his contract may be he must be supposed to rely upon their credit. If he desires to have a further security than their personal credit it is open for him to stipulate for it, but if he does not—and in this case there is nothing to show that the claimants did desire to make any stipulation—he is making a contract with the owners themselves to which the law does not attach as a consequence any right of lien over their property. I agree that the contract alleged is a contract by which the owners invited the claimants upon their credit to supply certain necessaries in order to enable their ship to proceed upon her voyage to England, and it appears to me that to say that they thereby acquired a right of lien over the ship is inconsistent with the agreement upon which they undertook to make the payment. On both points I agree with your Lordship in the chair.

LORD PEARSON was absent.

The Court adhered.

Counsel for Bowring & Company (Claimants and Reclaimers) — Solicitor-General (Ure, K.C.)—Horne. Agents—Boyd, Jameison, & Young, W.S.

Counsel for the Other Claimants (Respondents)—Dickson, K.C.—Clark, K.C.—Murray. Agents—Smith & Watt, W.S.

Thursday, July 16.

SECOND DIVISION.

[Sheriff Court at Glasgow.]

H. M. ADVOCATE v. SUITS LIMITED.

(See also *H. M. Advocate v. Jacob*, 16th July 1908, ante p. 852.)

Trade-Mark — Trade Description — Merchandise Marks Act 1887 (50 and 51 Vict. cap. 28), sec. 2, sub-sec. 2—Master and Servant—Purchaser Writing for Patterns of “Scotch Tweed Waterproof All Wool”—Patterns “as Requested” Returned by Shop Assistant—Pattern not Answering Description.

The Merchandise Marks Act 1887, sec. 2 (2), enacts—“Every person who sells, or exposes for, or has in his possession for, sale, or any purpose of trade or manufacture, any goods or things to which any forged trade-mark or false trade description is applied, or to which any trade-mark or mark so nearly resembling a trade-mark as to be calculated to deceive is falsely applied, as the case may be, shall, unless he proves (a) that, having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade-mark, mark, or trade description, and (b) that on demand made by or on behalf of the prosecutor he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or (c) that otherwise he had acted innocently, shall be guilty of an offence against this Act.”

A person with a view to obtaining evidence of an offence against the Merchandise Marks Acts wrote to a firm of clothiers stating he wanted a Scotch tweed waterproof, asking for patterns and saying—“What I want is a good serviceable coat, all wool.” An assistant in the shop sent patterns “as requested.” All of these did not answer the trade description “Scotch Tweed,” and were not “all wool.” One of the patterns not answering the description was chosen and a coat thereof supplied, but the clothiers when requested refused to give a receipt for the price as for a coat of “Scotch Tweed All Wool.” The shop assistants had instructions not to give goods any other description than as invoiced; they had forms which required that the goods should be marked on the forms as in the stock books, which was as invoiced, and when a piece was taken it was ticketed with a form repeating this description. The pattern in question was of material invoiced merely as “overcoating.”

A complaint having been brought charging an offence against the Merchandise Marks Act 1887, section 2 (2), against the clothiers, held that assum-

ing the facts would otherwise have amounted to an offence, the clothiers had acted innocently.

Opinions (per Lord Justice-Clerk, Lord Low, and Lord Ardwall) that the facts did not amount to an offence irrespective of the question of acting innocently.

Observations (per Lords Low and Ardwall) on the conduct necessary on the part of persons seeking evidence against offenders.

His Majesty's Advocate brought a complaint in the Sheriff Court at Glasgow against the firm of Suits Limited, 163 Trongate, Glasgow, under the Summary Jurisdiction (Scotland) Acts 1864 and 1881, and the Criminal Procedure (Scotland) Act 1887, which charged an offence against the Merchandise Marks Act 1887, sec. 2, sub-sec. 2 (*quoted sup. in rubric*).

The complaint set forth that Suits Limited "did between 18th November and 11th December 1907, in their warehouse at 163 Trongate, Glasgow, sell to Thomas Steven, clerk, 39 Fort Street, Ayr, a waterproof coat to which the false trade description 'Scotch Tweed All Wool' was applied, contrary to the Merchandise Marks Act 1887, and particularly section 2, sub-section (2), whereby the said Suits Limited are guilty of an offence against said Act, and are liable, on summary conviction, to a fine not exceeding twenty pounds."

