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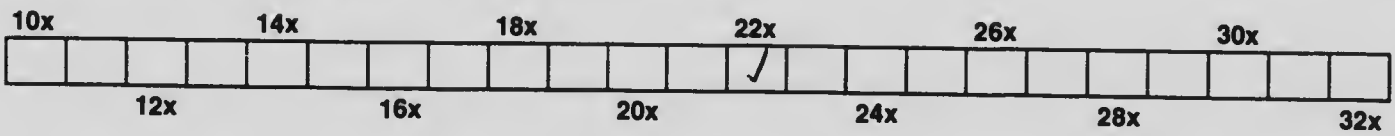

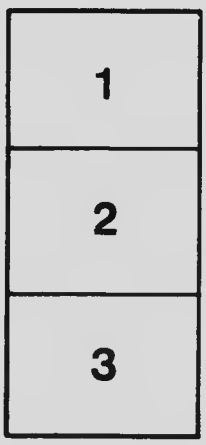

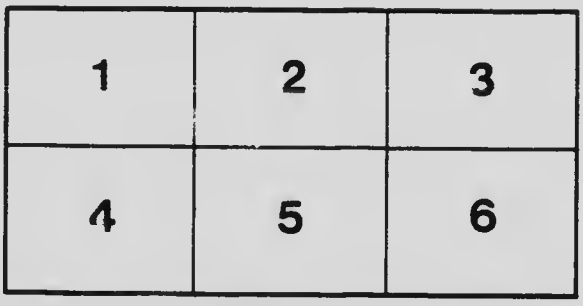


FACULTY
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THE LAW OF WAR AND CONTRACT

THE LAW OF WAR AND CONTRACT

INCLUDING THE PRESENT WAR DECISIONS AT HOME AND ABROAD

BY

H. CAMPBELL

KING'S INN, DUBLIN; BARRISTER-AT-LAW;
CLERK OF THE CROWN, BOMBAY;
PROFESSOR OF LAW, GOVERNMENT LAW SCHOOL, BOMBAY

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PREFACE

No field of English law has been so much affected by the great European war as the law of contract. In addition to the effect of the common law, called into existence by the declaration of hostilities between Great Britain and her enemies, came the consequences, various and wide-reaching, resulting from numerous Statutes, Proclamations, Orders in Council, and Regulations—in short, emergency legislation. Relations of all kind were affected: Banker and Customer, Master and Servant, Principal and Agent, Vendor and Purchaser. Immense interests were touched, extensive centres of trade disturbed—the insurance world, the shipping community and the common markets of sale. For over three years legal adjudications on complex points have poured out in an unending stream, at which commercial men are much confused, practising lawyers perplexed, and even some Judges embarrassed.

The author, therefore, proposes to collect all the decisions due to the present war, as also some earlier war cases, under appropriate principles of law, in the following pages, and so to arrange them that those who have little leisure at their disposal can by means of separate chapters, clear marginal notes and an exhaustive index, find what they may be seeking for with as little delay as possible.

The author has endeavoured to use as far as possible the *ipsissima verba* of the Judges in setting ont the law. He has ventured to treat such important subjects as

(1) Enemy *status*,
(2) the effect of requisitioning vessels under charter-parties,
(3) the effect of war on life-insurance policies, and
(4) commercial impossibility,

at some little length.

Many more cases will no doubt be decided, but in order to have a work at hand the author has chosen to stay the survey of decisions as reported down to August 1, 1917, though cases which have since been affirmed or reversed on appeal are noted down to September 24, 1917. All cases as to the Moratorium are omitted, as the Postponement of Payments Act was only in force for six months from August 3, 1914.

The present work grew from notes for the author's practice in Bombay, passed into an Indian edition, and now makes an appearance here. Many friends have helped both in India and England, especially Mr. Maurice L. Gwyer, barrister-at-law of the Inner Temple, and Mr. Gavin Steel Little, solicitor, of Bombay—to mention only two.

Notice of any errors and comments will be always gladly received.

H. CAMPBELL.

High Court Chambers,
Bombay,
1917.

CONTENTS

PAGE

PREFACE v

TABLE OF CASES xi

CHAPTER I

INTRODUCTORY—

Divisions of work:—Contracts executed or executory; Unlawful contracts; Contracts impossible of performance 2

Distinction between contracts made before and during war with enemies 2

Who are enemies? 3

Emergency legislation and contracts 11

CHAPTER II

AGREEMENTS WITH ENEMIES DURING WAR—

Such agreements are void, and are not "contracts" . . 12

Contracts with prisoners of war—position of persons interned 13

Contracts with persons in the realm under the protection of the King 13

Trading contracts with the enemy are illegal 14

CHAPTER III

EXECUTORY AND EXECUTED CONTRACTS—

(*A*) Enemy Contracts 16

Executory contracts are suspended, but may be dissolved; vested rights are undisturbed 17

(*B*) Non-enemy Contracts 24

(*C*) Executory and Executed Contracts *re* the Sale of Goods 26

(*D*) Sale of Goods: Prize Court Proceedings 33

Pledges; Mortgages; Sales of goods in transit at sea 33

PAGE

(*E*) Contracts with Clauses providing for War, etc.: Recent cases arranged alphabetically according to the character of the contract 42
Bill of Lading 42
Building Contract 48
Contracts of Carriage 49
Charter-parties 49
" " —Restraint of Princes . . . 51
" " —Requisitionment 68
Landlord and Tenant 107
Insurance (Fire) 107
" (Life) 108
" (Marine) 112
" " (1) Proximate cause of loss . 112
" " (2) War risks and the like . 124
" (Other) 130
Sale of Goods 134
(1) Providing for cancellation . 134
(2) Providing for suspension only . 139
Force Majeure 151
"Subject to safe arrival" . 152

(*F*) Clauses implied in Contracts *re* War:—General principles 153

(*G*) Miscellaneous Effects of War and Emergency Legislation on Various Contracts:—Recent cases arranged alphabetically— 156
Affreightment 156
Agency 157
Broker and Client 157
Company Contracts 158
Landlord and Tenant 159
Master and Servant 160
Mortgagor and Mortgagee 165
Sale of a Business 167
Transfer of a Company's Business 168
Vendor and Purchaser 168

CHAPTER IV

CONTRACTS MUST BE LAWFUL—

General Principles of English and Indian Law . . . 170
Trading Contracts 172
Trading with the Enemy 172
Other Illegality 176

PAGE

(A) Enemy Contracts:—Recent cases arranged alphabetically—

Affreightment (c.i.f.) 178
Agency 180
Bailment 182
Banker and Customer 183
Bills of Exchange 184
Insurance (Life) 191
" " American Cases 198
" (Marine) Early Cases 218
" (c.i.f.) 220
" (other) 221
Landlord and Tenant 222
Master and Servant 222
Partnership Agreements 222
Patent Agreements 225
Promissory Notes 228
Sale of Goods (other than c.i.f.) 232
Sale of Goods (c.i.f.) 233
Shareholders' Contract 234
Vendor and Purchaser 235

(B) Non-Enemy Contracts:—Recent Cases—

Agent and Principal 240
Banker and Customer 241
Bills of Exchange 242
Building Contract 242
Charter-party 243
Insurance (Life) 245
" (Marine) 245
Master and Servant (Seamen) 245
Sale of Goods (other than c.i.f.) 247
" " (1) Contract Affected . . . 247
" " (2) " Unaffected . . 248
Sale of Goods (c.i.f.) 254
" " " Enemy Bill of Lading . 256
" " " Banker's position in . . 261

CHAPTER V

IMPOSSIBILITY OF PERFORMANCE—

General principles of law. Provisions in the Indian Contract Act. Physical, legal and commercial impossibility: Rise in prices; Rise in freights; Doctrine of Frustration of Adventure 263

PAGE

(1) Principles of earlier cases—*Bailey* v. *De Crespigny*; *Taylor* v. *Caldwell*; *Appleby* v. *Myers* . . . 273
(2) Principles of the "*Coronation Cases*" 276
(3) Principles of recent war cases 284
Implied terms as to peace 287
(*A*) Recent Cases where Performance was held to be excused—
Agent and Principal 293
Banker and Customer 293
Bill of Lading 294
Building Contract 294
Charter-party 295
Sale of Goods 296
(*B*) Recent Cases where Performance was held not to be excused—
Agent and Principal 297
Bill of Lading 298
Charter-party 299
Insurance (Marine) 299
Sale of Goods 300
" " Effect of Embargoes 303

CHAPTER VI

EMERGENCY LEGISLATION AND CONTRACTS—

(*A*) Trading with the Enemy: Proclamations and Statutes 305
(*B*) Defence of the Realm Acts and Consolidated Regulations 312
(*C*) Courts (Emergency Powers) Acts 1914–17. Cases thereunder 332
(*D*) Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915. Cases thereunder 339
(*E*) Excess Profits Duty Tax 342
(*F*) Bills of Exchange Act, 1914 342
(*G*) National Insurance Acts, 1915 343
(*H*) Various Acts as to certain Goods 344
(*I*) British Ships (Transfer Restriction) Act, 1915 . . 344
(*J*) Prospective Legislation 344

GENERAL INDEX 347

INDEX OF CASES CITED AND REFERRED TO

PAGE

Admiral Shipping Co., Ltd. *v.* Weidner, Hopkins & Co., 1916, 1 K.B. 429; C.A. 1917, 1 K.B. 222 .. .. .. 54, 77, 81, 155, 272, 295
Admiralty Commissioners *v.* Ropner & Co., 33 T.L.R. 362 94
Albrecht *v.* Sussman, 1873, 2 Ves. & B. 323 3
Amorduct Mfg. Co. *v.* Defrics, 1914, 84 L.J.K.B. 586 10
Anderson *v.* Marten, 1907, 2 K.B.D. 248 116
Anderson *v.* The Owners S.S. San Roman, 5 L.R.P.C. 301 59
Anglo-Mexican, The, 1915, 114 L.T. 807 225
Anglo-Northern Trading Co. *v.* Emlyn Jones & Williams, 1917, 2 K.B. 78; 34 T.L.R. 27 C.A. 77, 90, 92, 250
Antoine *v.* Morshead, 1815, 7 Taunt. 237 191
Appleby *v.* Myers, 1867, L.R. 2 C.P. 651 .. .. 73, 274, 275
Aramayo-Franeke Mines, Ltd., *In re*, 1917, 1 Ch. 451 168
Armitage & Batty *v.* Borgmann, 1915, 59 Sol. J. 219 224
Associated Oil Carriers, Ltd. *v.* Union Insurance Society of Canton, 1917, 2 K.B. 184 .. .. 59, 129
Associated Portland Cement Manufacturers, Ltd. *v.* William Cory & Son, Ltd., 1915, 31 T.L.R. 442 .. .. 287, 298
Atkinson's Case, 10 East, 530 62
Attorney-General *v.* Birmingham Tame & Rea District Drainage Board, 1912, A.C. 802 252
Aubert *v.* Gray, 1862, 3 B. & S. 163 218
Auto-Piano Co. *v.* Kastner & Co., *In re* Kastner & Co., 1917, 1 Ch. 390.. 234

Baily *v.* De Crespigny, 1869, L.R. 4 Q.B. 180 273
Barenfels, The [unreported] 175, 187
Barker *v.* Hodgson, 3 M. & S. 267 177
Barnett *v.* Javeri & Co., 1916, 2 K.B. 390.. 152
Bechoff, David & Co. *v.* Babna; *In re* Mary Duchess of Sutherland, 1915, 31 T.L.R. 248 .. .. 5, 13
Bechstein, *In re*, Berridge *v.* Be[illegible]n, 58 Sol. J. 863 182
Becker, Gray & Co. *v.* London [illegible]surance Corporation 1915, 3 K.B. 410; 1916, 2 K.B. 156, C.A.; 34 T.L.R. 36, H.L. 126, 300
Bekhor, Nissim Isaac *v.* Haji Sultanali Shastary & Co., 1915, I.L.R. 40 Bom. 11 255
Bensaude *v.* Thames & Mersey Marine Insurance, 1897, A.C. 609 .. 251
Bernon, The, 1 Ch. Rob. 101 3

PAGE

Berridge *v.* Bechstein, *In re* Bechstein, 58 Sol. J. 863 182
Berthoud *v.* Schweder & Co., 1915, 31 T.L.R. 404 .. .. 291, 293
Bexley Local Board *v.* West Kent Sewage Board, 9 Q.B.D. 518 .. 98
Biddell Bros. *v.* Clemens Horst & Co., 1911, 1 K.B. 934; 1912, A.C. 18.. 257
Blakeley *v.* Müller, 1903, 2 K.B. 760 n. 276
Blythe & Co. *v.* Richards, Turpin & Co., 114 L.T. 753 .. .. 144, 270
Boggiano & Co. *v.* Arab Steamers, Ltd., 1915, I.L.R. 40 Bom. 529 244, 295
Bolckow, Vaughan & Co. *v.* Compania Minera de Sierra Minera, 32 T.L.R. 404; C.A. 33 T.L.R. 111 .. .. 146, 270, 300
Bor *v.* Hughes, 1914, 49 I.L.T. 63 337
Brandon *v.* Curling, 1803, 4 East, 410 .. .. .. 207, 218, 219
Brandon *v.* Nesbitt, Bristow & Towers, 1794, 6 T.R. 23, 25 219
British & Foreign Marine Insurance Co. *v.* Sanday & Co., 1916, 1 A.C. 650 (H.L.) 52, 57, 172
British & Foreign S.S. Co., Ltd. *v.* The King, 1917, W.N. 246 "The Times," July 13, 1917 120
British Association of Glass Bottle Manufacturers, Ltd. *v.* Foster & Sons, Ltd., 33 T.L.R. 163; C.A. 33 T.L.R. 314 225
British Berna Motor Lorries, Ltd. *v.* Inter-Transport Co., Ltd., 1915, 31 T.L.R. 200 301
British Petroleum Co., Ltd. *v.* Brighton Shoreham Aerodrome, Ltd., "The Times," May 9, 1917 11
Broadmayne, The, 1916, P. 64 .. .. 69, 101
Bromley *v.* Heseltine, 1807, 1 Camp. 75 219
Brown *v.* Turner, Brightman & Co., 1912, A.C. 12 79
Budgett *v.* Stratford Co-operative & Industrial Society, Ltd., 1916, 32 T.L.R. 378 163
Burton *v.* Pinkerton, L.R., 2 Ex. 340 245
Butler *v.* Allnutt, 1816, 1 Sark. 223 219

Campbell & Phillips, Ltd. *v.* Denman, 1916, 21 Com. Cas. 357 131
Candilis (C. G.) & Sons *v.* Harold Victor & Co., 1916, 33 T.L.R. 20 .. 225
Capel *v.* Souledi, 1916, 1 K.B. 439; C.A. 1916, 2 K.B. 365 100
Carpenter *v.* Farnst, Eades, Irvine & Co., 1915, 1 Ch. 22 338
Cazalet *v.* Morris & Co., 1916, S.C. 952 101
Chandler *v.* Webster, 1904, 1 K.B. 493 C.A. 279
Chartered Bank of India *v.* Gilpin Brown, 52 L.J. 28 [unreported] .. 41
China Mutual Steam Navigation Co. *v.* Maclay, 34 T.L.R. 81 328
Chinese Engineering & Mining Co., Ltd. *v.* Sale & Co., 1917, 2 K.B. 599 84
Civil Service Co-operative Society *v.* General Steam Navigation Co., 1903, 2 K.B. 756 C.A. 276, 281
Clare & Co. *v.* Dresden Bank, 1915, 2 K.B. 576 183
Clapham S.S. Co., Ltd. *v.* Naamlooze Venrootshap Handels-En Transport Maatschappiji Vulcaan, 1917, 2 K.B. 639.. .. .. .. 30, 252
Clark *v.* Lindsay, 1903, 19 T.L.R. 202 282
Cohen *v.* New York Mutual Life Insurance Co., 1872, 10 Am. Rep. 522.. 208
Collins *v.* Sedgwick, 1917, 1 Ch. 179; 32 T.L.R. 554 158
Condran, *In re*, Condran *v.* Stark, 1917, 1 Ch. 639 .. .. 161, 167
Concadoro, The, 1916, 2 A.C. 199 152
Cooke *v.* Thomas Wilson Sons & Co., Ltd., 114 L.T. 268 49

PAGE

Cooper *v.* North-Eastern Railway Co., 114 L.T. 55 164
Countess of Warwick S.S. Co., Ltd. *v.* Le Nickel Société Anonyme, 1917, 33 T.L.R. 291; 34 T.L.R. 27, C.A. 82
Coward & Co., *In re*, 1914, 59 S.J. 42 338
Coxe *v.* Employers' Liability Assurance Co., Ltd., 1916, 2 K.B. 629 .. 108
Crawford & Rowat *v.* Wilson, Sons & Co., 1 Com. Cas. 277 66
Crown Steamship Co., Ltd. *v.* The Lords Commissioners of the Admiralty, 33 T.L.R. 472 95
Cunningham *v.* Dunn, 3 C.P.D. 443 177
Curtis & Co. *v.* Head, 1901, 17 T.L.R. 718 134

Da Costa *v.* Newnham, 1788, 2 T.R. 407 304
Daimler Co., Ltd. *v.* Continental Tyre & Rubber Co. (Great Britain), Ltd., 1916, A.C. 307 H.L. 6, 23, 29, 40, 172, 182, 225-234, 239
Daksa, The, 1917, 33 T.L.R. 281 35
Dampskibsaktiesalkabet Aurdal *v.* Compania De Navegacion La Estrella, 1916, S.C. 882 271
Davies *v.* Rhondda, U.D.C. 34 T.L.R. 44, C.A. 161
De Beers Consolidated Mines, Ltd. *v.* Howe, 1906, A.C. 455 6
Debtor, *In re* A, 1916, H.B.R. 156 C.A. 339
De Bingham *v.* London Life Association, Ltd., 1915, W.N. 165.. .. 337
De Jager *v.* Attorney General of Natal, 1907, A.C. 326 3
Delmada *v.* Motteux, 1785, Park 357 219
Dennis *v.* White & Co., 1917, A.C. 479 164
Dickson & Co., Ltd. *v.* Devitt, 1916, 32 T.L.R. 547 157
Dinham, Fawens & Co. *v.* Witherington & Everett, 1916, W.N. 154 .. 91
Direction der Disconto Gesellschaft *v.* Brandt & Co., 1915, 31 T.L.R. 586 189
Distington Hematite Iron Co., Ltd. *v.* Possehl & Co., 1916, 1 K.B. 811 .. .. 18, 140, 232
Dolphin *v.* Robins, 1859, 7 H.L.C. 390 6
Driefontein Consolidated Gold Mines *v.* Janson, 1901, 2 K.B. 419; 1902 A.C. 484 220
Du Belloix *v.* Lord Waterpark, 1 D. & Ry. 16 229
Duckworth *v.* Scottish Widows' Fund Life Assurance Society, 33 T.L.R. 430 .. .. 109, 206, 245
Duncan Fox & Co. *v.* Schrempft & Bonke, C.A., 1915, 3 K.B. 355 27, 179, 254

East Asiatic Co., Ltd. *v.* The S.S. Toronto Co., Ltd., 1915, 31 T.L.R. 543 .. .. 42, 103, 294
Ebbw Vale Steel, Iron & Coal Co. *v.* Macleod & Co., 1915, 31 T.L.R. 604; C.A. 32 T.L.R. 485; (H.L.) 33 T.L.R. 268 .. 145, 271, 297
Elliott *v.* Crutchley, 1906, A.C. 7 277
Embiricos *v.* Sydney Reid & Co., 1914, 3 K.B. 45 .. .. 64, 81, 251
Enlayde, Ltd. *v.* Roberts, 1917, 1 Ch. 109 107
Esposito *v.* Bowden, 1857, 7 E. & B. 763 .. .. .. 14, 17, 58, 76, 171
Etherington Lancashire & Yorkshire Accident Insurance Co., *In re*, 1909, 1 K.B. 591 115
Ettlinger (Karl) *v.* Chagandas & Co., 1915, I.L.R. 40 Bom. 301. .103, 267, 284

	PAGE
Eumæus, The, 32 T.L.R. 125	225
Euterpe S.S. Co., Ltd. v. Nort. of England Protecting & Indemnity Association, 1917, 33 T.L.R 540	128
Farnst, Eades, Irvine & Co., *In re*, Carpenter v. The Company, 1915, 1 Ch. 22	338
Feldt v. Chamberlain, 1914, 58 Sol. J. 788	224
Feliciana, The, 1915, 59 Sol. J. 546	32
Fenton v. Victoria Seats Agency, 1902, 19 T.L.R. 16	283
Fenwick (William France) & Co., Ltd. v. North of England Protecting Association, Ltd., 1917, 2 K.B. 522	117, 122
Finlay v. Liverpool G.W. Steamship Co., 1870, 23 L.T. 251	52
Flameneo, The, 1916, 33 T.L.R. 53	6
Ford v. Cotesworth, L.R. 5 Q.B. 544	177
Ford & Sons, Ltd. v. Leetham & Sons, 1915, 31 T.L.R. 522	136, 296
Forster v. Christie, 1809, 11 East, 205	304
Foster v. Barnard, 1916, 2 A.C. 154	157, 338
Foster's Agency v. Romaine, C.A. 1916, 32 T.L.R. 331	289
Fox (Duncan) & Co. v. Schrempft and Bonke, C.A. 1915, 3 K.B. 355	27, 179
Fried. Krupp Aktiengesellschaft, *In re*, 1916, 32 T.L.R. 553; 1917, 2 Ch. 188	231
Fried. Krupp Aktiengesellschaft, No. 2, *In re*, 1916, 32 T.L.R. 695	310
Furness, Withy & Co. v. Rederiaktiegolabet Banco, 1917, W.N. 275	53
Furtado v. Rogers, 1802, 3 B. & P. 196	12, 171, 207, 218, 219
Gamba v. Le Mesurier, 4 East, 407	207, 219
Gaudig & Blum, *In re*, Spalding, v. Lodde, 1915, 31 T.L.R. 153	181
Geipel v. Smith, L.R., 7 Q.B. 404	71, 75, 80
General Steam Navigation, Ltd. v. Janson, 1915, 31 T.L.R. 630	127
Gibson v. Service, 1814, 5 Taunt. 433	219
Glynn v. Margetson, 1893, A.C. 551	47
Goldschmidt, *In re* Th., Ltd., 1917, 2 Ch. 194	234
Gordon v. Vaughan, 1810, 12 East 302	219
Gothland, The, 1916, P. 239	41
Government v. Zimmerman, 1847, 5 N.C. 440	6
Great Northern Ry. Co. v. Arnold, 1916, 33 T.L.R. 114	107
Greenway Bros., Ltd. v. Jones & Co., 1915, 32 T.L.R. 184	142, 267, 300
Grey (Edward) & Co. v. Tolme & Runge, 1915, 31 T.L.R. 551	24
Groom, Ltd. v. Barber, 1915, 1 K.B. 316; 1914, 31 T.L.R. 66	260
Haarbleicher v. Baerselmann, 1914, 137 L.T. (Jo.) 564	190
Hadley v. Clarke, 8 T.R. 259	304
Halsey v. Lowenfeld, C.A. 1916, 2 K.B. 707	23, 175, 196, 222
Harrison, Ltd. v. Dowling, 1915, 3 K.B. 218	163
Harvey v. Fernie, 1882, 8 App. C. 43	6
Hasedorn v. Bazett, 1813, 2 M. & S. 100	219
Healy Box Co., Ltd. v. Brock & Co.'s "Crystal Palace" Fireworks, Ltd., 33 T.L.R. 88	312
Heilgers & Co. v. Cambrian Steam Navigation Co., Ltd., 33 T.L.R. 344; 34 T.L.R. 72, C.A.	83
Herne Bay Steam Boat Co. v. Hutton, 1903, 2 K.B. 683 C.A.	280

PAGE

Hilekes, *In re, ex parte* Mulicsa Rubber Plantation, Ltd., 1917, 1 K.B. 48 6
Hobbs *v.* Henning, 1865, 17 C.B. (N.S.) 791 219
Holland Gulf Stoomvaart Maatschappij *v.* Watson, Munro & Co., 1915, 32 T.L.R. 169 106
Hollins (William) & Co. *v.* Paget, 1917, 1 Ch. 187 166
Hoop, The, 1799, 1 Ch. Rob. 196 .. .. 13, 14, 194, 219
Horlock *v.* Beal, 1916, A.C. 486 (H.L.) 70, 246, 265, 269, 275, 283, 287, 304
Hosack *v.* Robins, 1917, 1 Ch. 142; C.A. *idem.* 332 338
Hulton & Co., Ltd. *v.* Chadwick & Taylor, Ltd., 33 T.L.R. 363 22, 301
Hypatia, The, 1917, P. 36 5

Ingle *v.* Continental Insurance Co., of Manheim, 1915, 1 K.B. 227 24, 220
Innholders Co. *v.* Wainwright, 33 T.L.R. 356 295
Instone & Co. *v.* Speeding, Marshall & Co., 1915, 32 T.L.R. 202 .. 143
Ionides *v.* Universal Marine Insurance Co., 14 C.B. (N.S.) 285 .. 114, 121
Irish Land Commission *v.* O'Neill, 1915, 2 I.R. 66 337

Jackson *v.* Union Marine Insurance Co., L.R. 10 C.P. 125 .. 71, 304
Jager *v.* Tolme & Runge, 1916, 32 T.L.R. 291 C.A. .. 138, 253, 304
Janson *v.* Driefontein Consolidated Gold Mines, 1902, A.C. 484 6, 13, 18, 221
Johnston *v.* Goldsmid [unreported] 191
Jones *v.* Woodward, 116, L.T. 378 165
Joyce *v.* Lord Ebury, 33 T.L.R. 145 163

Kacianoff *v.* China Traders' Insurance Co., Ltd., 1914, 3 K.B. 1121 .. 124
Karberg (Arnhold) & Co. *v.* Blythe, Green, Jourdain & Co., 1 K.B. 495 .. .. 174, 178, 255, 261
Kastner & Co., *In re*; Auto-Piano Co. *v.* Kastner & Co., 1917 1 Ch. 390 234
Keats *v.* Conolly, 1915, W.N. 174 C.A. 337
Kearley *v.* Thomson, 24 Q.B.D. 742 239
Keir *v.* Andrade, 6 Taunt. 504 .. .. 208, 219
Kellner *v.* Le Mesurier, 4 East, 396 207
Koppers Coke Oven & Bye-Product Co., *In re*, 1914, W.T. 456 .. 224
Kreglinger & Co. *v.* Cohen, 1915, 31 T.L.R. 592 233
Krell *v.* Henry, 1903, 2 K.B. 740 C.A. 278
Kronprinsessan Margareta, The, 1917, P. 114 35
Kronprinzessin Cecilie, The, 1915, 32 T.L.R. 139; (P.C.) 33 T.L.R. 292 36
Kydd *v.* Liverpool Watch Committee, 1898, A.C. 327 99

Leader, Plunkett & Leader *v.* Direction der Disconto Gesellschaft, 31 T.L.R. 83 337
Leather *v.* Simpson, 1871, L.R. 11 Eq. 398 .. .. .. 186, 261
Leete (Jos.) & Sons, Ltd. *v.* Direction der Disconto Gesellschaft, 1916, 32 T.L.R. 158 293
Leiston Gas Co. *v.* Leiston-cum-Sizewell U.D.C., 1916, 2 K.B. 428 C.A. 25, 176, 248, 284, 288
Lepage *v.* San Paulo Copper Estates, Ltd., 1917, 33 T.L.R. 457 .. 235
Letts *v.* Excess Insurance Co., 32 T.L.R. 361 109
Leyland Shipping Co., Ltd. *v.* Norwich Union Fire Insurance Society, C.A., 1917, 1 K.B. 873 .. .. 112, 118

PAGE

Lilley *v.* Doubleday, 7 Q.B.D. 510 41
Linaria, The, 31 T.L.R. 396 34
Lipton, Ltd. *v.* Ford, 1917, 2 K.B. 647 253
Liston *v.* Owners S.S. Carpathian, 1915, 2 K.B. 42; 1915, W.N. 103 .. 246
Lloyd Royal Belge Société Anonyme *v.* Stathatos, 1917, 33 T.L.R. 390; 34 T.L.R. 70, C.A. 54, 74, 87, 193, 273–284
Lobitos Oilfields, Ltd. *v.* Commissioners of the Admiralty, 33 T.L.R. 472 93
Lock *v.* Army, Navy & General Assurance Association, 1915, 31 T.L.R. 297 112
London American Marine Trading Co., Ltd. *v.* Rio De Janeiro Tramway, Light & Power Co., Ltd., 1917, 2 K.B. 611 92
London & Northern Estates Co. *v.* Schlesinger, 1916, 1 K.B. 20 23, 222, 285
London, Chatham & Dover Ry. Co. *v.* Spiers & Pond, Ltd., 1916, 32 T.L.R. 439 166
London County & Westminster Bank *v.* Tomkins, 33 T.L.R. 471 .. 166
Louisiana, The, 1916, 32 T.L.R. 619 40
Lyric Theatre, London, Ltd. *v.* Lyric Theatre, Ltd., 1914, 84 L.J. (K.B.) 712 337

Macbeth & Co., Ltd. *v.* King, 1916, 32 T.L.R. 581 127
Mackenzie, *In re*, Mackenzie *v.* Edwards-Moss, 1911, 1 Ch. 578 .. 6
Manhattan Life Insurance Co. *v.* Buck, 1877, 95 U.S.R. Sup. Ct. 24 .. 211
Manningtry, The, 1916, P. 329 4
Marshall & Co. *v.* Nagincland Fulchand, 18 Bom. L.R. 915 257
Marshall *v.* Glanville, 1917, 2 K.B. 87 .. .. 162, 298
Marten *v.* Pyman, C.A., 24 T.L.R. 10 126
Maskinonge S.S. Co. *v.* The Dominion Coal Co., C.A. 1917, 33 T.L.R. 340 105
Matsoukis *v.* Priestman & Co., 1915, 1 K.B. 681 49
Maxwell *v.* Grunhut, 1914, 31 T.L.R. 79, C.A. 181
McConnell *v.* Hector, 3 B. & P. 113 3
Mercedes Daimler Motor Co. *v.* Maudsley Motor Co., 31 T.L.R. 178 .. 227
Metropolitan Water Board *v.* Dick, Kerr & Co., 1917, 2 K.B. 1 [C.A.] 26, 105, 156, 242, 251, 266, 295
Meyer *v.* Sanderson & Co., 1916, 32 T.L.R. 428 103
Meyers (Fr.) Sohn, Ltd., *In re*, 1917, 2 Ch. 201 235
Millar *v.* Law Accident Insurance Co., 1903, 1 K.B. 712 57
Miller (Andrew) & Co. *v.* Taylor & Co., 1916, 1 K.B. 402, C.A. 81, 83, 250, 285, 304
Mirabita *v.* Imperial Ottoman Bank, 1878, 3 Ex. D. 164 258
Miramichi, The, 1915, P. 71 33
Mitchell, Cotts & Co. *v.* Steel Bros. & Co., 1916, 2 K.B. 610 243
Mitsui & Co., Ltd. *v.* Mumford, 1915, 2 K.B. 27 130
Mitsui & Co. *v.* Watts, Watts & Co., H.L. 1917, A.C. 227 .. 60, 251, 299
Modern Transport & Co. *v.* Dumeric Steamship Co., 1917, 1 K.B. 370 .. .. 92, 299
Molinos De Arroz *v.* Mumford, 1900, 16 T.L.R. 469 134
Moore & Gallop *v.* Evans, 1917, 1 K.B. 458; 34 T.L.R. 51, H.L. 1 K.B. 458 .. .. 131, 132
Morrison & Co., Ltd., *v.* Shaw, Savill & Albion Co., Ltd., C.A. 1916, 2 K.B. 783 47

PAGE

Moss *v.* Donohoe, 1916, 32 T.L.R. 343 247
Motishaw & Co. *v.* Mercantile Bank of India, Ltd., 1916, 18 Bom. L.R. 521 .. .. 185, 261

Naylor, Benzon & Co., Ltd. *v.* Hirsch & Son, 1917, 33 T.L.R. 432 140, 232, 266
Ness *v.* O'Neill, 114 L.T. 451 336
Netherlands South African Rly. Co. *v.* Fisher, 1901, 18 T.L.R. 116 .. 3
Newsum Sons & Co., Ltd. *v.* Bradley, 1917, 2 K.B. 112; 34 T.L.R. 49, C.A. 157, 299
New York Life Insurance Co. *v.* Clopton, 1869, 3 American Rep. 290 .. 206
New York Life Insurance Co. *v.* Davis, 1877, 95 U.S. Rep. 425 .. 215
New York Life Insurance Co. *v.* Statham, 1876, 93 U.S. Rep. 24 .. 211
New Zealand Shipping Co. *v.* Société Des Ateliers et Chantiers De France, 1917, 33 T.L.R. 276 48
Nickels & Co. *v.* London & Provincial Marine & General Insurance Co., Ltd., 1900, 6 Com. Cas. 15 116
Ningchow, The, 1916, P. 221; 1915, 31 T.L.R. 470 34
Nissim Isaac Bekhor *v.* Haji Sultanali Shastry & Co., 1915, I.L.R. 40 Bom. 11 255
Nobel's Explosives Co. *v.* Jenkins, 1896, 2 Q.B. 326 .. .. 50, 60, 62
Nordman *v.* Rayner & Sturges, 1916, 33 T.L.R. 87 .. .. 14, 180, 297
North-Western Salt Co. *v.* Electrolytic Alkali Co., 1914, A.C. 461 H.L. 178
Notara *v.* Henderson, L.R., 7 Q.B. 225 80

Oconera Iron Ore Co., Ltd. *v.* Fried Krupp Aktiengesellschaft, 1917, 33 T.L.R. 570 152
Odessa, The, 1915, P. 52; 1916, A.C. 145 (P.C.) 34, 188
O'Mealey *v.* Wilson, 1808, 1 Camp. Rep. 482 4
O'Neill *v.* Armstrong, Mitchell & Co., 1895, 2 Q.B. 70, 418 246

Padgett (W.R.) *v.* Jamshedji Hormusji Chothia, 1916, 18 Bom. L.R. 190 228
Palace Shipping Co. *v.* Gans Steamship Line, 1916, 1 K.B. 138 .. 103
Palm Branch, The, 1916, P. 230 41
Panariellos, The, 32 T.L.R. 459 34
Paradine *v.* Jane, Alleyn 26 87
Petition of Right, *In re* a, 1915, 3 K.B. 649 69
Pearcey *v.* Muller & Lilley, 52 L.J. C.C. Rep. 26 252
Penrith Castle, The, 33 T.L.R. 552 326
Perry *v.* Fitzgerald, 1915, 2 Ir. Rep. 11 336
Phileo Publishing Co. *v.* Nolan, 1915, 49 I.L.T. 65 337
Phosphate Mining Co. *v.* Rankin, Gilmour & Co., 1915, 115 L.T. 211 .. 65
Pieschall *v.* Allnutt, 1813, 3 Taunt. 792 219
Polurrian S.S. Co., Ltd. *v.* Young, 1915, 1 K.B. 922 .. .. 129, 252
Polzeath, The, 1916, P. 241 C.A. 40
Poona, The, 112 L.T. 782 .. .. 10, 40
Porter *v.* Freundenberg, 1915, 1 K.B. 857, C.A. 4, 13, 237
Potts *v.* Bell, 1800, 8 T.R. 548 .. .. 218, 219
Princess of Thurn and Taxis *v.* Moffitt, 1915, 1 Ch. D. 58 14
Prinz Adalbert, The S.S., 1917, 33 T.L.R. 490 36

PAGE

Provincial Bank of Ireland *v.* O'Donnell, 1917, 2 I.R. 43 337
Pyman *v.* Marten, 22 T.L.R. 831; C.A. 24, *idem* 10 120

Quellec et Fils (Le) *v.* Thomson, 1916, 115 L.T. 224 .. .. 120, 123

Redmond *v.* Smith, 1841, 7 M. & G. 457 218
Rees *v.* Bute (Marquis), 1916, 2 Ch. 61 168
Reiseher *v.* Borwick, 1894, 2 Q.B. 548 113
Rex v. Board of Trade, *ex parte* Derry, 1917, 33 T.L.R. 316 225
Rex v. Commanding Officer 30th Batt. Mid. Regt., 1917, 2 K.B. 129 .. 3
Rex v. Commissioners of Inland Revenue, 1917, 2 K.B. 405 .. 162, 342
Rex v. Kupfer, 1915, 2 K.B. 321 3
Rex v. Lynch, 1903, 1 K.B. 444 3
Rex v. Superintendent Vine Street Police Station, 1916, 1 K.B. 268 .. 13
Rio Tinto Co., Ltd. *v.* Eitel Bieber & Co., 1917, 33 T.L.R. 299 22, 29, 31, 232, 233
Risdale *v.* Kilmarnock (Owners), 1915, 1 K.B. 503 164
Roberts *v.* Hardy, 1875, 3 M. & S. 533 3
Robinson *v.* International Life Assurance Society, 1870, 1 American Rep. 490 216
Robson *v.* Premier Oil & Pipe Line Co., Ltd., 1915, 2 Ch. 133 .. 174, 182, 234
Rodocanachi *v.* Elliott, L.R. 9 C.P. 518 .. .. 52, 55
Rogers (R. P. & S.), Ltd. *v.* Whittaker, 1917, 1 K.B. 942 107
Romaine & Zinc Corporation *v.* Skipworth, 1914, 32 T.L.R. 106 .. 29
Rombach *v.* Rombach, 1914, W.N. 423 224
Ropner & Co. *v.* Ronnebeck, 84 L.J. (K.B.) 392 105
Rotch *v.* Edie, 1795, 6 T.R. 413 304
Rylands Bros., Ltd. *v.* Veithardt & Hall, Ltd., "The Times," June 26, 1917 .. .. 141, 232

Saint Enoch Shipping Co., Ltd. *v.* Phosphate Mining Co., 1916, 2 K.B. 624 243
Saint Tudno, The, 1916, P. 291 .. .. 10, 40
Sands *v.* New York Life Insurance Co., 1872, 10 American Rep. 535 .. 209
Santley *v.* Wilde, 1899, 2 Ch. 474 166
Savona, The, 1900, P. 252 81
Schaffenius *v.* Goldberg, 1916, 1 K.B. 281, C.A. 13
Scheepvaart Maatschappji Gylsen *v.* North African Coaling Co., 114 L.T. 755 .. .. 134, 270
Schmidt *v.* Van Der Veen, 1915, 31 T.L.R. 214 247
Schneider (Theodor) & Co. *v.* Burgett & Newsam, 1916, 1 K.B. 495 179, 221, 257
Scotland *v.* South African Territories, Ltd., 1917, 33 T.L.R. 255 5, 222
Scott *v.* Attorney-General, 1886, 11 P.D. 128 6
Scottish Navigation Co. *v.* Souter & Co., 1917, 1 K.B. 222 (C.A.) 54, 77, 266, 295
Seligman Bros. *v.* Brown, Shipley & Co., 1916, 32 T.L.R. 549 .. 241
Seligman *v.* Eagle Insurance Co., 1917, 1 Ch. 519 .. .. 196, 209
Seville and United Kingdom Carrying Co. *v.* Mann, George & Co., 32 T.L.R. 192 and 522 298
Sharp Bros. & Knight *v.* Chant, 1917, 1 K.B. 771 159

PAGE

Shipton, Anderson & Co. *v.* Harrison Bros., 1915, 3 K.B. 676.. 28, 296
Shipton *v.* Cardiff Corporation, 1917, W.N. 175 163
Sichel *v.* Sichel, *In re* Sichel, 1916, 1 Ch. 358 182
Smith & Service *v.* Rosario Nitrate Co., 1894, 1 Q.B. 174 53
Smith (Benjamin) & Co. *v.* The King, 33 T.L.R. 342 C.A. 43
Smith, Coney & Barrett *v.* Becker, Gray & Co., 1916, 2 Ch. 86 .. 137, 303
Société Nouvelle D'Armement *v.* Spillers & Baker, Ltd., 1917, 1 K.B. 865 103
Sorensen *v. Reg.*, 1857, 11 Moo. P.C. 141 3
Sorfareren, The, 1915, 32 T.L.R. 108; 46 L.T. 46 40
Southfield, The, 1915, 113 L.T. 655 33
Spalding *v.* Lo[illegible], *In re* Gandig & Blum, 1915, 31 T.L.R. 153 181
Sparenburgh *v.* [illegible]matyne, 1797, 1 Bos. & P. 163 .. .. .. 3, 13
Stevenson (Hugh) & Sons, Ltd. *v.* Aktiengesellschaft für Cartonnagen-Industrie, 1916, 3 K.B. 763; C.A. 1917, 1 K.B. 842 19, 30, 173, 180, 223, 230
Stirling *v.* Norton, 1915, 31 T.L.R. 293 337
Svorono, The, 1917, 33 T.L.R. 415 .. .. 57, 64, 103
Sylvestre's Case, 1702, 7 Mod. Rep. 150 3

Tabbs *v.* Bendelack, 1801, 4 Esp. 108 4
Tamplin Steamship Co. *v.* Anglo-Mexican Petroleum Products Co., H.L. 1916, 2 A.C. 397 69, 74, 76, 79, 81, 86, 87, 90, 91, 153, 198, 264, 276, 284, 288, 291
Tappenden *v.* Rendall, 2 B. & P. 467 239
Taylor *v.* Caldwell, 1863, 3 B. & S. 826 274
Textile Manufacturing Co. *v.* Salomon Bros., 1915, 18 Bom. L.R. 105; I.L.R. 40 Bom. 570.. .. .. 23, 232
Thomas *v.* Hamlyn & Co., 1917, 1 K.B. 527 161
Thom *v.* Sinclair, 1917, A.C. 32 165
Thompson *v.* British Berna Motor Lorries, Ltd., 1917, 33 T.L.R. 187.. 157
Thompson Bros. & Co. *v.* Amis, 1917, 2 Ch. 213 161
Tingley *v.* Müller, C.A. 1917, 2 Ch. 144 .. .. 5, 14, 23, 173, 180, 235
Tommi, The, 1914, P. 251; 1915, 33 T.L.R. 15 35
Tonnevold & Finn Fris, *In re* an arbitration between, 1916, 2 K.B. 551 102
Torres *v.* Torres, 1917, W.N. 263 339
Tozer *v.* [illegible]ola, 1917, W.N. 244; 34 T.L.R. 73, C.A. 159
Trevalin, Ltd. *v.* Saccharin, "The Times," May 15, 1917 .. 30, 226

Van Uden *v.* Burrell, 1916, S.C. 391 5
Veithardt & Hall, Ltd. *v.* Rylands Bros., Ltd., "The Times," June 28, 1917 .. .. 141, 232
Volkl *v.* Rotunda Hospital, 1914, 2 K.B. (Ir.) 543 34
Vrow Margaretha, The, 3 Ch. Rob. 338 34
Vulcan Car Agency, Ltd. *v.* Fiat Motors, Ltd., 32 T.L.R. 73 240

Walters *v.* White, 136 L.T. 377 341
Warburton *v.* Co-operative Wholesale Society, Ltd., 1917, 1 K.B. 663.. 162
Wangh *v.* Morris, 1873, L.R. 8 Q.B. 202 219
Weber, *ex parte*, 1916, 1 A.C. 421 13
Weis & Co. and Crédit Colonial et Commercial (Antwerp), *In re*, 1916, 1 K.B. 346; 114 L.T. 368.. .. .. 260, 301

PAGE

Welby *v.* Parker, 1916, 2 Ch. 1 167
Weld & Co. *v.* Fruhling & Goschen, 32 T.L.R. 469. 186
Wells *v.* Williams, 1698, 1 Salk. 45. 3
Wetherman *v.* London & Liverpool Bank of Commerce, Ltd., 1914, 31 T.L.R. 20 183
Williams Bros. (Hull), Ltd. *v.* Naamlooze Vennootschap Berghuys (W. H.) Kolenhandel, 1915, 21 Com. Cas. 253 104
Williams *v.* Dormer, 1857, 2 Rob. Eccl. 505 6
Williams *v.* Paine, 169 Sup. Court Rep. 55 238
Willison *v.* Patteson, 7 Taunt. 439 .. .. 3. 12, 191
Wilson *v.* Anderton, 1 B. & Ad. 450 183
Wilson *v.* Marryat, 1798, 8 T.R. 31. 219
Wilson *v.* Ragosine & Co., Ltd., 31 T.L.R. 264 184
Wilson Bros. Bobbin & Co. *v.* Green, 1917, 1 K.B. 860 128
Wilson & Co., Ltd. *v.* Tennants (Lancashire), Ltd., C.A. 1917, 1 K.B. 208; H.L. 1917, A.C. 495 .. .. 147, 266
Wolf & Sons *v.* Carr, Parker & Co., Ltd., 31 T.L.R. 407 C.A. 232
Wolff *v.* Oxholm, 1817, 6 M. & S. 92. 230
Worthley *v.* Mann, 1916, W.N. 390 341
Worthington *v.* Charter Oak Life Insurance Co., 1874, 19 American Rep. 495 199
Wycombe Borough Electric Light & Power Co., Ltd. *v.* Chipping Wycombe Corporation, 1917, 33 T.L.R. 489 .. .. .. 26, 248

Yelverton *v.* Yelverton, 1859, 29 L.J.P. 34 6

Ziman *v.* Komata Reefs Gold Mining Co., 1915, 2 K.B. 163 337
Zinc Corporation *v.* Hirsch, 1916, 1 K.B. 541, C.A. 32 T.L.R. 7 21, 25, 29, 31, 143, 151, 232
Zinc Corporation, Ltd., and Romaine *v.* Skipworth, 1916, 1 K.B. 541. . 29

PAGE
167
186
3
183
104
6
238
, 191
183
219
184
128
, 266
232
230
341
199
, 248
6
337
, 31,
, 232
29

THE LAW OF WAR AND CONTRACT

CHAPTER I

Introductory

Arrangement of Work.

Since the outbreak of the present European war a considerable number of cases have been decided in the English Courts and in the Colonies as regards the effect of war upon contracts. Great Britain has enjoyed peace for so long a time, save for the conflict with the late South African Republics some years ago, that there are not many earlier cases to be found reported on this subject. Since the old wars of a hundred years ago forms of contracts have come into being that the commercial world of those days never contemplated, and so the Court of Appeal and the House of Lords have had to adjudicate upon many novel points since the present war began. It is intended in the ensuing chapters to collect together all the modern cases under appropriate principles of law common to Great Britain and her Colonies, so that it may be seen what the Courts are actually deciding nowadays, and to give both practitioner and merchant a handy work of reference to enable him

Collection of modern war cases

Under principles of law.

Arrangement of Work.

to ascertain what effect war may have at law upon the contract with which he is concerned, and so avoid a long and roving inspection of the various law reports, which now present a very substantial body of decisions.

Three main Divisions:

The work naturally falls into three broad divisions which usually have to be regarded—

(1) Contracts executory and executed.

First, it is necessary to ascertain the state that the contract is in, namely whether it is executed, or is only executory, for, as will be seen when this subject is dealt with (*vide* Chapter III), the rules of law that are applicable differ according to the executed or executory character of the contract.

(2) Contracts must be lawful;

Next, it is necessary to observe whether the consideration or the object of the contract is lawful or whether it is opposed to public policy, in view of the state of war at the time, for it is obvious that an unlawful agreement, or one against the interest of the State, will not be recognized in British Courts. This subject is treated of in Chapter IV.

(3) Contracts impossible of performance.

Lastly, the question as to whether the contract is possible of performance in view of the outbreak of hostilities has to be considered. Chapter V is devoted to this topic.

These considerations involve frequently an examination of the *status* of the parties to the contract, and a distinction has to be drawn at the outset between contracts entered into in times of peace with subjects of other States, who by the outbreak of war become clothed with enemy character, and agreements made during war-time with enemy subjects. These latter are dealt with in the next Chapter and will be seen to

be absolutely void, with certain exceptions, if exceptions they can be called.

Arrangement of Work.

It becomes, therefore, necessary to discuss as shortly as possible the circumstances under which parties to contracts become at law "enemies."

Very shortly they may be summarised as follows—

Enemy parties to contracts.

Who are enemies?

(1) Enemies by birth. [*Sylvestre's Case*, 1702, 7 Mod. 150.]

(2) Enemies by participating in hostilities. [*The Netherlands South African Rly. Co.* v. *Fisher*, 1901, 18 T.L.R. 116; *De Jager* v. *Att. Gen. of Natal*, 1907, A.C. 326; *Sparenburgh* v. *Bannatyne*, 1797, 1 B. & P. 163.]

(3) Enemies by naturalization. A British subject cannot legally become naturalized during hostilities in an enemy state. [*Rex* v. *Lynch*, 1903, 1 K.B. 444.] Similarly during war a declaration of alienage under the British Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. V. c. 1), cannot be legally made. [*Rex* v. *Commanding Officer 30th Battalion Mid. Regt.*, 1917, 2 K.B. 129.]

(4) Enemies by reason of their place of trade or business being in a hostile country. [*McConnell* v. *Hector*, 3 B. & P. 113; *Roberts* v. *Hardy*, 1875, 3 M. & S. 533; *Willison* v. *Patteson*, 1817, 7 Taunt, 439; *The Bernon*, 1 Ch. Rob. 101; *Rex* v. *Kupfer*, 1915, 2 K.B. 321.]

(5) Enemies by commercial domicile in hostile territories. [*Wells* v. *Williams*, 1697, 1 Salk. 46; *Sorensen* v. *Reg.* 1857, 11 Moo. P.C. 141; *Albretcht* v. *Sussman*, 1873, 2

Arrangement of Work.

Enemy parties to contracts.

Ves. & B. 323; *O'Mealey* v. *Wilson*, 1808, 1 Camp. Rep. 482; *Tabbs* v. *Bendelack*, 1801, 4 Esp. 108; *The Manningtry*, 1916, P. 329.]

Who are enemies?

Since the commencement of the war the meaning of "alien enemy" has been much discussed. It was at first thought that domicile and not nationality was the test. This is true to a certain extent and in some cases. But the point was fully dealt with by the Court of Appeal in *Porter* v. *Freudenberg* (1915, 1 K.B. 857), where it was held that neither domicile nor nationality is the true test. Para. 3 of the Proclamation of September 9, 1914, as to Trading with the Enemy, adopts the same rule. The expression "enemy" means any person resident or carrying on business in an enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country.

Commercial domicile.

Reference should also be made in this connection to the relevant provisions of the Trading with the Enemy (Extension of Powers) Act, 1915 (5 & 6 Geo. 5 Ch. 98), which provide for the extension of the restrictions relating to trading with the enemy to persons to whom, though not resident or carrying on business in enemy territory, it is by reason of their enemy nationality or *enemy associations* expedient to extend such restrictions.

The Court of Appeal have recently held in an important case raising special features that where an enemy by birth gives up his residence in the United Kingdom and proceeds, with the permission of the Crown, to another neutral country avowedly *en route* to the

country of his birth, enemy character attaches to him, and evidence to show that he reached the neutral destination is sufficient, as a presumption can be drawn that he eventually reached the enemy state. [*Tingley* v. *Müller*, 1917, 2 Ch. 144, and see p. 235, *post*.]

Arrangement of Work.

Enemy parties to contracts.

The recent case of *Scotland* v. *South African Territories, Ltd.* [1917, 33 T.L.R. 255] shows that voluntary residence in enemy territory of a British subject, both in his own interest (*e.g.* to earn his salary) and in that of his employer, impresses the character of enemy upon him.

Who are Enemies?

The President of the Prize Court has in a recent case [*The Hypatia*, 1917, P. 36] stated that in his opinion in order that a person may acquire a commercial domicile in any [illegible] residence in that country is an essential condition.

Commercial domicile.

It would appear from a Scotch decision that where the sole partners of a neutral firm carrying on business in a neutral State also were interested in, although not the sole partners of, a firm in enemy territory that the partners are alien enemies and are not entitled to sue in the courts of this country. [*Van Uden* v. *Burrell*, 1916, S.C. 391; 53 Sc.L.R. 400, Ct. of Sess.]

Conversely an action can be maintained by a person of enemy nationality who is neither residing nor carrying on business in an enemy country, but is residing either in an allied or a neutral country and is carrying on business through his partners in that allied country. [*In re Sutherland (Duchess); Bechoff, David & Co.* v. *Bubna (Countess)*, 1915, 31 T.L.R. 248.] For cases where alien enemies are in this country under the protection of the Crown see next chapter (p. 13, *post*).

Arrangement of Work.

Enemy parties to contracts.

As regards an enemy with a neutral domicile leaving that domicile and so far as was known going to another neutral country the Prize Court has held that he thereby revests himself with his original character as an enemy. [*The Flamenco*, 1916, 32 T.L.R. 53.]

Who are enemies?

(6) Enemies by marriage to an enemy husband. [*Harvey* v. *Farnie*, 1882, 8 App. Cas. 43; *Dolphin* v. *Robins*, 1859, 7 H.L.C. 390; *Yelverton* v. *Yelverton*, 1859, 29 L.J.P. 34; *Government* v. *Zimmerman*, 1847, 5 N.C. 440; *Williams* v. *Dormer*, 1857, 2 Rob. Eccl. 505; *Scott* v. *Att. Gen.*, 1886, 11 P.D. 128; *In re Mackenzie*; *Mackenzie* v. *Edwards-Moss*, 1911, 1 Ch. 578.]

(7) Enemies in the form of companies of which the central management and real control is to be found in an enemy country. [*De Beers Consolidated Mines, Ltd.* v. *Howe*, 1906, A.C. 455; *Janson* v. *Driefontein Consolidated Gold Mines*, 1902, A.C. 484.]

Companies.

Lord Parker, in the celebrated case of *Daimler Co., Ltd.* v. *Continental Tyre & Rubber Co.* [1916, 2 A.C. 307] in regard to a company registered in England whose directorate and all whose shareholders save one consisted of enemies, laid down the following propositions:—

"(1) A Company incorporated in the United Kingdom is a legal entity, a creation of law with the *status* and capacity which the law confers. It is not a natural person with mind or conscience. It can be neither loyal nor disloyal. It can be neither friend nor enemy.

Arrangement of Work.

Enemy parties to contracts.

Who are enemies?

Companies.

(2) Such a Company can only act through agents properly authorized, and so long as it is carrying on business in the United Kingdom through agents so authorized and residing in the United Kingdom or a friendly country it is *prima facie* to be regarded as a friend, and all His Majesty's lieges may deal with it as such.

(3) Such a Company may, however, assume an enemy character. This will be the case if its agents or the persons in *de facto* control of its affairs, whether authorized or not, are resident in an enemy country, or wherever resident, are adhering to the enemy or taking instructions from or acting under the control of enemies. A person knowingly dealing with the Company in such a case is trading with the enemy.

(4) The character of individual shareholders cannot of itself affect the character of the Company. The enemy character of individual shareholders and their conduct may, however, be very material on the question whether the Company's agents, or the persons in *de facto* control of its affairs, are in fact adhering to, taking instructions from, or acting under the control of enemies.

(5) A Company registered in the United Kingdom, but carrying on business in a neutral country through agents properly authorized and resident here or in the neutral country, is *prima facie* to be regarded as a friend, but

Arrangement of Work.

may through its agents or persons in *de facto* control of its affairs, assume an enemy character.

Enemy parties to contracts.

(6) A Company registered in the United Kingdom but carrying on business in an enemy country is to be regarded as an enemy."

Who are enemies?

Companies.

These propositions are scarcely satisfactory to a person who is brought into business relationship with a Company British in form, though enemy in fact, as they entail on him the necessity of finding out whether circumstances exist that may stamp it with an enemy character before he continues to deal with it.

Lord Parker's sixth proposition came under examination in a case where the Company was registered in England, which had English directors and secretary and 55 German shareholders out of a total of 540. The business of the Company was to manage a rubber estate in German East Africa which it had taken over from an alien, whom it had appointed as an agent. The Trustee in Bankruptcy had rejected the Company's proof of a debt due to the Company by the alien enemy. On appeal *Horridge, J.* held that the Company carried on business in an enemy country within Lord Parker's sixth proposition. The Court of Appeal, in reversing this finding, held that a British Company doing business in an enemy country and having an agent there did not thereby turn into an enemy company. The Master of the Rolls observed of the proposition in question: "if that meant that a company which was in all other respects English, but happened to have a commercial agent in an enemy's

country, was to be regarded as an enemy company it seemed to him inconsistent with the reasons which not only Lord Parker, but all the other noble Lords had given. No doubt such a company by improper acts might bring itself within the provisions of the law, but that did not turn it into an enemy company any more than the improper act of an Englishman turned him into an alien." [*In re Hilckes, ex parte Muhesa Rubber Plantations, Ltd.* 1917, 1 K.B. 48.]

Arrangement of Work.

Enemy parties to contracts.

Who are enemies?

Companies.

It should be noted that Lord Halsbury did not associate himself with Lord Parker's propositions, but decided against the plaintiffs on this short ground that "the whole discussion is solved by a very simple proposition that in our law, when the object to be obtained is unlawful, the indirectness of the means by which it is to be obtained will not get rid of the unlawfulness, and in this case the object of the means adopted is to enable thousands of pounds to be paid to the King's enemies." Lord Halsbury took the view that the Company was akin to a partnership, and that on the outbreak of war the Company could not meet nor authorize any agent to meet on company business and the object of the Company to distribute the profits of the adventure according to shares amongst the members became unlawful when the German shareholders became enemies.

"It seems to me," said Lord Halsbury, "too monstrous to suppose that for an unlawful, because, after a declaration of war, a hostile, purpose the forms of that institution should be used, and enemies of the State, while actually at war with us, be allowed to

Arrangement of Work.

continue trading and actually to sue for their profits in an English Court of Justice."

Enemy parties to contracts.

Who are enemies?

Companies.

Lord Shaw remarked: "A Company registered in Britain may have shareholders and directors who are alien enemies. Transactions or trading with any one of them becomes illegal. They have no power to interfere in any particular with the policy or acts of companies registered in Britain; alien enemy shareholders cannot vote; alien enemy directors cannot direct; the rights of all these are in complete suspense during the war. As to shareholders or directors who are not alien enemies, they stand *pendente bello* legally bereft of all their co-adjutors who are . . . All British trading by the Company is still permitted if there are British shareholders who can carry it on." In connection with the *Daimler* case see also the case of *Amorduct Manufacturing Co.* v. *Defries* [1914, 84 L.J.K.B. 586]. It is interesting to note that under the Act in England to facilitate legal proceedings against enemies (5 Geo. V. c. 36) the expression "British Subject" includes a corporation incorporated in His Majesty's dominions [*vide* Sec. 2 (*c*)]. In Prize Court proceedings the goods of a Company incorporated in Great Britain are not condemned as enemy property even if the directors and shareholders are enemies or are residing in enemy country. [*The Poona*, 112 L.T. 782.] For the purposes of condemning a ship as prize the Court can look behind the nominal character of a British Company that owns the vessel and see whether the Company is not controlled by and under the influence of an enemy company. [*The St. Tudno*, 1916, P. 291.]

Arrangement of Work.

Enemy parties to contracts.

Who are enemies?

Companies.

The expression "Subject of any State at war with His Majesty" in the Patents, Designs & Trade Marks (Temporary Rules) Acts of 1914, with the amending Act of 1914 as regards a Company includes any Company the business whereof is managed or controlled by such subjects, or is carried on wholly or mainly for the benefit or on behalf of such subjects, notwithstanding that the Company may be registered within His Majesty's dominions.

An enemy Company cannot be treated as such in an action by it when at the date of the writ of summons its affairs are in the hands of a Controller duly appointed. [*British Petroleum Co., Ltd.* v. *Brighton Shoreham Aerodrome, Ltd.*, "*The Times*," May 9, 1917.]

The concluding chapter of this work calls attention to various Statutes, Proclamations, and Regulations, passed as Emergency Legislation, which affect contracts.

CHAPTER II

Agreements made with Enemies during War

General Rule.

Such agreements are void.

Transactions with enemies during a period of war are void *ab initio*, and so when peace returns they are still void and of no effect. [*Willison* v. *Patteson*, 1817, 7 Taunt. 439.] Such transactions are sometimes loosely referred to as "contracts," but they never pass beyond the stage of unlawful agreements, and it is incorrect to term such agreements "contracts." On the principles of the English law it is not competent to any subject to enter into a contract to do anything which may be detrimental to the interest of his own country, and such a contract is as much forbidden as if it had been expressly forbidden by Act of Parliament. [*Furtado* v. *Rogers*, 3 B. & P. 196.] Indeed a declaration of war imports a prohibition of commercial intercourse and even correspondence with the inhabitants of an enemy's country. [*Esposito* v. *Bowden*, 7 Ell. & B. at p. 779.] Lord Stowell has pointed out the reason why even correspondence is unlawful with the country's enemies in these terms:—"Who can be insensible to the consequences that might follow if every person in time of war had a right to carry on a commercial intercourse with the enemy, and under colour of that had the means of carrying on *any other* species of

intercourse he might think fit?" [*The Hoop*, 1799, 1 Ch. Rob. 196 at p. 200.]

Two exceptions to the rule, more apparent than real, may be said to exist:—

Exceptions to General Rule.

(1) Contracts made with prisoners of war. [*Sparenburgh* v. *Bannatyne*, 1797, 1 B. & P. 163.]

(1) With prisoners of war.

The position of a person interned who is an alien enemy is deemed to be that of a prisoner of war, nor does it matter that he is a civilian and was not apprehended in arms. [*Ex parte Weber*, 1916, 1 A.C. 421; *Rex* v. *Superintendent Vine Street Police Station*, 1916, 1 K.B. 268.]

It has however been held by *Younger J.* that internment of a registered alien enemy does not operate as a revocation of the licence to remain in the country which is implied in registration, so that where a contract is made between a German subject resident and carrying on business in England and a British subject, after the outbreak of the present war, and is one in no way prohibited by any proclamation against trading with the enemy, it is in no way affected by the fact that the German subject is subsequently interned, and he is entitled to maintain any action otherwise competent to him in respect thereof. [*Schaffenius* v. *Goldberg*, C.A., 1916, 1 K.B. 284.]

(2) If the alien enemy is within the realm and is *sub protectione domini regis*, he is not regarded as an enemy. [*Janson* v. *Driefontein Consolidated Gold Mines, Lt.*, 1902, A.C. 484 at p. 505; *Porter* v. *Freudenberg*, 1915, 1 K.B. 857 C.A.; *In re Mary Duchess of*

(2) With persons under protection of the Crown.

Exceptions to General Rule.

(2) With persons under protection of the Crown.

Sutherland: Bechoff, David & Co. v. *Bubna*, 1915, 31 T.L.R. 248; *Volkl* v. *Rotunda Hospital*, 1914, 2 K.B. (Ir.) 543; *Princess of Thurn & Taxis* v. *Moffit*, 19[illegible], 1 Ch. 58; *Nordman* v. *Rayner & Sturgess* 1916, 33 T.L.R. 87.] The case of *Zachary* v. *Müller* (1917, 2 Ch. 144), has also a special interest here. The defendant, a German subject, before leaving the United Kingdom, by special permission of Government during war, *en route* for Germany, appointed a British subject to act as his attorney for the sale of premises he owned in London. The premises were sold by the attorney and the Court of Appeal held that there was a valid contract of sale. (See the case cited later at p. 235).

Saving these exceptions, all contracts with enemies are void, and in addition *trading* contracts with enemies are actually illegal unless licensed by the Crown, for under the law as to trading with the enemy it is illegal to aid and comfort the enemy because such aid and comfort amounts to adherence to the King's enemies. [*The Hoop*, 1797, 1 Ch. Rob. at p. 196–200; *Esposito* v. *Bowden*, 1857, 7 E. & B. 763 at p. 779.]

Contracts of this type are happily rare nowadays, for the public has had ample notice of the illegality of commercial activities with the enemy by the issue of the various Royal Proclamations since the outbreak of the present war.

It is the class of contract made before war with

persons who subsequently became enemies that is of practical importance, and with this class a large number of the recent decisions are concerned. These are noted in the succeeding chapters under distinct headings.

Exceptions to General Rule.

(2) With persons under protection of the Crown.

CHAPTER III

Executory and Executed Contracts

In determining the effect of war upon contracts it is usually necessary to ascertain in what state the contract is at the time of war, namely, whether it is executory or executed. An executory contract is a continuing contract entailing the fulfilment of outstanding promises. A contract is executed when one of the parties has fulfilled his obligations in full. The rules applicable differ accordingly. The distinction between (A) contracts which have enemy parties thereto and (B) those between non-enemies has to be observed.

(A) Enemy Contracts

(A) Enemy Contracts.

Rules of law.

The following rules were stated in *Halsbury's Laws of England*, and, it would appear from recent decisions, rather overstated—

"The effect of an outbreak of war upon a contract that has been previously made with a subject of a hostile State is that *if the contract is executory it is avoided and both parties are released from performance;* if, however, the contract was executed at the time when the war began, its validity is not affected, but the remedy upon it is suspended during the con-

tinuance of the war and revives when peace is restored." (Vol. 7, p. 463.)

(A) Enemy Contracts.

Rules of law:

Executory contracts are suspended, but may be dissolved.

The first part of this statement, it is submitted, is too sweeping. The more modern view would appear to be that executory contracts are suspended, save only where such suspension has the effect of putting the parties to the contract into a position that they themselves never contemplated, or in other words is such as to involve an entirely different contract. The rule then would appear to be that executory contracts so affected by suspension are avoided *in toto*. No doubt *Willes J.* in *Esposito* v. *Bowden*, remarking upon the effect of war upon executory contracts of affreightment made before war is declared, which makes the further execution unlawful or impossible, said :—" The authorities establish that the effect is to dissolve the contract and to absolve both parties from further performance of it " [7 Ell. & B. at p. 783], but the contract in that case involved, if performed, a trading with the enemy, and, in any event, being a commercial one, where time was of the essence of the contract, it could not very well have been left open indefinitely.

The first trace of the more modern view is to be found in an *obiter dictum* of Lord Halsbury when, as Lord Chancellor, he delivered judgment in one of the leading cases that arose out of the late South African war as follows—

" No contract or other transaction with a native of the country which afterwards goes to war is affected by the war. The remedy is indeed suspended : an alien enemy cannot sue in the Courts of either country

(A) Enemy Contracts.

while the war lasts; but the rights on the contract are unaffected, and when the war is over the remedy in the Courts of either is restored." [*Janson* v. *Driefontein Consolidated Gold Mines, Ltd.*, 1902, A.C. 484 at p. 493.]

Rules of law:

Executory contracts are suspended, but may be dissolved.

The present-day view as to the effect of war on an executory contract has been thus expressed by *Rowlatt J.*—

> "That being so, the question is whether this contract is dissolved. The defendants have cited *dicta* to the effect that contracts are not dissolved but are suspended by war. This is a loose expression which gives rise to confusion. The words themselves really mean that during war there is an interval in which the parties are not in contractual relations. But that is not the sense in which the phrase is used. It is used to convey the meaning that performance of the obligations of the contract is either postponed during war or that obligations falling due during war are cancelled, leaving a number of others to be performed in the ordinary way at the end of the war. That is the sense which the defendants wish to convey. The plaintiffs contended that all contracts were dissolved by war except executed contracts where payment is the only obligation remaining to be performed, in which case, they suggest, a payment may be postponed until after the war. I am not going to lay down that proposition in the present case. The plaintiffs' next contention was this: that where postponement of the performance of mutual obligations, or the cancellation of mutual obligations, which fall due during the war, involves a substantial alteration of the contract itself, no such postponement or cancellation can take place, because an executory contract is suspended as opposed to dissolved only where the suspension does not involve the making of a different contract between the parties: that is right. War does not create any contract." [*Distington Hematite Iron Co., Ltd.* v. *Possehl & Co.*, 1916, 1 K.B. 811.]

(A) Enemy Contracts.

Rules of law:

Executory contracts are suspended, but may be dissolved.

The facts of that case were as follows. Plaintiffs, an English firm, and the defendants, German merchants, contracted in 1911 whereby the plaintiffs were to give the defendants the sole right to sell certain kinds of pig iron of the plaintiffs on the Continent. The defendants were bound to take 3,000 tons a year. The defendants were not bound to take delivery during any war in which Germany might be interested. The contract was still running when the war broke out. The plaintiffs sued for a declaration that the contract was dissolved by the outbreak of war; the defendants contended that the contract was merely suspended. *Rowlatt J.* remarked as follows—

> "The case was not one in which there was some future thing to be done, but the contract established continuous relations involving continuous efforts between the parties; and to affirm such a contract as standing, although at the present time and for the indefinite future it could not be acted upon, would be not to maintain the existing arrangement between the parties but to create an entirely different one. The outbreak of the war ended performance of the contract and the contract was dissolved. To treat the performance of it as capable of resumption after the war would be to put the parties in a position which they had never intended." (*Idem* at p. 351.)

So it is that executory contracts such as contracts of partnership, which involve commercial intercourse in the closest degree, are dissolved on the outbreak of war when one of the partners or more are alien enemies. [*Hugh Stevenson & Sons, Ltd.* v. *Aktiengesellschaft für Cartonnagen-Industrie*, 1917, 1 K.B. 842.]

(A) Enemy Contracts.

Rules of law:

Executory contracts are suspended, but may be dissolved.

It must be, however, that there are a number of cases where it would be unreasonable to suppose that the contract could remain in a state of suspended animation, such for instance as commercial contracts where time is of the essence of the contract.

Indeed a very common-sense opinion has been expressed thus—

> "Broadly speaking I think that ordinary contracts, commercial or other, like sale of goods for future delivery (*e. g.* on the cotton or corn markets), charter-parties, steamship line conferences, or insurance are dissolved; though rights of property arising out of them and already in existence before the war, such as debts, accrued claims for damages, return of premium if due on cancellation of a marine policy, or surrender value of a life policy, and such like, will be preserved and be enforceable by action after the war. Where, too, a party to a contract would be in equity entitled to specific performance or redemption, the right would probably be recognized and preserved. And in those contracts where property is the important thing, and the mutual obligations of performance rather incidental to the property, when the war is over the obligations of performance will revive as incidental to the property; and thus the whole contract will be merely suspended." [*Scott's Effect of War on Contracts*, 2nd Ed., p. 28.]

To illustrate further how an executory contract may be not merely suspended but dissolved by war, reference can be made to a case where the facts were as follows:—The plaintiffs were an English company: the defendants traded in Germany. The contract between them was in respect of the sale by the plaintiffs to the defendants of a certain quantity of zinc concentrates in each year from 1912 to 1919 and the plaintiffs were not to supply the zinc con-

centrates to any other persons. A clause in the contract ran :—"In the event of any cause beyond the control of either the sellers or the buyers preventing or delaying the carrying out of this agreement, then this agreement shall be suspended during the continuance of any and every such disability." After the outbreak of war the plaintiffs sued for a declaration that the agreement was thereby dissolved. *Bray J.* held that the agreement only provided for the suspension of deliveries and that there would still remain things to be done or rights to be exercised, which after the outbreak of war would be illegal, and that the contract was dissolved. [*Zinc Corporation, Ltd.*, v. *Hirsch & ors.*, 32 T.L.R. 7.]

(A) Enemy Contracts.

Rules of law :

Executory contracts are suspended, but may be dissolved.

On appeal this decision was upheld. *Swinfen Eady L.J.* remarked—

> "The result was that the outbreak of war had dissolved the contract so far as regarded the future performance after August 4, 1914. The remedy of either side for what had previously been carried out remained in abeyance until the termination of the war. There remained, however, another point of view from which the matter must be considered.
>
> The contract of 1910 not only provided that the defendants should purchase the plaintiffs whole production, but that the plaintiffs should not sell their concentrates to any other person. . . . Thus the position was that the defendants could not take delivery and yet the plaintiffs could not sell their production elsewhere and must keep their premises encumbered with concentrates which they could not dispose of. . . . To recognize such a contract and to give effect to it by holding that it remains legally binding on the contracting parties would be to defeat the object of this country in crippling the commerce of the enemy—it would be to undo by means of British tribunals the work done for the British nation

(A) Enemy Contracts.

by its naval or military forces." (*Idem*, 1916, 1 K.B. 541.]

Rules of law:

A further case as to suspension of deliveries was tried as a test case before *Sankey J.* [*Rio Tinto Co., Ltd.* v. *Ertel Bieber & Co.*, 1917, 33 T.L.R. 294.]

Executory contracts are suspended, but may be dissolved.

The plaintiffs, an English Company, agreed to supply the defendants, German Companies, with cupreous sulphur ore to be shipped from Spain and delivered at German and other European ports between February 1911 and November 1914. The agreements provided for suspension of deliveries if the plaintiffs were prevented, and provision was made for reduced deliveries to be received by the defendants on the occurrence of causes over which they had no control.

Evidence was given in the case to show that the contract would involve daily communication between the parties. *Sankey J.* held that the contract had become illegal, and was of opinion that the effect of suspending the deliveries would be to protect the enemy's trade during war and enable the defendants on the conclusion of peace to resume their trade as speedily as possible, as also to hinder the plaintiff's business. The decision was upheld in appeal (33 T.L.R. 537; see also *E. Hulton & Co., Ltd.* v. *Chadwick & Taylor, Ltd.*, 33 T.L.R. 368, cited p. 301, *post*). As regards agreements to resume trading after war, the question is discussed later (see p. 29, *post*).

It is not true that every contract made between an English subject and an alien enemy is either extinguished or suspended. For instance, treating a lease to an alien enemy as a contract, the enemy

(A) Enemy Contracts.

lessee is liable for rent of the premises. [*Halsey* v. *Lowenfeld*, 1916, 2 K.B. 707.] Nor does the fact that the lessee is personally prohibited from residing in the area where the demised premises are situated exempt him from the liability to pay rent. [*London and Northern Estates, Ltd.* v. *Schlesinger*, 1916, 1 K.B. 20.]

Rules of law:

Executory contracts are suspended, but may be dissolved.

And in *Tingley* v. *Müller* [1917, 2 Ch. 144] the Court of Appeal held that the sale of premises by an enemy through British agents to a purchaser was not invalid but subsisting. The case is fully set out hereafter (*vide* p. 235).

Executed contracts.

The cases of *The Continental Tyre and Rubber Company, Ltd.* v. *Daimler Co., Ltd.*, *idem.* v. *Tilling Limited* [1914, 31 T.L.R. 77; C.A. 1915, 1 K.B. 893; H.L. 1916, A.C. 307] are instances of executed contracts sued on by a company in the first case on a bill of exchange accepted before war for goods supplied before war, and matured and dishonoured after the outbreak of war; and in the second case for the price of goods sold and delivered before the war. Up to the House of Lords it was held that the company was not an enemy and could sue (*Buckley L.J.* however dissenting in the Court of Appeal) but the House of Lords reversed this judgment on the ground that the secretary of the company was not authorized to file the suit.

The question as to whether a contract is merely suspended during the duration of hostilities does not arise where the period of the contract has expired before there is any likelihood of hostilities coming to an end. [*The Textile Mfg. Co.* v. *Salomon Bros.*,

(A) Enemy Contracts.

40 I.L.R. Bom. 570.] The case is cited hereafter (*see* p. 232).

Rules of law:

As regards the rule laid down as to the effect of war upon *executed* contracts, rights which have vested before the outbreak of war are preserved,

Executed contracts.

and where all that remains to be done after the outbreak of war is payment by the enemy, that payment will if possible be enforced. Thus in a case of an executed contract, namely a policy of insurance

Vested rights.

on goods between a British subject and a German insurance company, where the loss under the policy had accrued before the war, it was decided that the contract was not suspended and that a suit to recover for the loss lay. [*Ingle* v. *Continental Insurance Co. of Mannheim*, 1915, 1 K.B. 227.]

It is sufficient to sum up by saying that the effect of the doctrine of supervening illegality or impossibility is to annul so much of the contract as remains to be performed, and it is wholly immaterial upon which of the parties the impossibility first operates. [*Edward Grey & Co.* v. *Tolme & Runge*, 1915, 31 T.L.R. 551 at p. 553.

(B) NON-ENEMY CONTRACTS

Turning next to contracts to which the parties are free of enemy character it may be observed that

Vested rights.

the same rule as regards vested rights is applied to contracts between non-enemies. For instance, in a case under an agreement the plaintiffs undertook to provide gas standards at their own expense and to supply them with gas, and the defendants, a district

(B) Non-Enemy Contracts.

Rules of law:

Vested rights.

council, were to pay the gas company at a certain yearly rate per lamp for five years. The plaintiffs did the work and supplied the gas up till the end of 1914 when the military authorities forbade the lighting of lamps in the defendants' area. In an action to recover payment in respect of a period during which the order of the military authorities was in operation it was argued for the defendants that the contract was at an end on account of the supervening illegality. The Court held that as the columns, lanterns, and burners had been supplied the contract was *executed* so far, and not executory, and that the contract had not been rendered either unlawful or impossible and that there was no ground for treating the contract as suspended during the time that the order was in force. [*Leiston Gas Co., Ltd.* v. *Leiston-cum-Sizewell U.D.C.*, 1916, 1 K.B. 912.]

In an appeal against this decision the Lord Chief Justice, dismissing the appeal, observed—

"Part of the performance of the contract had become unlawful, but another part of the contract, which cannot be regarded as a trivial part, was lawful and could be performed. In these circumstances the defendants are not justified in treating the contract as at an end, or in refusing to make the payments as agreed by them." [1916, 2 K.B. 428 C.A.] This statement, it is submitted, is not in accordance with the principle that if the performance of any term of an agreement or the exercise of any right or option given by it be rendered unlawful the whole agreement is dissolved [*Zinc Corporation, Ltd.* v. *Hirsch*, 1916, 1 K.B. 541 C.A.], which principle

(B) Non-Enemy Contracts.

Rules of law.

Vested rights.

does not seem to differ from that expressed in section 24 of the Indian Contract Act. It would appear in the case under discussion that it was impossible to distinguish in the amount agreed to be paid *per* lamp how much was deferred payment spread over the period for supplying the plant and how much was for the actual gas consumed. So that it would appear that the agreement was not capable of severance.

The ground upon which it appears this decision can best be supported is the principle that where through no fault of either party to a contract something happens to make its fulfilment more expensive to one of them that party has to bear the loss occasioned, under the old rule, "Let the loss lie where it falls": but even on this ground the decision in appeal can scarcely be regarded as satisfactory. It is also to be noticed that the attention of the Court was not called to the view taken by various judges of the probable duration of an impediment depending on war. [*Metropolitan Water Board* v. *Dick, Kerr & Co.* 1917, 2 K.B. at p. 33, *per Scrutton L.J.*] The case has been followed in a later one which had some differences in the facts, but it was held none in principle. [*Wycombe Borough Electric Light and Power Co. Ltd.* v. *Chipping Wycombe Corporation*, 1917, 33 T.L.R. 489.]

(C) EXECUTORY AND EXECUTED CONTRACTS *re* SALE OF GOODS

The distinction between executory and executed contracts is of particular importance in cases of the

(C) Re Sale of Goods.

sale of goods, and also in Prize Court proceedings. There are a considerable number of cases, and it would be desirable to treat the subject under these two headings "C" and "D."

General principles.

In executed contracts of sale the property in the goods passes from the seller to the buyer. The goods can be described as "goods sold and delivered." Where the property passes but the possession merely is retained the goods can be said to be "bargained and sold." The seller is entitled in either case to sue for the *price*. Where however the property in the goods has not passed, and the contract is *executory*, the seller has only got an agreement to sell. This may occur because at the time of the agreement the goods have yet to be produced, or are not yet in a fit condition for delivery, or the price is to be paid only upon delivery of the goods, or any like reason.

A recent case illustrates the importance of the point under discussion. [*Duncan Fox & Co.* v. *Schrempft & Bonke*, 1915, 3 K.B. 355.]

Passing of the property.

Liverpool merchants contracted with each other to sell and buy some barrels of honey, the payment to be in cash in exchange for shipping documents on presentation of the same. Before war the sellers shipped the goods on a German steamer and obtained a German bill of lading. War broke out and the Proclamation of August 5, 1914, was issued, warning the public against trading with the enemy (see p. 305, *post*). This proclamation had the effect of dissolving all executory contracts, and indeed rendered the performance of the contract illegal and impossible. On the 5th August the vendors tendered to the

(C) Re Sale of Goods.

purchasers the bill of lading in respect of the goods.

Passing of the property.

Now if the contract for sale of the goods had been *executed* at this date, the vendors would have been entitled to the price, and the purchasers would have had to bear the loss, but as the contract showed that the property in the goods was not to pass until delivery of the shipping documents, it was clearly an *executory* contract. Consequently it is not surprising to find that the Court held that the vendors were left in the position in which they stood when the outbreak of war made performance impossible. At that date no delivery of documents had taken place, and so they were not entitled to claim payment of the price in return for the tender of the bill of lading. In any event, the contract of affreightment, being a German bill of lading, would not be a valid one and the tender of such a bill of lading would be invalid. Another case in this connection may be useful to refer to here. [*Shipton Anderson & Co.* v. *Harrison Bros. & Co.*, 1915, 3 K.B. 676.] The plaintiffs had bought from the defendants a quantity of wheat which was lying in a Liverpool warehouse, and whilst there, on the 8th September 1914, the Government requisitioned the wheat under the Army (Supply and Storage of Food) Act, 1914. The defendants however had not given the buyers a delivery order, which was necessary to withdraw the wheat from the warehouse. The buyers sued the vendors for damages, contending that a contract to sell specific goods in existence is absolute in its terms, and that the vendors warrant they can and will per-

form it and run the risk of any subsequent event which renders performance impossible. The defendants relied (*inter alia*) on the contention that the contract being executory the Act of State in requisitioning the wheat terminated the contract. The Court held on the facts that the vendors had reserved the right of disposal, so that the property had not passed to and was not at the risk of the buyers.

(C) Re Sale of Goods.

Passing of the property.

It has been said that it is not contrary to public policy for a contract made before war to provide that after the war is over trading shall be resumed with persons who in the meantime have become alien enemies. [*Zinc Corporation and Romaine* v. *Skipworth*, 1914, 31 T.L.R. 106, reversed on other grounds without dealing with this point, 1914, 31 T.L.R. 107.]

Agreement to resume trading after war.

But in other cases this view does not appear to have been accepted by the Court. [*Zinc Corporation, Ltd.* v. *Hirsch*, 1916, 1 K.B. 541; *Rio Tinto Co., Ltd.* v. *Ertel Bieber & Co.*, 1917, 33 T.L.R. 299.] In the last cited case *Sankey J.* leaned to the view that protection of an enemy's trade during war by providing that after war deliveries under the contract were to be resumed was objectionable. In this connection however the observations of Lord Parker in the *Daimler* case [1916, A.C. 307 at p. 347] should not be overlooked, particularly the following:—

"The prohibition against doing anything for the benefit of an enemy contemplated his benefit during the war, and not the possible advantage he may gain when peace comes."

The legislature has not confined itself to this view in Regulation 15 B of the Defence of the Realm

(C) Re Sale of Goods.

Agreement to resume trading after war.

Regulations in respect of goods held "on account of, or for the future account of, or for the benefit or future benefit, direct or indirect" of enemy persons (*see* p. 322, *post*). The case of *Trevalin Ltd.* v. *Saccharin* (cited p. 226, *post*) can also be referred to in connection with this question. *Swinfen Eady L.J.* has observed:—"Every transaction whereby a profit may ultimately enure to an enemy is not necessarily a transaction entered into for the benefit of an enemy." [*Hugh Stevenson & Sons, Ltd.* v. *Aktiengesellschaft für Cartonnagen-Industrie*, 1917, 1 K.B. 842 at 848.] Mr. Justice Lawrence in his dissenting judgment in the last case, referring to Lord Parker's *dictum* given above said:—"This must be read 'secundam subjectam materiem'; he" (*i. e.* Lord Parker) "was dealing with the argument that an English company having one enemy shareholder would be compelled to close its works. In the case supposed the contract would not be made for the benefit of an alien enemy shareholder, but for the benefit of the company itself."

While these pages were going through the press an important case (*The Clapham Steamship Co., Ltd.* v. *Naamlooze Venrootschap Handels-en-Transport Maatschappiji Vulcaan*, 1917, 2 K.B. 639; 33 T.L.R. 546) has been decided in which *Rowlatt J.*, on a declaration by the plaintiffs that a charter-party granted to the defendants, an enemy controlled Company, for five years had become dissolved by the outbreak of war, held that to keep the contract alive was to support the enemy during war. The learned Judge is reported to have observed:—

(C) Re Sale of Goods.

Agreement to resume trading after war.

"It seems to me that if at the moment when war breaks out the enemy is entitled to retain his assurance of tonnage to be available at the end of the war his commercial position is fortified even during the war. He is enabled, by the prospect of shipping facilities which he has, to keep together his connexion with neutral or enemy merchants overseas, and even (if he likes to speculate on the war's being short, or if he can obtain contracts with conditions protecting him if it should be long) to enter *de presenti* into new contracts to be performed when peace arrives. His ability to do these things at least for a time helps to drive his adversary to the necessity for a long war. In any case it enables the enemy fully to commit his own shipping for the purposes of his trade during the war without being hampered by the necessity for having it free at the end, for then he has the right to the services of the shipping of his adversary.

On the other hand, the adversary must not commit his shipping on pain of being liable for damages if peace should find him unable to resume the fulfilment of his contract with the enemy charterer. I do not think that the law will allow a British subject to remain in this relation with an enemy. I do not base my decision on the ground that the maintenance of the charter-party in a state of suspension during the war will benefit the enemy after the war. That may or may not of itself make it illegal. What I say is that it supports the enemy during the war.

In deciding on these grounds that this charter-party was put an end to by the outbreak of war I am applying what I conceive to be the principle which lies at the very root of the rule which makes trading with the enemy illegal, and I think that I am applying it on lines approved by the Court of Appeal in the *Zinc Corporation* v. *Hirsch* (32 T.L.R. 232), though the special features of the two cases are, of course, very different, and perhaps I am carrying the application a little further.

Since this judgment was written I have seen a report of the decision of the Court of Appeal in *Rio Tinto Company* v. *Eitel Beiber & Co.* ("The Times" of July 26). That decision, like that in the Zinc Corporation case (*supra*), was based primarily on the

(C) Re Sale of Goods.

circumstance that the contract involved actual intercourse with the enemy during the war. So far, however, as I am able to judge from the report, at least one of the Lords Justices was of opinion that that case fell also within the principle which I think is applicable here."

Agreement to resume trading after war.

And see further reference to this subject later, (*vide* pp. 140 and 172, *post*).

Stoppage in transit.

As regards the passing of property in the case of goods sold, and the right to stop the goods while in transit, so as to restore the property in the goods to the vendor, an interesting case decided recently may be noted. Certain goods sold by a neutral to an alien enemy were shipped on a British ship and seized in the London Docks. In prize proceedings the sellers contended that the failure of the buyers to meet their acceptances given for the price of the goods constituted a failure to pay, involving insolvency under section 62, sub-section 3, of the Sale of Goods Act, and giving a right to the vendors to stop the goods in transit and so have the effect of the goods reverting to them. The goods were however condemned, as the alleged stoppage occurred after seizure, and Sir S. Evans gave as his opinion that the failure to meet the acceptances through bankers because of the outbreak of war could not be treated as a failure to pay debts, and the vendors could not be "deemed to be insolvent." [*The Feliciana*, 1915, 59 Sol. J., 546.]

(D) SALE OF GOODS:

PRIZE COURT PROCEEDINGS

(D) Sale of Goods: Prize Court.

The question as to when the property in the goods sold has passed is of prime importance in cases of prize. If the property in the goods has passed to an enemy at the time of capture then the goods can be condemned, but, if the seller has retained a *jus disponendi* over the goods, the goods are regarded as his, and, if he is a British subject or neutral, the goods are not liable to condemnation. This rule is well illustrated in a recent prize case. A cargo was shipped under a c.i.f. contract by a neutral to a German buyer on a British vessel before the present war for conveyance to Rotterdam to enemy firms. Payment was to be by cheque against documents. The neutral seller held the bill of lading, which had not been endorsed, and had thus a *jus disponendi*. The ship was diverted to the Manchester Ship Canal and the goods seized. For the Crown, in asking that the goods should be condemned, it was submitted that the test to be applied was at whose risk the goods were, but the Court refused to apply this test and treated the cargo by the test of ordinary municipal law as applicable to contracts for the sale and purchase of goods, and, finding that the goods were the property of the neutral, ordered their release. [*The Miramichi*, 1915, P. 71.] Indeed all that the Prize Court is concerned with is the national character of the thing seized and, in determining this, that Court has taken *ownership* as the criterion, meaning by ownership the property or *dominium* as opposed to any special rights

Jus disponendi.

(D) Sale of Goods: Prize Court.

created by contracts or dealings with individuals. Special rights of property created by an enemy owner, such as pledges of the goods captured, are not recognised in a Court of Prize. [*The Odessa*, 1915, P. 52; J.C. 1916, A.C. 145.]

Pledges.

But where the enemy pledgors have lost their right to redeem the goods pledged the goods are not liable to be seized as enemy goods. [*The Ningchow*, 1916, P. 221.]

Mortgages.

The rights of mortgagees of enemy goods captured as prize are not regarded in a Prize Court, even though the goods have been consigned to a British port, and the mortgagees are persons who have arranged to sell them on commission in England. [*The Linaria*, 1915, 31 T.L.R. 396.]

It must however be remembered that it is not enough for consignors to retain the *indicia* of title to the goods and the *jus disponendi* over them when the goods are engaged in commercial intercourse with the enemy, as the Privy Council have held that such goods are liable to condemnation on that ground. [*The Panariellos*, 1916, 85 L.J. (P.) 112; 32 T.L.R. 459.]

Sales while goods in transit at sea.

As regards sales of goods at sea during transit, if the sale by the enemy is made while war is imminent it is held that the property in the goods shall be deemed to continue. [*The Vrow Margaretha*, 1 Ch. Rob. 338.] But if the enemy vendor has no thought of the imminence of war and has not such a war at any time in mind while the transactions of sale are taking place, the sale will be valid and the goods are not liable to seizure. [*The Southfield*, 1915, 113 L.T. 655.]

Lord Parker has laid down these rules :—

(D) Sale of Goods: Prize Court.

"(1) Where a transfer of goods at sea was induced by apprehension on the part of the transferor of hostilities between the State to which he owed allegiance and another State, such transfer was deemed to be in fraud of the belligerent rights of the latter State, and should such hostilities subsequently arise and the goods be seized as prize the transferee could not (at any rate if he were aware of the apprehension which induced the transfer) set up his own title to show that the goods had at the date of seizure lost their enemy character.