On 1st April 1908 the Sheriff-Substitute (GLEGG), after evidence had been led, assoilzied the company, and an appeal was taken by stated case.

The case gave the following *facts* as proved—"The communications between the parties were conducted entirely by writing. Throughout the whole proceedings Steven was acting at the instigation and under the direction of the Ayr Procurator-Fiscal. The respondents acted through their servants at their branch in Glasgow.

"On 18th November 1907 Steven wrote to the respondents—"I am told you supply Scotch tweed waterproofs for 20s. to measure; and as I want one, would you please send me patterns. I fancy you can give me directions for measuring myself, so that I would not need to go to Glasgow. What I want is a good serviceable coat, all wool, and fit to turn rain. Cash on delivery."

"On 19th November the respondents replied—"Enclosed please find patterns as requested. Trusting you will be able to make a favourable selection. All the measures we will require is the width across back, the length of coat and sleeve, and your chest measurement over 'waistcoat.' Various patterns were enclosed, but of what material these, other than that chosen, were composed does not appear.

"On 29th November Steven wrote—"I got the patterns of Scotch tweed waterproof which you sent in answer to my letter of 18th November. I have selected the one I enclose, and I also send the measurements. When I receive the coat I will remit the price. Please send it soon."

"The pattern selected was one which Steven and his advisers, after examination, believed not to be Scotch tweed. The coat supplied was made from cloth of this pattern.

"On 2nd December 1907 the respondents wrote—"Many thanks for your order to hand, but regret to say we are not able to make anything up without a deposit."

"On 3rd December 1907 Steven replied—"As requested by yours of 2nd, I send herewith postal order for £1 in payment of the Scotch tweed waterproof which I ordered. Please send on coat soon, with a receipt for the price."

On 9th December 1907 Steven wrote—"I sent you a postal order for 20s., but have not got an acknowledgment, and the waterproof I ordered has not come to hand. Please send it on soon, with a receipted account."

"In reply the respondents sent the coat and an invoice, bearing 'Overcoat £1,' to which was annexed a receipt as follows—"Received of Mr Steven the sum of one pound."

"On 12th December 1907 Steven wrote—"The waterproof is to hand. I would like to have a duplicate receipt for its price; so please sign the enclosed receipt, and return in the enclosed stamped envelope."

"The form referred to bore—"Duplicate. —Received from Thomas Steven, Fort Street, Ayr, one pound in payment of all wool Scotch Tweed Waterproof supplied to him."

"On 18th December 1907 Steven wrote—"I sent you on 12th a form of duplicate receipt for the price of the waterproof I got from you, but I have not received it back. In case it has gone amissing I enclose a fresh receipt, and I shall be obliged by your signing it and returning it to me."

"This form was the same as the previous one.

"On 19th December 1907 the respondents wrote—"Re your letter to hand. Enclosed please find copy of your receipt. Received from Mr T. Steven the sum of £1 in payment of overcoat supplied to him."

"'Scotch Tweed All Wool' by the definition received in the trade requires that the article shall be made of material spun and woven in Scotland, and be composed wholly of wool, except for a small percentage, about 2 per cent. of foreign matter. The coat supplied contained 20.51 per cent. of cotton."

The Sheriff-Substitute further stated—"I held that (1) 'Scotch Tweed All Wool' is a trade description; (2) the coat supplied was not 'Scotch Tweed All Wool'; (3) it was not proved that the respondents sold to Steven a coat to which the trade description 'Scotch Tweed All Wool' was applied within the meaning of section 2, sub-section (2), of the Merchandise Marks Act 1887.

"I therefore assoilzied the accused. "I also found that if I had held that said trade description was applied, that the respondents had acted innocently within the meaning of section 2, sub-section 2 (c), of the Act. The respondents' servants were

enjoined not to give goods any description other than that by which they were invoiced to the Glasgow branch. At the said branch there were supplied forms which required that the description of the goods should be marked on the forms in the same way as the goods themselves were entered in the stock-book, which had to be made up from invoices received from headquarters. When a piece was separated from the bulk to make the overcoat in question, it was ticketed with a form on which the description was repeated. The material in this case was invoiced by the respondents to the said branch as overcoating No. 294, and this number was repeated on the forms mentioned and in the stock-book. Under the rules of the respondents' business it was only under the name of 'overcoating' that it was permissible for the respondents' salesmen to supply it."