Sales while goods in transit at sea.

"(2) If at the date of the transfer the circumstances were such as to give rise to a general apprehension of war the *onus* was on the transferee to prove the complete innocence of the transaction. It would not be enough to prove his own innocence. He must prove also that the contract was not induced by apprehension of war on the part of the transferor.

"(3) The transferee might discharge that *onus* by showing that the transfer was pursuant to a contract made at a time when no such hostilities were apprehended." [*The Daksa*, 1917, A.C. 386.] See also *The Kronprinsessan Margareta* [1917, P. 114].

Sales of enemy ships.

Sales or transfers of enemy ships made to defeat the right of an imminent belligerent to capture the ships are not recognised in Prize Courts. [*The Tommi*, 1914, P. 251.]

Shipment to selling agents.

Where goods are shipped by the vendors to persons described as "selling agents," who are paid by commission and to whom the bills of lading are endorsed, and the vendors do not reserve any right of disposal of the goods after shipment, the question whether the property in the goods has passed to the "selling agents" depends upon intention and is a question of fact. This is shown by a recent case :—

An American company shipped in July 1914

(D) Sale of Goods: Prize Court.

Shipment to selling agents.

at New York for Hamburg on a German steamer a consignment of pig lead. Bills of lading were made out to the order of the shippers at Hamburg and were endorsed to a German company or order and were sent forward to the German company. An arrangement between the American company and the German company secured to the former the benefit of a previous agreement in which the German company were described as "selling agents." A draft on demand for the provisional price, as arranged, was sent to an English company which was connected with the arrangement. It was held, on the goods being seized and the English company refusing to pay the draft on account of the war, that the property in the goods had passed to the German company. [*The Kronprinzessin Cecilie*, 1915, 32 T.L.R. 139; affirmed P.C. 33 T.L.R. 292.]

Inferences to be drawn from course of shipment.

The Judicial Committee of the Privy Council have made some important observations for business men on the inferences to be drawn from the commercial course of arrangements in regard to shipping goods, dealing with the bills of lading, drawing of, endorsing, and discounting the drafts, so as to bear on the question of the passing of the ownership of the goods to the acceptor on returning the drafts and taking up the bills of lading. [*The Prinz Adalbert*, part cargo ex., 1917, 33 T.L.R. 490]. The facts as set out in Lord Sumner's judgment are as follows :—

> "When the German steamship *Prinz Adalbert*, bound from Philadelphia to Hamburg, was seized as prize at Falmouth on August 5, 1914, she had lubricating

(D) Sale of Goods: Prize Court.

Inferences to be drawn from course of shipment.

oil on board. The appellants, the Crew Levick Company, of Philadelphia, neutral shippers, filed a claim alleging that the oil was theirs and that they had shipped and consigned it to the Maschinen Oel Import Actiengesellschaft, of Hamburg, as their agents for sale on the Continent of Europe, and that, as it had never passed to any purchaser, it had always continued to belong to them. The President decided that the oil had ceased to belong to the appellants on shipment. Neither the actual shipping documents nor the dates of the acceptances to the accompanying drafts appeared to have been brought to his attention. At their Lordships' bar the appellant's argument made those dates crucial. The President was strongly and justly impressed by the absence of proper evidence of the prior course of dealing between the shippers and the consignees. The appellants petitioned their Lordships for leave to remedy that defect, but their Lordships refused to grant it for reasons of principle.

"Both parcels were covered by bills of lading, which made the oil deliverable to the shippers' order at Hamburg and were indorsed in blank by an officer of the claimant company. The bills of lading and certificates of insurance were attached to drafts, drawn by the claimants on the Maschinen Oel Import Gesellschaft and discounted in the United States—namely, a 60 days' draft for 75 per cent. of the invoice value of 290 barrels, and a draft at three days' sight for the full value of 86 barrels. The discounting bank forwarded the documents to Germany. The draft drawn against the 86 barrels reached Hamburg on or before August 1, 1914, when it was accepted by the Maschinen Oel Import Gesellschaft against surrender of the bill of lading. The other draft was accompanied by a bill of lading of the same date—July 20—and the evidence did not show any sufficient reason to suppose that it was not forwarded by the same mail. The appellants contended that it was not accepted until August 10, though no reason for that difference could be given. That bill of lading also was handed over to the Maschinen Oel Import Gesellschaft against acceptance of the corresponding draft, and ultimately that company returned both bills of lading to the claimants at Philadelphia. Presumably they

(D) Sale of Goods: Prize Court.

Inferences to be drawn from course of shipment.

also met both bills of exchange when they fell due, for the amounts were debited against the appellants in a quarterly account current, brought down to September 30, which they rendered to the claimants on November 28. It did not appear that the claimants had either paid or otherwise settled the debit balance shown on that account, and, as the evidence left the matter, they had received the proceeds of the two bills of exchange, less discount, in Philadelphia, had neither paid nor agreed to pay to the acceptors the amounts of those bills, and had got back the bills of lading from the acceptors, without conditions or explanation, and so, presumably, for the acceptors' account."

Lord Sumner then proceeded to deal with the transfer of ownership by saying :—

"By general mercantile understanding, which had the force of law, where transactions originated like the present in time of peace, without prospect of war, the delivery of an indorsed bill of lading, made out to the shipper's order, while the goods were afloat, was equivalent to delivery of the goods themselves, and was effectual to transfer ownership if made with that intention. The bill of lading was the symbol of the goods. Apart from specific formalities or similar prescriptions of municipal law not now material such intention was a question of fact. The usual course of dealing in the export of merchandise, and the interest of the parties concerned in it, sufficed for the necessary inference in the absence of evidence to the contrary. When a shipper took his draft, not as yet accepted, but accompanied by a bill of lading, indorsed in that way, and discounted it with a banker, he made himself liable on the instrument as drawer, and he further made the goods, which the bill of lading represented, security for its payment. If, in turn, the discounting banker surrendered the bill of lading to the acceptor against his acceptance, the inference was that he was satisfied to part with his security in consideration of getting this further party's liability on the bill, and that in so doing he acted with the permission, and by the

(D) Sale of Goods: Prize Court.

mandate of the shipper and drawer. Possession of the indorsed bill of lading enabled the acceptor to get possession of the goods on the ship's arrival. If the shipper, being then owner of the goods, authorized and directed the banker, to whom he was himself liable and whose interest it was to continue to hold the bill of lading until the draft was accepted, to surrender the bill of lading against acceptance of the draft, it was natural to infer that he intended to transfer the ownership when that was done, but intended also to remain the owner until that had been done. Particular arrangements made between shipper and consignee might modify or rebut these inferences, but in the absence of evidence to the contrary, and apart from rules which arose only out of a state of war existing or imminent at the beginning of the transaction, the general law inferred in these circumstances that the ownership in the goods was transferred when the draft drawn against them was accepted.

Inferences to be drawn from course of shipment.

"Their Lordships were unable to agree with the President's view that the property in the oil passed on shipment. In their opinion the claimants were owners until the Maschinen Oel Import Gesellschaft accepted the drafts, drawn against the two parcels respectively, but no longer. Such was the true inference from the mercantile transactions themselves.

"Sundry communications were produced, either requesting that the shipment should be made or advising that it had been made, but they were neutral in their effect; nor was it material to consider how the transaction might be worked out after the drafts had been accepted. That depended on arrangements between the parties, which were not properly proved, and the transfer of the ownership in the oil on the acceptance of the drafts was consistent either with a sale to the German company and a resale by them to German customers, or with some agency arrangement, under which they might debit the amount of the drafts paid and credit the proceeds of their sales to the claimants, and obtain their own remuneration by charging an agreed commission.

"It followed that the 86 barrels had ceased to belong to the claimants, and had become the property of the Machinen Oel Import Gesellschaft on August 1."

(D) Sale of Goods : Prize Court.

In the case of *The Sorfareren* [1915, 32 T.L.R. 108] it was held that the goods sold c.i.f. by an English company, and paid for by the German purchasers, had passed to them and were condemnable in prize proceedings. Where, after the outbreak of war, goods have been shipped by a neutral consignor, with the intention that they should ultimately become the property of the enemy, and the goods have been seized as prize, the fact that at the time of seizure the legal property in the goods had not passed does not make the capture unlawful. In such cases capture is regarded as delivery and the goods are treated as enemy property. [*The Louisiana*, 1916, 32 T.L.R. 619.]

C.i.f. sales.

Shipment *post bellum*.

British company's goods.

The goods of a company incorporated in Great Britain are not subject to condemnation although its directors and shareholders are either enemies or persons residing in an enemy State, as the goods are not enemy property. [*The Poona*, 112 L.T. 782, 31 T.L.R. 411.]

The case can be compared with the *Continental Tyre and Rubber Co., Ltd.*, v. *Daimler Co., Ltd.* [1916, A.C. 307 H.L.].

In the Prize Court on a claim to seize a ship nominally owned by a British Company inquiry is legitimate to look behind the ownership, and if it is found that the British Company is controlled by an enemy Company the ship can be treated like an enemy ship. [*The St. Tudno*, 1916, P. 291. See also *The Polzeath*, 1916, P. 241.]

It is interesting to note that the Defence of the Realm Regulations make ample provisions in certain

(D) Sale of Goods: Prize Court.

cases for instances of companies under enemy control and set out the tests to be applied to determine whether such companies are to be deemed to be under such control. (See Chapter VI, *post*.)

Enemy goods insured by neutrals.

When goods are seized as enemy goods and are insured with neutral underwriters who pay off as for a total loss and then claim the goods they cannot recover as they take any ownership subject to the rights of capture. [*The Gothland* 1916, P. 239; and see *The Palm Branch*, 1916, P. 230.]

Captor's liability for torts

In passing from this subject it may be useful to refer to the old rule that a capture made without reasonable cause or an improper dealing by captors with the property seized gives a right to damages. The matter is referred to by a recent article in a legal publication [52 L.J. 28] in connection with a judgment of the Prize Court in Egypt in the case of *The Chartered Bank of India* v. *Capt. Gilpin Brown and ors.*, where a tort had been committed. It should be remembered that if a bailee elects to deal with the property entrusted to him in any way not authorized by the bailor, he takes upon himself the risk of so doing. [*Lilley* v *Doubleday*, 7 Q.B.D. 510]. The captor is in the position of bailee of neutral cargo on a prize until the vessel has been delivered to the Prize Court, and exercises his discretion as to its disposal at his peril.

(E) CONTRACTS WITH CLAUSES PROVIDING FOR WAR, ETC.

(E) Contracts with War Clauses.

A great number of decisions have been given since the war dealing with contracts that contain clauses providing for the outbreak of war or like eventualities.

Recent cases:

The cases decided are mostly in connection with contracts of the nature of bills of lading, charter-parties and marine insurance; and of the sale of goods; and the clauses in the case of the former class generally provide for the safety of the ship; and in the latter for the suspension of deliveries in the event of war, *force majeure*, restraint of princes, interference with supplies, rise in freights, etc.

It is proposed shortly to set out the facts of each case, as it may be said that no principle can be laid down, for each case depends on the wording of the particular clause and the existing circumstances.

The cases will be approached in alphabetical order according to the nature of the contract in the case.

BILL OF LADING

Bill of lading.

In *East Asiatic Co., Ltd.* v. *The S.S. Toronto Co., Ltd.* [1915, 31 T.L.R. 543], by the terms of the bill of lading, the steamer *Toronto* was to call at Port Said for orders and to deliver a parcel of beans at the port there ordered, or so near thereto as she might safely get. Orders were duly given for Amsterdam. The defendants, the shipowners, protested that Amsterdam was not a safe port. They had other

(E) Contracts with War Clauses.

Recent cases :

Bill of lading.

cargo for Hull and were entitled to call there first to deliver that cargo. The bill of lading contained the exception of "restraint of princes." When the vessel arrived at Hull the defendants declined to go to Amsterdam and claimed freight, and, on non-payment of the freight, lightered and warehoused the beans. Meantime the authorities ordered the beans to be detained pending inquiry, and ultimately they prohibited their export. The plaintiffs, being holders of the bill of lading, sued for damages for failure to carry the beans. *Bailhache J.* held that the defendants had broken their contract to carry the beans, as Amsterdam was a safe port, but that the action of the authorities amounted to a restraint of princes and that the exception in the bill of lading excused the defendants' failure to carry to Amsterdam.

A petition of right [*Benjamin Smith & Co.* v. *The King*, 1917, 33 T.L.R. 159, reversed on appeal, 33 T.L.R. 342] led to difference of judicial opinions in regard to the construction of a bill of lading. The facts were: The suppliants shipped sheepskins in a steamer bound for London at Melbourne. The Crown had requisitioned the refrigerated spaces in certain steamers trading between Australia and Europe, and had issued to shipowners a document, which was relied on by both parties, summarising the conditions governing the hire of steamers. The Crown decided to allow traders' goods to be shipped in such vessels when there was cargo space to spare. Under these circumstances the suppliants' goods were shipped, and a bill of lading was granted which contained the following clauses :—

(E) Contracts with War Clauses.

"Shipped in good order and condition on board the *SS. Marere* via ports subject to Government requirements, &c.

. . . . . .

Recent cases:

Bill of lading.

"4. With liberty to proceed to and stay at any port or ports, place or places, in any order or rotation backwards and/or forwards, and notwithstanding that such ports or places are out or away from the customary or geographical route, to the port of discharge hereinbefore mentioned, for the purpose of receiving and for discharging goods, coals, supplies, or passengers or for any other purpose whatsoever, whether *ejusdem generis* or not, and to return once or oftener to any port or ports, place or places, without any liability whatsoever resting on the shipowners on the ground of deviation by reason of any route taken, as above, and with liberty on the way to call and stay at any intermediate port or ports to discharge or take on board passengers, cargo, coal, or other supplies, and to sail with or without pilots, and to tow and assist vessels in all situations.

"The insulated space on the ship having been taken by his Majesty's Government, the ship in addition to any liberties expressed or implied in this bill of lading shall have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages, or otherwise howsoever given by his Majesty's Government or any Department thereof, any person acting or purporting to act with the authority of his Majesty or of his Majesty's Government, or of any Department thereof, and anything done or not done by reason of any such orders or directions shall not be deemed a deviation; ship free to carry contraband of war and like risks."

There was also a clause exempting the Crown if the cargo was lost owing to an act of the King's enemies.

The vessel left Melbourne in August 1915 with troops, horses and guns for Gallipoli, and goods, including the suppliants', for London; reached Egypt

at the end of September, and sailed under orders of the authorities to Mudros, where she discharged mails and meat. She was ordered to Imbros in October, remained there until December discharging under orders meat daily for the troops, went back to Mudros, still under orders, and while there took on board on two occasions some 500 tons of meat from other steamers, storing the same for the purpose of supplying the troops there with rations. On January 16 she left Mudros for London, the suppliants' goods being all this time on board. Between Mudros and Malta she was torpedoed by a hostile submarine and the cargo perished. Before *Sankay J.* it was contended that the vessel had deviated from her voyage and had started on a new one and that, therefore, the exception as to loss by the King's enemies in the bill of lading no longer applied to the carriage of the goods.

(E) Contracts with War Clauses.

Recent cases :

Bill of lading.

Mr. Justice Sankey said that, looking at the terms and conditions contained in the document governing the letting and hiring of steamers for transport purposes and at the bill of lading, it was clear that the vessel's voyages were alike intended for military purposes, and that the carriage of goods of private persons to London was subsidiary to and subservient upon such military purposes. He did not think the use of the ship was foreign to that intent and object, nor that what happened amounted to an abandonment of the voyage. He therefore held that there had been no deviation from the specified voyage; and, further, that the user of the ship both at Mudros and Imbros was in consequence of orders and directions given by his Majesty's Government, and came

Deviation of voyage.

(E) Contracts with War Clauses.

Recent cases:

Bill of lading.

Deviation of voyage.

within the express provision that compliance with such orders and directions was not to be deemed to constitute a deviation. He therefore dismissed the petition.

On appeal this decision was reversed on the ground stated by the *Lord Chief Justice* that the facts showed that the Government used the ship as a store and warehouse and that such use was not provided for in the bill of lading.

"He thought the Government could use the vessel for any military purpose always provided that that purpose was consistent with the main object and intent of the contract, which was to carry the goods from the Commonwealth to London or ports in the United Kingdom; and he would be prepared to go very far in such times as these in giving a wide latitude to the Government as to the ports of call. But when the Government did an act which was not consistent with the main object and intent of the contract, that of the carriage of goods to London, by keeping the ship at Mudros as a convenient depot for meat to be served out to the troops there and not carried to London, that could not be justified under the contract."

As regards the clauses dealing with deviation in the bill of lading, they were got rid of by stating:—

"The language itself of that document was wide enough, either in the deviation clause or the stamped insulated space clause to cover any use which the Government might choose to make of the vessel at any place; but it was well settled law that in construing such a document regard must be had to the

intent and object of the document, and general words must be limited by regard to the main object and intent of the contract. That had been laid down by the House of Lords in *Glynn* v. *Margetson* ([1893], A.C., 551) and by the Court of Appeal in *James Morrison and Co.* v. *Shaw, Savill, and Albion* [1916], 2 K. B. 783)."

(E) Contracts with War Clauses.

Recent cases :

Bill of lading.

It is submitted that the correctness of this decision is to be doubted. The main object and intent of the contract was no doubt the carriage of the goods, but the carriage of them by the Government at its convenience and according to the military exigencies that might arise and for which the authorities could be able to provide at their absolute discretion. It is submitted that the reasoning of the Appeal Court did not sufficiently emphasize this discretion; and that the carriage of the goods was entirely subject to the more important military use of the vessel. It seems difficult to conceive how the Crown could have more effectually provided in the bill of lading for the use of the vessel than was done. The rule of construction that was applied is no doubt sound, but, it is submitted, it has been wrongly applied in this instance.

Deviation of voyage.

In *James Morrison & Co., Ltd.* v. *Shaw, Savill and Albion Company* [1916, 2 K.B. 783], the plaintiffs, endorsees of a bill of lading in respect of wool shipped on the defendants' steamer, sued to recover damages for the value of the wool, as the ship had been torpedoed and sunk near the Havre lightship. The bill of lading had a marginal note : " Direct service between New Zealand and London " and provided in a clause

(E) Contracts with War Clauses.

Recent cases :

Bill of lading.

"Intermediate port."

for "liberty on the way to London to call and stay at any intermediate port." Havre was not one of the usual ports of call for the defendants' line. It was held that calling at Havre was not within the liberties reserved by the bill of lading, as Havre was not an "intermediate" port, and therefore that the plaintiffs could recover.

Bills of lading frequently incorporate the clauses contained in the charter-party. Clauses dealing with the eventuality of war in charter-parties are in view of recent case law discussed in their order later (*vide* p. 50).

BUILDING CONTRACT

Building contract.

In *New Zealand Shipping Co.* v. *Société des Ateliers et Chantiers de France* [1917, 33 T.L.R. 276] by contract made in March 1913 the defendants undertook to build for the plaintiffs a steamship. The time for completion (*e.g.* January 30, 1915) was open to be extended if delayed by any "unpreventible cause" and in the event of France becoming engaged in war.

The contract further provided that if the defendants should "fail or be unable to deliver the steamer within eight months from the date agreed . . . this contract shall become null and void and all moneys paid by the purchasers shall be repaid."

The defendants were unable to complete. It was held on a case stated by an arbitrator that the defendants were entitled to treat the contract as null and void save in so far as the return of the monies paid

to them by the plaintiffs. The decision was affirmed on appeal [33 T.L.R. 545]. The case can be compared with *Matsoukis* v. *Priestman and Co.* [1915, 1 K.B. 681], where as a result of the universal coal strike in 1912 the builders got behindhand in the completion of the steamer. *Bailhache J.* held that the defendants were excused and that the case fell within the *force majeure* clause in the contract.

(E) Contracts with War Clauses.

Recent cases:

Building contract.

CONTRACT OF CARRIAGE

In *Cooke* v. *Thomas Wilson Sons & Co., Ltd.* [1915, 114 L.T. 268] the plaintiff was a passenger by the defendants' steamer on a trip from Hull to Archangel. The passenger ticket on its face bore a condition that the defendants would not be responsible for any loss, damage or detention of luggage in any circumstances, nor for any personal injuries or other loss or damage arising from collision, perils of the sea, or from any act, neglect or default of the pilot, master, mariners, etc. The steamer struck a mine and foundered owing to the negligence of the defendants' servants. In an action by the plaintiff for damages for personal injuries and shock and for loss of luggage, it was held that the defendants, having done all that was reasonably sufficient to give the plaintiff notice of the conditions, were entitled to judgment.

Contract of carriage.

CHARTER-PARTIES

Coming now to the consideration of recent cases dealing with charter-parties it will be at once evident that a world-wide war, waged both on land and sea, must necessarily in the case of a great mercantile

Charter-party.

Effect of war.

(E) Contracts with War Clauses.

Recent cases :

Charter-party.

Effect of war.

marine Power, like the United Kingdom, with numerous over-sea engagements, affect contracts involving the use and hire of seagoing vessels and the carriage of their cargoes very considerably. Hence the reports will be found to deal extensively with litigation in the Courts over bills of lading and charter-parties. Cases dealing with the former have been noted in their place (see p. 42 ante). War affects charter-parties in a variety of ways both directly and indirectly. War may upon its declaration *eo instanti* stamp the legal character of "enemy" on one of the parties to the contract making the contract *ipso facto* illegal (see Chapter IV). The charter-party may have in it a clause excepting takings at sea, arrests, restraint of kings, princes, rulers, or people. The question that often then occurs is, whether the exception in the light of the events that have happened applies? Again, though no express clause exists which may cover the occurrence that has in fact interposed, yet the parties to the contract are supposed sometimes to have impliedly agreed that the contract should be wholly at an end on the happening of such events. In short, it is often pleaded that the contract has become illegal and no further performance can be had of it, or that it has become impossible at law to perform and so further performance is to be excused, or both such pleas. Yet again it may be pleaded that the particular clause in the contract governs the situation. It is with this aspect that for the moment the following matter has concern.

There are of course a number of miscellaneous cases dealing with particular clauses in charter-parties,

such as who is to bear the insurance of war risks, etc. But for the present it is proposed to deal with the group of cases that have so far appeared as regards "restraint of princes," and that form of restraint that arises from the Admiralty requisitioning vessels under charter.

(E) Contracts with War Clauses.

Recent cases:

Charter-party.

Effect of war.

RESTRAINT OF PRINCES

Restraint of princes.

In approaching the case law as to what constitutes a "restraint of princes" so as to afford a valid defence on an action on the contract to the owners of the vessel, the carriers of the goods, or the underwriters of the adventure or goods, as the case may be, distinction has to be made between a restraint that is in fact imposed and prevailing and one that is proximate and impending, or, as it is often put, an apprehension of restraint. Most of the cases reported, both before and as a result of the European war, fall under these two heads.

Generally.

Where the facts establish an existing restraint which actually stops the goods or the voyage, then the exception in the charter-party, bill of lading, or insurance policy applies and an action must fail. The cases to be presently cited show that a restraint can be, firstly, physical, as where the voyage or goods are actually stopped; secondly, though not actually imposed the existing restraint effectually interferes with the carrying out of the contract; and thirdly, where to pursue the voyage or to carry the goods to their destination is in view of existing warfare illegal.

(E) Contracts with War Clauses.

The second classification is closely akin to but stops short of apprehension of restraint.

Recent cases:

The following cases decided during previous wars illustrate what has been set out.

Charter-party.

For readers who are not lawyers it is proposed first of all to set out as shortly as possible what is the meaning of the phrase "restraint of princes."

Restraint of princes.

Primarily such words mean the act of a State or Government interfering with a strong hand. [*Finlay* v. *Liverpool Great Western Steamship Co.*, 1870, 23 L.T. 251 at 254 *per Martin B.*]

Generally.

The words are usually preceded by language such as "takings at sea, arrests," and *Bramwell B.* in comparing the latter words with the phrase itself points out that the language of the phrase is wider and more comprehensive than the preceding words. [*Rodoconachi* v. *Elliott*, L.R. 9 C.P. 518 at p. 523.] The word restraint as applied to goods must mean a restraint of those having the custody of the goods. But this primary meaning is not exclusive. Actual or threatened force no doubt constitutes a restraint. A submission without opposition and without the presence of either actual or threatened force to a restraint imposed by political or executive acts is not the less a restraint. [*British and Foreign Marine Insurance Co., Ltd.* v *Sanday & Co.*, 1916, 1 A.C. 650 at p. 669, *per Lord Parmoor.*] It should be noticed that a restraint of princes by a foreign Government is enough if that Government is capable of enforcing the restraint upon the persons having the custody of the chartered ship or cargo though the ship is outside the direct enforcement of the

restraint by that Government. [*Furness, Withy & Co. v. Rederiaktiegolabet Banco*, 1917, W.N. 275.]

(E) Contracts with War Clauses.

(1) *Actual Restraint*

Recent cases:

Charter party.

Restraint of princes

(1) Actual restraint

The case of *Smith and Service v Rosario Nitrate Co.* [1894, 1 Q.B. 174] shows what delays fall within a charter-party exception of "restraints of princes and rulers." The defendants chartered the plaintiff's vessel to load a cargo of nitrate at Iquique in Chili from the day the vessel was ready to receive cargo. The customary mode of loading at Iquique was to send the nitrate down direct by rail from the mines to the port and there put it on board as required.

Civil war broke out in Chili when the vessel arrived at Iquique, and in consequence of the railway from the mines being in the hands of the troops, the nitrate could not be sent down to the port. When that state of things ceased the cargo was loaded and the vessel sailed. The vessel put into another Chilian port for coal and was there detained for a few days on a demand being made for export duties by the Government in power there, though these had been paid already to the *de facto* Government in power at Iquique. The plaintiffs sued for demurrage. It was held that both delays fell within the exception clause in the charter-party. Here it is clear that military interference with the railway line was an actual physical restraint. For another case arising out of the present war where the vessel under charter was detained by the British authorities at Gibralter because she was a Greek vessel, and which detention was held to frustrate the adventure, see *Lloyd Royal Belge*

(E) Contracts with War Clauses.

Société Anonyme v. *Stathatos* [1917, 33 T.L.R. 390, affirmed on appeal, 34 T.L.R. 70].

Recent cases:

An important decision as to the detention of a vessel due to the present war should be noted. In *Scottish Navigation Co.* v. *W. A. Souter & Co.* [1917, 1 K.B. 222 C.A.] the charter-party was for a Baltic round. It was headed "Time-charter." It excepted restraints of princes. No voyage was to be undertaken that would involve risk of seizure or capture, and in the event of Great Britain or other European Power being involved in war affecting the working of the steamer at the commencement or during the currency of the charter the defendants had the option of cancelling the charter or insuring the steamer against all war risks for full value. She came on hire on July 4, 1914 and the first month's hire was paid; she was sub-chartered by the defendants, and she proceeded to the Baltic and was loading a cargo for the sub-charterers at a port in Finland when war broke out. In consequence of orders of the Russian authorities she was not allowed to leave. She was quite uninsurable against war risks. On August 5, when she was partly loaded, the defendants purported to cancel the charter, reserving certain claims. The Court of Appeal held that the enforced delay was of such indefinite duration as completely to frustrate the commercial adventure and that the contract was consequently determined and the shipowners not entitled to the hire claimed.

Charter-party.

Restraint of princes.

(I) Actual restraint.

In another case [*Admiral Shipping Co., Ltd.* v. *Weidner, Hopkins & Co.*, 1917, 1 K.B. 222] a vessel was chartered for two Baltic rounds. Restraint of

princes was included in the mutual exception clause. The charter-party also provided for cancellation by the charterers in the event of war affecting the working of the steamer. The hire of the vessel was paid by the charterers to the owners in advance up to August 14, 1914. On August 2 the Russian Government detained the vessel, war having broken out between Russia and Germany on August 1, and the owners directed the captain to remain in port. On August 28 the British Consul at the port repatriated the crew. No notice of cancellation was given. It was held by the Court of Appeal that as the charterers had been deprived of the use of the vessel for an indefinite period the contract comprised in the charter-party had become impossible of performance and both parties were excused from further performance. In the Court the cause of the vessel's detention was held to be due to restraint of princes, but the decision of that Court was reversed.

(E) Contracts with War Clauses.

Recent cases:

Charter-party.

Restraint of princes.

(1) Actual restraint.

(2) *Potential as distinguished from Actual Restraint*

Two earlier cases can be mentioned here to illustrate how a restraint existing though not actually imposed can amount to a restraint of princes.

(2) Potential not actual restraint.

The case of *Rodocanachi* v. *Elliott* [L.R. 9 C.P. 518] establishes that an actual seizure of goods during war time is not necessary so long as the goods can be said to be seized for all effective purposes. In the case the goods were in transit from Marseilles to London and had to pass through Paris. On their way they came within the lines of the German army by which Paris was then completely invested, and

(E) Contracts with War Clauses.

Recent cases :

Charter-party.

in consequence the goods could not be moved, and were as effectually prevented from coming out as if they had been actually seized by the German army. It was held that under those circumstances there was a constructive total loss by restraint of princes.

Another case to be considered in connection with this subject arose out of the late war between China and Japan. [*Nobel's Explosives Co., Ltd.* v *Jenkins & Co.* 1896, 2 Q.B. 326.] The action was brought to recover damages for the non-delivery at Yokohama of explosives admitted to be contraband of war after war had been declared between China and Japan. The goods were shipped in London by the defendants' steamer under a bill of lading which excepted "restraints of princes" and which provided that "in case of the blockade of the port of discharge, or if the entering of or discharging in the port shall be considered by the master unsafe by reason of war" the master might land the goods at the nearest safe port. The vessel arrived at Hongkong and anchored there flying a red flag. In that port were revenue cruisers of the Chinese Government, and within sight two Chinese war-vessels. Other war-vessels were near the port. *Mathew J.* in giving judgment for the defendants remarked—

Restraint of princes.

(2) Potential not actual restraint.

> "The war-ships of the Chinese Government were in such a position as to render the sailing of the steamer with contraband of war on board a matter of great danger, though she might have got away safely. The restraint was not temporary, as was contended by the plaintiff's Counsel. There was no reason to expect that the obstacles in the way of the vessel would have been removed in any reasonable time. I find that the Captain in refusing to carry the goods further acted

reasonably and prudently, and that the delivery of the goods at Yokohama was prevented by 'restraints of princes and rulers' within the meaning of the exception."

(E) Contracts with War Clauses.

Recent cases:

Charter-party.

It is a question whether these remarks are not now virtually over-ruled by the House of Lords. [*The Svorono*, 1917, 33 T.L.R. at p. 416, *per Sir S. Evans.*] The case of *Millar* v. *Law Accident Insurance Co.* [1903, 1 K.B. 712] is an authority for the proposition that potential as distinguished from actual physical force is sufficient to constitute a "restraint."

Restraint of princes.

(3) *By Operation of Law*

(3) By operation of law.

The next case (one of marine insurance) supports the view that illegality in continuing the adventure is, in face of war, a restraint of princes. [*British & Foreign Marine Insurance Co., Ltd.* v. *Sanday & Co.*, 1916, A.C. 650.] The plaintiffs, who were British subjects, were the owners of goods shipped on board two British vessels bound from the river Plate to Hamburg. The cargoes were sold to German buyers, but upon terms that the property was not to pass till delivery. They were insured with the defendants by two policies covering risks including "takings at sea, arrests, restraints and detainments of all kings, princes and people." The policy was in a printed form containing the f.c.s. clause, but this clause had been struck out in consideration of an extra premium. Policies and voyage were entered into before the outbreak of war. A few days after the outbreak of war both vessels altered their course from Hamburg to British ports—Glasgow and Falmouth. The owners

(E) Contracts with War Clauses.

Recent cases :

Charter-party.

of the cargoes gave notices of abandonment and claimed from the underwriters the value of the cargoes as on a constructive total loss occasioned by the "restraint of kings, princes and people."

The defendants contended (*inter alia*) that there was no such restraint.

Restraint of princes.

Bailhache J. and the majority of the Court of Appeal held as a fact that the masters of the vessels voluntarily altered their course without physical compulsion and because further prosecution of the voyage would be illegal.

(3) By operation of law.

On the authority of *Esposito* v. *Bowden* [7 E. & B. at p. 81] it was held that the declaration of war was an Act of State making trading with Germany illegal, and that such Act of State was a forcible intervention *manu forti*, and that such intervention was a "restraint of princes" within the meaning of the policy, and so it was decided that the owners could recover the insured values.

Swinfen Eady L.J. dissented from this view, and a writer in a recent article has likened the reasoning of the Appeal Court to "The house that Jack built," and submits that the apparent logical necessity of the judgment in fact is not altogether convincing [59 *Sol. J.*, 454], but, be that as it may, the "house that Jack built" seems to have been substantial, for the Law Lords, in upholding the decision of the Court of Appeal, held that the policies were an insurance not merely of the actual merchandise from injury, but also an insurance of its safe arrival—*e. g.*, the adventure itself: that the plaintiffs were irretrievably deprived of the adventure

(E) Contracts with War Clauses.

Recent cases :

Charter-party.

because all prospect of safe arrival on the voyage to Germany was hopelessly frustrated, and that the assured party reasonably abandoned because actual total loss appeared to be unavoidable. A further case supporting the same view may be consulted. [*Associated Oil Carriers, Ltd.* v. *Union Insurance Society of Canton, Ltd.*, 1917, 2 K.B. 184, cited at p. 129, *post.*]

Restraint of princes.

(4) *Apprehension of Restraint*

(4) Apprehension of restraint.

In *Sanday & Co's* case cited *supra* the following *dictum of Bailhache J.* was accepted as correctly stating the law :—

> " When once it is admitted that force is not necessary to constitute restraint of princes it is clear that a shipowner who keeps his vessel at home or diverts her to a home port in obedience to such a proclamation is not taking steps to avoid that particular peril, but is submitting to its operation . . . in such a case restraint of princes is the proximate cause of loss."

Coming to the cases that may be said to distinguish between an existing restraint and a mere apprehension of restraint of princes reference should be made to a case that arose out of the war in 1870 between France and Germany [*Anderson* v. *The Owners S.S. San Roman*, L.R. 5 P.C. 301]. The plaintiffs as owners of a cargo on board the defendants' steamer sued for recovery of damages in respect of deprivation for a long time of the cargo and consequent depreciation thereof. The charter-party excepted " restraints of princes and rulers." While the vessel was at Valparaiso undergoing the necessary repairs

(E) Contracts with War Clauses.

Recent cases :

Charter-party.

Restraint of princes.

(4) Apprehension of restraint.

war broke out between France and Germany. French armed cruisers were in, and in the neighbourhood of, the port, in consequence of which the vessel was unable to leave the port for some time. The Privy Council, in upholding the decision of the Court of Admiralty dismissing the suit, approved of the following *dictum* as correctly stating the law of England : "An apprehension of capture founded on circumstances calculated to affect the mind of a Master of ordinary courage, judgment, and experience, would justify delay," and on the facts held there was a sufficient risk of capture to justify the delay. It is difficult on the facts to distinguish this case from *Noebel's* case (cited at p. 56, *ante*), but, in view of the wording of the *dictum* that the Privy Council approved of, it is set out here as showing that the Courts can recognize apprehension of restraint as falling within a clause dealing with restraint of princes. An important House of Lords decision during the present war has however occasioned some doubt, it is thought, as to whether that Tribunal is prepared to admit as sound the proposition that an apprehension of a restraint can, at law, be equivalent to a restraint. [*Mitsui & Co., Ltd.* v. *Watts, Watts & Co.*, 1915, 32 T.L.R. 288; C.A. 1916, 2 K.B. 826; H.L., 1917, A.C. 227.] The facts are important. By a charter-party dated June 1914 the defendants agreed to provide a steamer to proceed to Marioupol, a port on the sea of Azov, and there load a cargo and to carry it to Japan for delivery there. The name of the steamer was to be declared at least twenty-one days before the expected

(E) Contracts with War Clauses.

Recent cases :

Charter-party.

Restraint of princes.

(4) Apprehension of restraint.

date of readiness. The charterers had the option of cancelling the charter if the vessel was not ready to load by September 20, 1914. The charter-party included in its exceptions clause arrests and restraints of princes. At the beginning of August war broke out between Germany and Great Britain, Russia, and France. Turkey, who had control of the Dardanelles, through which the vessel would have to pass on her voyage to Japan, did not enter into the war until November 1914. There was, however, at this time no activity on Germany's part in the Black Sea or in the passage from the Black Sea to the Mediterranean or in the Levant. Between the 1st and the 26th September, 1914, various ships passed inwards and outwards through the Dardanelles. On the 26th, however, the Dardanelles were finally closed and up to the time of the action had never been opened. On the 5th November Great Britain declared war against Turkey. The plaintiffs, through their brokers, on the 1st of September requested that the name of the steamer should be declared. The defendants replied on the same day that the charter-party must be considered cancelled, alleging as a reason that the British Government had prohibited steamers from going to the Black Sea to load. No such prohibition had in fact been made. The plaintiffs sued the charterers for not providing a steamer according to the charter-party. The defence was that on the reasonable apprehension of Turkey becoming involved in the war, and of the Dardanelles being thereupon closed, the shipowners were justified by reason of the exception of arrests and restraints

(E) Contracts with War Clauses.

Recent cases :

Charter-party.

Restraint of princes.

(4) Apprehension of restraint.

of princes in not sending a vessel to load. *Bailhache J.* held on the point under discussion that (1) there was no justification for the breach, and (2) that if the steamship had been provided at Marioupol the charterers could have insured the goods for Japan and that they had lost the chance of doing so owing to the shipowner's default. The Court of Appeal affirmed *Bailhache J.'s* findings save on the question of the measure of damages. The House of Lords accepted similarly these findings as correct. As to what constituted a restraint of princes the Law Lords did not attempt to lay down any definite rule of law in distinguishing between mere "apprehension" of war and restraint of princes.

Lord Finlay L.C., remarked :—

> "There was a reasonable apprehension that the Dardanelles might be closed, but such an apprehension does not constitute a restraint of princes. To bring the case within the exception there must be an actual restraint in existence."

Lord Dunedin observed :—

> "Restraint of princes, to fall within the words of the exception, must be an existing fact and not a mere apprehension. This was held long ago by Lord Ellenborough in *Atkinson* [10 East, 530]. The more recent cases cited by the appellants, such as *Geipel* [L.R., 7 Q.B. 404] and *Nobel's Explosives* [1896, 2 Q.B. 326], do not in any way touch that proposition. They only show that it may be possible to invoke the exception when a reasonable man in face of an existing restraint may consider that the restraint, though it does not affect him at the moment, will do so if he continue the adventure. It would be useless to try to fix by definition the precise imminence of peril which would make the restraint a

present fact as contrasted with a future fear. The circumstances in each particular case must be considered."

(E) Contracts with War Clauses.

Earl Loreburn approved of the last expression of Lord Dunedin, and added :—

Recent cases :

"No form of words is likely to cover automatically all contingencies."

Charter-party.

The learned Earl also remarked :—

Restraint of princes.

"It is true that mere apprehension will not suffice, but on the other hand it has never been held that a ship must continue her voyage till physical force is actually exercised."

(4) Apprehension of restraint.

Lord Summer is reported as having said :—

"The reasonable apprehension of a prudent man and the inutility of doing something which cannot lead to any good result are considerations material in deciding at what distance of time or over what area an existing restraint of princes may be deemed to be operative so as to restrain, but restraints in themselves they are not. The appellants admit that apprehension alone will not suffice, and say that the shipowner must take the risk of his fears being justified by the event. This argument converts a provision stipulating the effects of the operation of certain clauses into a speculation upon the chances of their coming into operation. To some of the excepted matters, for example, fire, explosions, or collisions, such a contention is obviously unfitted. In any case its application would lead to the interpolation of a period of suspense during which neither party could be certain of his rights until the course of events determined the speculation in one way or the other."

From the *dicta* set out one remains in doubt as to whether an apprehension of restraint is sufficient to call in aid the exception clause. The Lord Chan-

(E) Contracts with War Clauses.

Recent cases :

Charter-party.

Restraint of princes.

(4) Apprehension of restraint.

cellor distinctly says that an apprehension does not constitute a restraint. Lord Dunedin, Lord Loreburn and Lord Sumner say the same, but they appear to have approved of and followed the language to a certain extent of the two earlier cases, and have therefore, so to speak, left a door open to invoking that doctrine when the facts are sufficiently strong to establish a proximate restraint pending and almost certainly to be imposed. A pertinent criticism of these judgments of the Law Lords has been thus put :—

> "I do not find it easy to evolve from the opinions expressed in the House of Lords a clear formula embodying a principle applicable to all cases. Apparently all the learned Lords expressed the view that there must be an existing restraint to justify a reliance upon the exception as a defence to the non-performance of a contract; but while all of them speak of the necessity for an existing restraint, they do not appear to express the same views on the question whether an apprehension or a reasonable apprehension of peril from the restraint of princes constitutes a restraint within the meaning of the exception clause." [*Per Sir S. Evans* in *The Svorono*. 1917, 33 T.L.R. 415.]

The passage of a vessel through the Dardanelles led to an earlier case than that last cited, in which an actual state of war was in existence at the time of the apprehension of restraint. [*Embiricos* v. *Sydney Reid & Co.*, 1914, 3 K.B 45.] The case arose out of the Greco-Turkish war of 1912. The plaintiffs, by a charter-party made with the defendants before war, agreed that a vessel of theirs should proceed to the Sea of Azoff, there load a cargo of grain, and carry it to a port in the United Kingdom. The charter-

party contained a clause excepting the "restraint of princes."

(E) Contracts with War Clauses.

The ship arrived just before war at her port and commenced to load. War was subsequently declared before the expiry of the lay days.

Recent cases:

The defendants then cancelled the charter-party as the ship was liable to be seized as a Greek vessel by the Turkish authorities if she attempted to pass the Dardanelles. It was held that the defendants were justified in doing so, not only in view of the possible capture, but also because of the consequent inability of the plaintiffs to perform their duty under the contract of carrying the cargo to its destination.

Charter-party.

Restraint of princes.

(4) Apprehension of restraint.

When at the time of the apprehension of restraint the owners have to nominate the vessel a recent case raised the question whether a tender should first be made before reliance can be placed on the exception of restraint of princes. [*Phosphate Mining Co.* v. *Raukin, Gilmour & Co.*, 1915, 115 L.T. 211; 21 Com. C. 248.] The facts were these:—

Whether tender of vessel necessary before clause applies?

The defendant ship-owners, in 1913, agreed to supply a steam vessel (to be nominated) for carriage of goods up the river Ems. During the war the Germans had full control over the fairways of the Ems. Freights had risen enormously. The defendants refused to tender a vessel, maintaining that they need only nominate one of their own vessels, and having done so to rely on the exception clause. The plaintiffs argued that the exception clause did not come into operation until a steamer was nominated.

Bailhache J. held that as the defendants contracted not as owners, but as contractors, it was not sufficient

(E) Contracts with War Clauses.

Recent cases :

Charter-party.

Restraint of princes.

(4) Apprehension of restraint.

for them merely to nominate one of their own vessels and not try to procure another steamer in the market ; but that, on the other hand, it was not necessary that a steamer should have been nominated for the exceptions clause to come into operation, since such a conclusion would leave the defendants without excuse if the operation of the exception were such that it was impossible to procure any steamer which could, or would undertake the voyage. The learned Judge then proceeded to pass to the question, "Were the defendants prevented from procuring a steamer to perform the contractual voyage?" and said :—

Whether tender of vessel necessary before clause applies ?

> "The limits of the endeavours which the defendants were bound to make to procure some steamer to carry the plaintiffs' phosphates are indicated by a passage in the judgment of Lord Esher in *Crawford & Rowat* v. *Wilson, Sons & Co* [1 Com. Cas. 277 at p. 280], which, if I may paraphrase it so as to make it applicable to the precise facts of this case, would then read thus : 'if owing to an excepted peril the defendants could not provide a steamer without doing something which it was wholly unreasonable they should be called upon to do, they would be prevented, although by doing the unreasonable thing they might possibly have provided a steamer.'"

The learned Judge, applying this test to the facts of the case, which showed enormous rise in freights, insurance rates difficult to procure, possible fear of loss of cargo and non-earning of freight, held that the defendants were not liable.

It is submitted that on these authorities a restraint of princes can be as under :—

Summary.

(1) An existing restraint physically imposed on the subject matter of the contract and

obstructing the course of the adventure and the further carrying out of the contract.

(E) Contracts with War Clauses.

(2) An existing restraint stopping short of a physical imposition, but of such force and proximity that the adventure is effectually stayed. In short, potential as distinguished from an actual restraint.

Recent cases: Charter-party.

(3) An existing restraint which by operation of law *ipso facto* and forthwith makes illegal the further continuance of the adventure, such as a declaration of war.

Restraint of princes. Summary.

(4) An existing restraint of a physical nature not yet imposed on the subject matter of the contract, but so very proximate and so placed as to make it practically certain that to move from the momentary situation of safety will be to attract in the immediate future an imposition of that power. Such a state of affairs may be treated as an actual restraint, or can be perhaps termed an apprehension of restraint, but when the threatened restraint is in point of degree less close at hand but still proximate and apt to grow more so if the adventure is persisted in, then such a state of affairs can be more correctly termed an apprehension of restraint as opposed to a restraint. An apprehension of restraint justifies the abandonment of the undertaking only when it can be found that the person taking that step acted in view of all the material circumstances prevailing at the time as an ordinary

(E) Contracts with War Clauses.

reasonable and prudent man of courage, experience and judgment would so act.

Recent cases:

(5) Apprehension that at some subsequent time, however near, an actual restraint may come into existence, is not at the material time a restraint in itself at all, or even to be deemed to amount to one, even though after-events may justify that apprehension.

Charter-party.

Restraint of princes.

Summary.

The Defence of the Realm Regulations (see Chap. VI) make provision for powers to interfere with shipping, which, if enforced, may be perhaps construed some day as a restraint of princes.

The question as to what is a restraint of princes leads into another question as to whether the adventure has been frustrated thereby, and the doctrine of frustration is bound up with the general law of contract as to supervening impossibility making performance of the contract impossible. The doctrine of frustration is more fully dealt with later (see p. 271).

Requisitionment.

Requisitionment of chartered vessels by Government is a form of restraint of princes. It is now proposed to survey all the cases under that head.

REQUISITIONMENT OF CHARTERED VESSEL

As to what is a "requisition" of a ship, there is no magic in the word. It does not connote the same state of things in every particular case. It may be nothing more than a hiring of the ship, and the owner has no alternative as to whether he will accept the proposition of hiring or not, but the vessel is, after all,

(E) Contracts with War Clauses.

Recent cases:

Charter-party.

Restraint of princes

Requisitionment.

a hired ship. It does not take the property of the ship out of the owner and vest it in the Crown. [*The Broadmayne*, 1916, P. 64.] The power to requisition vessels would appear to be a prerogative of the Crown when it is necessary to requisition them in times of war or invasion—"*Salus republicae suprema lex*" (see *In re A Petition of Right*, 1915, 3 K.B. 649, where the old cases are collected). Regulation 39 B.B.B. of the Defence of the Realm Regulations (*see* p. 327, *post*) has an important bearing on the power of requisitionment. Various other provisions are to be found in the emergency legislation of to-day for requisitionment (see *Manual of Emergency Legislation*, pp. 90–93, 220–226).

The House of Lords has recently delivered an important judgment [*F. A. Tamplin Steamship Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.*, 1916, 2 A.C. 397] as to the effect of Government requisitioning a steamer under charter. The facts were as follows. A steamer was chartered from the owners for five years, from December 1912, for the carriage of petroleum and crude oil, or its products, the charterers having liberty to sublet the steamer on Admiralty or other service without prejudice to the charter-party; the charterers, however, remaining responsible. An exception clause in the charter-party included restraint of princes. In February, 1915, the British Government requisitioned the steamer for Admiralty transport service, and she was then fitted up and used for the transportation of troops. Up to the hearing of the case the steamer was still being used by the Government. No one

(E) Contracts with War Clauses.

Recent cases:

Charter-party.

Restraint of princes.

Requisitionment.

knew how long the Government would continue to use the vessel. On an arbitration it was held that the charter-party came to an end when the steamer was requisitioned. On appeal, *Atkin J.* held that it remained in force. This judgment the Court of Appeal affirmed. [1916, 1 K.B. 485.] The House of Lords (Viscount Haldane and Lord Atkinson dissenting) affirmed the decision of the Court of Appeal.

Lord Loreburn is reported to have observed as follows:—

> "To decide the question it was necessary to ascertain the principle of law which underlay the authorities. He believed it to be that when a lawful contract had been made and there was no default, a Court of Law had no power to discharge either party from the performance of it unless either the rights of some one else or some Act of Parliament gave the necessary jurisdiction. But a Court could 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 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 would be implied, though it were not expressed in the contract. In applying that rule it was manifest that such a term could rarely be implied except where the discontinuance was such as to upset altogether the purpose of the contract. Some delay or some change was very common in all human affairs, and it could not be supposed that any bargain had been made on the tacit condition that such a thing would not happen in any degree.
>
> "In the recent case of *Horlock* v. *Beal* [1916, 1 A.C., 486] this House considered the law on the subject, and previous decisions were fully reviewed, especially in the opinion delivered by Lord Atkinson. An examination of those decisions confirmed him in

(E) Contracts with War Clauses.

the view that, when the Court had held innocent contracting parties absolved from further performance of their promises, it had been on the ground that there was an implied term in the contract which entitled them to be absolved. Sometimes it was put that performance had become impossible and that the party concerned did not promise to perform an impossibility. Sometimes it was put that the parties contemplated a certain state of things which fell out otherwise. In most of the cases it was said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them he thought that was at bottom the principle upon which the Court proceeded. It was in his opinion the true principle, for no Court had an absolving power, but it could infer from the nature of the contract and the surrounding circumstances that a condition which was not expressed was a foundation on which the parties contracted.

Recent cases:

Charter-party.

Restraint of princes.

Requisitionment.

"When the question arose in regard to commercial contracts, as happened in *Geipel* v. *Smith* [L.R. 7 Q.B., 404], and *Jackson* v. *Union Marine Insurance Company* [L.R. 10 C.P., 125] the principle was the same, and the language used as to 'frustration of the adventure' merely adapted it to the class of cases in hand. In these cases it was held, to use the language of Lord Blackburn, 'that a delay in carrying out a charter-party, caused by something for which neither party was responsible, if so great and long as to make it unreasonable to require the parties to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at an end.'

"That seemed to him another way of saying that from the nature of the contract it could not be supposed that the parties, as reasonable men, intended it to be binding on them under such altered conditions. Were the altered conditions such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said, 'If that happens, of course, it is all over with us'? What, in fact, was the true meaning of the contract? Since the parties had not provided for the contingency, ought a Court to say

(E) Contracts with War Clauses.

Recent cases:

Charter-party.

Restraint of princes.

Requisitionment.

that it was obvious that they would have treated the thing as at an end?

"Applying the principle to the present case, he found that the contracting parties stipulated for the use of the ship during a period of five years, which would naturally cover the duration of many voyages. Certainly both sides expected that these years would be years of peace. They also expected, no doubt, that they would be left in joint control of the ship, as agreed, and that they would not be deprived of it by any act of State. But he could not say that the continuance of peace or freedom from any interruption in their use of the vessel was a tacit condition of this contract. On the contrary, one, at all events, of the parties might probably have thought, if he thought of it at all, that war would enhance the value of the contract, and both would have been considerably surprised to be told that interruption for a few months was to release them both from a time-charter that was to last five years. On the other hand, if the interruption could be pronounced, in the language of Lord Blackburn already cited, 'so great and long as to make it unreasonable to require the parties to go on with the adventure,' then it would be different. Both of them must have contracted on the footing that such an interruption as that would not take place, and he would imply a condition to that effect.

"Taking into account, however, all that had happened, he could not infer that the interruption either had been or would be in this case such as made it unreasonable to require the parties to go on. There might be many months during which this ship would be available for commercial purposes before the five years had expired. It might be a valuable right for the charterer during those months to have the use of the ship at the stipulated freight. Why should he be deprived of it? No one could say that he would or that he would not regain the use of the ship, for it depended on contingencies which were incalculable. The owner would continue to receive the freight he bargained for so long as the contract entitled him to it, and if, during the time for which the charterer was entitled to the use of the ship, the owner received from the Government any sums of money for the use

of her he would be accountable to the charterer. Should the upshot of it all be loss to either party, and he did not suppose it would be so, then each would lose according as the action of the Crown had deprived either of the benefit he would otherwise have derived from the contract. It might be hard on them, as it was on the plaintiff in *Appleby* v. *Myers* (L.R. 2 C.P., 651). The violent interruption of a contract always might damage one or both of the contracting parties. Any interruption did so. Loss might arise to some one whether it were decided that these people were, or that they were not, still bound by the charter-party. But the test for answering that question was not the loss that either might suffer. It was this: Ought the Court to imply a condition in the contract that an interruption such as this should excuse the parties from further performance of it? He thought not. He thought they took their chance of lesser interruptions, and the condition that he would imply went no further than that they should be excused if substantially the whole contract became impossible of performance, or, in other words, impracticable by some cause for which neither was responsible.

"Accordingly he was of opinion that the charter-party did not come to an end when the steamer was requisitioned and that the requisition did not suspend it or affect the rights of the owners or charterers under it, and that the appeal failed. If it were established that this ship would be used by the Government for substantially the remainder of the five years he would be of a different opinion."

(E) Contracts with War Clauses.

Recent cases:

Charter-party.

Restraint of princes.

Requisitionment.

The statement of law by Lord Parker should also be borne in mind (see p. 153, *post*).

The principles of law reviewed and restated by the Law Lords in the *Tamplin Case* are unquestionably correct. But the result reached in that decision has occasioned in practice some difficulty as will be seen by later decisions, which though adopting the law as laid down by the House of Lords have arrived at opposite conclusions on the facts.

(E) Contracts with War Clauses.

Recent cases:

Charter-party.

Restraint of princes.

Requisitionment.

In considering the effect of requisitioning of steamers under charter upon the charter-party it would appear that no difference of principle exists whether the charter-party be a voyage or a time charter-party (see *Bailhache J.*'s views at p. 79, *post*). Lord Parker had rather doubted this in the *Tamplin Case* [1916, 2 A.C. 397], and other Judges had shared those doubts [see *Lloyd Royal Belge Société Anonyme* v. *Stathatos*, 1917, 33 T.L.R. 390]. The chief difficulty in considering the subject of requisitionment comes to a head when an attempt is made to arrive at an estimate as to what length of suspension of a charter-party by Government requisitionment is sufficient in fact to put an end to it at law.

It is clear that one can start with the proposition that the interruption must bear in regard to time a very considerable proportion to the length of life of the particular charter-party, for Lord Blackburn observes, as pointed out above, that it must be "so great and so long as to make it unreasonable to require the parties to go on with the adventure." When the vessel taken up has been released it is tolerably easy for a Court to compare the length of the Government user with the length of time of the charter-party, and to decide as to whether the interruption would be such as a reasonable and prudent man of business would consider to come within Lord Blackburn's *dictum*.

When, however, the vessel still remains under Government control at the time of hearing, or when the action on the charter-party is brought, the *dictum*

is not of much assistance, and a more precise test is required to arrive at a correct answer to the problem.

(E) Contracts with War Clauses.

It is almost impossible to be able to establish by evidence the duration of the compulsory user of the vessel, for it is difficult to conceive how Government can be able to state how long they will require the vessel. The war has lasted so long, and the necessity for requisitioning so ever-growing, that it would seem only reasonable for Courts to draw a fair inference that once a vessel is taken up her return in the near future is highly improbable. The end of the war does not necessarily mean every vessel's return, for after the war many vessels will still be required, and one cannot predicate with any certainty the return of any particular steamship. Indeed the Ministry of Shipping has by a Press Notice of the 19th June, 1917, notified those who are arranging for the charter of British vessels for use after the war that such persons can have no assurance that national requirements will admit of effect being given to such arrangements when the time comes (see *The Times*). It is submitted that it is permissible to allow for a continuance of the forced user *in futuro* for an indefinite period, and there would appear to be authority for this view, for it has frequently been remarked of a state of war generally that the continuance of war is too uncertain to be regarded as temporary.

Recent cases:

Charter party.

Restraint of princes.

Requisitionment.

"A state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants as to defeat and destroy the object of a commercial adventure like this." [*Per Lush J.* in *Geipel* v. *Smith*, L.R. 7 Q.B. 404.] "The more con-

(E) Contracts with War Clauses.

Recent cases:

Charter-party.

Restraint of princes.

Requisitionment.

venient course for both parties seems to be that both should be at once absolved, so that each, on becoming aware of the fact of a war, the end of which cannot be foreseen, making the voyage or the shipment presumably illegal for an indefinite period, may at once be at liberty to engage in another adventure without waiting for the bare possibility of the war coming to an end in sufficient time to allow of the contract being fulfilled, or some other opportunity of lawfully performing the contract perchance arising." [*Esposito* v. *Bowden*, 7 E. & B. 763 at p. 792.]

No doubt the last *dictum* was made in a case where it had become illegal to continue the adventure, but that seems scarcely sufficient distinction for not applying the same principle to an interruption of a charter-party by a physical restraint such as requisitionment. Lord Atkinson has said: "It is not necessary to wait till the delay has occurred. It is legitimate to come to the conclusion that the delay caused by war will be so long and so disturbing to commerce as to defeat the adventure and to act accordingly at once" [*Tamplin Case*, 1916, 1 A.C. at p. 507]; and Lord Shaw has said in the same case: "The stoppage and loss having arisen from a declaration of war must be considered to have been caused for a period of indefinite duration, and so to have effected a solution of the contract arrangements for and dependent upon the completion or further continuance of the adventure." Lord Haldane also agreed in the same case to the same principle when he observed: "It is impossible for any Court to speculate as to the duration of the war,

on which the Admiralty requirements may depend. It is enough that events which are of public notoriety indicate the duration as one about which there is no apparent certainty of which a Court of Justice can take cognizance" (*idem* at p. 411).

(E) Contracts with War Clauses.

Recent cases:

How much greater is that public notoriety now?

Charter-party.

One may therefore, it is submitted, assume a further proposition as sound, namely that the interruption to a charter-party by Government requisitionment owing to the present war is not a mere temporary interruption and can be presumed to last long enough so as to make it safe to say as between business men, "We cannot speculate as to how long the vessel will be used by Government. It may be for years, and though we may have months, or even years left before the charter ordinarily would expire, we must not drift on with only the chance of the war coming to an end within such time as to leave us a substantial period of time for the charter-party to be commercially operative."

Restraint of princes.

Requisitionment.

If this submission is correct law there would be little disagreement that the *Tamplin Case* would have been decided otherwise and more in line with the numerous cases that followed it. But the *Tamplin Case* did not so decide, and therein lies the great difficulty and the chief objection to such a submission.

The other cases that followed have held various periods of interruption by requisitioning to have been sufficient to frustrate the adventure in their particular circumstances. [*Scottish Navigation Co., Ltd.* v. *Souter & Co.*; *Admiral Shipping Co., Ltd.* v. *Weidner, Hopkins & Co.*, C.A. 1917, 1 K.B. 222; 34 T.L.R. 27, C.A.]

(E) Contracts with War Clauses.

Recent cases:

Charter-party.

Restraint of princes.

Requisitionment.

The whole question has been examined by *Bailhache J.* in another charter-party case [*Anglo Northern Trading Co.* v. *Emlyn Jones & Williams*, 1917, 2 K.B. 78], since affirmed [34 T.L.R. 27]. The plaintiffs, the owners, let a vessel to the defendants for "the term of about 11 or 12 calendar months" from the time the steamer was delivered and placed at the disposal of the charterers. Hire was to be paid monthly in advance. In default of payment the owners had the power of withdrawing the vessel without prejudice to their rights under the charter. Losses or damages were absolutely excepted if occasioned by "restraints of princes." The charter-party was in the Baltic and White Sea Conference form, giving the charterers a wide choice of purposes for which the ship might be used by them. The steamer was delivered, but owing to a survey the charter-party was extended by a month and 19 days. On July 26, 1916, the steamer was requisitioned and this displacement of her chartered use continued till the time ran out. The Admiralty paid a rate of hire much less than the chartered rate.

The charterers paid in advance for the month ending July 28, 1916, but made no further payments. The owners claimed for the amount due under the charter-party and were willing to set off the amount received from the Admiralty contending that the requisitionment had not put an end to the charter-party. On arbitration it was held, subject to the Court's opinion, that the charter-party was not ended, and the award was for the owners for the nett amount claimed.

The matter then came before *Bailhache J.*

The defendants contended that the doctrine of frustration of adventure applied to a time-charter. The owners argued *contra*. *Bailhache J.*, urged by the consideration that the decisions were conflicting and that it was desirable for some intelligible principle to be stated for the commercial community, delivered a considered judgment in which he held that the doctrine did apply to a time-charter and that the adventure was frustrated, and that the requisitionment was a restraint of princes.

In dealing with the authorities the learned Judge is reported to have observed that the law at present stood thus:—

"(1) The doctrine of commercial frustration is applicable to a time charter-party: see *per* Lords Loreburn, Haldane, and Atkinson in *Tamplin's Case* [1916, 2 A.C. 397], and the subsequent decision of the Court of Appeal in *Souter's Case* [1917, 1 K.B. 222]. I think it impossible to hold, as is sometimes contended, that the last-mentioned decisions turned solely upon the conclusion of the Court of Appeal that the charter-parties in those cases were voyage and not time charter-parties. (See especially the judgment of Lawrence J. at p. 249.)

"(2) The doctrine does not apply when the time charterer has the use of the vessel for some purpose for which he is under the terms of the time charter-party entitled to use her even though that purpose is not the particular purpose for which he desires to use her. [*Brown* v. *Turner, Brightman & Co.*, 1912, A.C. 12.] I think that, in so far as the decision in *Weidner, Hopkins' Case* [1917, 1 K.B. 222] seems contrary to this view, that part of the decision is founded upon the fact that Swinfen Eady and Bankes L.JJ., considered that the charter-party in that case was a voyage and not a time charter-party. I am aware that the judgment of Lawrence J. in that

(E) Contracts with War Clauses.

case cannot be explained on this ground, but, with every respect for any judgment of his, I think the law is as I have stated it.

Recent cases :

"(3) It follows that the doctrine does not apply unless the owner is unable to give the time charterer the use of the vessel for any purpose whatever within the scope of the charter-party.

Charter-party.

"(4) Whether in a given case the doctrine of frustration of adventure is to be applied to a particular time charter-party depends upon the circumstances. The main consideration is the probable length of the total deprivation of use of the vessel as compared with the unexpired duration of the charter-party.

Restraint of princes.

Requisitionment.

"(5) That raises another question—namely, when is the party desirous of relying upon the doctrine of frustration in a position to claim his right so to do? If he does so as soon as the event happens which in his view gives him the right, its duration must be a matter of estimate depending chiefly on the nature of the event. The particular event with which I am concerned in this case is a requisition of the vessel by the Admiralty for an undefined period.

"Now there is nothing more repugnant to business men who have to look ahead and make their arrangements in advance than uncertainty as to their engagements already made. Doubt as to their contractual obligations paralyses business, and I think that in time charter-parties where hire is periodically payable, and failure to pay may entail the withdrawal of the vessel, and payment and acceptance of the hire, if not a waiver of the right to rely upon frustration, at any rate extend the period of suspense, the parties must have the right to claim that the charter-party is determined by frustration as soon as the event upon which the claim is based happens. The question will then be: What estimate would a reasonable man of business take of the probable length of the withdrawal of the vessel from service with such materials as are before him, including, of course, the cause of the withdrawal, and it will be immaterial whether his anticipation is justified or falsified by the event. This view is, I think, supported by such cases as *Geipel* v. *Smith* [L.R. 7 Q.B. 404]; *Notara* v. *Henderson* [L.R. 7 Q.B. 225, at p. 237];

The Savona [1900, P. 252, at p. 259]; and *Embiricos* v. *Reid & Co.* [1914, 3 K.B. 45].

(E) Contracts with War Clauses.

"I should entertain no doubt of its accuracy but for the decision of the Court of Appeal in *Andrew Millar & Co.* v. *Taylor & Co.* [1916, 1 K.B. 402], which seems to point the other way, and to indicate that the proper attitude to adopt is 'Wait and see.' That is not, however, a charter-party case, and for the reason given does not, in my opinion, apply to time charter-parties.

Recent cases:

Charter-party.

"(6) The decision of the Court of Appeal in the *Duneric Case* [1917, 1 K.B. 370] does not appear to have any material bearing on the matter in hand. Mr. Roche in support of the appeal expressly disclaimed any reliance upon the doctrine of frustration of the adventure. A good deal of confusion has been caused by misapprehension of this case and treating it as an authority on frustration of adventure.

Restraint of princes.

Requisitionment.

"These conclusions, if sound, are, I think, sufficient for practical guidance. If the principles I have stated are correct, commercial men will not care to inquire how they are arrived at, but lawyers may feel some surprise that I quote as my authority for the proposition that the doctrine of frustration of adventure applies to a time charter-party the opinions of Lords Haldane and Atkinson, who formed the dissentient minority in *Tamplin's Case* [1916, 2 A.C. 397], and not those of Lords Buckmaster and Parker, who with Lord Loreburn formed the majority in that case. The reason is that, as I understand it, the judgment of the Court of Appeal in *Admiral Shipping Company* v. *Weidner, Hopkins & Co.* [1917, 2 K.B. 222] has not followed the line of reasoning taken by Lords Buckmaster and Parker, nor, as I read his speech, did Lord Loreburn.

"The question at issue is the implication into a time charter-party of a clause providing for the determination of the contract by frustration of the adventure, which will not conflict with the express provisions of the contract. The general rule of law is, of course, that no term can be incorporated by implication into a contract which conflicts with some term expressed in the contract. Lord Parker, speaking for himself, and Lord Buckmaster, points this

(E) Contracts with War Clauses.

Recent cases :

Charter-party.

Restraint of princes.

Requisitionment.

out in *Tamplin's Case* (*supra*, at p. 427), where after referring to the terms of the charter-party in that case, terms which are the usual terms in most time charter-parties, and were the same as in *Weidner, Hopkins Case* (*supra*), he says: 'Under these circumstances it appears to me to be difficult, if not impossible, to frame any condition by virtue of which the contract of the parties is at an end without contradicting the express provisions of the contract and defeating the intention of the parties as disclosed by those provisions.' I had pointed out the same difficulty in *Weidner, Hopkins' Case* [1916, 1 K.B. at p. 438] in a passage to which Lord Parker referred and of which he approved. The Court of Appeal in that case expressly say that my view was mistaken. True it is that the majority of the Court of Appeal held that the charter-party there was a voyage and not a time charter-party, but that does not dispose of the difficulty now under consideration. The express terms of that contract being the same in this respect as in the contract in *Tamplin's Case*, the introduction by implication into both contracts of the same term must necessarily cause the same conflict between the express terms and the terms so implied, if conflict there be.

"It is not my purpose to discuss the matter further, still less to endeavour to set up again any opinion of my own against a judgment of the Court of Appeal. I should not indeed have referred to my own view of the matter at all but that its reversal in the Court of Appeal after its approval by Lord Parker seems to be the clearest indication I can get that I am right in saying that, notwithstanding the difficulty felt and expressed by Lord Parker in the passage I have cited, the doctrine of frustration of adventure does apply to a time charter-party."

In line with this view is that of another case of a time charter-party [*Countess of Warwick S.S. Co., Ltd.* v. *Le Nickel Société Anonyme Rubastic*, 1917, 33 T.L.R. 291; 34 T.L.R. 27, C.A.] where the vessel was chartered for not less than 12 calendar

months and after five months' use of the vessel she was requisitioned and the evidence showed that there was no reasonable anticipation of getting her back in the balance of the time. *Sankey J.* held that the doctrine of frustration of adventure was applicable to a time charter and that on the facts there was a frustration and the contract had come to an end. The learned Judge in commenting on the proposition laid down in *Andrew Millar & Co., Ltd.* v. *Taylor & Co.* (cited *supra*), that the parties ought to have waited to see if it was possible for them to fulfil their contract, said that in his view in a case like the one before the Court he ought not to look to what had subsequently happened but to what was the position at the time of requisitionment.

Recent cases :

Charter-party.

Restraint of princes.

Requisitionment.

In a decision a few days later [*Heilgers & Co.* v. *Cambrian Steam Navigation Co., Ltd.*, 33 T.L.R. 348], *Horridge J.* held that a charter-party for 15 months interrupted by requisition when $4\frac{1}{2}$ months only remained to run was avoided. The learned Judge relied on the two cases last mentioned. Two fresh points were urged in this case which the learned Judge dealt with as follows—

"It was further contended that as under transfer form T. 99 the owners of the vessel were allowed by the Government to take the benefit of salvage this showed that the charterers would not entirely lose the use of the vessel, but I do not think this gives them any right to the use of the vessel, but is merely a term by which the Government allow payment of salvage remuneration to the owners.

"Another contention arose on the fact of the Govern-

(E) Contracts with War Clauses.

Recent cases:

ment's having in some cases returned the temporary use of the vessel, but I do not think that charterers could in any way rely on their obtaining this advantage."

Charter-party.

The Court of Appeal have affirmed the judgment of Horridge J. [34 T.L.R. 72].

Restraint of princes.

Requisitionment.

While the foregoing pages were in the press a further case has been decided which deals with some of the submissions already made. The case adds to the difficulties of the law as regards the effect of requisitionment on charter-party arrangements, as the Court held that the charter-parties in the case had not come to an end; that it could not be assumed that the war would last till the termination of the charters; and that no assumption could be made that after the war requisitionment would still continue. [*Chinese Engineering and Mining Co., Ltd.* v. *Sale & Co.*, 1917, 2 K.B. 599.]

The following are the material reported facts:—

The plaintiffs by three charter-parties dated July 29, 1913, December 24, 1913, and July 11, 1914, chartered three steamers, the *Albiana*, the *Wimbledon*, and the *Tungshan*, from the defendants, for periods of five years from the dates of delivery of the ships. The *Albiana* was delivered to the plaintiffs on December 10, 1913, the *Wimbledon* on May 25, 1914, and the *Tungshan* on March 9, 1915. The ships were to be employed between ports in East Asia, and were to be redelivered at the expiration of the charter-parties at Chinwangtao, Shanghai, or Hong-kong at charterers' option. The owners had to pay (*inter alia*) for the insurance of the steamers and maintain them in a

(E) Contracts with War Clauses.

thoroughly efficient state. The charter-party hire for the *Albiana* was £1,170 a month, the *Wimbledon* £1,158 7*s*., and the *Tungshan* £1,129 10*s*. 6*d*.

Recent cases:

The Admiralty requisitioned all three steamers. The *Albiana* was requisitioned on July 6, 1915. She was released by the Admiralty on September 22, 1915, and requisitioned again on December 18, 1916, the Admiralty hire being £1,983 17*s*. a month. The *Wimbledon* was requisitioned on August 7, 1914. She was released on December 24, 1914, and was again requisitioned on January 28, 1916, the Admiralty hire being £2,071 17*s*. a month. The *Tungshan* was requisitioned on January 21, 1916, the Admiralty hire being £2,199 9*s*. a month. She was sunk in the Mediterranean by a submarine, May 15, 1917. The other two ships were still in requisition.

Charter-party.

The Admiralty form of charter-party provided that the steamers were to be employed between such ports in any part of the world as the Admiralty might direct, and that the steamers should be redelivered to the owners at any United Kingdom coal port; that the owners should pay (*inter alia*) for the insurance of the ship; and that the Admiralty should not be liable if the steamer should be lost or damaged by sea risk.

Restraint of princes.

Requisitionment.

The plaintiffs claimed from the defendants the balance of the sums received by the defendants from the Admiralty for the three steamers, and also a declaration that they were entitled to the sums receivable by the defendants from the Admiralty, less the charter-party hire.

The defendants by their defence said that the charter-parties were dissolved by the requisitions and,

(E) Contracts with War Clauses.

alternatively, they counterclaimed for a declaration that the compensation to be received from the Admiralty was divisible between the plaintiffs and the defendants according to their respective rights and interests.

Recent cases :

Charter-party.

Restraint of princes.

Requisitionment.

Evidence was given that the amount payable by the owners for disbursements, especially for the insurance of the ships, when employed by the Admiralty, was very much greater than the amount payable by them when the ships were employed under the charter-parties to the plaintiffs between East Asiatic ports.

The case was tried before *Rowlatt J.*, and that learned Judge is reported to have said—

> "It is essential to bear in mind the nature of the payment which the Admiralty has made, namely, that it is hire for the use of the vessels monthly. The charterers, though they had no possession of these ships under their charter-party, had a valuable contractual interest in their services, for the destruction of which the Crown might justly make compensation. But I have no fund of that kind to deal with, and if the result of the action of the Government has been to destroy the charter-parties, they have destroyed them without providing for compensation to the charterers. They have ignored them, and have put themselves in the position of compulsory charterers direct from the owners, to whom in that case the hire they pay would belong. If, however, the charters are not destroyed the charterers are bound to continue to pay the hire to the owners, and are entitled as between them and the owners to the use of the vessels, and, as pointed out by Lord Loreburn in the *Tamplin Case* [*i.e.* 1916, 2 A.C. 397], the owners must account for any hire received by them for such use.
>
> "It is for these reasons that to determine the ownership of the fund in dispute it is necessary to see whether the action of the Government has destroyed

(E) Contracts with War Clauses.

the charter-parties by virtue of what one may briefly refer to as the doctrine in *Paradine* v. *Jane* [*Aleyn* 26], as developed by modern cases.

Recent cases:

"That doctrine, as a general rule of the law of contracts, must apply to time charters as to other contracts. This was pointed out by my brother Atkin in *Lloyd Royal Belge Société Anonyme* v. *Stathatos* [33 T.L.R. 390]. But there are many kinds of events and circumstances which in different connexions have been held to call the rule into operation. The simplest case of all is where there has been destruction of specific subject matter. There is, however, a very particular and special instance of its application, and that is where all that has happened is delay, but delay certain to be so prolonged as to destroy the possibility of performance of the contract as at all contemplated.

Charter-party.

"Lord Loreburn in the *Tamplin Case* (*supra*) clearly held that if the interruption was bound to eat up the whole time, that would destroy the contract. Furthermore, I think it is settled that this result follows notwithstanding that the event leading to the delay is one the occurrence of which is prevented by an exceptions clause from giving rise to a claim for breach of contract. Lords Loreburn, Haldane, and Atkinson were clearly of that opinion in the *Tamplin Case* (*supra*).

Restraint of princes.

"In these circumstances the practical question which I have to consider is whether the requisition of these steamers, or any one of them, portended when made, or has at any time up to the date of tri come to portend—for I am authorised by the ag ement of the parties so to extend my inquiry—that the Government user would continue for substantially the remainder of the charter period. I use the words of Lord Loreburn in the *Tamplin Case* (*supra*).

Requisitionment.

"Now on the question of time there was evidence before me that the volume of requisitioning has been rapidly growing, and that to-day practically the whole of that class of British vessels with which this case is concerned are under requisition, so that there is very little chance of any of these ships being released during the war. Evidence was also given of statements made in Parliament on behalf of the Ministry

(E) Contracts with War Clauses.

Recent cases:

Charter-party.

Restraint of princes.

Requisitionment.

confirming that view, and it was further suggested that requisitioning, or at least control, of shipping on the same scale would probably continue after the war. But the earliest of these charters to determine, namely, that of the *Athiana*, will not expire until December 1918, and I cannot assume that the war will last till then, nor can I assume that the Government will interfere with these ships after the return of peace. It is true that the ships have been taken for an indefinite time, and that no one can say that this state of affairs will terminate before the charters would have expired even in the case of the latest of them, that of the *Tung han*, which would have continued, had she not been sunk, till March 1920. But I do not think that I am at libert, to look at it in that way. I must approach it as Lord Loreburn did when he said that it must be 'established' that the interference would last substantially to the end of the charter period. On this part of the case I come to the conclusion that none of these charter-parties has come to an end.

"The question remains whether the charterers are entitled to the whole of the Admiralty hire or whether they must share it with the owners. In this case the use of the vessels by the Admiralty is not such as the charterers could have enjoyed themselves under their charter-parties or conferred on others by sub-charters. If that had been the case the Admiralty hire would have been paid for something which it lay exclusively in the hands of the charterers to enjoy or transfer without any right in the owners to object. The compulsory charter to the Admiralty would have been equivalent to a compulsory sub-charter taking effect entirely out of the charterers' interest, and the charterers would have had to be regarded as solely entitled to the position of owners for the purposes of the Admiralty charter-party, and as such solely entitled to the Admiralty hire. Here, however, the Admiralty hire is being paid partly for a use of the vessels to which the charterers were not entitled to put them in return for the hire which they pay to the owners. Therefore, the Admiralty charter takes effect partly out of the interests of the charterers and partly out of that of the owners. In these circumstances the

Admiralty hire must clearly be divided between the two, as was pointed out by Lord Parker in the *Tamplin Case*."

(E) Contracts with War Clauses.

The learned Judge then proceeded to state what the principle of division should be

Recent cases :

"It was agreed that the figures were to be referred, but I think that I ought to give some guidance as to the principle to be followed. The evidence before me showed that the conditions of the Admiralty charter were more onerous to the owner, involving him in higher payments for insurance and other disbursements, than the conditions of the plaintiffs' charters, and this certainly is one element to be considered. I understood Mr. MacKinnon, for the charterers, to suggest that the owners should be compensated for any extra expense of this kind, and that the charterers should take the balance. I do not think that this is correct, nor, if the Admiralty hire were lower than it happens to be in this case, would it always be just to the charterers. I think a proportional division must be made in every case even where the Admiralty hire is less than the hire paid by the time charterers. However small it is, it forms the only fund out of which both parties must be paid for the invasion of their respective rights and interests, and paid *pari passu* in the proper proportions. This proportion must be found by ascertaining as fairly as possible, first, what the owners could properly demand monthly for altering the charter to the Admiralty form, and, secondly, what the charterers could properly demand monthly for the loss of the benefit of the charter.

Charter-party.

Restraint of princes.

Requisitionment.

"The first sum should not only include what is necessary to indemnify the owners against extra expense, but also something to represent what they might reasonably have asked for consenting to alter the charter at all. If they had been free they could have bargained for that. The second sum must not include anything for special loss possibly inflicted upon the charterers by reason of dislocation of the trade for which they happened in fact to require the ships, but must be fixed on the basis of the value of the ships' services pursuant to the time charters in

(E) Contracts with War Clauses.

Recent cases:

Charter party.

Restraint of princes.

Requisitionment.

the tonnage market. The ratio between the two sums will be the ratio in which the Admiralty hire will be divided. As that hire must be treated as fixed on the day of the requisition the two sums forming the ratio must be calculated with reference to the values ruling on that same day. Further, they must be calculated on the footing that the requisition is to last for an indefinite time but to expire substantially before the expiration of the time charters. This is because the prospective length of the interruption may possibly have a bearing even on the rate per month which the respective parties may be regarded as justly demanding."

The result of this last decision is to break the current of authority that followed after the *Tamplin Case*. No doubt in view of the facts that the lives of the charters would continue till 1918 and 1920, a very considerable time, a number of minds might well hesitate to pronounce that the contracts had been interfered with to such an extent as to put an end to them once and for all. To apply a rule of thumb measure, such as has been suggested, might in such a case involve a hardship. It is however submitted that a clear principle to be applied irrespective of loss falling on one party or the other will be welcomed by the shipping community, as a whole, who will then know what their legal position actually is on the charters to which they are parties during the present war.

Despite the views of *Rowlatt J.*, it is respectfully submitted that the sounder view is to treat a requisitionment of chartered vessels during war as frustrating the adventure, in short as *Bailhache J.* has postulated in the *Anglo-Northern Trading Co. Case* (*supra*, at p. 78).

(E) Contracts with War Clauses.

In leaving the subject of requisitionment attention must be called to the startling and important powers recently given to Courts to suspend or annul any contract, where owing to the requisition or user of any ship any term of the contract cannot be enforced without serious hardship (see p. 334 *post*), as also to Reg. 39BBB (p. 327 *post*) of the D.O.R.A. Regulations, which has an important bearing on this subject.

Recent cases:

Charter-party.

Restraint of princes.

Requisitionment.

As regards the payment of compensation discussed by *Rowlatt J.* in the judgment set out above it should be remarked that Lord Parker in the *Tamplin Case* [1916, 2 A.C. at p. 428] has referred to the payment of compensation to owners under the proclamation of August 3, 1914, and has observed—

Payment of compensation.

> "Owners must in this Proclamation include all persons interested. It cannot in the present case mean the owners exclusive of the charterers or the charterers exclusive of the owners. Both are entitled to compensation, and if such compensation be not agreed with either separately, but with both together, the amount so agreed will be divisible between them according to their respective rights and interests. The case was argued before your Lordships on the footing that it would determine which of two possible claimants was to be held entitled to all which might be payable by the Government by way of compensation under the Proclamation. I entirely dissent from this view."

Some miscellaneous points as regards requisitionment may next be noted.

Partial requisitionment.

In *Dinham, Fawcus & Co.* v. *Witherington & Everett* [1916, W.N. 154], by a charter-party made before the war the defendants contracted to supply tonnage up till the end of March 1915. Restraints of princes were

(E) Contracts with War Clauses.

excepted. At the time of the contract the defendants owned five ships and were agents for seven others, but only four of the twelve were suitable to satisfy the tonnage required. Two of these were requisitioned in July, and the other two in August, 1914.

Recent cases:

Charter-party.

In September the plaintiffs called on the defendants to name a steamer; the defendants refused; the plaintiffs procured another at a higher rate and sued to recover the difference. *Bailhache J.* held that the charter-party was a contract to supply tonnage; that it was open to the defendants, if they had no steamer left wherewith to perform that contract, to procure one; that the requisition of their steamers did not prevent them from performing their contract and that the exception clause afforded no defence.

Partial Requisitionment.

In *The Modern Transport Co.* v. *Doneric Steamship Co.* [1916, 1 K.B. 726; C.A. 1917, 1 K.B. 370] it was held that the requisitioning of a vessel, chartered under a time-charter, did not entitle the owners to withdraw the vessel, after the requisitioning of the steamer was over, on the ground that the plaintiffs declined to pay hire for the vessel during that period, and it was held that the plaintiffs, on the defendants' counter-claim, were liable for the hire during that period.

A good deal of confusion has been caused by misapprehension of this case and by treating it as an authority on frustration of adventure [*per Bailhache J.* in *Anglo-Northern Trading Co.'s Case*, cited at p. 78, *ante*].

Compensation for ship when lost.

An important decision [*London American Marine Trading Co., Ltd.* v. *Rio De Janeiro Tramway, Light*

& *Power Co., Ltd.*, 1917, 2 K.B. 611] has been pronounced as to whether the owners or the charterers are entitled to the compensation money to be paid by the Admiralty on the vessel being lost by war risks while under requisitionme and during the currency of the charter-party. *Rowlatt J.* has decided in favour of the owners. The facts were these:

(E) Contracts with War Clauses.

Recent cases:

Charter-party.

Requisi-tionment.

Compen-sation for ship when lost.

The plaintiffs had chartered a steamer to the defendants for eight years odd from June 1914. In March 1915 the Government requisitioned the steamer on the terms in the form of charter known as T. 99, by which the Government assumed war risks on her ascertained value. Early in 1917 the ship was lost by war risks; and the action was for a declaration that the sum to be paid by the Government belonged solely to the plaintiffs.

Under the original time charter between the plaintiffs and the defendants, the plaintiffs were to insure; and in the event of the loss o. the ship the charter was to terminate, with an option to the plaintiffs to substitute another ship.

The defendants' chief argument was that compensation was payable to the "owners," and that they were entitled to occupy along with the plaintiffs the position of "owners," the compensation monies replacing a floating and still chartered ship. The Court, however, based its view on the reason that—

> "The parties must share the benefit or compensation according to their interests; and this part of it is in respect of an interest entirely the plaintiffs', namely, that in having the ship, if lost, replaced by a sum of money equivalent to her value, which, the charter

(E) Contracts with War Clauses.

coming to an end by that loss, would be entirely the plaintiffs'.

. . . . . .

"The ship has been converted into money by the same event as determines the interest of the charterers; and the owners take the money as they would have taken the ship had the charter been determined by some other event, or by efflnxion of time.

Recent cases:

Charter-party.

Requisitionment.

Compensation for ship when lost.

"But I may put the case in another way. I cannot but think that the argument of the defendants is based on a false idea generated by the use of the word 'compensation.' It suggests that there must be compensation not for the use of the ship by the Government but for the accident that during that use an event happened which determined the charter-party. The charterers had the use of the ship subject to the possibility of the happening of an event. They could have insured against that event had they been so minded. The Admiralty took the vessel, and the charterers still remained exposed to the possibility that that event would happen; and if the Admiralty did not take her for voyages other than those in which the charterers would have employed her, the risk of determination of the charter would have been the same; and this risk could have formed no element in any possible claim by the charterers for compensation under the Order in Council.

"For these reasons I think that the plaintiffs succeed."

As regards the Admiralty's liability to pay compensation for the loss of a requisitioned vessel a point of considerable importance has been ruled upon by the Court on a special case stated by arbitrators, namely, Whether interest is payable on the capital value of the lost vessel from the date of loss until the date of payment? [*Admiralty Commissioners* v. *Sir Ropner & Co.*, 33 T.L.R. 362.]

Defendants' vessel requisitioned in January 1915 was lost a year later while in Government service.

(E) Contracts with War Clauses.

By agreement the ordinary Admiralty charter-party, known as T. 99, was to govern the terms of the requisitioning. By that document war risks were accepted by the plaintiffs, the owner bearing the ordinary marine risks. Government paid two large sums on account from time to time which fell short of the total value payable as subsequently found by the arbitrators. The defendants claimed interest on any part of the whole sum remaining unpaid, and argued *inter alia* that the Admiralty were in the position of underwriters. This contention failed, the Lord Chief Justice holding that the document was a charter-party and not an insurance policy, since it did not comply with the requirements of the Marine Insurance Act, 1906.

Recent cases :

Charter-party.

Requisitionment.

Compensation for ship when lost.

This is a suitable place wherein to refer to a matter of great importance to shipowners, whose vessels have been lost while in the Admiralty service under requisitionment, namely, the power of arbitrators acting under the requisitioning Proclamation of August 3, 1914, and the Rules of the Constitution of the Admiralty Transport Arbitration Board of August 31, 1914, to state a case on points of law. [See *Lobitos Oilfields, Ltd.* v. *The Lords Commissioners of the Admiralty*. *The Crown Steamship Company, Ltd.* v. *same*, 33 T.L.R. 472.]

Arbitration.

In the first of these cases the question was whether on the facts in the arbitration the Admiralty were in law liable for the loss of the steamer *El Zorro*, on the ground that it was due to risks of war taken by the Admiralty—namely, such risks as would be excluded from an ordinary English policy of marine insurance

(E) Contracts with War Clauses.

by the following, or a similar, but not a more extensive clause —

Recent cases :

Charter-party.

> "Warranted free from capture, seizure, and detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after the declaration of war."

Requisitionment.

Compensation for ship when lost.

Arbitration.

The *El Zorro* was requisitioned by the Admiralty on September 29, 1914. The terms of requisition were that war risks were taken by the Admiralty. While the vessel was under requisition she became a constructive total loss at the end of December 1915. The Admiralty admitted that they were liable for all risks excluded by the usual f.c. and s. clause in an ordinary Lloyd's policy; but their case was that the loss of the steamer was due to other causes. Questions arose as to the liability of the Admiralty for the loss of the vessel and as to the amount of the hire.

Mr. Justice Sankey had ordered that the arbitrators should state a case for the opinion of the Court under Section 19 of the Arbitration Act, 1889. The Admiralty appealed, submitting —

(1) There was not an arbitration within the meaning of the Arbitration Act. There was no submission properly so called.

(2) If submission there was, it was a submission on the terms of rule 6, which provided that the decision of the tribunal should be final and should not be subject to review.

(3) It was a matter of discretion whether a case should be ordered, and in the special circum-

stances of this case the arbitrators ought not to be ordered to state a case.

(E) Contracts with War Clauses.

In the second case, which was heard after the former was argued, the questions were—

Recent cases:

(1) Whether the Admiralty were entitled to charter or use the plaintiffs' vessel, the *Crown of Leon*, for a certain voyage to Philadelphia; Charter party.

(2) Whether the Admiralty were liable for the damage suffered by the vessel in the course of a voyage, through the carriage of certain cargo. Requisitionment. Compensation for ship when lost.

(3) Whether marine risks should be deemed to be borne by the Admiralty. Arbitration.

The ship was requisitioned on January 26, 1916, under the Proclamation of August 3, 1914. There was no charter and no agreement as to hire. The claimants said that the vessel was not suitable for the carriage of ore, especially on a winter voyage across the Atlantic, and they also said that on March 8, 1916, the vessel left Philadelphia with a cargo of 4000 tons of copper ore. They were never consulted about the loading of cargo, and they said that the Admiralty were not entitled to charter or to use the vessel for such a voyage, as the vessel had been built for quite different purposes. They contended that the Admiralty were guilty of negligence, and that in any event the Admiralty were liable for the damage caused on the voyage.

Mr. Justice Low similarly ordered a case to be stated.

The arguments were substantially on the same

(E) Contracts with War Clauses.

lines as in the previous case, except that there was no document which could be construed as a submission under the Arbitration Act.

Recent cases:

The Court dismissed both appeals.

Charter-party.

Requisitionment.

Compensation for ship when lost.

Arbitration.

Mr. Justice Bray, in giving judgment, is reported to have said: "With regard to the first point, it was clear that the agreement between the parties to refer was a written agreement to submit present or future differences to arbitration (see the Arbitration Act, 1889, Section 27). It had been said, however, that, in view of the constitution of the Transport Arbitration Board, the case was analogous to that of *Bexley Local Board* v. *West Kent Sewage Board* (9 Q.B.D., 518), in which the Court held that the Local Government Board were not arbitrators. That case was distinguishable because in the present matter the reference was undoubtedly by consent, and, in addition, in local government inquiries the Local Government Board in no way assumed the functions of arbitrators. In the Rules which had been made under the Proclamation the words 'arbitration' and 'arbitrators" appeared again and again. It was clear that what was contemplated was arbitration, arbitrators, and awards, and there was no provision, express or implied, excluding the application of the Arbitration Act, 1889. It, therefore, seemed to him that there had been a submission to arbitration.