The questions of law for the opinion of the Court were—(1) Did the respondents sell to Steven a coat to which the trade description 'Scotch Tweed All Wool' was applied within the meaning of and contrary to section 2, sub-section (2), of the Merchandise Marks Act 1887? (2) Was the trade description 'Scotch Tweed All Wool' applied to the coat sold by the respondents to Steven within the meaning of section 2, sub-section (2), of the Merchandise Marks Act 1887? (3) Did the respondents act innocently within the meaning of section 2, sub-section 2 (c), of the Act."

The arguments of parties on the first and second questions of law in the case were substantially the same as those presented in the case of *His Majesty's Advocate v. Jacob* in the High Court of Justiciary, reported *supra* at p. 852.

On the third question of law, argued for the appellant—The accused had not discharged the *onus* which lay on them here of proving that they had acted innocently. It was not enough for them to show that they had given general directions to their servants which had not been obeyed. They were bound to prove, in order to avoid criminal liability, that they had done everything reasonably possible to prevent the commission of an offence, and this they had failed to do—*Coppen v. Moor* (2), [1898] 2 Q.B. 306; *Budd v. Lucas*, [1891] 1 Q.B. 408.

Argued for the respondents—The question whether the accused had acted innocently was one of fact, and the Sheriff-Substitute's decision on it was therefore not open to review. This case was differentiated from that of *Coppen v. Moor* (2), *supra*, by the fact that there the Court of first instance had held that the accused had not acted innocently, and there were evidently suspicious elements there which were absent here. *Coppen v. Moor* (2) merely decided that it was not necessary to prove criminal intention on the part of the accused—*Christie Manson and Woods v. Cooper*, [1900] 2 Q.B. 522. It had not been suggested here what the respondents could have done further than they did to prevent commission of an offence by their employees.

LORD JUSTICE - CLERK—As regards the first point in the case, namely, whether a technical offence was committed under the section, I think that this is not so strong a case for the prosecution as the case of *Jacob*. In this case I should have much more difficulty in holding that anything was proved which amounted to a contravention. But this case admits of being decided on the third question. The Sheriff-Substitute has found as matter of fact that the respondent in this case acted innocently in the sense of section 2, sub-section 2 (c), of the Act. I must say that in dealing with an Act of Parliament like this, in which the *onus* of proof is placed on the accused, I should require a very strong case before I would reverse the judgment of the Sheriff and hold the accused guilty. Apart from that I think the Sheriff was right. We are dealing with a case in which under an Act of Parliament an employer may be made criminally responsible for the unauthorised act of his servant. I think that we ought to be very cautious in applying an enactment of that kind. The judgment of the Sheriff appealed from appears to me to be right, and I would propose that the appeal be dismissed.

LORD STORMONTH DARLING — I did not take part in the judgment in the case of *Jacob*, and although I do not suggest for a moment that that judgment is unsound or even doubtful, I should prefer not to express any opinion on the first point in this case. On the second point, which is sufficient for its decision, I am clear that the Sheriff-Substitute has come to a right conclusion.

LORD LOW—I am of the same opinion. On the first part of the case I think that it is plain that no offence under the Act was proved, and it is unnecessary to go into details.

I should, however, like to say a word as to the method employed in getting up a case against the respondent. It is no doubt legitimate, and indeed may be necessary if the statute is to be enforced, for a procurator-fiscal to employ a person to make a fictitious purchase, but although that is quite allowable, everything ought to be done in a straightforward manner, and the article desired ought to be asked for unambiguously. Here the whole correspondence seems to me to have been calculated, if it was not designed, to mislead. What the writer in his first letter said that he wanted was a Scotch tweed waterproof, and although he did in a subsequent part of the letter introduce the expression "all wool," he did so only incidentally, and it is not surprising that what was sent in reply to this letter was the kind of tweed which is used for making waterproof coats. I confess that it seems to me that the letters were from beginning to end an unfair attempt to entrap the tradesman to whom they were addressed.