"The next point raised was that the award should be 'final and conclusive and not subject to appeal or review.' Rule 6 of the Rules made under the Proclamation in which those words appeared, however, provided that, for that to be so, the President of the

Arbitration Board must so direct. In this case Lord Mersey had given no such direction, and that part of the rule did not apply. Even if the direction had been given the effect would have been the same. Section 20 of Paragraph (*h*) of the First Schedule to the Arbitration Act, 1889, provided that, unless otherwise agreed, an award should be final and binding on the parties. In the very Act, therefore, which empowered the Court to direct a special case to be stated, reference was made to an award being 'final and binding.' The wording of Rule 6 was not inconsistent with the existence in the arbitrators of power to state an award in the form of a special case or a case for the opinion of the Court. *Kydd* v. *Liverpool Watch Committee* [24 T.L.R. 257; 1856 A.C. 327] was not a relevant authority. The second point taken by the Crown failed.

Recent cases:

Charter-party.

Requisitionment.

Compensation for ship when lost.

Arbitration.

"The last point was that the Court, in its discretion, would not order the arbitrators to state a case. There was a large sum in dispute, which had to be very carefully considered. It was very important that the consideration of the case should be by skilled arbitrators. But in directing the statement of a case the Court were not taking away the jurisdiction of the arbitrators except to the extent of deciding a point of law for them. All the facts would still be left.

"The second case differed from the first only in one respect, namely, that there was a question whether there had been a submission in writing. He thought that there clearly was such an agreement to refer in the correspondence between the parties. The appeals would be dismissed."

(E) Contracts with war clauses.

Recent cases:

Charter-party.

Restraint of princes.

Commandeering.

The case of *Capel & Co. v. Soudedi* [1916, 1 K.B. 439; C.A. 1916, 2 K.B. 365] furnishes an instance of the *commandeering* of a vessel.

The defendant, the owner of a Greek steamer, chartered her for a year to the plaintiffs, coal merchants at Cardiff, to carry certain cargoes at a rate per month. The charter-party contained the following clause: "Should steamer be commandeered by the Greek Government this charter shall be cancelled." The ship was employed by the plaintiffs to carry coal to Marseilles. While the ship was lying in that port discharging coal the Greek Government sent an order to the Captain requiring him to proceed at once to the Piraeus for the purpose of placing the ship at their disposal if they should desire to use it. Later, while the ship was still at Marseilles, the Greek Government withdrew their order and released the vessel. She then returned to Cardiff. Freights had risen in the meantime considerably above the rate reserved in the charter-party, and the defendant contended that the ship had been "commandeered" within the meaning of the charter-party.

Atkin J. remarked of the word "commandeered":

> "As to the meaning of that term I have to form the best conclusion that I can. It is a word, as I understand, of recent origin in ordinary use, and a word as to which there has been no previous judicial interpretation to guide me. In my opinion that expression means that the particular Government seize, or require the owner to surrender control of, the subject-matter for their own military purposes, and not for general political purposes or for the protection of the ship."

It was argued in the case that the notice was only a preliminary step in the direction of commandeering.

(E) Contracts with War Clauses.

and did not amount to a commandeering itself, but the Court held on the evidence that this was not so and that the ship had been commandeered and the charter-party consequently cancelled. On appeal [1916, 2 K.B. 365] the Court held that the judgment of the Court below was right, as on the facts the Greek Government had the ship under their control. *Lush J.* expressed the view that "Service of a notice that a ship will be commandeered does not necessarily amount to commandeering her."

Recent cases:

Charter-party.

Restraint of princes

Commandeering.

It would thus seem that there is no practical difference between "requisitioning" and "commandeering."

A ship which has been requisitioned and is in service of the Crown is exempt from arrest as long as she is under requisition. [*The Broadmayne*, C.A. 1916, P. 64.]

In *Cazalet* v *Morris & Co.* [1916, S.C. 952] it was questioned whether a shortage of railway trucks due to the Government having taken them for the defence of the realm was a "restraint of princes."

MISCELLANEOUS CLAUSES IN CHARTER-PARTIES

Miscellaneous clauses.

Having now reviewed the subjects of Restraint of Princes and Admiralty requisitionment of chartered ships, it is desirable to notice here a number of war cases in which various miscellaneous clauses in charter-parties dealing with war and like events came up for consideration.

Risk of seizure or capture.

Attention may first be called to a contract in a charter-party, between neutrals, which let a ship for five years to trade within the limits of the European

(E) Contracts with War Clauses.

trade. It contained this clause: "That no voyage be undertaken and no goods, Governments or persons shipped that would involve risk of seizure, capture, repatriation or penalty by Rulers and Governments."

Recent cases:

Charter-party.

The owner in June 1915 refused to proceed on a voyage from Leith to Rouen owing to the risk of German submarines, and, for the same reason, refused to take other voyages from London to Trondjhem, and thence to Archangel and back to Hull. In an appeal from an Umpire's decision, *Scrutton J.* (now *L.J.*), upholding the same, held that a voyage which involved the risk of the vessel being attacked and sunk by German submarines was a voyage which would "involve risk of seizure or capture," and that the shipowner was therefore entitled to refuse to proceed on the proposed voyages. [*In re An Arbitration between Tonnevold and Finn Fris*, 1916, 2 K.B. 551.]

Miscellaneous clauses.

Risk of seizure or capture.

General average contribution.

While dealing with charter-parties it may be a suitable opportunity to call attention to a recent case dealing with a general average contribution owing to war conditions wherein the plaintiff sued the charterers of their sailing vessel for the contribution towards expenses incurred for tugging the vessel from Queenstown to Sharpness. Enemy submarines had been at work in the vicinity, as shown by the loss of the S.S. *Lusitania*, and the master accordingly had the vessel tugged. *Sankey J.*, after stating the law of general average, held that the risk of being attacked or destroyed by the King's enemies was not an extraordinary and abnormal peril which alone could justify the expenses incurred, as it appeared that only one sailing vessel had been torpedoed up to that

time. [*Société Nouvelle D'Armement* v. *Spillers and Baker's, Ltd.* 1917, 1 K.B. 865.]

(E) Contracts with War Clauses.

Recent cases:

Charter-party.

Where a charter-party has a clause "that should the steamer be lost or missing, the hire shall cease from the date when she was lost or last spoken, or if not spoken, then from the date when last seen, and hire paid in advance and not earned shall be returned to the charterers" it would appear (*Lloyd Royal Belge Société Anonyme* v. *Stathatos*, 1917, 33 T.L.R. 390; affirmed on appeal, 34 T.L.R. 70) that the reference to the return of the hire excludes the implication that the hire is to be returned in the event of the contract being dissolved in other ways, as for instance by a restraint frustrating the adventure.

Miscellaneous clauses.

Return of hire.

"Safe port."

The expression "safe port" in a charter-party implies that the port must be both physically and politically safe, and the dangers likely to be incurred on a voyage to a port may be taken into account in considering whether a port is "safe." [*Palace Shipping Co., Ltd.* v. *Gans S.S. Line*, 1916, 1 K.B. 138.]

Sir S. Evans held in a recent case [*The Svorono*, 1917, 33 T.L.R. 415] that on the facts of that case the port of Dunkirk was a safe port at the end of August and the first week of September 1914. Amsterdam was on the facts in another case held to be a safe port (see *East Asiatic Co., Ltd.* v. *S.S. Toronto Co., Ltd.*, at p. 42 *ante*).

The position of Antwerp in September 1914 was considered by a Bombay Court in a case cited hereafter. [*Ettlinger* v. *Chagandas & Co.*, at p. 267 *post*.]

Sending out vessel on last day of charter.

In *Meyer* v. *Sanderson & Co.* [1916, 32 T.L.R. 428], a steamship was chartered on the terms that the hire

(E) Contracts with War Clauses.

Recent cases:

Charter-party.

Miscellaneous clauses.

Sending out vesse on last day of charter.

was to be "for about six months," and the vessel was not to be used in waters where war-like operations were in progress. On the issue of the German decree that every hostile ship in waters around Great Britain would be destroyed, the owner informed the charterer that the charter was cancelled as the vessel was on the run from Manchester to Nantes. Eventually the parties agreed that she should go on trading between Manchester and Nantes. On June 18, 1915 the six months expired, but the charterers sent the vessel on one more voyage and she did not return till June 30. It was agreed that if the arbitrators should decide that the hire had continued for more than "about six months" the charterers should pay the owner a further sum. The arbitrators so found, and on a special case being stated, *Atkin J.* held that the charterers had not acted reasonably in sending out the vessel on the day of the completion of the six months, and affirmed the award.

Strikes.

In *Williams Bros. (Hull), Ltd.* v. *Naamlooze Vennootschap Berghuys (W. H.) Kolenhandel* [1915, 21 Com. Cas. 253] it was held that shipowners were not liable on a charter-party containing a clause that "the owners shall not be liable for any delay in the commencement or prosecution of the voyage due to a strike or lock-out of seamen. . . ."

There was a delay in the prosecution of the voyage due to the crew refusing to go on a voyage owing to the German threat to sink neutral vessels in the North Sea after February 18, 1915. It was held that a "strike" is not limited to disputes between employers and workmen with regard to increase or diminu-

tion of wages; it includes a general concerted refusal by workmen to work in consequence of an alleged grievance.

(E) Contracts with War Clauses.

Recent cases:

In connection with the subject of strikes the case of *Ropner & Co.* v. *Ronuebeck* (1914, 84 L.J.K.B. 392) shows that the doctrine that circumstances sometimes arise which entitle a charterer to refuse to load a steamer if he thinks that she will not be able to proceed with the cargo on board to her destination within a commercially reasonable time applies to the existence of war, and cannot be extended to the case of strikes.

Charter-party.

Miscellaneous clauses.

Strikes.

In approving of this decision in another case Lord Justice Scrutton remarked:—

> "Strikes have always been treated by the Courts as subject to such unexpected termination that they cannot without more be treated as abrogating contracts" [*Metropolitan Water Board* v. *Dick, Kerr & Co.*, 1917, 2 K.B., at p. 35.]

Trading in "war region."

In a recent decision [*Maskinonge S.S. Co.* v. *The Dominion Coal Co.*, 1917, 33 T.L.R. 132] by an agreement supplemental to a charter-party it was agreed that in the event of the vessel being ordered to trade in the "war region" then the insurance premiums payable by the owners should be refunded to them by the charterers. The vessel had been used in the St. Lawrence river and down the American coast. A German submarine entered American waters and sunk vessels about 100 miles south of the waters in which the vessel plied. *Bailhache J.* held that the one incursion of a submarine did not convert American waters into part of the war region. The Court of

(E) Contracts with War Clauses.

appeal reversed this judgment [1917, 33 T.L.R. 340]. The Lord Chief Justice said

Recent cases:

Charter party.

Miscellaneous clauses.

Trading in "war region."

"that he agreed with Mr. Justice Bailhache that it was very difficult and perhaps undesirable to define the limitations to be attached to the words 'the war region,' and he preferred to address himself to the question whether the facts established here that the ship was trading in a war region. The mere apprehension that an area might be one in which hostile operations would be carried on was not enough. The agreement here was a mercantile document and must be interpreted as a document entered into by business men. He thought that what the parties had in mind was that circumstances might easily arise which might involve paying a higher rate of insurance, and, though that would not alone suffice to bring the case within the words, still, where there had been actual operations of a German submarine destroying six vessels in an area proximate to that in which the vessel was trading and was ordered to trade in the future and there was a reasonable apprehension that these operations would continue, that constituted the area a war region within the meaning of the contract. The great increase in the insurance premiums showed that the insurance market at any rate took the view that the war region had been extended to the coast of North America. No doubt after a time the apprehension calmed down, but the Court had to consider the state of things at the time when the insurance was effected on October 10, and at that time the ship was (in his Lordship's opinion) trading in what was then a war region within the meaning of the words in the contract."

War risk insurance.

In *Holland Gulf Stoomvaart Maat-Schappij* v. *Watson, Munro & Co.* [1915, 32 T.L.R. 169] the defendants chartered a Dutch steamer from the plaintiffs. A clause in the charter-party read "*War risk, if any required, for charterers' account* . . ." By further clauses the plaintiffs were to provide for ordinary insurance, and nothing in the charter-party was to be construed as

a demise of the steamer. The defendants failed to insure against war risks. The vessel was sunk on a voyage under the charter by a German cruiser. Plaintiffs sought to recover for this failure. The Court of Appeal, reversing *Bailhache J.*, held the action must fail as the words italicised above meant that the charterers were to bear the cost of insurance, but the insurance was to be effected by the owners and not by the charterers.

(E) Contracts with War Clauses.

Recent cases.

Charter-party.

Mixed lunacy clauses.

LANDLORD AND TENANT

It would appear that a lease "for the period of the war, the rent payable weekly" is not void for uncertainty as a lease. [*Great Northern Rly. Co.* v. *Arnold*, 1916, 33 T.L.R. 114.]

Landlord and tenant.

Where a lessor, who was under a covenant to insure the demised premises against loss or damage by fire, took out a policy which exempted the insurance company from liability in case of loss or damage by invasion, foreign enemies or explosion, he was held liable under the covenant on the occasion of the premises becoming damaged by the discharge of incendiary bombs from enemy aircraft. [*Eolaydc, Ltd.* v. *Roberts*, 1917, 1 Ch. 109.]

INSURANCE (FIRE)

A case arising from incendiary bombs dropped from a Zeppelin on insured premises [*Rogers* v. *Whittaker*, 1917, 1 K.B. 942] raised the question of the construction of an exception clause in the policy which excluded damage "resulting from insurrection, riots, civil commotion, or military or usurped power."

Insurance (Fire).

"Military or usurped power.

(E) Contracts with War Clauses.

Recent cases:

Insurance (Fire).

"Military or usurped power."

The defence was that the exception applied, and this was upheld. *Sankey J.* divided the clause into two heads: (1) Insurrection, riots, civil commotion, which he held referred to domestic disturbances of different degrees of intensity though not containing an exhaustive definition of mere domestic disturbance; and (2) Military or usurped power, which he held opened a new and another category of excepted events importing something more than mere internal incidents and events of a different character to those included in the previous class. In short, the view taken was that the clause is not merely a riot clause but a riot and a war clause combined.

INSURANCE (LIFE)

Insurance (Life).

Death due to war causes.

In a recent case an Insurance Company escaped liability on a policy against accidental death by reason of a clause in the policy exempting death "directly or indirectly caused by or arising from or traceable to war." The insured met his death by being killed by a train on whose line he was engaged at the time in inspecting the guards and sentries placed there to guard the line. The Court held, on an appeal from arbitration, that the death fell within the excepted causes. [*Coxe* v. *Employers' Liability Assurance Co., Ltd.*, 1916, 2 K.B. 629.]

Insurance "ex war."

In a case that arose out of the sinking of the S.S. *Lusitania*, a firm of insurance brokers received from the plaintiff's husband instructions to effect an accident insurance for him and sent on his behalf to the defendants, an insurance company, a slip containing the words "ex war." The defendants there-

upon issued a policy which they intended to be in accordance with the slip and which provided that "The Company will not be liable in respect of any death of the assured directly or indirectly caused or contributed to by war" and that "the Company will not be liable in respect of any death of the assured caused by an accident happening outside the limits of Europe unless same be agreed by special endorsement. A typewritten clause was added which provided, "Notwithstanding anything herein contained the assured is fully covered while on a journey from the United Kingdom to the United States of America and for Canada, while there and on return."

(E) Contracts with War Clauses.

Insurance (Life).

Insurance "ex-war."

During the currency of the policy the plaintiff's husband on his return voyage from America to England in the S.S. *Lusitania* was drowned, the vessel being sunk by a German submarine. The defendants, in the action on the policy by the widow, pleaded that the death of the assured was caused by war and they claimed rectification so as to give effect to the slip. *Bailhache J.* held that the typewritten clause only meant that the assured was to be fully covered while on his journey to America and back, as he would be if the accident had happened in Europe, and that in any case, as the intention of the parties was that the policy should be in accordance with the slip, the defendants were entitled to rectification and the plaintiff could not recover. [*Letts* v. *Excess Insurance Co.*, 1916, 32 T.L.R. 361.]

"Military service."

One of the few life insurance cases decided during the war [*Duckworth* v. *Scottish Widow's Fund Life Assurance Society*, 1917, 33 T.L.R. 430] has raised

(E) Contracts with War Clauses.

Recent cases:

Insurance (Life).

"Military service."

some interesting questions of importance. The plaintiff took out a life policy with the defendant company for £50,000. In his proposal he stated *inter alia* that he had no prospect or intention of joining any military force. Compulsory military service had not been then legalised. The policy contained a clause providing that if the assured

> "shall enter into or engage in any military service except in Great Britain or Ireland or naval service without the licence of the directors previously obtained then . . . this policy shall be void,"

and premiums paid were to be forfeited, subject to relief. In the Schedule there was a special provision modifying the foregoing clause as follows: -

> "Notwithstanding anything herein contained . . . should the life assured (not having previously joined of his own accord any military force or volunteered for any form of military service) be legally compelled to engage in military service such service shall be covered without prejudice to the assurance and without payment of extra premium."

The materiality of these clauses was due to the fact that the plaintiff, who was thirty-seven years of age, attested under Lord Derby's scheme after the issue of the policy, received a day's pay, and was passed into the reserve. His reason for so doing was alleged to be that he expected to receive more favourable treatment in any claim he might make for exemption than if he had not attested, and not because he wished to join the army. The plaintiff had as a matter of fact obtained an exemption which was still in force. He sought a declaration that the policy was still in force notwithstanding his attestation and

(E) Contracts with War Clauses.

Recent cases:

Insurance (Life).

"Military service."

was not liable to be forfeited in the event of his being called upon for military service elsewhere than in Great Britain. Two points were urged on his behalf: (1) that the clause referring to military service was contrary to public policy, as it gave encouragement not to enlist for military service, and that it should be deleted as obnoxious, leaving the valid part of the policy standing, and (2) that the Court should grant equitable relief as the words in brackets in the provision in the Schedule did not enhance the risk taken by the defendants, for if the plaintiff went abroad the words did not increase the risk of his being injured.

The Company did not contend that the policy was at the moment anything but good, and that attesting in itself did not avoid the policy, but it said that if the plaintiff went abroad an extra premium would be payable, which could not be fixed until it was known what nature of service, rank, etc., would be the plaintiff's lot.

The suit failed. *Coleridge J.* held that on the first point the law could not re-organize the business of insurance companies. Business was business, and to enforce on insurance companies a law that they should make no distinction between the risk of staying at home and that of fighting abroad, "on the ground of public policy, was, in his opinion, to ride the horse of public policy too hard." The learned Judge thought the second ground provided a strong argument, but as the law at the time did not allow him to alter contracts he could not do so, and since there was no forfeiture against which to grant relief judgment must be for the defendants.

(E) Contracts with War Clauses.

Recent cases:

Insurance (Life).

Arbitration clause.

In *Lock* v. *Army, Navy and General Assurance Association* [1915, 31 T.L.R. 297] a life insurance policy provided that it should not cover death by war, and it also provided for arbitration. The insured person lost his life on board *H.M.S. Bulwark* by the explosion which caused her loss. In an action on the policy the defendants applied to have the action stayed. The Court held that it was open to the insurers to dispute the opinion formed by the Admiralty that the ship had not been torpedoed or lost through an act of war, and that as the policy contained an arbitration clause all legal proceedings must be stayed.

INSURANCE (MARINE)

(1) *Proximate Cause of Loss*

Insurance (Marine).

(1) Proximate cause of loss.

The war has been responsible for raising again a very difficult case under marine insurance policies, namely, where a vessel is lost, her loss being brought about by two or more factors, one excepted under the policy, the other not so excepted, which of these can be said to be the proximate cause of the loss?

In *Leyland Shipping Co., Ltd.* v. *Norwich Union Fire Insurance Society, Ltd.* [1917, 1 K.B. 873] the facts, sufficient to state for the question to be considered, were these:—

The S.S. *Ikaria* was insured by a time policy against (*inter alia*) "perils of the sea" and many other enumerated perils. It also had this clause: "Warranted free . . . from all consequences of hostilities or warlike operations. . . ."

The vessel was torpedoed by a German submarine

25 miles from Havre while on a voyage. She was struck well forward and settled down by the head. She was kept afloat and tugged into harbour, taken along a dock, and as she was in danger of sinking there owing to a rise of wind and bumping against the quay she was ordered to a berth in the outer harbour, where she grounded several times at low tide until at last her bulkheads gave way under the strain, when she never floated again, and became a total loss. The shipowners sued on the policy as for a loss by "perils of the sea." The defendants' case being that she was lost by "consequences of hostilities." *Rowlett J.* held [1916, 32 T.L.R. 569] that the defendants' contentions were correct and gave judgment for them. This was upheld in appeal, but *Scrutton L.J.* expressed the greatest doubt as to the correctness of a previous decision of the Court of Appeal [*Reischer* v. *Borwick*, 1894, 2 Q.B. 548], but followed it out of respect, throwing out a hint that it would be better to leave it for the House of Lords to decide as to the correctness of the decisions of the Court of Appeal. So great an authority as the Lord Justice expressed his own view thus :—

(E) Contracts with War Clauses.

Recent cases :

Insurance (Marine).

(1) Proximate cause of loss.

> "It seems, therefore, that had this been a policy against perils of the sea only there would on the facts of this case have been a loss by perils of the sea, the entry of sea water into the vessel, and the underwriters could not have successfully pleaded: 'This is not a loss by perils of the sea, but by enemies.' The next step seems to me much more difficult. It is said that this is not a policy against perils of the sea only, but includes a warranty 'warranted free from all consequences of hostilities or warlike operations;' and it is said, even if this loss be within the policy as proximately caused by perils of the sea or men-of-war, it is taken

(E) Contracts with War Clauses.

Recent cases :

Insurance (Marine).

(1) Proximate cause of loss.

out again by the exceptive warranty because it was the consequences of hostilities. The operation of such a warranty is to take out of the policy a loss which would otherwise be within it " (at p. 895 896). . . . " The words of this very warranty, ' consequences of hostilities,' were construed in the same case by *Willes J.* [*Ionides v. Universal Marine Insurance Co.*, 14 C.B. (N.S.) 285] to mean the proximate consequences or effects of hostilities only. ' If you cannot presume the exception of loss from a consequence of hostilities to involve all consequences, however remote, you are necessarily driven to say that the word " consequences " is to be dealt with according to the ordinary rule, as meaning proximate consequences only.' The bearing of this on the construction of the present policy would seem to be that, as the policy insured against the proximate consequences of the perils of the sea, the assured would recover for these, unless they could also be said to be proximate consequences of hostilities " (at p. 896) . . . " I should have felt bound by the authorities to hold that there was here a loss by the proximate cause, perils of the sea, and that, as the warranty must also be limited to proximate consequences of hostilities, hostilities here were only a cause, and not the proximate cause, of the loss."

Having thus indicated the difficulties of the case law by these excerpts it may be useful to give the guiding reasons for the decision of the rest of the Court. Lord Justice Swinfen Eady said :—

" The policy with the warranty, effects an insurance against perils of the sea other than such perils of the sea as are the direct and immediate consequence of hostilities or warlike operations. Where, in the case of a vessel at sea, sea-water flows into her through an opening in such quantities that the vessel sinks and is lost, that is a loss through a peril of the sea. If the opening were made by a hostile shell or torpedo, and in consequence the vessel fills and sinks, the loss would still be a peril of the sea, but, being the direct and immediate consequence of hostilities, such a loss would not be recoverable under a policy in the form

of the present one" (at p. 883). . . . "As the policy against sea perils in the present case contained a warranty against all consequences of hostilities or warlike operations, the question arises, Was the loss, assuming it to be a peril of the sea, the proximate consequence and effect of hostilities?"

(E) Contracts with War Clauses.

Recent cases:

Insurance (Marine).

Then after setting out the facts the learned Lord Justice continues:—

"The train of causation from the act of hostility to the loss was unbroken. She was never out of immediate danger from the time she was first injured to her final loss, and the efforts to save her were acts done by way of salvage. There was not any new intervening cause of loss after the injury by torpedo, no new casualty causing the damage."

(1) Proximate cause of loss.

Lord Justice Bankes accepted the view of the law expressed by *Vaughan Williams L.J.* in *In re Etherington and Lancashire and Yorkshire Accident Insurance Co.* [1909, 1 K.B., 591 at 599], where it was said—"In my opinion, it is impossible to limit that which may be regarded as the proximate cause to one part of the accident. The truth is that the accident itself is ordinarily followed by certain results according to its nature, and if the final step in the consequences so produced is death, it seems to me that the whole previous train of events must be regarded as the proximate cause of the death which results," of which *dictum* it was added that though too widely expressed to be capable of general application the language applied to the present case.

In considering this case attention may here be called to an earlier decision where the loss was held to be only an indirect consequence of hostilities.

(E) Contracts with War Clauses.

Recent cases :

Insurance (Marine).

(1) Proximate cause of loss.

In *Anderson* v. *Marten* [1908, A.C. 334], a case that arose out of the Russo-Japanese war, the question was whether the plaintiff was entitled to recover on a time-policy on disbursements in respect of a vessel carrying contraband of war, which was leaking and in a dangerous condition, when she was stopped by a Japanese cruiser and a crew put on board. The vessel while in charge of the guard subsequently was beached and became a total wreck. Later the vessel was condemned as a prize by a Japanese Prize Court. The policy in the case contained the clause—"Warranted free from capture, seizure and detention and the consequences of hostilities." Such words of course meant that notwithstanding any words in the body of the policy to the contrary, the underwriters were not to be liable if the loss was from capture, seizure or detention. *Channell J.* held that capture without condemnation did not divest the owner of his property, but that an adjudication *in rem* had the effect of relating back to the capture so as to pass the title to the captors, and that therefore the plaintiff was not entitled to judgment. The learned Judge took the view that the owner lost his ship by capture and that the Japanese captors afterwards lost their prize by shipwreck. It was also held that the loss of the vessel was only an indirect consequence of hostilities.

Another earlier case may also be noted here. In *Nickels & Co.* v. *London & Provincial Marine & General Insurance Company, Ltd.* [1900, 6 Com. Cas. 15] rice was shipped on board a Spanish vessel for carriage from Liverpool to Cuba under a bill of

lading which provided that, if as a consequence of war the captain should deem it prudent not to enter the port of destination, he might deposit the goods at such other port as he might consider convenient, the whole of the freight being in that case considered as earned. The rice was insured against all risks excluded by the free of capture and seizure clause, one of such risks being "all consequences of hostilities." After the vessel had sailed, war broke out between Spain and the United States. The captain put back to Liverpool, where freight was paid and charges incurred, in respect of which a claim was made for a loss under the policy.

(E) Contracts with War Clauses.

Recent cases:

Insurance (Marine).

(1) Proximate cause of loss.

It was held by *Mathew J.* that the loss was not a consequence of hostilities within the meaning of the policy, but was due to the exercise by the captain of the power given him by the bill of lading, and that there had therefore been no loss under the policy.

A somewhat unusual case of marine insurance involving damage due to a vessel striking a wreck, the result of hostilities, is to be found in *William France, Fenwick & Co., Ltd.* v. *North of England Protecting and Indemnity Association, Ltd.* [1917, 2 K.B. 522], where the facts were as follows:—

On August 1, 1915, the S.S. *Fulgens*, on her voyage from Hartlepool to London, was sunk off Norfolk about 9 a.m. in shallow water by a German submarine. On the same day, at 6.40 p.m., the plaintiffs' S.S. *Sherwood*, on her voyage from London to Scotland, before there had been time to buoy or otherwise mark the spot where the *Fulgens* lay, and without

(E) Contracts with War Clauses.

Recent cases

Insurance (Marine)

(1) Proximate cause of loss

negligence, ran upon the *Fulgens* and made water fore and aft and received particular average damage. The plaintiffs sued the defendants, the underwriters, on a war risk time policy. The policy was expressed to cover risks, *inter alia*, (*a*) all consequences of hostilities, and (*b*) all risks excluded from recovery under the ordinary policies upon hull and machinery by reason of the presence in such policies of the f.c. and s. clause of the institute clauses now in use.

Bailhache J. remarked:

"The question that I have to determine is whether the loss in this case is covered by this policy and is not covered by the ordinary marine policy containing the f.c. and s. clause. The authorities bearing on the point have been so closely examined by the Court of Appeal in the case *Leyland Shipping Company* v. *Norwich Union Insurance Company* [1917, 1 K.B. 873] that it would be mere pedantry on my part to discuss them again. The question is the same if one approaches it from the standpoint of whether this loss is excluded from an ordinary marine policy containing the usual f.c. and s. clause, or from the standpoint of whether it is within this policy. The defendants' rules, however, which are incorporated into this policy preclude the plaintiffs from recovering if the loss is covered by the ordinary form of marine policy with the f.c. and s. clause, and I propose to consider the matter from this point of view.

"Now, the running of a ship on a sunken wreck is an ordinary marine peril, and damage suffered in consequence of so doing is recoverable under a marine policy. I agree, however, with the plaintiffs that when a marine policy contains the usual f.c. and s. clause one must make further inquiry and ascertain whether that marine peril was brought into operation by an act of hostility. In making this further inquiry it must always be remembered that the act of hostility to be looked for must be the proximate cause. It is not sufficient that some act of hostility is one of the links in a chain of causes without which link the

(E) Contracts with War Clauses.

Recent cases

Insurance (Marine)

(1) Proximate cause of loss.

accident would not have happened. It must be the effective proximate link in the chain.

"I do not think there is any difference of opinion as to the test to be applied, but there is always room for difference of opinion as to how the test works out in the circumstances of a particular case. In this case I think the act of hostility, the sinking of the *Fulgens*, was too remote. I can, perhaps, best explain my reasons for coming to this decision by two illustrations. Let me suppose a torpedoed timber ship, deserted and derelict but not sunk, and a collision in the dark with such a ship. That would, in my opinion, be a marine peril, and the loss would be recoverable under a marine policy containing the ordinary f.c. and s. clause. Again, let me suppose a case where there was a narrow and shallow entrance to a port, and suppose that the enemy deliberately sunk a ship in the entrance for the purpose of damaging any vessel trying to make the port, and that they succeeded. Such a case would, in my opinion, be covered by this policy and not by a marine policy with the f.c. and s. clause. This case seems to me to fall within my first illustration and not within my second. The truth obviously is that the act of hostility on which the German submarine was bent was the sinking of the *Fulgens*. Have sunk the *Fulgens*, the submarine had attained h end. The object of the submarine was to sink the *Fulgens*, and not by sinking the *Fulgens* to destroy some other ship.

"All that can be said in the plaintiffs' favour in this case is that but for hostilities this loss would not have been suffered; but the rule in insurance law, that one must seek the proximate cause, is so rigid that that statement does not carry the plaintiffs far enough. The casualty was due to the fact that by a singular chance the *Sherwood* happened to pass over the very spot where the *Fulgens* had been sunk. There was no particular reason why she should do so. I think vessels navigating the seas must, in the matter of wrecks, take the seas as they find them, and if they run on a wreck the reason why the wreck happened to be there is absolutely immaterial unless it was actually placed there as an act of hostility to damage passing vessels."

(E) Contracts with War Clauses.

Recent cases:

Insurance (Marine).

(1) Proximate cause of loss.

In *Le Quellec et Fils* v. *Thomson* [1916, 115 L.T. 224] a vessel was insured "against war risks only (French conditions), including extinction of lights." On a voyage the vessel went on the rocks at the Cap de la Hogue, where, owing to war conditions, the light in the lighthouse had been extinguished. The master was not attempting to steer by the light, but said in evidence that if it had been burning he would have seen the light when he deviated from the course he had set, and so could have saved the vessel. There was no evidence from which it could be inferred that the master, in the weather existing at the time of the accident, could have seen the light if it had been there. *Rowlatt J.* held that on these facts the owners could not recover, as the extinction of the light was too remote a cause of the loss of the vessel.

A further case [*British and Foreign Steamship Co., Ltd.* v. *The King*, 1917, W.N. 246; and see "The Times," July 14, 1917], arising out of a petition of right, has been recently decided.

The suppliants were the owners of the steamer *St. Oswald*. In March, 1915, the *St. Oswald* was requisitioned by the Director of Transports and was taken into the service of the Admiralty on the terms of Form T. 99, which was sent by the Admiralty to the suppliants.

Clause 24 of charter-party T provided that—

"The Admiralty shall not be held liable if the vessel shall be lost, wrecked, driven on shore, injured, or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire,

accident, stress of weather, or any other cause arising as a sea risk."

(E) Contracts with War Clauses.

Clause 23 provided that

Recent cases.

"The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following or similar but not more extended clause: Warranted free from . . . all consequences of hostilities or warlike operations whether before or after declaration of war. Such risks are taken by Admiralty on the ascertained value of the steamer if she be totally lost at the time of such loss."

Insurance (Marine).

(1) Proximate cause of loss.

The facts were shortly that while the *St. Oswald*, used as a transport, was sailing with lights out owing to the war, in the Mediterranean she collided with a French warship and sank. Her owners claimed on a loss caused by warlike operations. The defence was that the vessel was lost by a sea-risk—*e.g.* a collision.

Roxclatt, J. in deciding for the suppliant observed:—

> "It seems to me that the true view is that these vessels were in instant peril, as the consequence of the warlike operations, and that the manœuvres which they executed did not constitute an intervening cause of the collision, but are to be regarded merely as an attempt which failed to escape from the existing peril. It is the converse of the position in *Ionides* v. *Universal Marine Insurance Company* [11 C.B. (N.S.). 259], where the absence of the light merely prevented the master from correcting his already mistaken course.
>
> "If I could say that the *Suffren* was to blame for starboarding I should have held that the negligence of her commander had intervened and immediately

(E) Contracts with War Clauses.

Recent cases :

Insurance (Marine).

(1) Proximate cause of loss.

caused the disaster. As it was, I think that the warlike operations brought the vessels into a position where escape or destruction depended upon sudden action, which might be fortunate or disastrous, but which had to be taken. It is all a consequence of the warlike operations. It might have turned out otherwise, but that is only saying that the consequence might have been different. If the *Suffren* had run down the *St. Oswald*, without seeing her at all, it could be said that she might have missed her. The circumstance that the commander of the *Suffren*, constrained to instant action as a consequence of warlike operations, took of two courses open to him the one which turned out to be the fatal one does not break the chain of consequence. That is just what steaming without lights brings about. That is why it causes losses, namely, because it prevents ships from seeing each other until it is too late to ensure safety, though by good fortune they may escape."

Interesting comparisons can be drawn between the decision in *Fenwick & Co.'s Case* and the French case (cited *supra*) on the one hand, and, on the other, this later decision. The facts in each differ, and the difference of facts make a great difference in deciding whether the loss primarily flows from an ordinary sea risk or from a war peril. A writer in the City notes of *The Times* (see July 16, 1917) has offered some interesting criticism on this last decision as follows :—

"There is one important feature of the present case to be noted—namely, that the steamer which was sunk was employed at the time as a transport, and that the vessel with which she was in collision was a battleship. Further, the Judge held that, when the vessels sighted each other, they were in instant peril, 'as the consequence of the warlike operations.' The immediate decision which had to

be taken was 'just what steaming without lights brings about.' Still, the judgment does not make it clear that, if the collision had been between two vessels engaged in commercial work, or between a warship and a merchant vessel engaged on her ordinary work, the decision would have been reversed.

(E) Contracts with War Clauses.

Recent cases :

Insurance (Marine).

(1) Proximate cause of loss.

"There are known even quite lately to have been collisions between merchant vessels sailing with lights out, and owners have no doubt at all that many of the accidents which have occurred during the war have been caused indirectly, if not directly, by the war through the withdrawal of usual aids to navigation. But the one consideration that has counted has been the proximate cause of the loss. A little more than a year ago it fell also to Mr. Justice Rowlatt to give judgment in the case of the French steamer *Ashtree* which, while insured on French conditions, stranded near Cap de la Hogue because, the owners contended, the light on the cape had been extinguished. The following summary of the judgement which appeared in *The Times* is interesting in view of the same Judge's present decision :—

"'Mr. Justice Rowlatt pointed out that underwriters in subscribing to a policy covering the risk of extinction of lights [French conditions] depart from the long-established principle of *proxima causa* in establishing the incidence of loss in marine insurance, because the extinction of lights, while facilitating strandings or collisions, can never be exactly the proximate cause of casualty. Therefore, when this risk is accepted, immediate proximate cause of the casualty may be "skipped over." In

(E) Contracts with War Clauses.

Recent cases:

Insurance (Marine).

(1) Proximate cause of loss.

the present case, though, the Judge came to the conclusion that there was just a chance that if the light had been working the captain would have seen it: but he could not find convincing evidence that the light would have saved the ship. The weather was bad, and the Judge found that the captain got out of his course owing, probably, to something being the matter with the compass or probably owing to inefficient navigation. The loss was due to marine perils and not to war risks.'

"Only a few days ago, Mr. Justice Bailhache, giving judgment in the case of the British steamer *Sherwood*, which collided with the wreck of the steamer *Fulgens*, sunk in shallow water by a German submarine, took his stand by the law of *proxima causa*, and held that the *Sherwood* was damaged through a marine peril. The latest decision, while dealing plainly with 'warlike operations,' shows that the distinction to be drawn between a war and a marine peril may sometimes be a fine one."

(2) *War Risks and the Like*

(2) War risks and the like.

Capture.

In a case that arose out of the Russo-Japanese war and decided so recently as May 1914 by the Court of Appeal, it was held that the fact that the goods insured were expected to be captured if the cargo went forward was not sufficient to constitute a constructive total loss, as the risk of capture had never begun. The facts of the case were shortly these:—The plaintiffs, Russian subjects, under a marine insurance insured a cargo of salt beef with the defendants at and from San Francisco to Vladi-

vostok *via* Nagasaki against (*inter alia*) capture. War broke out during the currency of the policy, and the Japanese were blockading Vladivostok. The defendants telegraphed to the plaintiffs to the effect that if the cargo were sent to Vladivostok *via* Nagasaki they would take up the position that the plaintiffs deliberately caused any loss occasioned by the perils insured against. The plaintiffs' representatives in San Francisco, who were not desirous of increasing the loss to the underwriters, proposed that the cargo should be discharged at San Francisco and sold elsewhere, which was done, and ultimately notice of abandonment was given to the underwriters, who refused to accept it. *Lush J.* remarked :—"We have therefore to see whether the loss of the cargo was really caused by the risk insured against—whether it was really caused by capture. Now it certainly is not necessary to show if there was actually a capture, but it is necessary to show, if there was not a capture, that the loss was caused by that peril, and to do that it must be shown that the peril was the proximate cause of the loss. It seems to me on these facts impossible to say that the ship was ever in peril of capture. What was done in discharging the cargo was really done to prevent the ship ever coming into the peril; it was not done to arrest the consequences of any peril in which the ship actually was. That being so, it seems to me quite impossible to say that the one was the consequence of the other." [*Kaciancff* v. *China Traders Insce. Co., Ltd.*, 1914, 3 K.B. 1121 at p. 1130.]

(E) Contracts with War Clauses.

Recent cases :

Insurance (Marine).

(2) War risks and the like.

Capture.

With this case may be compared a present war

(E) Contracts with War Clauses.

Recent cases :

Insurance (Marine).

(2) War risks and the like.

Capture.

decision. [*Becker Gray & Co.* v. *London Assurance Corporation*, 1915, 3 K.B. 410.] The plaintiffs, before war, took out a policy on jute belonging to them and forming part of the cargo of a German steamer on a voyage from Calcutta to Hamburg. The policy covered perils of "men-of-war." During the voyage war broke out and the master put in to a neutral port and did not continue the voyage, being in peril of capture. In an action against the underwriters it was held that though the voyage could not be continued, yet the loss of the venture was not due to the peril of men-of-war, as the loss arising out of the attempt to avoid capture was not the same as a loss by capture itself, and though there might be a loss without actual capture, yet as the vessel had not been chased by men-of-war the master had only gone into port to prevent the peril from beginning to operate, and it had not in fact begun to operate, and therefore the plaintiffs were not entitled to recover. In the Court of Appeal and subsequently in the House of Lords the decision of Bailhache J. was affirmed [1916, 2 K.B. 156; 34 T.L.R. 36].

As regards capture of a vessel and clauses dealing therewith in the policy an earlier case may be here recalled.

In *Pyman* v. *Marten* [1907, 22 T.L.R. 834; 24 T.L.R. 10, C.A.] a time-policy on a ship contained a clause that "should the vessel be sold or transferred to new management, then unless the underwriters agree in writing to such sale or transfer this policy shall thereupon become cancelled from date

of sale or transfer. . . . A *pro rata* daily return of premiums to be made." The policy contained a warranty free of capture, seizure and detention and the consequences thereof, or any attempt thereat and also from all consequences of hostilities or war-like operations. The ship was seized by the Japanese during the war with Russia, during the currency of the policy, while on a voyage to Vladivostok with coal, and was taken to a Japanese port and there condemned by a Prize Court. The ship-owner claimed a *pro rata* return of the premium upon the ground that the ship had by her seizure and condemnation been "transferred to new management." It was held both by *Phillimore, J.* and by the Appeal Court on appeal that the capture and condemnation was not a transfer to new management and that the ship-owner was not entitled to recover.

(E) Contracts with War Clauses.

Recent cases:

Insurance (Marine).

(2) War risks and the like.

Capture.

In another case where the marine policy had an exception as to warlike operations and the vessel insured left Hull in a seaworthy condition, the weather being moderate, and from the time she reached the open sea was never heard of again nor any wreckage found, and there was a mine-field not far off at the time, it was held, on the evidence, in an action on the policy, that she was not lost by an ordinary peril of the sea but either had struck a mine or was torpedoed, and therefore the plaintiffs could not recover. [*Macbeth & Co., Ltd.* v. *King*, 1916, 32 T.L.R. 581.]

Disappearance of vessel.

The case can be compared with a further one where a presumption as to loss by warlike operations was drawn. [*General S.N. Co., Ltd.* v. *Janson*, 1915, 31 T.L.R. 630.] The steamship *Oriole* was insured

(E) Contracts with War Clauses.

Recent cases:

Insurance (Marine).

(2) War risks and the like.

Disappearance of vessel.

with the defendant against war risks. She left London for Havre in a seaworthy condition on January 29, 1915, and was last seen on January 30, 1915, off Dungeness. Two other steamers were torpedoed off Havre by a German submarine on that day. It was held on the evidence that the S.S. *Oriole* had been lost by a war risk and that the defendant was liable. In a later case a vessel insured against war perils only was lost during bad weather at sea while carrying an awkward cargo. Mines were in the locality. No wreckage was found, and the ship's end was apparently of great suddenness. Casualty lists showed two other vessels missing. It was held that the loss was due to enemy action, and that therefore the underwriters were liable. [*The Euterpe S.S. Co., Ltd.* v. *North of England Protecting and Indemnity Association*, 1917, 33 T.L.R. 540.]

In *Wilson Bros., Bobbin & Co.* v. *Green* [1915, 31 T.L.R. 605, and 1917, 1 K.B. 860], by a policy of marine insurance underwritten by the defendant the plaintiffs were insured in respect of a wood cargo laden on a Norwegian ship for a voyage from a Baltic port to an English port. The policy which contained the usual suing and labouring clause, was against war risks only, and excluded all claims arising from delay. Shortly after sailing the vessel was stopped before it reached the Sound by a German torpedo boat, when the master, on being informed that no vessel with timber (which had been declared contraband) was allowed to pass, proceeded to a Danish port. Notice of abandonment was given, but the defendant refused to accept it. The master

subsequently went to a Norwegian port and there discharged the cargo. The Norwegian Government placed no obstacle in the way of the cargo being reshipped for England. It was shown that many ships carrying wood had discharged their cargoes in Sweden which were railed across Sweden and reached England. It was held that the total loss of the venture was not unavoidable and the plaintiffs could not recover on the policy.

(E) Contracts with War Clauses.

Recent cases:

Insurance (Marine).

(2) War risks and the like.

No partial or total loss.

The case came on again before *Bray J.* [1917, 1 K.B. 860] on the claim to recover under the suing and labouring clause the cost of storing the cargo at Grimstadt and forwarding it to this country. *Bray J.* held that the plaintiffs could recover on this claim and remarked:—

"If the loss was incurred by the perils insured against, namely, war risk, it covered particular average as well as total loss, and it seems to me that there was at all events a danger of a partial loss here."

In another case that arose out of the Greco-Turkish war, when a vessel was detained by the Greek Government and afterwards released, it was held that it was not proved that at the date of suit the recovery of the vessel was unlikely and the plaintiffs were not entitled to recover upon the policy as for a constructive total loss. [*Polurrian S.S. Co., Ltd.* v. *Young*, 1915, 1 K.B. 922.]

In *Associated Oil Carriers, Ltd.* v. *Union Insurance Society of Canton, Ltd.* [1917, 2 K.B. 184] the plaintiffs in January 1913 chartered their oil-tank steamer to a German Company. On July 31, 1914, the charterers telegraphed orders that the vessel was to

(E) Contracts with War Clauses.

Recent cases:

Insurance (Marine).

(2) War risks and the like.

Loss of freight.

proceed from Portland, where she then was, to Kustendji in Rumania. The plaintiff's agents insured with the defendants the "freight and/or anticipated profit" against war risks only. The defendants were not informed that the charterers were Germans. On August 4, 1914, the date of the declaration of war, the plaintiffs telegraphed to Gibraltar for the vessel to await orders. Some days later plaintiffs ordered the master to proceed to Les Palmas and then to Norfolk in Virginia. The master sailed accordingly. On August 19 the Admiralty requisitioned the vessel. The plaintiffs claimed for a total loss on the grounds that the outbreak of war rendered the voyage illegal, that the freight became totally lost, and that the loss was due to restraint of princes.

Atkin J. held that the charter was dissolved by war and that the freight was lost because British law forbade the fulfilment of the contract of affreightment, and therefore restraint of princes caused the loss, and that as it was proved that no other freight could be procured the loss was actual and not constructive. The defence of non-disclosure was overruled, as it was held on the evidence that no underwriter would have been influenced by that fact at the time.

INSURANCE (OTHER)

Insurance (other).

The case of *Mitsui & Co., Ltd.* v. *Mumford* [1915, 2 K.B. 27] arose on an insurance policy taken out by the plaintiffs, a Japanese company, with a London house on timber stored in their warehouse at Antwerp. The defendant was the underwriter. Loss directly caused "by war, military or usurped power" was

(E) Contracts with War Clauses.

Recent cases; Insurance (other). Loss by "war, military, or usurped power."

insured against. The Germans occupied Antwerp, but the timber was intact and at the time of action had not been seized by the German authorities. The plaintiffs claimed they had been deprived of the power of dealing with the timber and sought to treat the case as one of a constructive loss of the timber. *Bailhache J.* held that the facts showed there was no loss of the timber in a commercial sense and that the loss of power of immediately dealing with it amounted to a loss of market rather than a loss of goods and that for the former the defendants were not liable.

It should be noted that the head-note in the official report of this case goes too far by extending the language of *Bailhache J.* to any and every case of a loss of commercial goods on land (see *Moore* v. *Evans*, 1917, 1 K.B. at p. 469, *per* Bankes L.J.).

In *Campbell & Phillips, Ltd.* v. *Denman* [1916, 21 Com. Cas. 357] the plaintiffs, an English company, were insured by a non-marine Lloyd's policy for a period of three months from July 27, 1914, "against loss of and/or damage to" oil seeds and general merchandise at Antwerp "directly caused by . . . war . . . military or usurped power." The policy also provided that no claim was to attach for delay, deterioration, or loss of market. The property insured was stored in an Antwerp storehouse. The Germans occupied Antwerp during the currency of the policy, and published various proclamations preventing the removal of stores and calling for a return of goods held in stock. The warehouse owners made a return. Later, when the policy had expired, German officers searched the warehouse. The goods were requi-

(E) Contracts with War Clauses.

sitioned by the Germans without payment in December 1914. The plaintiffs gave notice of abandonment on October 15th, which was not accepted.

Recent cases :

Insurance (other).

Bray J. held that the plaintiffs had not when the policy expired on October 26th been irretrievably deprived of the goods nor of their possession, as the goods remained in the warehouse where they had been deposited by the plaintiffs, and that, therefore, there had not been an actual total loss of the goods, and further, that as the plaintiffs had not proved that it was unlikely, although it was uncertain, that they would recover the goods they had not proved that there had been a constructive total loss of the goods. From observations made by Lord Justice Bankes it would appear that *Bray J.* has wrongly applied the law of marine insurance to this case. Notice of abandonment and constructive total loss have no application outside marine insurance. [*Moore* v. *Evans*, 1917, 1 K.B. at p. 468.]

What is a "loss."

An important case has recently been before the House of Lords which raised the difficult question as to what facts will constitute a "loss." [*Moore & Gallop* v. *Evans*, 1916, 1 K.B. 479; 1917, 1 K.B. 458; 34 T.L.R. 51.]

The plaintiffs insured jewellery and pearls, which belonged to them, while in any place or in transit anywhere in Europe against loss or damage "arising from any cause whatever, whether on land or water." The plaintiffs during July 1914 consigned parcels of pearls on sale or return to different consignees at Brussels and at Frankfurt. These had not been returned at the time war broke out. The Brussels

parcel had been on instructions deposited with a bank there. Of the Frankfurt consignment little was known, but there was no evidence to show that the pearls were not then with the consignee. The plaintiffs contended that the articles were lost to them inasmuch as it would be illegal for them to recover possession from Frankfurt or Brussels. The Court of Appeal and the House of Lords held that the evidence failed to establish a loss, and that the policy being one upon goods the doctrine of frustration of adventure had no application to the case. Lord Justice Bankes considered that when war renders it impossible to have access to goods insured, or for those who hold them to return them, and it is probable that such a position will continue for some time, it cannot be said that there is a "loss," and that to constitute a loss the chance of recovery must be a mere chance. Of the word "loss" the learned Lord Justice observed :—

(E) Contracts with War Clauses.

Recent cases :

Insurance (other).

What is a "loss."

> "The word 'loss' in such a policy as this may have a very different meaning when applied to perishable goods, or to goods warehoused at a heavy rent, from what should be attributed to it when applied to such goods as pearls and jewellery when detained under the circumstances of the present case. As applied to this last-mentioned class of goods the first and natural meaning of the word 'loss' seems to me to be the being deprived of them. It is manifest, however, that it is not every kind of deprivation which was within the contemplation of the parties. Mere temporary deprivation would not under ordinary circumstances constitute a loss. On the other hand, complete deprivation amounting to a certainty that the goods could never be recovered is not necessary to constitute a loss. It is between these two extremes that the difficult cases lie, and no assistance can be derived at

(E) Contracts with War Clauses.

all from putting cases which are clearly on the one side or the other of the dividing line between the two."

A few earlier cases appear in the reports but of no special importance. [*Molinos de Arroz* v. *Mumford*, 1900, 16 T.L.R. 469; *Curtis & Co.* v. *Head*, 1901, 17 T.L.R. 718.]

CONTRACTS OF SALE OF GOODS

Sale of goods.

Contracts that involve the sale of goods usually have in them provisions which become of importance in case of the outbreak of war. These clauses may directly provide for that eventuality or for causes that directly or indirectly flow from a state of war or circumstances akin to war.

Effect of war generally.

The clauses that mostly come up for notice in the Courts have usually to do with the agreement of the parties providing for either the cancellation of the contract, or, else, a suspension of the deliveries thereunder. It is proposed to collect the present war decisions under the first of these heads at this stage.

(1) *Clauses providing for Cancellation*

(1) Providing for cancellation.

In one of the first war cases to be noted [*Scheepvaart Maatschappij Gylsen* v. *North African Coaling Company*, 1916, 114 L.T. 755] the defendants agreed to supply to vessels belonging to the plaintiffs, a firm of shipowners, bunker coal at Algiers. The contract, which was a pre-war form of contract, contained a clause providing that " in the event of war, hostilities,

(E) Contracts with War Clauses.

Recent cases:

Sale of goods.

(1) Providing for cancellation.

or other hindrance of any kind whatever beyond the control of the suppliers, affecting the normal working of the contract, the suppliers shall, during the continuance of those events, and until normal conditions again prevail, be relieved from all obligations under the contract. If Great Britain shall be engaged in war with a European Power the contract is subject to cancelment by the suppliers." At the time of the making of the contract war was in fact prevailing, and an additional clause was printed on a slip and attached to the contract in these terms:—

> "Clause A. Notwithstanding the war clause in the attached contract, it is understood that the depots will supply during present hostilities so long and in such quantities as the port authorities will permit, and should circumstances arise to further interfere in any manner with the supply, shipment, carriage, or delivery of coals, this contract is subject to cancellation by the suppliers."

Subsequently freights rose, with the result that coal became expensive at Algiers and the defendants were not in a position to carry out their contract with the plaintiffs at a profit.

Besides this, a vessel of the defendants carrying coal to Algiers was requisitioned by the British Government, and the defendants procured another at a higher price, but delay was occasioned before she could arrive at Algiers with the coal.

The defendants notified the plaintiffs that in consequence of abnormal circumstances having arisen they were compelled to cancel the contract under clause A. The plaintiffs sued for breach of contract. The question in the suit was whether the events which

(E) Contracts with War Clauses.

happened were sufficient to relieve the coaling company under the provisions of the clause.

Recent cases :

Scrutton J. (now L.J.) held that the defendants were within their rights to cancel. As to the rise in freights the learned Judge was satisfied that if the defendants were unable to cancel the contracts the coal required would have had to be brought in vessels at double the freight, and as to the requisitioning of the defendants' vessel, that that was a fresh circumstance further interfering with shipment and carriage.

Sale of goods.

(1) Providing for cancellation.

As to freights it was observed :—

> " I do not think the mere variations of the market with the tonnage available in a particular place are enough to prove the physical scarcity, the results of which would amount to 'interference.' It must always be a question of degree, for every rise of price may be attributed to short supply, or supply too small for the demand, and what is a question of degree may often be a very difficult question, but a question of fact."

In *Ford & Sons, Ltd.* v. *Leetham & Sons* [1915, 31 T.L.R. 522] the defendants, who were millers, contracted before the war to sell and deliver a quantity of flour, delivery to be in 90 days and the goods to await the buyers' orders at the mill. The contract provided that—

> " in case of prohibition of export, blockade, or hostilities preventing shipment or delivery of wheat to this country, the sellers shall have the option of cancelling this contract or any unfulfilled part thereof . . . and in that event the buyers shall not be entitled to damages for non-delivery."

Through the outbreak of the war a substantial quantity of wheat was prevented from being shipped or delivered to England. The defendants cancelled

the contract on August 12, 1914. The plaintiffs sued them for damages.

(E) Contracts with War Clauses.

Recent cases :

Sale of goods.

(1) Providing for cancellation.

Bailhache J. thought the above clause did not mean a total prohibition of shipment of wheat, as it would be impossible to suppose that all the countries of the world would prohibit at one and the same time the export of wheat to England except in the unlikely circumstance of England being at war with the whole of the rest of the world, and as a substantial source of supply (viz. Russia and Egypt) had been shut up, the clause applied and the defendants were held to have properly cancelled the contract.

In the next cases the clauses provided for closing the contracts.

In *Smith, Coney & Barrett* v. *Becker, Gray & Co.* [1916, 2 Ch. 86] the contracts were for the sale and purchase of sugar f.o.b. Hamburg, and were subject to a war clause as follows :—

> " In the event of Germany being involved in a war with either England, France, Russia, and/or Austria, this contract, unless previously closed, shall, on official notice being given that such a state of war exists, be deemed to be closed at the average quotation of the official calls held on the 6th working day counted backwards from the day when such official notice is given."

The Court observed :—" The contract was for sale of sugar f.o.b. at Hamburg, or if by reason of war this was not possible, it was provided by the war clause that the contract should be settled by a payment of cash. There was no illegality in this contract with its two branches. If delivery was impossible the contract could be performed by a payment in cash."

(E) Contracts with War Clauses.

Recent cases :

Sale of goods.

(1) Providing for cancellation.

In *Jager* v. *Tolme & Runge* [1916, 32 T.L.R. 291 C.A.] the plaintiff entered into two contracts for the purchase of a quantity of beetroot sugar f.o.b. at Hamburg. The contracts were made subject to the rules, regulations and by-laws of the Sugar Association of London and were registered with the London Produce Clearing House, Ltd. Under those rules both vendors and purchasers register their contracts with the London Produce Clearing House, and a novation follows under which the clearing house become the purchasers from the sellers and the sellers to the purchasers.

The defendants entered into contracts by which they sold a quantity of sugar to the clearing house for delivery in August 1914, and that sugar had been appropriated by the clearing house to the plaintiff's contract. The sugar in question had arrived at Hamburg and was free of all Customs formalities required prior to export and was lying there stored in warehouse.

On July 31, 1914, the German Government placed an embargo on the export of sugar. On the same day the defendants made a tender of the sugar and asked for shipping instructions. War broke out on August 4. On August 7 the plaintiff refused to accept the tender, alleging that the original contracts were void and incapable of performance. The defendants claimed arbitration under one of the rules of the Sugar Association, which ran as follows :—

> " For the purposes of the war clause a contract against which a tender has been made shall be deemed a closed contract. Should the state of war prevent

shipment or warehousing and / or passing of documents, then any party to the contract shall be entitled to appeal to the council for a decision which shall be binding on all concerned."

(E) Contracts with War Clauses.

Recent cases :

Sale of goods.

The plaintiff sued for a declaration that the contracts were void and incapable of performance by reason of the embargo, or were illegal by reason of the war and the proclamation as to trading with the enemy, and further claimed an injunction to restrain the defendants from going to arbitration.

(1) Providing for cancellation.

Sankey J. held that the plaintiff's suit failed. On appeal, however, this decision was reversed. It was held that the further performance of the contract became illegal on the outbreak of war and that both parties were absolved from any further obligations under it on the ground that its performance would involve commercial intercourse with the enemy. It was also held that the effect of the rules was to establish contractual relations between the plaintiff and the clearing house as sellers and not with the defendants.

(2) *Clauses providing for Suspension Only*

(2) Providing for suspension only.

In approaching clauses that provide for suspension of deliveries on the occurrence of warlike events distinction has to be made between (1) contracts entered into by persons who are not enemies, and (2) contracts to which the parties on one side or the other have become enemies by operation of law. This distinction is of importance because in contracts of the second classification it is often urged that the contract has been agreed to be suspended during

(E) Contracts with War Clauses.

war, leaving it open to be revived and acted upon when peace is restored. This argument is often met by the contentions (1) that the clause if enforced is against the law of trading with the enemy inasmuch as it is for the enemy's benefit to protect his trade during war, thus enabling him to resume trading when war is over (see p. 29, where the cases are collected), and (2) that the clause has no application. Recent cases as to this latter contention are as follows :—

Recent cases :

Sale of goods.

(2) Providing for suspension only.

An important case, already noticed at the commencement of this chapter [*Distington Hematite Iron Co., Ltd.* v. *Possehl & Co.*, 1916, 1 K.B. 871] should first be noticed (vide p. 18).

It shows how clauses providing for suspension during war are unavailing when there exists the insuperable difficulty in the way of treating the contract as capable of resumption after the war, and so placing the parties in a position which they have not agreed to occupy.

The case of *Naylor, Benzon, & Co., Ltd.* v. *Hirsch & Son* [1917, 33 T.L.R. 432] is of interest on this point. The plaintiffs, London merchants, by three pre-war contracts sold to the defendants, Germans trading in Germany, various quantities of pyrites to be delivered f.o.b. at Huelva, Spain, between various dates during August 1914 and 1917, the times of shipment remaining to be mutually arranged. By a clause in each of the contracts it was provided that in case of strikes, wars, civil commotion, accidents, or any other cause beyond the control of either sellers or buyers hindering shipment or delivery

" the deliveries may be wholly or partially suspended during the continuance of the same without liability; shipment to be resumed as soon as practicable." The plaintiffs sued for a declaration that the contracts were dissolved as from the outbreak of war, and argued that the strike clause provided for suspension of delivery, but that there was no suspension of mutual arrangements, and further that the strike clause only provided for suspension on the occurrence of events hindering delivery, and as war between the countries of the parties did not merely " hinder " but made it altogether illegal to go on with the contract the clause did not apply. The defendants were unrepresented. *Bray J.* gave the declaration asked for, as in his opinion the position did not come within the word " hindered," which pointed to a delay much less serious.

(E) Contracts with War Clauses.

Recent cases :

Sale of goods.

(2) Providing for suspension only.

In a defended case that went to the Court of Appeal [*Veithardt & Hall, Ltd.* v. *Rylands Bros., Ltd.*, " The Times," July 28, 1917] the contract was in regard to the sale of steel wire rods which the plaintiffs, to the defendant's knowledge, had ordinarily obtained from works in Germany in previous dealings. The following clause provided for suspension of deliveries :—

> " Specifications against the contract must be lodged one month in advance and must amount to not less than 10 tons at a time. In case of *force majeure* or strikes or combinations of workmen or accidents, war or mobilization, or want of raw material arising through suppliers of the works not fulfilling obligations entered into, or any other occurrence which may partially or wholly interfere with the delivery, same may be partially or wholly suspended during the continuance of any or either of these occurrences. In such cases, however, the " association," meaning

(E) Contracts with War Clauses.

thereby the works in Germany, are prepared to entrust other works, meaning thereby other works in Germany, with the execution of the orders if at all possible."

Recent cases :

Sale of goods.

(2) Providing for suspension only.

Younger J. held (*inter alia*) that the events specified, including war, were intended to be confined to events which prevented delivery in due time, but not to an event such as the war which made the contract absolutely illegal. In appeal this view was upheld.

Other war cases dealing with contingencies beyond the seller's control are as under :—

In *Greenway Bros., Ltd.* v. *Jones & Co.* [1915, 32 T.L.R. 184] the plaintiffs and defendants entered into two contracts in June and July 1914 for the sale and delivery by the defendants to the plaintiffs of certain quantities of spelter to be delivered by July 31 and August 31, respectively. In both contracts there was a provision which said, " delays *en route* or other contingencies beyond our control to be sufficient excuse for any delay traceable to these causes." The defendants made a sub-contract for the spelter with German firms and, owing to the outbreak of war, could not get it from them, but they could have got it in England at an abnormal price. The plaintiffs sued the defendants for breach of the contract, and the defendants relied on the above clause. *Shearman J.* pointed out that the clause was the usual strike clause which had been common in charter-parties but which had got into building contracts, and was now finding its way into contracts for the sale of goods. The learned Judge, assuming that the war was a contingency *ejusdem generis* with those contemplated in the clause, held the defendants had failed to satisfy

him that the delay in delivery was traceable to the war.

(E) Contracts with War Clauses.

Recent cases :

Sale of goods.

(2) Providing for suspension only.

The case of *Zinc Corporation, Ltd.* v. *Hirsch* [1916, 1 K.B. 541] shows that a stipulation as to suspension of deliveries of certain zinc concentrates is not the same thing as a stipulation for the suspension of the whole contract. In this case the contract was held to be dissolved as it would have involved commercial intercourse with the enemy. (The case is cited more fully at p. 20, *ante*.)

Another case is that of *Instone & Co., Ltd.* v. *Speeding Marshall & Co.* [1915, 32 T.L.R. 202]. This came before the Courts on a special case stated by an Umpire. The plaintiffs in July 1914 contracted to buy and the defendants agreed to deliver 1500 tons monthly of D.C.B. coal during 1915 at specified prices f.o.b., Blyth. The contract contained the following clause :—

> "In case of war, *force majeure*, strikes, restrictions of output . . . or other hindrances intervening or interfering or affecting delivery or chartering or strikes at port of destination which may interfere with the discharging, sellers to have the option to suspend partly or entirely any deliveries under this contract."

The defendants failed to deliver during April to December 1915, and the plaintiffs bought against them at considerably enhanced prices, and claimed the differences from the defendants. The defendants contended that the clause relieved them and gave them the right to suspend delivery, (1) because there was an unusual rise in price altogether abnormal, (2) the output from the collieries producing D.C.B. coal was reduced owing to the number of miners who

(E) Contracts with War Clauses.

Recent cases :

Sale of goods.

(2) Providing for suspension only.

had enlisted, and (3) some colliers would not contract ahead and none except upon extremely hard terms. The Court upheld the Umpire's view that the defendants were liable. *Bailhache J.* observed :—" Care must be taken not to let a man lightly off his bargain and yet not to construe such a clause as that relied upon with too pedantic literalness. Rise in price as an excuse was a question of degree. He was not prepared to establish a principle, but in this case the rise was not in itself sufficient. As to restriction of output, this occurred no doubt in each of the three collieries producing D.C.B. coal, but this did not in fact affect the defendants' power to acquire such coal elsewhere at a price."

In *Blythe & Co.* v. *Richards, Turpin & Co.* [1916, 114 L.T. 753] by a written contract, dated December 1914, the defendants agreed to sell, and the plaintiffs agreed to buy, iron pyrites as produced at certain mines in Portugal to the amount of about 6000 tons per year for three years. Delivery was to be c.i.f., at Manchester. The contract contained this clause :

> " If war, or any other cause over which the sellers have no control should prevent them from shipping or exporting ore from the river Guadiana, or delivering under normal conditions, the obligation to ship and (or) deliver under the said contract shall be partially or entirely suspended during the continuance of such impediment, and for a reasonable time afterwards to allow the sellers time to recommence shipments."

A sudden and great increase in the rate of freights between Pomaron and Manchester occurred in January 1915. The result was that the defendants could no longer fulfil their contract with the plaintiffs at a

profit. The defendants accordingly notified the plaintiffs and refused to make deliveries at the contract prices. Plaintiffs in consequence sued, claiming a declaration that the defendants were not entitled to suspend deliveries and had committed a breach of contract. The question raised in the case was whether the rise of freights was a circumstance excusing the defendants from performance of their contract. The learned Judge (*Scrutton J.*) (as he then was) construed the term "under normal conditions" as applying to shipping and delivering, and observed as follows :—

(E) Contracts with War Clauses.

Recent cases :

Sale of goods.

(2) Providing for suspension only.

> "I think prevention by the matters referred to is physical or legal prevention, not economic unprofitableness. You are not prevented from buying a thing if you think its cost higher than you can afford, or that it is not worth the price. You are prevented from buying a thing by a given cause if, owing to that cause, there are none to be had. . . . In this case the defendants could, and did, get the ships, but as to some three-fourths of them at a cost which made their contract, if carried out by those ships, a losing one. The war did not prevent them performing their contract, but did indirectly by its action on freights make it an unprofitable one. If the defendants wished to say 'we will keep the benefit of any turn of the freight market which helps us, but if the market goes against us we will not perform our contract' they must, in my opinion, use clearer words than they have done."

The Court accordingly held that the plaintiffs were entitled to succeed.

In another case [*Ebbw Vale Steel, Iron and Coal Co.* v. *Macleod & Co.*, 1915, 31 T.L.R. 604], by certain contracts made in March and November 1914, for the sale by the defendants to the plaintiffs of a

(E) Contracts with War Clauses.

Recent cases:

Sale of goods.

(2) Providing for suspension only.

quantity of iron ore from a particular mine, it was provided that in the event of war, restraint of princes, or other occurrences beyond the personal control of the buyers or sellers, affecting the mine or the ships by which the ore was to be conveyed, the contract should, at the option of the party affected, be suspended.

In consequence of the loss of the German market owing to the war, the mine could not be worked at a profit, and it was therefore closed. There was also a great shortage of shipping with a resulting rise of freights, and the Government requisitioned the class of vessel used for shipping the ore.

The defendants, for these reasons, gave notice to suspend the contract. The plaintiffs sued for a declaration that the defendants were not entitled to suspend the operation of the contract. It was held that in the circumstances the war was the effective cause of the stoppage of the mine and the defendants were entitled to give the notice of suspension and that therefore the plaintiffs were not entitled to the declaration claimed [affirmed C.A. 32 T.L.R. 485; H.L. 33 T.L.R. 268].

In *Bolckow Vaughan & Co., Ltd.* v. *Compania Minera de Sierra Minera* [1916, 32 T.L.R. 404; C.A. 33 T.L.R. 111], the defendants, a Spanish company, contracted to sell to the plaintiffs in November 1914 a quantity of iron ore to be delivered at Middlesbrough during 1915. The contract provided for a right to suspend the supply "in case of war." After the contract there was a sharp rise in freights, and instructions were issued by the British Admiralty

causing delays to shipping. On February 6, 1915, the German Government threatened to sink all British and Allied ships in the waters round Great Britain, and it was publicly stated that neutral vessels might suffer. The Spanish firm used this declaration as a reason for claiming relief from their contract, and in March 1915 the defendants refused to make further deliveries until after the war. The plaintiffs treated this as a repudiation of the contract and sued for damages for breach of contract. It was held that as the contract was entered into after war the words "in case of war" meant "in case of war preventing the performance of the contract," and that as the defendants had not to charter ships at an increased freight the plaintiffs were entitled to recover.

(E) Contracts with War Clauses.

Recent cases:

Sale of goods.

(2) Providing for suspension only.

The House of Lords has delivered an important decision as to the correct view to be taken of a suspensory clause. [*C. S. Wilson & Co., Ltd.* v. *Tennants*, 1916, 114 L.T. 878; C.A. 1917, 1 K.B. 208; H.L. 1917, A.C. 495.]

The suspensory clause in the case was as follows:—

> "Deliveries may be suspended pending any contingencies beyond the control of the sellers or buyers (such as fire, accidents, war, strikes, lockouts, or the like) causing a short supply of labour, fuel, raw material or manufactured produce, or otherwise preventing or hindering the manufacture or delivery of the article."

The facts were shortly: Defendants in December 1913 contracted with the plaintiffs to supply them with magnesium chloride over the year 1914, as they would require, estimated at from 400 to 600 tons. The defendants had at that time three main sources

(E) Contracts with War Clauses.

Recent cases:

Sale of goods.

(2) Providing for suspension only.

of supply. On the outbreak of war one of these sources of supply, which was a German one, was completely shut off. Their other chief source of supply was cut off or greatly diminished. In fact there was an admitted short supply, but the article could be obtained in some quantities at an increased cost, and sufficient to meet the plaintiffs' requirements. The defendants had some sixteen other contracts for the commodity running at the time that they gave notice to suspend this and all their other contracts. The supply available could not have gone round all the contracts. Save for the plaintiffs the parties to the other contracts agreed to suspension, so that the defendants had enough to satisfy the plaintiffs' contract.

On this set of facts the Judge (*Low J.*) held that the defendants' claim to suspend under the clause, set out above, was justified by reason of the war having caused a short supply of the magnesium chloride, but he did not think it necessary to find that the deliveries in question were as a matter of fact prevented or hindered by this short supply. The Court of Appeal (the Master of the Rolls, Lord Justice Pickford and Mr. Justice Neville dissenting) reversed this judgment. The judgment of Lord Justice Pickford is particularly informing and important as the views therein expressed were largely approved of by the House of Lords who reversed the decision of the Court of Appeal.

Summarised, those views were that there was no prevention or hindering by war, inasmuch as all the defendants' contracts, except that with the plaintiffs,

had been got rid of as regards any claim to delivery. There was also a forcible criticism of the doctrine of "commercial" impossibility. As regards the enhanced prices, the learned Lord Justice observed :

(E) Contracts with War Clauses.

Recent cases :

Sale of goods.

(2) Providing for suspension only.

"It is not however possible, in my opinion, to lay down any general rule as to the effect of a large increase of prices upon clauses of this kind, as it must depend in every case upon the terms of the clause, and the words used, e.g. it is evident that words interfering with or affecting the performance of the contract may have quite different and wider meanings than preventing or hindering the manufacture or delivery of the article." [1917, 1 K.B. at p. 217.]

From the judgment of Earl Loreburn, in the House of Lords [1917, A.C. at p. 509], the following propositions can be evolved :—

(1) In such a clause the fact that there is a prevention or hindrance in general will not satisfy the clause. The prevention or hindrance must affect the delivery, the suspension of which is claimed, and the suspension is only whilst such prevention or hindrance continues.

(2) The right of suspension has to be determined in each month as the delivery falls due according to the state of things then existing, and not once and for all on the particular occasion when the first delivery is claimed to be suspended.

(3) "Prevention" in such a clause must refer to physical or legal prevention and not an economical unprofitableness, as even a great rise in price does not amount to a prevention

(E) Contracts with War Clauses.

of delivery on the true reading of such a clause.

Recent cases :

Sale of goods.

(2) Providing for suspension only

(4) "Hindering" in such a clause must refer to an interference with the manufacture or delivery from the same cause as "preventing," but interference of a less degree. "Hindering" delivery means interposing obstacles which it will be really difficult to overcome, and shortage of cash, or inability to buy at a remunerative price is not a contingency beyond a seller's control. In short, a great rise of price does not "hinder" delivery, and any contention that a loss to be sustained on the performance of the contract under conditions changed by war amounts to a prevention or hindrance will be unsustainable.

(5) Any argument that a man can be excused from performance of his contract when it becomes "commercially" impossible is a dangerous contention which ought not to be admitted unless the parties had plainly contracted to that effect.

The ground on which the House ultimately held that the defendants were to be excused was, shortly, that they could have satisfied the plaintiffs' contract if they had disregarded the rest of their business obligations and requirements, and that "to place a merchant in the position of being unable to deliver unless he dislocated his business and broke his other contracts in order to fulfil one surely hindered de-

livery" though it did not prevent delivery or make it impossible [*idem* at p. 510].

(E) Contracts with War Clauses.

Some miscellaneous clauses that occur in contracts of this character, as also, indeed, in others, may be noticed at this place.

Recent cases:

The expression "*Force majeure*" is one which is frequently found in contracts, and has been frequently relied upon by parties seeking to avoid the further performance of their contracts as an excuse at law. In *Zinc Corporation, Ltd.* v. *Hirsch* [1916, 1 K.B. 541], *Bray J.*, on the arguments that war is not included in the expression "*force majeure;*" that by "*force majeure*" is meant some cause of a physical nature affecting the means of production or delivery of the particular commodity; and that "*force majeure*" differs from war in that it does not make a contract illegal, but merely the performance impossible, observed: "I do not think these words are apt words for war, particularly having regard to the context. 'Restraint of Princes' is not to be found in the clause or any similar expression" (at p. 549). In appeal [1916, 1 K.B. 541) *Swinfen Eady L.J.* pointed out that the term "*force majeure*" as used on the continent of Europe includes war, but expressed no opinion as to whether the expression had the same meaning in the contract before the Court.

Sale of goods.

"*Force Majeure.*"

The expression "*force majeure*" is to be found in Art. 2 of the Hague Convention, No. 6 of 1907, and has been held to refer to circumstances which render a ship unable to leave the port within the days of grace allowed her, and does not include the circum-

(E) Contracts with War Clauses.

stances that the owners have not provided the master with sufficient funds to continue the voyage. [*The Concadoro*, 1916, 2 A.C. 199.]

Recent cases :

Sale of goods.

"Subject to safe arrival."

Before the war contracts of sale often had such clauses as "subject to safe arrival" or "subject to arrive," but they dropped out of modern contracts. Since the war they have been re-introduced. ***Bailhache J.*** has considered the meaning of such words in a recent case (*Barnett & Co.* v. *Javeri & Co.*, 1916, 2 K.B. 390). The words are usually to be found in relation to a named steamer, and in such case the question is usually whether there was, or was not, to be found in the terms of the contract a warranty that the goods, the subject matter of the contract, were in fact on board a particular steamer. Wherever there was such a warranty the vendor was held to be liable to deliver or pay damages for failure to deliver; where there is no such warranty the vendor succeeded, and the buyer failed to get either his goods or his damages. There is a fundamental difference between contracts which refer to the arrival of a particular steamer and an indefinite contract which refers to no particular steamer at all, but merely relates to the safe arrival of the goods. When such a contract is made during war, and the word "safe" refers to the goods there is an obligation to ship, but no liability to deliver if an accident occurs in transit. The phrase "an unavoidable cause" was held in a recent case not to include the outbreak of war (*Orconera Iron Ore Co., Ltd.*, v. *Fried. Krupp Aktiengesellschaft*, 1917, 33 T.L.R. 570), where a clause provided that the contract should have no

"Unavoidable cause" obstructing deliveries.

force while an unavoidable cause should prevent delivery or receipt of the goods. The same case is noticeable for the interpretation of the term "war" as used in obstructing or hindering deliveries, such war meaning a war wherein the country from which the supply is obtained is involved, and not a general war.

(E) Contracts with War Clauses.

Recent cases:

Sale of goods.

"War" *ditto*

F.—CLAUSES IMPLIED IN CONTRACTS AS TO WAR, ETC.

(F) Clauses Implied as to War.

Owing to an outbreak of war and the change of conditions that occur contracts that have been entered into before war, or if after its outbreak before the change of conditions has occurred, have often to be read as if a clause in them had been tacitly agreed to by the parties covering the altered conditions and allowing an abandonment of rights to performance.

General principles.

The principles under which a Court is permitted to read into a contract implied conditions as to the continuance of peace so as to excuse parties from their obligations have been laid down in the well-known House of Lords' decision in the *Tamplin Case*, and are set out in the judgment of Earl Loreburn, which has been already extensively cited (see p. 70, *ante*). In addition to those remarks, the following ones made by Lord Parker in the same case [1916, 2 A.C., at p. 422] may be here advantageously set out—

> "In considering the question arising on this appeal it is, I think, important to bear in mind the principle which really underlies all cases in which a contract

(F) Clauses implied as to War.

General principles.

has been held to determine upon the happening of some event which renders its performance impossible, or otherwise frustrates the objects which the parties to the contract have in view. This principle is one of contract law itself, depending on some term or condition to be implied in the contract itself and not on something entirely *dehors* the contract which brings the contract to an end. It is, of course, impossible to imply in a contract any term or condition inconsistent with its express provisions, or with the intention of the parties as gathered from those provisions. The first thing, therefore, in every case is to compare the term or condition which it is sought to imply with the express provisions of the contract, and with the intention of the parties as gathered from those provisions, and ascertain whether there is any such inconsistency.

"Again, in determining whether any such term or condition can be properly implied, the nature of the contract is of considerable materiality. If, for example, the contract be for the hire of a particular horse on a particular day, it would be easy to imply a condition that the horse should still be living on the day in question. If, however, the contract were for the hire of a horse generally it would be difficult, if not impossible, to imply a term relieving the hirer from liability if his only horse died before the day arrived. Moreover, some conditions can be more readily implied than others. Speaking generally, it seems to me easier to imply a condition precedent defeating a contract before its execution has commenced than a condition subsequent defeating the contract when it is part performed. A contract under which A is to have the use of B's horse for two days' hunting might well be defeated by the death of the horse before the two days commenced. It would be easy to imply a condition precedent to that effect. But the case would be very different if the horse died at the end of the first day, and it was sought to imply a condition subsequent relieving A. in that event of liability to pay the sum agreed for the hire."

From these remarks it will be observed that there is considerable difficulty in reading into a contract

(F) Clauses Implied as to War.

General principles.

any condition by virtue of which the contract of the parties is at an end without contradicting some express provisions of the contract and defeating the intention of the parties as disclosed by those provisions. *Bailhache J.* pointed this out in the *Admiral Shipping Co.* v. *Weidner Hopkins & Co.* [1916, 1 K.B., at p. 438] in the following language:—

> "Once more—in this case the charter-party makes provision for war affecting the working of the steamer at the commencement or during the currency of the charter-party. This is precisely what has happened in this case, and where the contract makes provision for a given contingency it is not for the Court to import into the contract some other and different provision for the same contingency called by a different name."

The Court of Appeal, however, reversed *Bailhache J.*, but Lord Parker emphasises the same *dictum*, and indeed approved of what *Bailhache J.* had said. That learned Judge has himself called attention to this point in a judgment already set out (see *Anglo-Northern Trading Co.'s Case* at p. 82, *ante*). It can therefore be said that the law on this point has yet to be more precisely pronounced. The last word has not yet been said. Possibly further cases may lead to such a pronouncement.

Lord Justice Scrutton is of opinion that "it is much easier to imply a term that the contract shall cease to be binding if its performance becomes illegal, especially when the duration of the illegality depends on a state of war, which the Courts take to be of lengthy though uncertain duration. . . . The parties cannot be taken to contract to do what is illegal, and are relieved when the performance

(F) Clauses Implied as to War.

General principles.

becomes illegal, unless it is clear that the illegality is so temporary as not substantially to interfere with the performance of the contract." [*Metropolitan Water Board* v. *Dick, Kerr & Co.*, 1917, 2 K.B. at p. 30.]

The learned Lord Justice does not appear, however, to have the difficulty in mind to which Lord Parker and Bailhache J. have called attention.

The question almost invariably leads into another branch of law, namely, the doctrine of supervening impossibility excusing the performance (*see* Chapter V, *post*).

G.—Miscellaneous Effects of War and Emergency Legislation on Various Contracts

(G) Miscellaneous Effect of War and Legislation.

A number of contracts of various kinds have been affected by war or by emergency legislation, necessitated by the present war, and which cannot be appropriately dealt with under the broad divisions of the subject which the present work has drawn (*see* Chapter I) as falling under agreements that are either illegal or impossible to perform. It is therefore proposed to review the reported cases of this character at this place in the work and to do so in alphabetical order according to the nature of the contract.

Affreightment Contracts

Affreightment contracts.

The abandonment of a vessel by her crew, during a voyage, under stress of enemy violence, without any intention to retake possession, gives the owner

of the cargo on board the right to treat the contract of affreightment as at an end. [*H. Newsum, Sons & Co., Ltd.* v. *Bradley*, 1917, 2 K.B. 112.] The Court of Appeal have affirmed the decision [34 T.L.R. 49]. (G) Miscellaneous Effect of War and Legislation.

AGENCY

In *Thompson* v. *British Berna Motor Lorries, Ltd.* [1917, 33 T.L.R. 187] an agreement to pay commission on goods "sold" was held not to cover a claim by a commission agent against his principle for goods "commandeered" by the Government as the word "sold" denoted a contract, while commandeering was the negation of contract. Agency.

BROKER AND CLIENT

In a House of Lords case [*Foster* v. *Barnard*, 1916, 2 A.C. 154] the defendant instructed the plaintiff, a broker, to buy certain shares. The plaintiff bought them from jobbers and received the scrip. The defendant refused to take them up and the plaintiff sold the shares and brought an action to recover the difference in price. It was held that the plaintiff had not entered into possession of the shares for the purpose of enforcing the payment, but that he was in the position of a mortgagee in possession having the right to realize his security and therefore had a right to sell the shares without the leave of the Court under S. 1 (1) (*b*) of the Courts (Emergency Powers) Act, 1914, and therefore entitled to recover the amount claimed. Broker and client.

In *Dickson & Co., Ltd.* v. *Devitt* [1916, 32 T.L.R.

(G) Miscellaneous Effect of War and Legislation.

Broker and client.

547] the plaintiffs instructed the defendant, an insurance broker, to effect a certain insurance on a certain ship "and/or other steamers." The defendant effected the insurance, but by mistake of his clerk the words "and/or other steamers" were omitted. Policies were sent to the plaintiffs. The goods went by other steamer, which was sunk by enemy submarine, and the plaintiffs were therefore unable to recover on the policy. In an action for negligence in effecting the insurance *Atkin J.* held that the client of an insurance broker is not, as between himself and the broker, bound to see whether his instructions to insure have been carried out and for that purpose to look at the documents himself and therefore decided for the plaintiffs.

COMPANY CONTRACTS

Company contracts.

In *Collins* v. *Sedgwick* [1917, 1 Ch. 179] a point as to deduction of excess profits duty arose. *Peterson J.* held that under the articles of association of a company, which provided that the selling price of the shares should be regulated by the amount of the entire profits available for distribution as dividend, allowance should be made for excess profits duty in ascertaining what were the profits available for distribution as dividend.

As to the power of a Controller of an enemy business appointed under the Trading with the Enemy Amendment Act, 1915, to make calls of unealled capital from enemy shareholders, or to distribute surplus assets amongst the members of the Company reference is made later (*vide* p. 234, *post*).

LANDLORD AND TENANT

(G) Miscellaneous Effect of War and Legislation.

A case of considerable interest at one time to landlords and tenants was that of *Sharp Bros. & Knight* v. *Chant* [1917, 1 K.B. 771], but the effect of the decision was got rid of by Parliament by a clause in the new Courts (Emergency Powers) Act.

Landlord and tenant.

The case of *Tozer* v. *Viola* [1917, 33 T.L.R. 522; 34 T.L.R. 73, C.A.] raised an interesting question as between landlord and tenant on Section 2 of the Courts (Emergency Powers) (Amendment) Act, 1916.

The plaintiff was lessee of ground-floor premises in Brook Street, at a rental of £500 a year. The lease, made in 1907, was for twenty years, with power to determine by the tenant in 1920, and there was the usual covenant by the lessee not to assign without the consent of the lessor. In 1910 the plaintiff assigned the lease to Maurice Spero, who entered into the usual covenant to indemnify the plaintiff against any claim arising out of the lease, and the lessor, the defendant in the action, duly authorized the assignment. In March, 1916, Spero, having joined the army, applied in the County Court for an order terminating his tenancy, as provided by the Act of 1916, and the order was made as from March 25, 1916. The order provided that the rights and liabilities of third parties were not to be affected, but only Spero and the defendant were represented at the proceedings, no notice being given to the plaintiff.

As the defendant had taken up the standpoint that, the assignee having gone, he was entitled to call upon

(G) Miscellaneous Effect of War and Legislation.

Landlord and tenant.

the plaintiff, as original lessee, to pay the rent and fulfil the covenants of the lease, the plaintiff brought the action asking for a declaration that the effect of the order of the County Court Judge was to determine the lease altogether, and that he was therefore discharged from all further or future liability thereunder.

Astbury J. in giving judgment for the plaintiff held that if the lessee was to be held liable under the lease the soldier would not be relieved at all, for he would remain liable under his covenant to indemnify, without having any interest in the property; and that the expression "determine the tenancy" implied a termination of the term itself. The Court of Appeal reversed this decision, holding that the determination of the tenancy as between assignee and lessor did not relieve the lessee of his liabilities under the lease.

Where lessees were under covenant to carry on premises as an hotel and restaurant and owing to loss of business during the war they proposed to close the hotel and to carry on the restaurant, an injunction to restrain them from so doing was refused. [*London, Chatham & Dover Rly. Co., etc.* v. *Spiers & Pond, Ltd.*, 1916, 32 T.L.R. 493.]

MASTER AND SERVANT

Master and servant.

Several decisions bearing on the relationship of master and servant owing to emergency legislation may next be noted.

Excess profits duty.

In *William Hollins & Co.* v. *Paget* [1917, 1 Ch. 187], a summons matter, the defendant, a manager of the

(G) Miscellaneous Effect of War and Legislation.

Master and servant.

Excess profits duty.

plaintiffs, in addition to salary was to receive a sum by way of commission equal to 5 per cent. of the excess of profits over those sufficient to pay preference dividends and dividends on the ordinary capital. The question raised was whether the sum paid for excess profits duty under the Finance (No. 2) Act, 1915, and the Finance Act, 1916, ought to be deducted from the sum on which the defendant's commission was to be calculated. *Eve J.* held that the defendant should be paid on the excess and the duty should not be deducted.

In *Thomas* v. *Hamlyn & Co.* [1917, 1 K.B. 527] *Rowlatt J.* held that where a manager of certain branches of a company's business was entitled to a percentage of the net profits of those branches, which were to be ascertained by deducting all expenses of the branches, the company could not deduct from the net profits of the branches the proportion of the excess profits duty which might, if it were apportioned, have been attributed to those branches.

In each of these cases the learned Judges considered that excess profits duty was a contribution to the Exchequer of part of the company's profits, and was analagous to income tax, which admittedly could not be deducted for the purpose of ascertaining net profits. This analogy has been doubted as correctly drawn. [*In re Condran, Condran* v. *Stark*, 1917, 1 Ch. 639.]

In *Thompson Bros. & Co.* v. *Amis* [1917, 2 Ch. 211] the liability of an employee, who had been paid a larger remuneration owing to increased profits in the employer's business, to refund any sums paid by

(G) Miscellaneous Effect of War and Legislation.

way of excess profit duty in respect of the increased remuneration, and which the Surveyor of Taxes had declined to deduct from the employer's profits, was recognized.

Master and servant.

Excess profits duty.

The case of *Rex* v. *Commissioners of Inland Revenue* [1917, 2 K.B. 405] shows that when the Commissioners refuse to allow the full remuneration of managing directors of a company, which remuneration was a fixed sum plus 10 per cent. of the net profits, it is a matter for their discretion and a *mandamus* will not lie.

As to the effect of employees having to join His Majesty's forces on their contracts of employment, several cases may be briefly noted.

Compulsory military service of employee.

In *Marshall* v. *Glanville* [1917, 2 K.B. 87], on appeal from a County Court, the facts were that the plaintiff was a commercial traveller. He became liable under the Military Service Act to military service. He was at his employer's instance exempted for a time, but eventually was called up to join the forces on July 16. Two days before that date he enlisted. When he left the facts were known to both sides, and the defendants were willing to take the plaintiff back when the war was over if room could be found for him. Neither party did anything formally to terminate the contract.

It was argued that the plaintiff had himself put an end to the contract by enlisting; the contrary argument being that the contract was merely suspended. It was held that the contract was terminated.

In *Warburton* v. *Co-Operative Wholesale Society, Ltd.* [1917, 1 K.B. 663] the Appeal Court held that a

promise to pay full wages to employees who enlisted for service applied to an employee who at the date of the offer was, under the Workman's Compensation Act, drawing an allowance for total incapacity, as the contract of service had not been determined by that consideration and was, therefore, continuing till the date of enlistment.

(G) Miscellaneous Effect of War and Legislation.

Master and servant.

Compulsory military service of employee.

For a similar case see *Harrison, Ltd.* v. *Dowling* [1915, 3 K.B. 218].

In *Joyce* v. *Lord Ebury* [33 T.L.R. 145] it was held that an employee who enlisted for military service was not entitled to participate in the Provident Fund of the employing organization, as he was no longer in employment.

In *Budgett* v. *Stratford Co-operative and Industrial Society, Ltd.* [1916, 32 T.L.R. 378] it was held that where an employer made an offer that if his employees joined the army they would receive half their wages and be reinstated in their employment at the end of the war, and the offer was accepted by an employee, the fact that the employee had joined the army was good consideration for the promise made by the employer. See also *Davies* v. *Rhondda* U.D.C. 34 T.L.R. 44.