On the second part of the case I accept the law as laid down in the case of *Coppen v. Moor*, [1898] 2 Q.B. 306, to the effect

that an employer may, in a question whether an offence under the statute has been committed, be responsible for the unauthorised actions of his servant, but while accepting that doctrine I agree with your Lordship in the chair that it must be applied with great care. In this case I think that the facts justified the Sheriff-Substitute in holding that the respondents acted innocently.

LORD ARDWALL—Undoubtedly it is a very important matter that adulteration of Scotch tweeds or any other textile fabrics should be prevented, and it is quite right that the authorities should take steps to bring to justice persons who make a traffic in adulterated goods; but I agree with my brother Lord Low that in taking the necessary steps everything should be done in a straightforward manner—there should be a straightforward demand for a specific description of goods about which there could be no ambiguity whatever. Of course traps must be laid in cases of this sort, but I quite concur with what has been said about this and the other case decided in the Justiciary Court this morning, that in each case the correspondence was an attempt to force the accused into giving a wrong description of the goods sold, and to make him admit by his own writing, after the sale had taken place, that he was guilty of an offence. Very properly the accused refused to commit himself to a description of an article which he had not supplied. I agree therefore for the reasons stated by Lord Low that neither the first nor second question can be answered in the affirmative.

In regard to the third question I agree that the Sheriff was right in holding that the accused acted innocently within the meaning of section 2, sub-section 2 (c). The precautions taken by them seem to have been most reasonable, and, so far as I can see, sufficient. I am accordingly of opinion on this ground also that the Sheriff-Substitute was right in holding that an offence under section 2, sub-section 2, has not been committed by the accused.

The Court answered the third question in the affirmative.

Counsel for the Appellant—Solicitor-General (Ure, K.C.)—W. Thomson—Lyon Mackenzie. Agent—W. S. Haldane, W.S., Crown Agent.

Counsel for the Respondents—Hunter, K.C.—Horne. Agents—Macpherson & Mackay, S.S.C.

Friday, July 17.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

MACKENZIE'S M.C. TRUSTEES v.
 BEVERIDGE'S TRUSTEES AND
 OTHERS.

Marriage Contract—Husband and Wife—Succession—Acquirenda—Legitim—Right of Marriage-Contract Trustees to Claim Legitim—Right of Trustees to Elect between Legitim and Testamentary Provisions.

In an antenuptial contract of marriage a wife conveyed to the trustees therein the whole means, estate, and effects, heritable and moveable, real and personal, belonging to her or to which she had right, or to which she might succeed or acquire right during the subsistence of the marriage, and undertook to complete titles to such means, estate, and effects, and to execute such further deeds in favour of the trustees as might be necessary for carrying out the purposes of the trust.

Held, on the death of the wife's father, that the marriage-contract trustees were not entitled to insist upon his testamentary trustees paying over to them the amount which she might claim as legitim, but that the right to elect to take the testamentary provisions in her favour, in preference to her legitim, still remained with her alone.

On 6th March 1907 the Right Hon. Baron Overtoun of Overtoun, and another, a majority of the trustees acting under the antenuptial contract of marriage dated 30th May and 2nd June 1873, entered into between Robert Mackenzie, writer, Glasgow, and Mrs Elizabeth Hill Beveridge or Mackenzie, brought an action against David M'Lean, 5 Kensington Court, London, and others, the testamentary trustees of the late William Beveridge of Bonnyton, Dunfermline (Mrs Mackenzie's father), acting under his trust-disposition and settlement, dated 22nd March 1902, and others. In it the pursuers sought declarator that they were entitled as trustees foresaid, and as assignees of Mrs Mackenzie under the said antenuptial contract of marriage, to payment of one ninth of the personal or moveable estate of her father, the said late William Beveridge, as her share of legitim. Conclusions for accounting and payment followed.

In the said antenuptial contract of marriage the provision by Mrs Mackenzie (Miss Elizabeth Hill Beveridge) was—"For which causes, and on the other part, the said Elizabeth Hill Beveridge hereby assigns, conveys, disposes, and makes over to . . . all and sundry the whole means, estate, and effects, heritable and moveable, real and personal, now belonging to her, the said Elizabeth Hill Beveridge, or to which she has right, or to which she may succeed or