A further case of contractual relationship between employer and employee is that of *Shipton* v. *Cardiff Corporation* (1917, W.N. 175).

The plaintiff, an electric tramcar driver in the defendant's employment, volunteered for service in His Majesty's forces and was accepted, and at the time of the action was a soldier. The local authority had passed two resolutions allowing leave of absence to employees who might join the British forces, pro-

(G) Miscellaneous Effect of War and Legislation.

viding for their re-instatement on return, and payment in the interval of any deficit between the civil remuneration and the military pay. By sec. 1, subs. (1) & (2) of the Local Government (Emergency Provisions) Act, 1916 (6 & 7 Geo. 5, c. 12) much the same matter was enacted as contained in the resolutions save that under the Act the sanction or permission of the local authority was required. The plaintiff had applied for this before volunteering. It had been refused. The plaintiff contended that no permission was necessary and relied on the resolution. *Rowlatt J.* held that the resolution was an offer which being accepted became a contract, and that in view of the Act it was not *ultra vires* of the local authority to pay the deficit of pay out of the rates, and passed judgment for the plaintiff.

Master and servant.

Compulsory military service of employee.

Accidents to servants.

In *Cooper* v. *North-Eastern Railway Co.* [114 L.T. 55] an engine-driver employee failed to recover compensation for an injury from a shell splinter in the German bombardment of Hartlepool from his employer, as the accident did not arise "out of" his employment.

In *Risdale* v. "*Kilmarnock*" (owners) [1915, 1 K.B. 503] it was held that injury to the engineer of a steam trawler in a collision with an enemy mine, through disregard of instructions, the disobedience being due to a desire to report mines to wars[illegible] was an accident arising "out of" his employment.

In attempting a survey of decisions under this head it may be noted that in a recent House of Lords' decision [*Dennis* v. *A. J. White & Co.*, 1917, A.C. 479] the Lord Chancellor considered a hypothetical

(G) Miscellaneous Effect of War and Legislation.

case of injury to a workman by bomb from hostile aircraft in dealing with the doctrine of liability of the employer where the accident in respect of which the workman claims compensation is due to a risk common to all mankind. The passages in the judgment that are relevant in this connection are as follows:—

Master and servant.

Accidents to servants.

> "There were, of course, cases in which it was necessary to inquire whether the nature of the employment specially exposed a workman to a risk of a general nature. . . . In the case of injury by a bomb thrown from hostile aircraft, the fact that the workman was engaged on work in a building brilliantly lighted so as to attract the notice of the enemy crews, might be most material as showing that the injury by the bomb was one which arose out of the employment. . . . Where the risk was one shared by all men, whether in or out of employment, in order to show that the accident arose out of the employment it must be established that special exposure to it was involved. . . ."

These remarks followed on the citation of the *dictum* of Lord Parmoor in his judgment in *Thom* v. *Sinclair* (1917. A.C. 12), namely, "the fact that the risk may be common to all mankind does not disentitle the workman to compensation if in the particular case it arises out of the employment."

CONTRACTS OF MORTGAGE

Mortgagor and Mortgagee.

A case has occurred [*Jones* v. *Woodward*, 116, L.T. 378] as regards the enforcing a security during the war in view of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (5 & 6 Geo. V. c. 97), s. 2, sub.-s. (4) (*b*).

The defendant by a written memorandum charged

(G) Miscellaneous Effect of War and Legislation.

Mortgagor and Mortgagee.

all his estate in certain properties to secure monies due from the defendant to the plaintiff, and agreed to give formal charges later on. The plaintiff sued for the recovery of the monies owing, some £5000, and to have the charge enforced by foreclosure or sale. A summons to stay the action was taken out by the defendant on the ground that plaintiff had not complied with the provisions of the Act above mentioned, and it was contended that the property the subject of the charge was mortgaged property. As the Act exempted "an equitable charge by deposit of title-deeds or otherwise," it was contended that the words "or otherwise" must be construed *ejusdem generis* with the words "title deeds." *Sargant J.* decided against this contention, and held that the Act did not apply.

(And see Chapter VI. *post.*)

As regards the exclusion of an equitable charge by deposit of title deeds from the Act under notice a recent case has considered what kind of mortgage the Act contemplates. [*London County & Westminster Bank* v. *Tomkins*, 1917, 33 T.L.R. 471.]

Shearman J. observed:—

> "In his opinion the draftsman of the Act had had in mind the definition of a mortgage given by Lord Justice Lindley in *Santley* v. *Wilde* ([1899] 2 Ch., at p. 474), and had intended to deal only with two classes of transactions, a mortgage by absolute assignment of property and a charge by deposit of title deeds. That being so, a mortgage for the purposes of the Act meant an assignment of property subject to redemption, and any document providing for less than that fell within the exception in section 2 (4) (*b*) of the Act."

(G) Miscellaneous Effect of War and Legislation.

Mortgagor and Mortgagee.

In *Welby* v. *Parker* [1916, 2 Ch. 1] an action was brought for foreclosure of a mortgage in July 1915, and a summons for directions was issued in November. The Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, which imposes restrictions on (*inter alia*) a mortgagee taking steps for exercising the right of foreclosure or sale, came into force in December. The mortgage was of a class subject to the Act.

It was held that the Act did not take away any rights, but merely suspended a particular form of remedy; that it related to a matter of procedure, and, therefore, might operate retrospectively: that both an attendance by the plaintiff on the summons and appealing from the refusal of the Judge in Chambers to make an order, were steps taken for the purpose of obtaining foreclosure, and the action, therefore, must be stayed until six months after the war.

Reference should be made to the provisions of the Courts (Emergency Powers) Act, 1914 (*vide* p. 332, *post*).

SALE OF A BUSINESS

Sale of a business.

The effect of recent legislation as to excess profits duty chargeable under the Finance (No. 2) Act, 1915, and the Finance Act, 1916, on an agreement, dated April 1914, to purchase a business at a figure equivalent to one-third of the *nett* profits during a period from 1914 to 1919, was considered in a recent case [*In re Condran, Condran* v. *Stark*, 1917, 1 Ch. 639], where it was held that the purchasers were only

(G) Miscellaneous Effect of War and Legislation.

liable to pay one-third of the net profits after deducting the excess profits duty.

TRANSFER OF A COMPANY'S BUSINESS

Transfer of a company's business.

How emergency legislation indirectly effected a proposed transfer of a company's business can be seen in a recent appeal. [*In re Aramayo-Francke Mines, Ltd.*, 1917, 1 Ch. 451.] A company producing metals requisite for munitions proposed to transfer its business to a Swiss company in order to avoid the burden of English income tax. In order to prevent the proposed transfer the Board of Trade applied for the appointment under the Trading with the Enemy Acts of a Controller. The Court of Appeal held that the case was one in which it was "expedient in the public interest that a Controller should be appointed owing to circumstances or considerations arising out of the present war" within Section 11, subs. (1) of the Trading with the Enemy Amendment Act, 1914, and therefore dismissed the appeal.

VENDOR AND PURCHASER'S CONTRACTS

Vendor and purchaser.

In *Rees* v. *Bute* (*Marquis*), [1916, 2 Ch. 64] defendant owned certain cottages. He sold some of them to the plaintiff under conditions of sale which provided that each purchaser should take a 99-year lease at a small ground-rent and pay taxes, rates and other outgoings. The parties were ignorant of the coming into force of the Increase of Rent and Mortgage Interest (War Restrictions) Act. When the defendant learnt of it he refused to complete. No

possession had been taken. In a suit by the purchaser for specific performance it was held the agreements to pay the purchase money being prohibited by s. 1 (2) of the Act [now see Courts (Emergency Powers) (No. 2) Act, 1916 (6 & 7 Geo. 5, c. 18) s. 2], the defendant was entitled to be relieved altogether from the contracts upon repaying all moneys received from the purchasers.

(G) Miscellaneous Effect of War and Legislation.

Vendor and purchaser.

CHAPTER IV

Contracts must be Lawful

General Principles.

It next becomes necessary to examine one of the leading principles that have to be observed in considering the effect of war upon contracts, namely—

The Consideration or Object of a Contract must be Lawful.

English Law.

When the consideration or object of an agreement becomes unlawful the agreement is void, and the parties are excused from performance. The consideration or object may be expressly forbidden by law or it may become opposed to public policy. The outbreak of war may by itself render contracts then in existence unlawful, or the State in pursuance of its policy during war may prohibit acts which happen to be the acts promised by the parties to be performed.

On the principles of the English law it is not competent to any subject to enter into a contract to do anything which may be detrimental to the interests of his own country, and such a contract is as much prohibited as if it had been expressly forbidden by Act of Parliament. It is admitted that if a man contracts to do a thing which is afterwards prohibited

by Act of Parliament, he is not bound by his contract. [*Furtado* v. *Rogers*, 3 B. & P. 196.] General Principles.

It is now fully established that, the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the license of the Crown, is illegal. The force of a declaration of war is equal to that of an Act of Parliament prohibiting intercourse with the enemy except by the Crown's licence. [*Esposito* v. *Bowden*, 7 Ell. & B. at p. 779.] English Law.

So it is that if an agreement be made to do an act lawful at the time of such agreement, but afterwards, and before the performance of the act, the performance be rendered unlawful by the Government of the country, the agreement is absolutely dissolved. If therefore before the commencement of a voyage war or hostilities should take place between the State to which the ship or cargo belongs and that to which they are destined, or commerce between them be wholly prohibited, the contract for conveyance is at an end, the merchant must unlade his goods, and the owners find another employment for their ship [*Idem*].

The Indian Contract Act (9 of 1872, s. 23) recognizes a similar rule. Every agreement of which the object or consideration is unlawful is void. The consideration or object of an agreement is unlawful if it is forbidden by law, or the Court regards it as opposed to public policy. Indian Law.

General Principles.

Trading contracts which by war are converted into commercial intercourse with an enemy are at once unlawful.

Trading contracts.

As observed in the House of Lords:

> "The declaration of war amounts to an order to every subject of the Crown to conduct himself in such a way as he is bound to conduct himself in a state of war. It is an order to every militant subject to fight as he shall be directed, and an order to every civilian subject to cease to trade with the enemy. There is a general rule in the maritime jurisdiction of this country by which all trading with the public enemy, unless with the permission of the Sovereign, is interdicted. . . . A declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and such intercourse except with the license of the Crown is illegal. . . . Immediately the Royal Prerogative is exercised and war is declared against another nation every subject of the King is bound to regard every subject of that nation as an enemy and the consequences ensue which I have mentioned." [*British and Foreign Marine Insc. Co., Ltd.* v. *Sunday & Co.*, 1916, 1 A.C. 650, H.L., *per* Lord Wrenbury.]

Trading with the enemy.

As to what is a trading with the enemy the law is in some cases by no means free from doubt.

In the House of Lords' decision in *Daimler Co.* v. *Continental Tyre & Rubber Co.* [1916, 2 A.C. 307] as regards a company with enemy shareholders carrying on trade, Lord Parker of Waddington said—

> "It was suggested in argument that acts otherwise lawful might be rendered unlawful by the fact that they might tend to the enrichment of the enemy when the war is over. I entirely dissent from this view. I see no reason why a company should not trade merely because enemy shareholders may after the war become entitled to their proper share of the profits of such trading. I see no reason why the trustee of an English business with enemy *cestuis que trust* should

General Principles.

Trading with the enemy

not during the war continue to carry on the business, although after the war the profits may go to persons who are [illegible] nemies, or why moneys belonging to [illegible] enemy out on the Lands of a trustee in this country should not be paid into Court and invested in Government stock or other securities for the benefit of the persons entitled after the war. The contention appears to me to extend the principle on which trading with the enemy is forbidden far beyond what reason can approve or the law can warrant. . . . In the meantime it would be lamentable if the [illegible]s of this country were fettered, businesses shut down [illegible]r money allowed to remain idle in order to prevent [illegible]y possible benefit accruing thereby to enemies after peace. The prohibition against doing anything for the benefit of an enemy contemplates his benefit during the war and not the possible advantage he may gain when peace comes" (at p. 347).

These remarks have been frequently referred to in other cases. Some Judges approve of them, while others regard them as *obiter dicta* and not supported by authority (see *Tingley* v. *Müller*, 1917, 2 Ch. 144, especially Scrutton L.J.'s judgment cited at p. 235, *post*).

Lawrence J. [illegible]is dissenting judgment in *Stevenson & Sons, Ltd.* [illegible]. *Aktiengesellschaft für Cartonnagen-Industrie* [1917, 1 K.B. at p. 855] observes:—

> "The reason that trading with the enemy is a crime at common law is that it is an act against the interests of the State. A nation at war has three main elements of force—men, wealth, knowledge. Trading with the enemy tends to increase his stock of the two latter, and is therefore contrary to the interests of the State and the allegiance of the subject. If a subject sells to or buys from an enemy, he intends to benefit himself, but it is illegal because it may also benefit the enemy. If he makes a contract for the benefit of the enemy, he adds intent to benefit the enemy and thereby accentuates his crime. It is an *a fortiori* case.

General Principles.

It is not the interest of the State to build up during war a fund for the enemy's use when peace comes."

Trading with the enemy.

In *Robson* v. *Premier Oil & Pipe Line Co.* [1915, 2 Ch. 124 at 136] it was laid down by the Court of Appeal that "a transaction between an alien enemy and a British subject which might result in detriment to this country or advantage to the enemy" comes within the principle upon which intercourse is prohibited, namely, that of public policy.

This, of course, is a very widely stated rule. It denotes the two extremes, but where cases are clearly within either branch of the rule there is seldom much difficulty in realizing what is trading with the enemy. In complicated and difficult cases, however, such a rule is of little assistance. The facts in each particular case are usually so very different that it may be impracticable to frame a rule that will cover all. From a common-sense point of view it is often clear enough to hold that there is no such trading with the enemy in substance, but facts are so often connected as to lead back to a technical and somewhat remote connection of a commercial character with an enemy, and it is in those cases that opinions will differ.

Two cases cited elsewhere illustrate the difficulties of deciding what is a trading with the enemy. Swinfen-Eady, L.J. appears to hold [*Arnhold Karberg & Co.* v. *Blythe, Greene, Jourdain & Co., Ltd.*, 1916, 1 K.B. 495] that if a c.i.f. vendor tenders to his buyer a bill of lading in respect of the goods sold, which has been procured by him from a shipping company that has become an enemy since the shipment and before the tender, that the buyer would be

General Principles.

involved by reason of the endorsements on the bill of lading in relationship of a commercial character with the enemy (see p. 256, *post*).

Trading with the enemy.

The Prize Court in Egypt (the S.S. *Barenfels*, unreported, see p. 187, *post*) also took the view that negotiating a draft in respect of c.i.f. goods between British subjects is a trading with the enemy when the goods were in the first instance sold before war by an enemy vendor. This view likewise seems difficult to support as the enemy had sold the draft before war to a British bank and had got its money for the goods. It would appear that a bald payment by or on account of an alien enemy to persons resident in this country is not a trading with the enemy provided the payment is independent of accompanying terms or conditions or circumstances which would in themselves constitute a trading with the enemy. As, for instance, the payment of rent arising out of a lease granted before war breaks out. [*Halsey* v. *Lowenfeld*, 1916, 2 K.B. 707.] In considering the performance of an obligation on an enemy's part it must be observed that when it requires the concurrence of the British subject such concurrence must not in itself involve unlawful intercourse, for if it does then the contract becomes unlawful and the enemy is no longer under an obligation to perform his part (*idem* at p. 716).

As regards agreements providing in the case of war for suspension of the contract and the resumption of trading with the enemy after war is over, reference to this subject has already been made (see p. 29, *et seq. ante*).

General Principles.

The illegality involved in the law of Trading with the Enemy is not of course the only form of illegality that may affect the contract.

Other illegality.

Emergency legislation in its numerous forms may bring about a like result.

Thus an Order in Council, or a regulation under the Defence of the Realm Regulations, may affect a contract, for example, by prohibiting export or import, or the sale and purchase of goods which are the subject matter of the contract. Or, again, Military Service under the law enforcing compulsory service may forthwith make a contract of employment illegal—for the would-be soldier cannot serve two masters—his country and his late employer.

Requisitionment of goods by the Crown in the hands of a vendor will make it illegal for him to make delivery of those goods to a purchaser in accordance with a contract previously made. Such illustrations can be multiplied.

In all such cases it can be said:—

"There is no doubt that when a party contracts to perform an act lawful at the time of the making of the contract, which thereafter becomes impossible of performance by reason of a change in the law, he is discharged from the obligation under the contract." [*Leiston Gas Co., Ltd.* v. *Leiston-cum-Sizewell U.D.C.*, 1916, 2 K.B. 428, at p. 431.]

Illegality under foreign law.

It should be understood that the change in the law is in the law of this country. Where the performance of a man's undertaking is prevented by the passing of some law in a foreign country, such illegality cannot be relied upon as an excuse for not paying

damages for a breach of the contract. For instance, if a freighter takes a vessel abroad and covenants in his charter-party to there load a cargo and when the vessel reaches the place a law prevents the loading of the cargo owing to infectious disease at the place, so that it becomes impracticable, if not impossible, to load the cargo as a consequence of which the master of the ship does not wait but takes the vessel away, the freighter has no excuse for his failure to carry out his covenant. [*Barker* v. *Hodgson*, 3 M. & S. 267.] As Lord Ellenborough C.J. put it in that case—

General Principles.

Illegality under foreign law.

> "Perhaps it is too much to say that the freighter was compellable to load his cargo; but if he was unable to do the thing, is he not answerable for it upon his covenant? Is not the freighter the adventurer, who chalks out the voyage, and is to furnish at all events the subject matter out of which freight is to accrue? The question here is, on which side the burthen is to fall. If indeed the performance of this covenant had been rendered unlawful by the Government of this country, the contract would have been dissolved on both sides, and this defendant, inasmuch as he had been thus compelled to abandon his contract, would have been excused for the non-performance of it, and not liable to damages. But if in consequence of events which happen at a foreign port, the freighter is prevented from furnishing a loading there, which he has contracted to furnish, the contract is neither dissolved, nor is he excused for not performing it, but must answer in damages."

Cases are however to be found in which a party to a contract being prevented from performing his obligations by a foreign law has been held to be discharged: see *Ford* v. *Cotesworth*, L.R. 5 Q.B. 544; *Cunningham* v. *Dunn*, 3 C.P.D. 443.

General Principles.

A point as to pleading may be noticed here. In an action on a contract where the defendant has failed to plead illegality the Court may not pronounce on the illegality unless it is apparent on the face of the contract, or unless the contract and the surrounding circumstances are fully before the Court. [*North-Western Salt Co.* v. *Electrolytic Alkali Co.*, 1914, A.C. 461].

Failure to plead illegality.

Having thus stated the general principles of law as regards the necessity for the lawfulness of a contract, and the result that ensues, it is desirable to divide the recent war decisions into the two following divisions :—

(A) Enemy Contracts.

(A) Contracts made before War with Persons who become Enemies, *e. g.* Enemy Contracts.

Recent cases :

The following are recent cases arranged alphabetically according to their nature.

CONTRACTS OF AFFREIGHTMENT

Affreightment (c.i.f.).

As c.i.f. contracts include an obligation on the seller's part to procure a contract of affreightment for the buyer, a number of cases have been decided in connection with contracts of this class that discuss the validity of a contract of affreightment procured by a c.i.f. vendor from an enemy shipowner for his purchaser. The chief of these was recently decided in the Court of Appeal. [*Arnold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.*, 1916, 1 K.B. 495.] The facts were as follows :—The plaintiffs, the sellers, an English firm, sold to the defendants, who were also an English firm, a quantity of horse beans to be shipped from China to Naples. The price

included costs, insurance and freight (*i.e.*, a c.i.f. contract). The sellers shipped the beans on a German ship in July 1914 and obtained a German bill of lading. War ensued. The vessel took refuge in a port in the Dutch East Indies. In October 1914 the sellers tendered the documents, including the German bill of lading, to the defendants, who refused to pay. The dispute between the parties then went to arbitration. The arbitrators stated a special case on the question whether the sellers were entitled to payment against such documents.

(A) Enemy Contracts.

Recent cases:

Affreightment (c. i. f.).

It was held (1) that the effect of the outbreak of war absolved the owner of the German ship from further performance of the contract, evidenced by the bill of lading; (2) that he was under no further continuing liability to proceed with the voyage to Naples; (3) that the contract was at an end, so that at the time of the tender there was no subsisting contract for carriage of the goods to Naples; and (4) that there was therefore no subsisting contract upon which the buyer could maintain an action (see p. 174, *ante*).

In the companion case [*Theodor Schneider & Co.* v. *Burgett & Newsam*, 1916, 1. K.B. 495], which was covered by the same decision, the documents included both a German bill of lading and a German policy of insurance.

So, too, in a case of a c.i.f. contract that went to the Court of Appeal [*Duncan Fox & Co.* v. *Schrempft & Bonke*, 1915, 3 K.B. 355] the Court took the view that the contract of affreightment, being a German bill of lading, was dissolved by war.

(A) Enemy Contracts.

AGENCY

Recent cases: Agency

It would seem, on the principle that all commercial intercourse with enemies is prohibited and unlawful, that all contracts of agency entered into before the war with persons who by the outbreak of war acquire the legal *status* of enemies would be unlawful.

For instance, treating a partnership as a contract of agency, it has been held that such a contract is dissolved on the outbreak of war. [*Hugh Stevenson & Sons, Ltd.* v. *Aktiengesellschaft für Cartonnagen-Industrie*, 1917, 1 K.B. 842.] An agency that is a trading contract is, like all contracts which involve trading with the enemy, dissolved by war. [*Esposito* v. *Bowden*, 1857, 7 E. and B. 763 at p. 784.]

A more recent decision has put the matter more cautiously.

"It can be said that most agencies, involving as they do continuous intercourse with an alien enemy, are revoked, or at least suspended, when the principal becomes an alien enemy." [*Tingley* v. *Müller*, 1917, 2 Ch. 144, *per Cozens-Hardy, M.R.*]

The case cited shows that there are exceptions, for where a power, irrevocable for a year, was given by a party, who became an enemy, to a British subject to sell premises belonging to the enemy, and it was made subject to sec. 46 and 47 of the Conveyancing Act, 1881, and sec. 9 of the 1882 Act, the Court of Appeal (*Scrutton L.J.* dissenting) held that the power had not been revoked (see p. 235, *post*).

The case of *Nordman* v. *Rayner* [1916, 33 T.L.R. 87, and see p. 297, *post*] shows that a commission

(A) Enemy Contracts.

Recent cases: Agency.

agent who is a German by birth and who is interned but only for a month and then released, because he is found to be of French extraction and with ante-German sympathies, can sue as for a breach of his contract, and his personalty will not affect his contract.

It has been held in another war case [*Maxwell* v. *Grunhut*, 1914, 31 T.L.R. 79 C.A.] that an agent managing under a power of attorney the business of an alien enemy is not entitled to sue for a declaration that he is a trustee of the assets of the business and entitled to collect and give receipts for moneys due to the business, as he can have no greater right to sue than his principal.

The case was subsequently followed in another. [*In re Gaudig and Blum—Spalding* v. *Lodde*, 1915, 31 T.L.R. 153.]

The case can be contrasted with the following one.

When war broke out between England and Germany the well-known piano makers, Beehsteins, had a London branch and were in a curious position. There were over 100 employees, nearly all English. The principals were fighting for the enemy, and the manager, also a German, was in Germany. The assistant manager of the London branch was a British subject, but he had no power to sign cheques on behalf of the firm and so could not go on paying the wages of the workmen. He took out a summons in the matter of the trusts of the business of C. Beehstein and claimed to be interested in the relief sought as a trustee of the said business property and assets. The Court appointed him to be receiver and manager of the

(A) Enemy Contracts.

Recent cases:

Agency.

London branch on his undertaking (1) not to remit goods or money forming assets of the defendants' business to any hostile country; and (2) to endeavour to obtain a license from the Crown to trade. [*In re The Trusts of the Business of C. Beckstein, W. Berridge* v. *E. & C. Beckstein*, 58 Sol. J. 863.]

As regards the position of enemy trustees it has been held that an alien enemy who is a trustee is incapable to act as such, as he is unable to sue. [*In re Sichel's Settlements: Sichel* v. *Sichel*, 1916, 1 Ch. 358.]

An alien enemy shareholder in an English company cannot employ a British subject as a proxy to exercise voting power at a meeting of the shareholders of the company. [*Robson* v. *Premier Oil and Pipe Line Co., Ltd.*, 1915, 2 Ch. 133; 31 T.L.R. 420.]

The Earl of Halsbury, in *The Continental Tyre and Rubber Co.* case [1916, 2 A.C. 307] remarked on the subject of a company British in form, but German in fact, that the company was akin to a partnership, and that on the outbreak of war the company could not meet nor authorize any agent to meet on company business.

BAILMENT

Bailment.

A case of bailment and conversion of the bailment has occurred, which can be referred to here, where the bailor was a British subject, and the bailee a London banker, and the bailment comprised shares deposited to the order of a German bank. The facts were as follows:—

The plaintiff, a British subject, instructed his

(A) Enemy Contracts.

Recent cases:

Bailment.

London bankers to transfer certain shares to the defendants "to the order of" a German bank, which had arranged to transfer them to New York, and the German bank had failed when war broke out so to transfer the shares. The plaintiff sought to recover the shares from the defendants, but the defendants refused to return the shares, as they said they had received them on account of the German bank. In the suit that was brought it was held that the plaintiff must succeed, and the following passage from Lord Tenterden's judgment in *Wilson* v. *Anderson* (1 B. & Ad. 450) was cited :—

"A bailee can never be in a better situation than the bailor. If the bailor has no title, the bailee can have none, for the bailor can give no better title than he has. The right to the property may therefore be tried in an action against the bailee, and a refusal like that stated in the case has always been considered evidence of a conversion." [*Wetherman* v. *London and Liverpool Bank of Commerce, Ltd.*, 1914, 31 T.L.R. 20.]

BANKER AND CUSTOMER

Bills of exchange.

A banking case can be noted here.

In *Clare & Co.* v. *Dresdner Bank* [1915, 2 K.B. 576] the plaintiffs had a current account with the Berlin branch of the defendant bank, whose head office was in Germany. The plaintiffs demanded the amount due to them from the London branch of the bank without having first applied for payment to the Berlin Office. It was held that this disentitled them from succeeding.

(A) Enemy Contracts.

BILLS OF EXCHANGE

Recent cases :

Bills of exchange.

Before turning to the recent war cases attention should be first called to the various Royal Proclamations and Statutes passed owing to the present war in connection with bills of exchange. Special attention should be drawn also to the prohibitions of banking or exchange transactions on behalf of enemy persons as contained in Regulations H. B. and C. of the Defence of the Realm Regulations (see Chap. VI).

Cases as to promissory notes are noted later in alphabetical order (*vide* p. 228).

In *Wilson* v. *Ragosine & Co., Ltd.* [1914, 31 T.L.R. 264] the facts were as follows :—The plaintiff, a British subject, was in partnership with a German subject in a paint business the seat of which was at Cologne, but which traded with a number of European countries. Suspecting war to be imminent the partners divided up the assets of the business, the British partner taking all the assets and liabilities other than German and Austrian. Amongst those assets was a bill of exchange for goods supplied before the war. The bill having been endorsed by the German firm to a German bank in England, who held it for collection only, was presented for payment on behalf of the German firm before the plaintiff could get back from Germany. On his return and on the agreement between the partners being shown to the German bank, it endorsed the bill in blank to the plaintiff, and he sued as holder of the bill. The defendant, anxious not to incur the penalties of trading with the enemy, threw the responsibility on the Court of deciding

Assignment before war.

(A) Enemy Contracts.

Recent cases :

Bills of exchange.

Assignment before war.

whether the sum could be paid. It was held that the plaintiff could recover on the bill, the Court treating the transaction as a *bona fide* assignment for valuable consideration made before war.

The following case [*Motishaw & Co.* v. *Mercantile Bank of India*, 1916, 18 Bom. L.R. 521], decided in India, deals with a transfer of a bill before war.

One Alberti, a Hamburg merchant, drew a bill of exchange on the defendants in respect of certain goods, sold on c.i.f. terms by him to the defendants, on June 24, 1914, in favour of the plaintiff bank payable at 30 days' sight. The bill was purchased by the plaintiff bank in London for its value, and sent out to the Bombay office of the bank. The bill was presented for acceptance and was accepted by the defendants on July 20, 1914, the bill being payable at the plaintiffs' office in Bombay. The bill purported to be drawn against c.i.f. goods which were on a German ship. The ship arrived at Bombay shortly before the outbreak of war between Great Britain and Germany, but in view of impending hostilities left that port before discharging her cargo and took refuge in the then neutral port of Marmagoa in order to evade capture. At the date of suit the German ship was still there.

When the bill matured on August 22, 1914, it was presented by the plaintiffs to the defendants for payment and was dishonoured by them.

The plaintiffs sued for the amount of the bill, alleging that they were ready and willing to hand over the bill of lading, insurance policy and the invoice against payment of the amount due under the bill.

(A) Enemy Contracts.

Recent cases :

Bills of exchange.

Assignment before war.

In December 1914 the British Government had made arrangements by which it was lawful for British owners of goods on enemy ships in neutral ports to pay the necessary amounts to secure their goods.

The defendants contended (1) that the acceptance of the bill was a qualified acceptance, and (2) that the bank could not tender the documents as they included a German bill of lading and a German policy of insurance.

Beaman J. held (1) that the bill did not show that the acceptance was conditional, and (2) that the position of the bank was not that of a seller under a c.i.f. contract, but, as endorsee for value, it had nothing to do with the validity or commercial value of the documents and did not guarantee their value. The learned Judge, in this respect, relying on *Leather* v. *Simpson* [1871, L.R. 11 Eq. 398] gave the plaintiffs a decree. On appeal it was held that on the view that the acceptance was unqualified, the defendants were bound to pay on due date, and if the acceptance was qualified the defendants were bound to pay "at or after maturity," and as a Proclamation allowed payment for the goods on the enemy ship in the neutral port, the defendants were liable to pay, as the plaintiffs were in a position to tender documents under which the defendants would be able to obtain delivery of the goods. [*Motishaw & Co.* v. *Mercantile Bank of India*, 1916, 18 Bom. L.R. 521.]

In *Weld & Co.* v. *Fruhling and Goschen* [1916, 32 T.L.R. 469] there was a transfer of a bill *subsequent* to the war, and it was held that the case was covered by

Sec. 6 (2) of the Trading with the Enemy Amendment Act. The facts were :— (A) Enemy Contracts.

The plaintiffs, a firm of New York merchants, were either shareholders or partners in the German firm of Weld & Co. The defendants were London bankers. Recent cases : Bills of exchange.

The plaintiffs sued on a bill of exchange drawn on June 26, 1914, by the German firm of Weld & Co., upon the defendants, and accepted by them, payable in London to the order of the German firm. The due date was January 1, 1915. The bill was endorsed to the plaintiffs after maturity. The plaintiffs agreed to take a certain number of bills in part payment of their share of the profits, and amongst those bills was the bill in suit. The question was whether the plaintiffs were entitled to sue, and *Bailhache J.* decided that the point was covered by Sec. 6 (2) of the above Act and dismissed the suit. Assignment after war.

In another case in the Prize Court in Egypt [*The Barenfels*, decided on May 26, 1915, unreported] the acceptance was *after* the outbreak of war. The facts were as follows :—The Chartered Bank of India, Australia, and China claimed release of certain goods on board the S.S. *Barenfels* on the ground that the ownership of these goods had passed to a British firm in Colombo. The sellers, a German firm, consigned on July 9, 1914, to the British merchants at Colombo (the buyers) the goods in question, and in respect of them a bill of exchange was drawn on the British firm on July, 22, 1914, discounted on the same date with the bank, and accepted on August 11, 1914, when the documents were handed over to the British Acceptance after war.

(A) Enemy Contracts.

Recent cases:

Bills of exchange.

Acceptance after war.

firm. The Crown contended that the acceptance of the draft after the outbreak of war with Germany came under the law of trading with the enemy, and consequently the contract between the German firm and the British firm had not been completed and was void, and the property in the goods had never passed. Counsel for the bank contended that the acceptance of the draft was no benefit to the enemy firms, it was only a benefit to the British bank, and as that bank had already paid the German firm before the outbreak of war the acceptance was merely a repayment by a British firm to a British bank on account of money already paid away before the war by the bank. The Court remarked:—

> "I am satisfied beyond a doubt that the transactions in this case bring it within the law of trading with the enemy. The acceptance of the draft by Messrs. Diethelm & Co. was an essential part of the commercial undertaking between the German firm Kiotenmacher & Co. and the British firm Diethelm & Co. The German firm agreed to ship and sell the goods and the British firm to buy and pay. The real contract is between those two firms and therefore the acceptance is part of a commercial undertaking with the enemy, although the actual benefit to the enemy may be remote. The Chartered Bank of India are merely intermediaries who, to assist the German firm, advance money on the security of documents placed in their hands, and consequently are mere pledgees whose claims under the *Odessa* case cannot be taken into consideration. As the contract in this case was one of documents against acceptance, the property in the goods does not pass until the acceptance has taken place, and, as I am of opinion that the acceptance, which took place after the outbreak of war, is an act of trading with the enemy, and is consequently illegal and void, I hold that, for the purposes of this case, no acceptance has taken place and the property

in the goods still remains in the German firm and has not passed to the British firm." (A) Enemy Contracts.

It has already been submitted that this decision is not sound (see p. 175, *ante*). Recent cases :

In *Direction Der Disconto-Gesellschaft* v. *Brandt & Co.* [1915, 31 T.L.R. 586] the plaintiffs were bankers with a branch in London and sued the defendants, merchants in London, on a bill of exchange, endorsed to the plaintiffs and accepted by the defendants, but dishonoured by them at maturity. The bill was drawn in a set of three by merchants in Brazil in payment for coffee which they were exporting, payable at 90 days' sight, in favour of a Brazilian bank. This bank was largely indebted to the plaintiff bank, and it sent the bill to the German bank as cover. The first of exchange was sent by the Brazilian bank to the plaintiffs on July 13, 1914, to obtain the defendants' acceptance and with instructions to hold it when accepted at the disposal of the duly indorsed sequence of exchange. Defendants accepted on July 31st, but it was never indorsed by the payees. The second of exchange was indorsed by the payees in plaintiffs' favour on July 13th and forwarded by them to their Berlin office. The third of exchange was indorsed and forwarded to the plaintiffs on July 16th, for use should the first or second of exchange have miscarried. The plaintiffs presented the first and third of exchange to the defendants for payment on October 31st. The defendants refused to pay. Bills of exchange. Acceptance after war.

The plaintiffs by licence received a limited permission to do banking business, and by further licence permission was limited to the completion of banking Banking transactions under licence.

(A) Enemy Contracts.

Recent cases :

transactions entered into before August 4, 1914, so far as those transactions would have in the ordinary course been carried out through or with the London establishment.

Bills of exchange.

Banking transactions under licence.

The plaintiffs had obtained advances from the Bank of England and had undertaken to collect funds due to them as soon as possible and apply those funds in repayment of that bank's advances. In the action the defendants pleaded that the plaintiffs were enemies and the transaction did not fall within the license.

Bray J. held that the transactions permitted by the license were not limited to transactions with the plaintiffs' London branch; that the transaction would in the ordinary course have been carried out in London; that the presentment or collection was not a new transaction; and that, therefore, the plaintiffs could recover.

Open endorsement.

In *Haarbleicher* v. *Baerselmann* [1914, 137 L.T.Jo. 564], a bill of exchange drawn upon and accepted by B. and payable to the order of R., a German subject, was indorsed by R. "*für mich*" to the order of H., value in account, and payment was afterwards refused on the ground that B. could not pay drafts collected on account of alien enemies, R. having become an enemy. It was held that evidence was admissible to show that by German law the endorsement "*für mich*" was not restrictive but open, and that the indorsement was not restrictive and H. was in a position to recover.

It would appear from older decisions that bills of exchange granted or negotiated by British prisoners

of war for necessaries can be sued on by the enemy holders on the restoration of peace. [*Antoine* v. *Morshead*, 1815, 7 Taunt. 237.] *Trotter* in his supplement to the *Law of Contract during War* (at p. 52) cites a Scottish case [*Johnston* v. *Goldsmid*, unreported] for the proposition that British or neutral holders in due course can, at common law, sue on a bill made with an alien enemy in time of war. [*Cf. Willison* v. *Patteson*, 1817, 7 Taunt. 439.]

(A) Enemy Contracts.

Recent cases:

Bills of exchange.

Granted by prisoners of war.

INSURANCE (LIFE)

When one comes to consider what effect an outbreak of war may have on a policy of life insurance one is met with considerable difficulties. To begin with, save for the few English decisions to be presently mentioned, there has been no clear pronouncement of what the Courts in this country consider to be the law. There are numerous American authorities, but these will be seen, when examined later, to conflict with each other. Then the circumstances of each particular contract have to be considered. One may have a British subject insured in an enemy company on a policy issued in the United Kingdom by a branch of that company, or else the converse case of an assurance of an enemy subject by a British Company. In this latter case the party insured may be (1) an enemy in the active sense of being in arms against this country; (2) a civilian not in the field of battle, but in works engaged in the output of military assistance; or (3) a non-combatant, such as a woman, and she may be occupied in work of a war character. Again some policies have clauses avoid-

Insurance (Life).

Effect of war.

(A) Enemy Contracts.

Insurance (Life).

ing the policy in part or in whole on the insured person becoming engaged in military or naval operations. It is difficult to evolve clear *formulæ* to answer each case from the scanty material the cases supply. The facts that most commonly raise the question as to the effect of war upon a life policy will be found to arise out of non-payment of premiums due; the effect of such non-payment under the law of trading with the enemy; the true construction of, and effect to be given to, clauses in the contract that provide for prompt payment of premiums and forfeiture on non-payment; also the death of the person assured during war from injury in the field or if not actually there in places that supply the battlefield with the sinews of war. In this latter connection it is common knowledge that the war has spread to such an extent that the broad distinction between the civilian and military population is almost gone, for the civilian has become so identified with the war interests of his country that though he may not be serving in the field he may be producing war material or else be engaged in pursuits which go to the continuation of the war.

Effect of war.

Trading with the Enemy Proclamations

Proclamation of Aug. 5, 1914.

In approaching the whole question it is necessary to consider first of all the pronouncements made to the British public on the outbreak of war in the Royal Proclamations as to trading with the enemy, and these it will be remembered do not make any new law, but merely state what the common law is that springs into existence when the state of peace dis-

(A) Enemy Contracts.

Insurance (Life).

Effect of war.

Proclamation of Aug. 5, 1914.

appears on the outbreak of war. It is not to be taken that such pronouncements exhaust what the common law is, and the argument that what is not included in such prohibitions is excluded and therefore unobjectionable must be tardily accepted. Proclamations hurriedly issued in the surprise of war cannot, as commonsense will dictate, pretend to be exhaustive, or to foresee and provide for all the difficulties that afterwards are found to have come into existence. Behind them remains the common law. The Royal Proclamation of the 5th of August 1914 warned British subjects—

> "not to make or enter into any NEW . . . life . . . or other policy or contract of insurance with or for the benefit of any person resident carrying on business or being in the said Empire" (*i. e.* the German), "nor under any EXISTING policy or contract of insurance to make any *payment* to or for the benefit of any such person in respect of any loss *due to the belligerent action* of His Majesty's forces or of those of any ally of His Majesty" (*see* Chapter VI).

This proclamation remained in force until that of September 9, 1914, to be presently noticed, took its place. It is clear that the first portion of this prohibition declares the common law principle that it is illegal to enter into agreements with enemies during war. The other half of the prohibition is very limited in its scope. It appears only to contemplate insurances by British Companies on lives of enemy subjects, and nowhere contemplates the converse case. Enemy subjects are confined to those trading or residing in enemy country. Finally it is further limited in so far as to prohibit the payment

(A) Enemy Contracts.

Insurance (Life).

Effect of war.

ont of claims by or on behalf of enemies who have suffered through "belligerent action"—whatever that term may include. Not a word is to be found in the clause forbidding the reception of monies, say in the form of premiums, from or on behalf of enemy insured persons.

Proclamation of Aug. 5, 1914.

It was therefore thought in some quarters that, viewing British policies on enemy lives made before the war as *choses in action*, they remained in a state of suspended animation and that there was no objection to a British Company accepting premiums from alien enemies under the proclamation, as the acceptance of a premium would not constitute *per se* the making of a new contract. How such premiums could be offered by an enemy in view of the law of trading with the enemy it is difficult to conceive, because the law of the enemy's country would in all probability make it illegal for him to do so, and indeed the law of trading with the enemy in this country is based on the fundamental objection that in time of war not merely all trading is prohibited, but all intercourse is prohibited even to correspondence. [*The Hoop*, 1 Ch. Rob. 196.] It has of course been suggested that the tender of the premium can be made by an agent. But here such agency could only be limited to a neutral agent, for contracts of agency with British subjects would in themselves be avoided by the outbreak of war (*see* p. 180, *ante*). The proclamation under notice was, however, replaced by that of September 9, 1914, and the change of language is noticeable. The material clause runs:—

Proclamation of Sept. 9, 1914.

"(6) Not to make or enter into any new . . . life . . . or other policy or contract of insurance with or for the benefit of an enemy; nor *to accept or give effect to* any insurance of any risk arising under any policy or contract of insurance (including re-insurance) made or entered into with or for the benefit of an enemy before the outbreak of war" (*see* Chap. VI).

(A) Enemy Contracts.

Insurance (Life).

Effect of war.

Proclamation of Sept. 9, 1914.

The new clause similarly seems to contemplate only insurance of an enemy, and does not appear to contemplate a policy made with an enemy insurance office. Attention will immediately rivet itself on the change of language from prohibiting payments on policies for loss due to "belligerent action" to a prohibition of giving effect to any contract of insurance whatever, as long as it is with or for the benefit of the enemy insured. It is clear that the prohibition has become considerably wider and covers claims arising on loss however caused. The disappearance of the clause as to loss due to "belligerent action" would appear to get over all such difficulties as the death of an insured, who, though not a soldier, has lost his life while engaged in pursuits akin to military operations in towns or places in the rear of the enemy forces, say by shell or bomb from our aircraft or guns. The proclamation is of importance by reason of the proviso in it (see Chap. VI) allowing payments by or on account of enemies to residents or business houses in this country in respect of transactions entered into before the outbreak of war. Is the payment of a premium due on a pre-war policy within this proviso? Or does that proviso merely contemplate a naked payment which in itself leads to no further intercourse between

(A) Enemy Contracts.

Insurance (Life).

Effect of war.

Proclamation of Sept. 9, 1914.

the parties or gives rise to further obligations? The difficulty in answering these questions arises from the further one, namely: Whether the reception of a premium from or on behalf of an enemy insured is "giving effect to" the insurance by the British Company. The Courts will have to decide whether an acceptance of a premium is here forbidden, or whether such prohibition is confined to payment of the sum insured. Where a policy has a clause forfeiting all premiums paid upon failure to pay the current premium in time, and an insured has paid premiums for many years until war broke out, in all a considerable sum, the acceptance of the current premium when tendered would appear to be giving effect to the continuous nature of such a contract. The proviso under notice has been commented upon in *Halsey* v. *Lowenfeld* [1916, 2 K.B. at p. 717] to which reference should be made. Besides the proclamation has two other clauses that may well bear upon the question of offer and acceptance of premiums due by an enemy.

Clause 1 says—

> "Not to pay any sum of money to or for the benefit of an enemy."

This would apparently prohibit the tender of a premium by a British agent on behalf of an enemy insured if it is to be taken that the keeping in force the insurance on the enemy's life is for his benefit, which it would appear to be, though an English decision, to be noticed later, appears to hold otherwise (see *Seligman's Case* at p. 209). The other clause in the proclamation runs—

"(9) Not to enter into any commercial, financial or other contract or *obligation* with or for the benefit of an enemy."

(A) Enemy Contracts.

Insurance (Life).

Effect of war.

Proclamation of Sept. 9, 1914.

It may well be said that the acceptance of a premium when tendered is an admission that the insurance company enters into a new obligation on their part for a fresh period of time to keep the enemy's life insured by them and to treat the policy as continuing and unaffected.

These proclamations give no guidance whatever to a British subject insured in an enemy office as to what is his legal position if he attempts to tender the premium due or if he avoids doing so for fear of contravening the law of trading with the enemy.

It would therefore appear that these proclamations shed very little light on the perplexities of the position. One has eventually to come back to what the common law of England is, and here it can only be said that it is difficult to say what that common law is. There are of course general principles of the law that may be applied, such as that executory contracts are suspended merely and revive on restoration of peace save where to suspend the contract is to put the parties into a position that they never contemplated, or that executed contracts are suspended and revive on peace being re-established (*see* Chapter III, *ante*). But the difficulty is that an insurance on life is a peculiar contract of which it is hard to say whether it is executory or executed. And to suspend a contract of life insurance for the necessary years of a long war may, when peace is restored, be to place insurance companies in a position that the principles

(A) Enemy Contracts.

Insurance (Life).

Effect of war.

Proclamation of Sept. 9, 1914.

and practice of their businesses, and the science of insurance not only never contemplated but absolutely put out of their calculations. The tender of a lump sum for delayed premiums for, say, five years on conclusion of a war, places insurance companies in a position they expressly avoid. Or again, it may be said that the proposition that non-performance is excused when the law forbids its performance applies to a failure to pay premiums. But here again, as Lord Parker observed in the *Tamplin Case* (*see* p. 154, *ante*), it is difficult to imply a condition subsequent defeating the contract when it is part performed. Besides the insured person may have gone back to his own country from this country just before the war, instead of staying here when he could perform perhaps his part of the bargain and pay his premium, and if he chooses to leave he cannot quarrel with the English law and complain that his bargain has unjustly been defeated. This will be seen when an examination of some of the American case law on this subject is made.

American Case Law

American cases :

Where a policy contains a provision for prompt payment of premiums, and these have not been paid owing to a state of war making payment either illegal or impossible, or, if tendered in fact have been refused for fear of breach of the law as to trading with the enemy, the Courts in America will be found to have taken one of three different courses-

(A) Enemy Contracts.

Insurance (Life).

American cases:

(1) One set of decisions pronounces that the failure to pay avoids the policy and no claim lies against the insurance company.

(2) Another set of decisions lays down that the failure to pay is excused by law with the result that the policy is suspended and not dissolved, and on a tender of arrears of premiums with interest the liability continues.

(3) A third group of cases comes midway between these two opposite views and allows that the policy is avoided, but that if the insurer insists on the application of this rule then the insured can claim the equitable value of the policy arising from the premiums actually paid.

The reasons given for the first of these views are forcibly put in the judgment in the following case.

(1) Policy avoided.

Worthington v. *Charter Oak Life In. Co.*

In *Worthington* v. *The Charter Oak Life Insurance Co.* (1874, 19 Am. Rep. 495) the facts were as follows: The defendants, an insurance corporation chartered and located in Connecticut, issued a policy on the life of a resident in Greenville, South Caroline, in a certain sum payable on death to the plaintiff, the insured's wife. The policy was effected by the Company's agent in Greenville. It contained the usual provision that on non-payment of premiums on the fixed dates the Company was not to be liable. It also provided that the insured should not, without the Company's previous consent, "enter into any military or naval service whatsoever, the militia

(A) Enemy Contracts.

Insurance (Life).

American cases:

(1) Policy avoided.

Worthington v. *Charter Oak Life In. Co.*

not in actual service excepted." Annual premiums were paid to the local agent, when on his withdrawal, premiums were remitted to the Company in Connecticut. When the premium for 1862 fell due the State of South Carolina with others was in rebellion against the general government and the President of the United States had by proclamation declared a state of war to exist and had forbidden all commercial intercourse between the citizens of the loyal and the rebellious States, and from that time till the close of the war in 1865 no premiums were paid on the policy. At the close of the war the insured tendered the amount of the unpaid premiums and interest, but the Company refused to receive them, or to acknowledge any further liability on the policy. No further premiums were paid. In 1869 the insured died, and the plaintiff sued on the policy, claiming the amount of the same after deducting the unpaid premiums. The defendants demurred to the sufficiency of the declaration which depended on the legal effect of the non-payment of the premiums considered with reference to the facts alleged as an excuse. The majority of the Court held that the contract of insurance had become void—two judges dissenting. *Carpenter J.*, who delivered the majority judgment, observed:—

> "The defendants, for a valuable consideration, made an irrevocable proposition to insure the applicant during life, upon certain terms and conditions. He was at liberty to accept or reject the proposition. If he accepted he was to comply with the condition and pay the premium on or before a given day. If he neglected to pay within the time limited, according

(A) Enemy Contracts.

Insurance (Life).

American cases:

(1) Policy avoided.

Worthington v. Charter Oak Life In. Co.

to the letter of the contract he virtually rejected the proposition and the contract was at an end. In terms the contract is a very simple one. The defendants, in effect, say to the other party, 'Pay at the time stipulated and you are insured; omit such payment and our proposition is withdrawn and your right to insure is extinguished.' It is impossible to put any other construction upon it. There is no room for doubt or uncertainty. The payment required is in no sense conditional. The proposition is not, pay if convenient; pay unless sudden sickness prevents; pay unless the act of God or the law intervenes to prevent payment; but absolute payment is required. To make it still clearer the proposition is not, if poverty, sickness, accident or the law prevents payment, you shall be insured the same as if you had paid. None of these risks were taken by the defendants; they were all taken by the insured. . . . It would seem that this analysis of the contract would of itself be a sufficient answer to the plaintiff's claim."

It will thus be seen that the Court regarded the payment of the premiums as a condition precedent to any subsequent liability of the defendants. As regards the effect of war making payment of premiums illegal and so saving the rights of the party and keeping the policy in force the Court took the view that as the parties had contemplated war and had not provided for the presumption the qualification could not be made. The learned Judge went on to observe:—

"But aside from this—assuming that the possibility of a war between the sections was not contemplated by the parties—is it clear that the law will imply the modification of the contract contended for? In the case of written contracts the law will imply nothing except what may fairly be presumed to have been intended by the parties. . . .

"But what reason is there for presuming an exception in the present case? It cannot be presumed from

(A) Enemy Contracts.

Insurance (Life).

American cases :

the mere fact that the act to be done, which was lawful when the contract was entered into, had unexpectedly become unlawful. That may have been a good reason why the insured, in exercising his right of election, should elect not to pay the premiums; but it certainly affords no ground for presuming that the parties intended in such a case that he should have all the advantage of an actual payment."

(1) Policy avoided.

Worthington v. *Charter Oak Life In. Co.*

Then the learned Judge proceeds to examine how insurance companies have considered every element of risk carefully and that their policies have been drawn to express the precise intention of the parties, and observes :—

"With all the light that experience and thought have thrown on this subject, it never has occurred to any one connected with the business, so far as we know or believe, that a clause of this kind was needed to protect the rights of any one. On the contrary, we venture to assert that a life insurance policy containing a provision that in case of war between the government of the insured and the government of the insurer, the policy should be continued in force during the war, without payment of the premiums, would be unprecedented in the history of life insurance; and if a Court of Justice construe the contract as meaning that, they impute to the parties a meaning which they did not intend; for it cannot be presumed that a Company, managed by intelligent men, would knowingly and understandingly make such a contract."

Then dealing with another argument the learned Judge observes :—

"But it is said that the non-performance of a contract will always be excused when the intervention of the law forbids one party from performing and the other party from receiving performance. This is doubtless a sound proposition. But the difficulty is it does not aid the plaintiff. The real question is, not whether the party is excused from performing,

(A) Enemy Contracts.

Insurance (Life).

American cases:

but what are the consequences of not performing? In one of the cases the Court says: 'Their' (the defendants) 'inability to receive the premium when due amounted to the same thing as if the premiums had been actually tendered and the defendants had refused to receive them.' With all deference, we submit that this cannot be true as a general rule. No case occurs to us in which it would be true when applied to an unconditional contract. To illustrate: a man contracts to erect for another a wooden building at a given place on or before a given day. Before performance the act becomes unlawful, by city ordinance, for example, forbidding the erection of wooden buildings in that locality. Non-performance would certainly be excused, but his legal excuse would give him no right under the contract. . . . The law having annulled the contract, both parties are absolved from all obligation under it. Therefore it is not true that the parties would stand as they would if performance had been lawful, and there had been a tender of performance and a refusal.

(1) Policy avoided.

Worthington v. *Charter Oak Life In. Co.*

"Neither is the proposition a sound one in its application to the case under consideration. Let us lay aside the existing insurance, and consider the contract solely in reference to the future. The defendants say to the insured, 'Pay us so much money on or before a given day and we will insure your life a given sum for one year from that day.' The defendants' undertaking is a conditional one. If the other party does not pay no obligation attaches. Before payment, and on the day named, the law absolutely prohibits the one party from paying and the other party from receiving payment. It cannot be true that that would be equivalent to payment; or assuming that there is no legal impediment, a tender of payment and a refusal. If it is, then the law excuses one party from paying the consideration, and yet gives him the benefit of the contract precisely as if he had paid. It deprives the other party of the consideration and converts a conditional promise into an absolute one without performance of the condition. It is no answer to say that the premium may be subsequently paid or allowed when the policy is collected. The parties have a right to make their

(A) Enemy Contracts.

Insurance (Life).

own contracts, and Courts have no power to vary them or make contracts for them. They have fixed the time of payment and made it material. *Time is of the essence of the contract.*"

American cases:

The Court then proceeded to hold that payment in itself was not unlawful:

(1) Policy avoided

Worthington v. Charter Oak Life In. Co.

"The law simply prohibited intercourse between enemies. As a consequence payment which required such intercourse was prohibited. If payment could be made without such intercourse it was perfectly lawful. Such payment was certainly possible. Had the insured come into the Northern States and remained here, or employed an agent, as he had an opportunity to do . . . he or his agent might have paid and the defendants might have received, the premiums without the violation of any law whatever. We cannot, therefore, attribute to the law consequences which the party, by his own act, has brought upon himself."

Having dealt with the law as to trading with the enemy, the following passage from the judgment will attract attention:—

"The difficulty in applying it" (*e. g.* the law) "to a policy of life insurance arises from the complex nature of the contract. There are cases which regard it as a contract of continuing performance, and therefore dissolved by war. Others consider it a contract of periodical performance and affected as the payment of a debt is, suspended or postponed until after the war. On this point there has been much discussion. We regard it as immaterial whether it is called by one name or another. In terms it requires certain acts to be done annually or oftener. On each act future rights and obligation depend. It neither begins nor ends, but continues a contract, and one which contemplates future acts of performance by both parties. As a rule each act requires intercourse or communication between enemies, whenever the parties to it are citizens of belligerent States. War dissolves the

(A) Enemy Contracts.

Insurance (Life).

contract so far as it relates to insurance which depends upon the payment of the premiums after the commencement of the war."

Distinguishing the payment from a debt, the judgment says:

American cases:

(1) Policy avoided.

Worthington v. Charter Oak Life Ins. Co.

"The one discharges an obligation previously existing, and closes the transaction between the parties; the other creates an obligation which did not previously exist, continues in force an existing contract which otherwise would have terminated, and contemplates future dealings between the parties. While it is in form the payment of money, it is in substance the making of a contract. The payment of a debt is only suspended; the making of a contract is prohibited by war."

The learned Judge then asks:—

"Is the contract executed or executory? Is the payment of the annual premiums a condition precedent or subsequent? On these points there has been little discussion. Courts have assumed one answer or the other, in reply to each, according as their decision has been for or against the company. Perhaps a categorical answer either way would not be strictly correct. In the case before us the premium was paid to January 14th, 1862. Up to that time it was an executed contract. No further act was required by either party. Had death intervened, the contract for future insurance would have ceased to exist, and nothing would have remained but to prove the death and pay the money—acts which pertain to the remedy. To that extent the contract was not dissolved by the war. By entering into the contract and paying the first premium the party acquired a right to continue the insurance during life. In that respect also it was an executed contract, and the party received all he contracted for—a mere right or privilege, which was unavailable and without value, unless he complied with the conditions. The law prohibited him from complying, and therefore destroyed the right, precisely as it forbids the contract

(A) Enemy Contracts.

Insurance (Life).

American cases :

of partnership or affreightment, and thereby destroys the rights of the parties under it. In relation to insurance after January 11th, 1862, which is the point that concerns the case, it is different. There is a manifest distinction between a *right to insure* and *actual insurance*. There is no actual insurance, and the party could obtain none, except by complying with the conditions—an act to be done by him. It was an executory contract on his part, and the law prevented the execution of it by him; the contract was necessarily dissolved."

(1) Policy avoided.

Worthington v. Charter Oak Life In. Co.

The clause as to "military or naval service" in this American case (see p. 199, *ante*) is not dissimilar to that in a present war decision of the English Courts where it was contended that such a clause was against public policy as it gave encouragement not to enlist for military service of the State. The Court in connection with that argument observed that "the law could not re-organize the business of insurance companies." [*Duckworth's Case*, 33 T.L.R. 430, cited *ante*, at p. 109.]

(2) Policy unaffected.

New York Life In. Co. v. Clopton.

The opposite view to that above, namely that the insurer remains liable, is found in the case of *The New York Life Insurance Co.* v. *Clopton* [1869, 3 Am. Rep. 290] where it was held that the failure to pay premiums for three years owing to the existence of the war between the North and South did not avoid the policy and that the plaintiff could recover the sum assured less the aggregate amount of the unpaid premiums. The Court went on the grounds that the established law of such internecine war "did not avoid a pre-existing and valid contract which a single act, such as payment of a debt, might have performed. In such cases a suspension of remedy during the war

was the consistent and only legitimate effect of the war on such contracts," and that in such a class of case the contract of insurance and not the performance of it is continuing and a suspension of remedy and not a dissolution of the contract is all that is necessary.

(A) Enemy Contracts.

Insurance (Life).

American cases:

The judgment is remarkable for the following passage—

> "Consequently the war did not dissolve the contract on any such ground as that on which it would have dissolved a contract of partnership or affreightment. But as a general rule, war may dissolve an insurance when it would only suspend legal remedy on ordinary commercial contracts not of continuing performance; and this is the most distinctive difference between a policy and other contracts. The only philosophical or authoritative reason for this distinction is the impolicy of assured indemnity against the perils to life or to property, incident to a state of war between the parties to the contract of insurance; and consequently the principle, which avoids such contracts made during the war is largely extended to the interdiction of the continuance during the war of such as were previously made, and were valid when made."

(2) Policy unaffected.

New York Life Ins. Co. v. *Clopton.*

The Court then proceeded to cite some English cases as to marine insurance which do not appear to be in point: [*Furtado* v. *Rogers*, 3 Bos. and P. 191; *Kellner* v. *Le Mesurier*, 4 East. 396; *Gamba* v. *Le Mesurier*, 4 *idem*, 407; *Brandon* v. *Curling*, 4 *idem*, 410; most of which are cited hereafter—see p. 218], and then proceeded to remark:—

> "It may be a grave question whether the implied condition as to perils of war should be extended beyond the belligerent right of capture or destruction by the Government of the insurer; and to that extent only we may admit that the continuation of the policy during

(A) Enemy Contracts.

Insurance (Life).

American cases:

(2) Policy unaffected.

New York Life In. Co. v. *Clopton.*

war would be illegal, and its pre-existing obligation became avoided. But the principle of this concession would not avoid a policy insuring property which is exempted by law from the belligerent power; and while it would avoid a policy insuring the life of one who becomes an actual enemy of the Government of the insurer, which had the right to destroy that life, it would not affect the validity of an insurance of the life of a neutral or passive non-combatant, over whose life there is no belligerent power; for though the domicile which makes him a technical enemy, whose property may be lawfully captured as enemies' property, yet as such nominal hostility does not subject his life, like his estate, to peril, no belligerent right is affected by the continued validity of the insurance, and consequently in such a case neither authority nor principle would avoid the policy any more than if it had insured the life of a child in the cradle, or insured property exempt from capture or confiscation." [*Keir* v. *Andrade*, 6 Taunt. 504.]

But what about a policy on the life of a person not actually a soldier, but engaged in Government military work such as, say, making munitions, or, sweeping the sea for enemy mines?

Further authority in America for holding that the policy is not avoided by non-payment of premiums due to war can be found, for instance, in *Cohen* v. *The New York Mutual Life Insurance Co.* [1872, 10 Am. Rep. 522]. The parties there were divided by the line of war; premiums were unpaid on account of it; tendered after war was over and refused by the company who declared the policy cancelled and forfeited. The plaintiff asked that she might be permitted to make the payments and that the policy be declared valid, or that the defendant be compelled to pay back the premiums paid with interest and the dividends, etc. It was held that the contract was

(A) Enemy Contracts.

Insurance (Life).

American cases:

not dissolved, but merely suspended by the war; that the payment of the premiums during its existence was legally excused, and the tender revived the policy; and that the case was a proper one for the exercise of the equitable powers of the Court. The further case of *Sands* v. *The New York Life Insurance Co.* [1872, 10 Am. Rep. 535] is in line with the case just cited.

(2) Policy unaffected.

Cohen v. *New York Mutual Life In. Co.*

Recent English decision.

Seligman v. *Eagle In. Co.*

The single instance so far of a decision in England during the present war which approaches this question can be noticed under this secondary view.

In *Seligman* v. *Eagle Insurance Co.* [1917, 1 Ch. 519] a person borrowed money from the defendant insurance company and insured his life with the company and two sureties were found. Owing to war he became an alien enemy. The plaintiff, one of the sureties, after the war commenced tendered the premiums due, which the company accepted without prejudice to the effect of the war upon the policies and subject to the reservation that such acceptance did not imply any assurance by the company as to the existing or continuing validity of the policies. Subsequently the plaintiff tendered the amount of the loan, demanding delivery of the securities held for the debt, but the company refused to assign the policies save on certain conditions. The plaintiff sought for a declaration that the policies were in his favour valid and subsisting either absolutely or in suspension during the war, and that he was entitled to their assignment.

Neville J. took the view that there was nothing in the nature of the contract to put an end to it upon

(A) Enemy Contracts.

Insurance (Life).

Recent English decision.

(2) Policy unaffected.

Seligman v. *Eagle In. Co.*

the outbreak of war; the receipt of money from an enemy in itself involved no unlawful intercourse, and the result of the payment of the premiums did not enable the alien enemy to gain anything while he was an alien enemy. The right of the policy holder was clearly suspended during the war, and the mere receipt of the premiums by the insurance company could not possibly be unlawful intercourse with the enemy, therefore the company was bound to hand over the securities without reservation to the surety upon payment of the debt.

As to this decision it must be noted that as between the surety and the insurance company there would be no obstacle to handing over the security, but as regards the legal effect of the war on the policy no authority and few reasons are given for the learned Judge's view. It is submitted that the question is a difficult one, and to say that the policy was subsisting and that premiums could legally be tendered by the insured and received by the company is open to doubt. It appears from the report that the insured, a German, went to Germany on the outbreak of war, and had not been heard of since. For all one knows he might have been fighting in the enemy ranks. The maintainance of the policy on an enemy's life might well be objectionable and against public policy, especially if, for instance, the insured was engaged in the armed forces of the enemy. It would certainly appear strange to hold that policies granted by a British company to enemy subjects would be unaffected by war, because suspension of the policy would only be temporary, and on the

resumption of peace the insured's representatives could recover on his death. It is also submitted that it is open to doubt to say that such an insured gains nothing by payment while he is an enemy. He gains an insurance on his life for a further period, and thereby secures an asset which would have a surrender value, and on which he could raise money in the enemy country or from a neutral during war—assuming that the policy validly subsists. The insurance company by accepting the premium would thus put in the enemy's power a fund wherewith to enrich himself and his nation, achieving an object which is the fundamental basis for the prohibition of holding commercial intercourse with the enemy.

(A) Enemy Contracts.

Insurance (Life).

Recent English decision.

(2) Policy unaffected.

Seligman v. *Eagle In. Co.*

Where the premiums are tendered by a surety or person interested in maintaining the policy although it may be for his own benefit it must involve an advantage for the principal debtor. As already pointed out (*vide* p. 196, *ante*) the acceptance of the premium may be giving effect to the insurance and so against the proclamation, or it may perhaps be treated as a re-insurance, which is likewise prohibited.

American cases.

The intermediate view of the American Courts given above, namely that the insurance company that insists on forfeiture is in turn liable to make good the equitable value of the policy to its holder is stated in the following cases:—

(3) Policy avoided but on terms.

In *The New York Life Insurance Company* v. *Statham Same* v. *Seyms; Manhattan Life Insurance Co.* v. *Buck* [1877, 93 U.S.R. Sup. Ct.] the annual premiums due on the three policies had all been paid regularly until the breaking out of the American Civil War.

New York Life In. Co. v. *Statham.*

(A) Enemy Contracts.

Insurance (Life).

American cases:

(3) Policy avoided but on terms.

New York Life In. Co. v. *Statham.*

Each of the policies contained various conditions upon the breach of which it was to be null and void; and amongst others the following:

> "That in case the said [assured] shall not pay the said premium on or before the several days hereinbefore mentioned for the payment thereof, then, and in every such case the said company shall not be liable to the payment of the sum insured, or in any part thereof, and this policy shall cease and determine."

The Manhattan policy contained the additional provision, that in every case where the policy should cease or become null and void, all previous payments made thereon should be forfeited to the company.

The parties assured were residents of Mississippi and the insurance companies corporations of New York and so divided by the line of war. All three policies were sued upon and the non-payment of the premiums was set up in bar of the actions; the plaintiffs respectively relying on the existence of the war as an excuse, and offering to deduct the premiums in arrear from the amounts of the policies.

The following propositions were laid down by the Court:—

> (1) "A policy of life assurance which stipulates for the payment of an annual premium by the assured, with a condition to be void on non-payment, is not an insurance from year to year, like a common fire policy; but the premiums constitute an annuity, the whole of which is the consideration for the entire assurance for life; and the condition is a condition subsequent, making, by its non-performance, the policy void.
>
> (2) "The time of payment in such a policy is material, and of the essence of the contract; and a failure to pay involves an absolute forfeiture, which cannot be relieved against in equity.

(A) Enemy Contracts.

Insurance (Life).

American cases:

(3) Policy avoided but on terms.

New York Life In. Co. v. Statham.

(3) "If a failure to pay the annual premium be caused by the intervention of war between the territories in which the insurance company and the assured respectively reside, which makes it unlawful for them to hold intercourse, the policy is nevertheless forfeited if the company insist on the condition; but in such case the assured is entitled to the equitable value of the policy arising from the premiums actually paid.

(4) "This equitable value is the difference between the cost of a new policy and the present value of the premiums yet to be paid on the forfeited policy when the forfeiture occurred, and may be recovered in an action at law or a suit in equity.

(5) "The doctrine of revival of contracts, suspended during the war, is based on considerations of equity and justice, and cannot be invoked to revive a contract which it would be unjust or inequitable to revive —as where time is of the essence of the contract, or the parties cannot be made equal.

(6) "The average rate of mortality is the fundamental basis of life assurance, and as this is subverted by giving to the assured the option to revive their policies or not after they have been suspended by a war (since none but the sick and dying would apply), it would be unjust to compel a revival against the company."

Chief Justice Waite differed from the majority of the Court on the point of liability to pay the equitable value, as did *Mr. Justice Strong*, who put his view in these words:—

> "This is incomprehensible to me. I think it has never before been decided that the surrender value of a policy can be recovered by an assured, unless there has been an agreement between the parties for a surrender; and certainly it has not before been decided that a supervening state of war makes a contract between private parties, or raises an implication of one."

Mr. Justice Clifford, with whom concurred *Mr. Justice Hunt*, dissenting said:—

(A) Enemy Contracts.

Insurance (Life).

American cases:

"Where the parties to an executory money-contract live in different countries, and the Governments of those countries become involved in public war with each other, the contract between such parties is *suspended* during the existence of the war, and revives when peace ensues; and that rule, in my judgment, is as applicable to the contract of life insurance as to any other executory contract."

Summary.

Looking at these three views it is clear that the American law is unsettled, but two out of the three groups of cases hold that a policy is avoided by non-payment of premium. Without suggesting that the American Courts have taken the views they did for or against the insurance company according as the claimant had been an enemy or a loyal subject respectively, it must be admitted that a Court would have a strong leaning to decide, if the law allowed it, in favour of a plaintiff that was a subject of its own country and against a party that had been an enemy. But a principle that applies logically and irrespective of a plaintiff's *status* must be laid down, whether it operates harshly or otherwise, and the sooner such a principle is recognized the better. It is submitted that if subjects of a State invest money in foreign investments in the form of life insurances, and war converts the foreign country into an enemy, they must take the consequences of such a risk. It is submitted that a life policy taken out by a British subject in Great Britain with a branch of a foreign insurance company that becomes an enemy is avoided as soon as the insured fails to pay the premium within the stipulated time, even though such failure is due to the fact that the law of

his country makes such payment illegal. Similarly a policy on the life of a foreign subject who becomes an enemy is avoided as soon as he fails to pay his premium in time. The rule should apply equally in both cases.

(A) Enemy Contracts.

Insurance (Life).

American cases:

It is submitted that the reasons given by the American Courts for avoiding the policy are difficult to combat and have the strict letter of the law to support them.

Agency dissolved.

It remains to give shortly a few further American cases dealing with other points.

New York Life In. Co. v. *Davis.*

In *The New York Life Insurance Co.* v. *Davis* [1877, 95 U.S.R. Sup. Ct.] the action was on a policy of life insurance issued by the above company before the Confederate war upon the life of a citizen and resident of the State of Virginia. The policy contained the usual condition, to be void if the renewal premiums were not promptly paid. They were regularly paid until the beginning of the war. The company, previous to the war, had an agent where the assured also resided; and premiums on this policy were paid to him in the usual way, he giving receipts therefor, signed by the president and actuary, as provided on the margin of the policy, which were usually sent to the agent about thirty days in advance of the maturity of the premium. About a year after the war broke out the agent entered the Confederate Service as a major, and remained in that service until the close of the war.

Offer of payment of the premium next due was made to the agent, which he declined, alleging that he had received no receipts from the company, and that

(A) Enemy Contracts.

Insurance (Life).

American cases :

Agency dissolved.

New York Life In. Co. v. *Davis.*

the money, if he did receive it, would be confiscated by the Confederate Government. A similar offer was made to him after the close of the war, which he also declined. He testified that he refused to receive any premiums, had no communication with the company during the war, and after it terminated did not resume his agency. The plaintiff in the action was assignee of the policy and claimed to recover the amount thereof, upon the ground that he was guilty of no laches, and that at the close of the war the policy revived. The Supreme Court, following *Statham's Case* (cited *ante*), decided against the claim on the ground that the agency was terminated by the breaking out of the war.

Mr. Justice Bradley, delivering the opinion of the Court (*Mr. Justice Clifford* dissenting), said :—

> "The war suspended his agency for all active purposes, and it could not be continued even for the collection of premiums without the defendant's consent; and this, so far as appears, was never given, either expressly or by subsequent ratification. Under these circumstances it cannot be affirmed that the plaintiff could bind the defendant by a tender of payment to the supposed agent. However valid a payment may be, if made to an agent in time of war, where he consents to act as such, and has the assent of his principal in so acting, an offer of payment cannot have any force or effect if neither of these circumstances exist."

Policy with neutral company.

Robinson v. *International Life. Ass. Society of London.*

In *Robinson* v. *International Life Assurance Society of London* [1870, 1 Am. Rep. 490) the head note of the reports runs :—

> "M., a resident of Virginia, held a policy of life insurance issued by the defendant, a foreign corporation, having a general agency and a sub-board of directors in New York, and paid his premiums regularly

(A) Enemy Contracts.

Insurance (Life).

Policy with neutral company.

Robinson v. International Life Ass. Society of London.

to an agent in Richmond, appointed by the New York agency. After the commencement of the war arising from the rebellion of the Southern States, the agent in Richmond received the premiums in Confederate money, but made no returns to the general agents at New York. Prior to the death of M. the defendants took no steps to revoke the authority of the Richmond agent. *Held*, in an action on the policy, that the defendant being a foreign corporation, the war did not operate as a suspension of the authority of their agent in Richmond. *Held*, also, that the receipt by the agent of Confederate money, in payment of the premiums, constituted a valid payment, and was binding on the company."

The *ratio decidendi* of the judgment being that the *status* of the defendant was simply that of a neutral, contracting or continuing a contract with a citizen of a belligerent country.

Effect of war on annuities.

Before leaving the subject of the effect of war on life policies another class of transaction involving life insurance presents equal difficulties, which can only be solved by applying some settled rule of law. For instance, suppose a large capital sum is paid by X to Y, an insurer for annual payments over the rest of X's life or some other persons, and war ensues between the country of Y and X, or the third party, what effect has it on this contract? Can Y claim that the contract is dissolved and keep the capital sum on the rule that the loss must lie as it fell? Can X, or the beneficiary, on the contrary, claim that the annuity is still payable plus the arrears, that the contract is executed so far as he is concerned, that his is a vested interest, and that the contract is suspended merely?

As already remarked, a recent writer has expressed the view that rights of property such as the return of

(A) Enemy Contracts.

premium if due on cancellation of a life policy, or surrender value of a life policy, will be preserved and be enforceable by action after the war (see p. 20, *ante*, and Scott's *Effect of War on Contracts*, 2nd ed., p. 28).

Insurance (Life).

Effect of war on annuities.

The Courts (Emergency Powers) Act, 1914, has some provisions as regards life insurance which should not be overlooked (see Chap. VI.).

INSURANCE (MARINE)

Insurance (Marine).

Before noting the present war decisions that have so far appeared in the reports the effect of earlier cases may be stated in as brief a form as possible.

Early cases :

As to marine insurance under the definition of that term in the English Marine Insurance Act, the ship or property must be one which may be lawfully insured. An insurance of goods in furtherance of an illegal trading with the enemy is void. [*Potts* v. *Bell*, 1800, 8 T.R. 548.] If the countries of the assured and underwriter go to war, the policy is void. [*Aubert* v. *Gray*, 1862, 3 B. and S. 163.] The insuring of an enemy's goods, as it amounts to an indemnity against capture by the insurer's State, is inconsistent with the very object of war [*Furtado* v. *Rogers*, 1802, 3 Bos. and P. 191], and is void *ab initio*.

This also applies to the case of capture by an Ally of the insurer's State, so that after the war the policy cannot be sued upon. [*Brandon* v. *Curling*, 1803, 4 East 410.]

In all policies there is an implied warranty that the adventure is a legal one. Where a voyage is illegal, an insurance upon it is illegal. [*Redmond* v. *Smith*, 1844, 7 Man. and G. 457.] Adventures are illegal

(A) Enemy Contracts.

Insurance (Marine).

Early cases:

when prohibited by statute law of the State of the underwriter, or Orders in Council [*Waugh* v. *Morris*, 1873, L.R. 8 Q.B. 202] or an embargo [*Delmada* v. *Motteux*, 1785, *Park* 357], and by the public policy of the insurer's country. [*Brandon* v. *Nesbitt*, *Bristow* v. *Towers*, 1794, 6 T.R. 23, 25; *Gamba* v. *Le Mesurier*, 1803, 7 R.R. 407, 590; see also *Furtado* v. *Rogers* and *Brandon* v. *Curling*, *supra*.] Insuring British-owned property engaged in trade with an enemy is also illegal for the same reason [The *Hoop*, 1799, 1 Ch. Rob. 196; and *Potts* v. *Bell*, *supra*], unless such trade is licensed [*Hasedorn* v. *Bazett*, 1813, 2 M. and S. 100] and such license is not used fraudulently. [*Gordon* v. *Vaughan*, 1810, 12 East 302; *Gibson* v. *Service*, 1814, 5 Taunt. 433.] The illegality of the adventure, to be effective, must occur on the actual voyage insured or it will not avoid the policy. [*Wilson* v. *Marryat*, 1798, 8 T.R. 31.] What is regarded is the immediate destination of the adventure, so that a policy on goods to a friendly or neutral port there to be delivered to a neutral resident in hostile country is good [*Bromley* v. *Heseltine*, 1807, 1 Camp. 75], and a policy on ammunition despatched from a neutral port to another to be sent on to a hostile port is legal. [*Hobbs* v. *Henning*, 1865, 17 C.B.N.S. 791.] In the case of an insurance on both legal and illegal goods belonging to the same assured, if some are within the protection of a license, the policy as to them can be held to be valid. [*Keir* v. *Andrade*, 1816, 6 Taunt. 498; *Pieschall* v. *Allnutt*, 1813, 4 Taunt. 792; *Butler* v. *Allnutt*, 1816, 1 Sark 223.]

A loss happening to a foreign subject under a policy

(A) Enemy Contracts.

Insurance (Marine).

made with a British insurer against capture of property in transit from the foreign State to Great Britain, by seizure made by the foreign Government in contemplation of war with Great Britain, and for the purposes of making war, is recoverable so long as an actual state of war does not exist. [*Driefontein Consolidated Gold Mines* v. *Janson*, 1901, 2 K.B. 419; 1902, A.C. 484.]

Early cases:

Attention may be called to the bearing that the Royal Proclamations have on this subject (see Chap. VI).

Recent cases:

Coming now to the cases decided during the present war, in one of them the plaintiffs, British subjects, by a policy of July 1914 insured with the defendants, a German insurance company, through their office at Bradford in England, certain goods against war risks only on a voyage from East Africa to England. A loss under the policy occurred at the end of August. The plaintiffs sued in September following. The defendants contended that the performance of the contract was suspended; that the important thing under a policy of insurance is payment; and that to pay would be to infringe the Proclamation of October 8, 1914. *Bailhache J.* held that the defendants ought to have paid on notice of the loss and that they could not improve their position by delaying payment, and on the application before him transferred the case to the long cause list. [*Ingle* v. *Continental Insurance Company of Mannheim*, 1915, 1 K.B. 227.]

Insurance in c.i.f. cases.

Insurance is a component part of a c.i.f. contract, and so contracts of this kind have come up during

the present war wherein the validity of policies of insurance procured by the seller for the buyer from enemy underwriters have been pronounced upon. Chief of these is a recent case decided in the Court of Appeal [*Theodor Schneider & Co.* v. *Burgett & Newsam*, 1916, 1 K.B. 495], where the facts were as follows. (A) Enemy Contracts. Insurance (Marine). Insurance in c.i.f. cases.

The plaintiffs, the sellers, sold to the defendants, the buyers, both being English firms, horse beans for shipment from China to a range of European ports. The sellers procured a German steamer for the carriage of the goods, and obtained also a German policy of insurance for the goods, before war. After war the ship took refuge in a neutral port, and in October 1914 the sellers tendered the documents, including the policy to the buyers who refused to pay. On a case submitted by the arbitrators the Court held that the policy, as well as the contract of affreightment, was dissolved by the outbreak of war, and that accordingly there were no subsisting contracts to tender to the buyers, who accordingly were justified in refusing to pay (see p. 179, *ante*).

INSURANCE (OTHER)

As to an alien enemy's property on land, express insurance of it against seizure by the insured's Government during war is illegal and void; but if such seizure takes place while war is only imminent the loss is recoverable under a policy in general terms. [*Janson* v. *Driefontein Consolidated Mines, Ltd.*, 1902, A.C. 484.] Insurance (other).

(A) Enemy Contracts.

LANDLORD AND TENANT

Recent cases:

Landlord and tenant.

It would appear that an enemy lessee in England is liable for the rent of the premises let to him [*Halsey* v. *Lowenfeld*, 1916, 2 K.B. 707 C.A.], and he is not exempted from liability by being ordered to reside in an area other than that in which the demised premises are situate. [*London and Northern Estates, Ltd.* v. *Schlesinger*, 1916, 1 K.B. 20.]

MASTER AND SERVANT

Master and servant.

A recent decision illustrates how a contract of service may become illegal. [*Scotland* v. *South African Territories, Ltd.*, 1917, 33 T.L.R. 255.]

The plaintiff sued the defendant for wages during a term when the plaintiff had been interned by the Germans in German South-West Africa. The plaintiff was the manager of the defendant's business in those parts, and after the outbreak of war remained voluntarily in German territory. Though interned he alleged he performed services for the company. The defendant company succeeded in the action on the ground that the plaintiff had no cause of action inasmuch as his voluntary residence in enemy territory had made him an enemy alien and it became illegal to carry out the contract of service.

PARTNERSHIP AGREEMENTS

Partnership contracts.

Where there is an agreement of partnership between a British subject and a person who becomes an enemy " the legal effect of an outbreak of war between

two partners, each residing in the respective belligerent countries, is to dissolve the partnership. The relation necessarily involves commercial intercourse in the closest degree, and such intercourse on the outbreak of war becomes illegal. Once such illegality has supervened it seems impossible for the relationship to continue to exist so as to be capable of being revived after the war." [*Hugh Stevenson & Sons, Ltd.* v. *Aktiengesellschaft für Cartonnagen-Industrie*, 1916, 1 K.B. 763.]

(A) Enemy Contracts.

Recent cases:

Partnership contracts.

In appeal, in this case (*Lawrence J.* dissenting) the position of the English partner on the dissolution of the partnership was stated to be that he could not insist upon taking the share of the other partner at a valuation, and that after the dissolution the partner continuing to trade with the joint property must account for the profits, so far as such profits might have been produced by a joint application of the partnership capital and other funds. The English partner could not increase his own rights, nor diminish those of his enemy partner. The *ratio decidendi* being that as the principal of the debt was not confiscated by the declaration of war so the interest should not be confiscated. The Court refused to grant the declaration given by *Atkin J.* in the Court below that the enemy partners were not entitled to any of the profits of the partnership since the dissolution on the outbreak of war. [1917, 1 K.B. 842.]

Position of British partner.

The case last cited was relied upon in a later one where an action was brought in a firm's name, which firm comprised two Turkish subjects, resident in

(A) Enemy Contracts.

Recent cases:

Partnership contracts.

Turkey, and a third partner who was British. It was contended that the action could not be brought, and to get over the objection it was urged that the war had dissolved the partnership so that the British partner was entitled to sue. The argument naturally failed, as the action was in the firm's name, and accordingly the suit was stayed. [*C. G. Candilis & Sons*, v. *Harold Victor & Co.*, 1916, 33 T.L.R. 20.]

Position of British partner.

The earlier cases avoided deciding what the actual effect of war is upon a contract of partnership. Some curious decisions were given. [See *Rombach* v. *Rombach*, 1914, W.N. 423; *In re Koppers Coke Oven and Bye-Product Co.*, 1914, W.T. 450.]

Appointment of receiver.

In *Armitage & Batty* v. *Borgmann* [1915, 59 Sol. J. 219] a partnership deed provided for what was to be done in the event of the two German partners in the firm being called out to serve in the German Army. A deed of accession had been before the outbreak of war entered into purporting to carry out the terms of the special clause. A receiver and manager was appointed by the Court on an *ex-parte* motion for the purpose of continuing the partnership business and not for winding it up.

But in *Feldt* v. *Chamberlain* [1914, 58 Sol. J. 788] two persons, F. and C., were in partnership with an alien. On the outbreak of war the alien returned to his country. It was held that the partnership was dissolved as regards the alien partner, but not as to F. and C.

Partnership goods in prize.

In the case of goods belonging to a partnership composed of Germans and British subjects, which have been seized as prize, the English owners can

(A) Enemy Contracts.

only escape the condemnation of their goods by showing that they broke off their connection with the partnership business as soon as possible after the outbreak of war. [*The Eumaeus*, 114 L.T. 190.]

Recent cases:

And where the partner is a neutral the same rule applies. [*The Anglo-Mexican*, 1915, 114 L.T. 807.]

Partnership goods in prize.

For a case where a company was treated as akin to a partnership, see *The Continental Tyre and Rubber Co. Case* (*per* Lord Halsbury, p. 9, *ante*).

PATENT AGREEMENTS

Patent Agreements.

A few decisions dealing with emergency patent legislation may be briefly noted here.

In *Rex* v. *Board of Trade and others, ex parte Derry* [1917, 33 T.L.R. 316] one Derry, a British subject, attempted by means of a rule *nisi* to prevent the Board of Trade disposing of certain applications to avoid particular patents. The applicant by a statutory declaration alleged that by virtue of a partnership agreement made between himself and two German subjects he was one of the beneficial owners of the patent, and that therefore the Board of Trade [illegible] jurisdiction to deal with the application to avoid the patents as it could not be said that the persons entitled to the benefit of the patents were enemy subjects. The applicant refused to give evidence of the contents of the partnership deed and so failed to prove the basis of his objection and the rule was accordingly discharged.

Patent agreements.

In a further case dealing with patent rights [*British Association of Glass Bottle Manufacturers, Ltd.* v. *Forster & Sons, Ltd.*, 33 T.L.R. 163; C.A. 33 T.L.R.

(A) Enemy Contracts.

Recent cases:

Patent agreements.

314] the plaintiffs sought for a declaration avoiding a grant by the Board of Trade to the defendants under emergency patent legislation of the right to make and use certain English patent bottle-making inventions. The patent was vested in a German company, so far as its legal title could be said to exist; the beneficial interest being in another German company; and the plaintiffs under various agreements made with the latter company were entitled to receive machines for glass-bottle manufacture as required by its members. It was contended for the plaintiffs that enemy persons were not the persons entitled to the benefit of the letters patent and the Board of Trade had therefore no power to deal with those patents. The action was dismissed as the plaintiffs were not shown to be licensees or assignees of the patents.

In *Trevalin, Ltd.* v. *Saccharin* ["The Times," May 15, 1917], the plaintiffs in the case were a limited company incorporated in February 1913, and with a registered office in the City of London. They carried on business as chemists, druggists, and makers of proprietary articles. The first defendants were a German company carrying on business in Germany, and the other defendant was a German subject resident in Berlin.

By an agreement dated April 8, 1913, the defendants sold to the plaintiffs (1) the rights relating to certain letters patent concerned with processes for the manufacture of medical preparations, and (2) the benefit of certain trade marks. Clause 8 of the agreement provided that if the plaintiff company

(A) Enemy Contracts.

Recent cases:

Patent agreements.

should go into liquidation, or wished to sell the letters patent or trade marks, before offering them for sale elsewhere they should offer them back to the vendors at the original cost price. Clause 9 of the agreement provided that the agreement should be construed according to the laws of England, and the address for service of the vendors in the United Kingdom should be with a named firm in the City of London. The patents and trade marks were duly transferred to the plaintiffs under the agreement, and, owing to the need for carrying out a scheme of reconstruction, the plaintiffs now wished to sell them to a new company to be formed to develop them.

The plaintiffs asked for a declaration that Clause 8 of the agreement was void and not binding and that they were entitled to offer the letters patent and the trade marks for sale without offering them first to the defendants as provided.

The plaintiffs contended that the clause was not binding, the making by the plaintiffs of the offer to re-sell to the defendants would involve commercial intercourse with the enemy, and that if the clause were binding it would prevent the plaintiffs from causing the valuable invention covered by the letters patent to be properly developed in the interests of this country, and would assist the defendants to resume their trade after the war and would diminish the effect of the war on the commercial prosperity of the enemy.

The defendants were not represented. *Bray J.* granted the declaration as prayed.

In *Mercedes Daimler Motor Co.* v. *Maudsley Motor*

(A) Enemy Contracts.

Recent cases:

Patent agreements.

Co. [1915, 31 T.L.R. 178] a patent was vested in the plaintiffs, an English company jointly with a German company, by a deed which enabled the English company to sue for infringement of the patent and to join the German company as co-plaintiffs. The English company sued for an infringement joining as co-plaintiff the German company. It was held that the suit could proceed as the plaintiffs had the sole right to sue and joining the enemy company was not a ground for suspending the action.

PROMISSORY NOTES

Promissory Notes.

Interest suspended during war.

Bills of exchange have already been noted (*vide* p. 184, *ante*). As to promissory notes in a Bombay case the question arose as to whether interest on a debt secured by promissory notes passed in favour of an enemy runs during war-time. [*Padgett* v. *Jamshedji Hormusji Chothia*, 18 Bom. L.R. 190.] The defendant in the case passed five promissory notes before the war to a German firm, which after the war was granted a license. The amounts under the notes bore interest at 6 *p.c. per annum*. The plaintiff, as an appointed licensee, sued for the recovery of the sums on the notes. The liability was admitted and the principal question was whether interest was payable after the outbreak of war. *Macleod J.* laid down the principle that the accrual of interest is suspended, even when the enemy creditor remains in the country of the debtor, until the debtor has actual notice that the principal debt can safely be paid without the possibility of its enuring for the

benefit of the enemy during the continuance of hostilities. The learned Judge observed as follows:— (A) Enemy Contracts.

"Then it was contended that the defendant was not liable to pay interest from the date of the outbreak of war until a license to trade had been issued. This raises a novel point. The common law of England must be applied, but there is no direct authority which lays down what is the common law. In *Du Belloix v. Lord Waterpark*, 1 *Dowling and Ryland*, p. 16 (1882), the plaintiff sued on a promissory note signed in Paris on December 27, 1787, payable six months after date. The defendant pleaded limitation, but there was no evidence that the plaintiff had been in England since the making of the note. The jury asked whether they were bound to give the plaintiff interest as well as principal and the learned judge charged them that, interest being the damage for the detention of the debt, the question was peculiarly for their consideration. The jury gave a verdict for the principal only. A rule was moved for to show cause why the verdict should not be increased, but the Court held that the question of interest had been rightly left to the jury. *Abbot C.J.* concluded: 'But there is another objection to the plaintiff's recovering interest on the debt, for during the greatest part of that time he was an alien enemy and would not have recovered even the principal in this country, and at all events during that portion of the time the interest would not have run and it would even have been illegal to pay the bill while the plaintiff was an alien enemy.' If this view is correct it seems that the question of allowing interest during the period of hostilities ought not to have been left to the jury. I have been referred to several American cases on the point, and, though these are not to be considered as authorities, I may refer to the principle which can be extracted from them to ascertain whether it is so consonant with the dictates of common-sense that I may safely assume that it agrees with the common law of England. Recent cases: Promissory notes. Interest suspended during war.

"The result of these American cases may be stated as follows. The existence of a state of war between the respective countries of the debtor and creditor

(A) Enemy Contracts.

Recent cases :

Promissory notes.

Interest suspended during war.

suspends the accrual of interest when it would ordinarily be recoverable as damages and not as a substantive part of the debt. So limited, the reason of the rule is obviously that a party should not be called upon to pay damage for retaining money which it was his duty to withhold and not to pay over. It is essential to the application of the rule suspending interest when the respective countries of the debtor and creditor are engaged in war that the circumstances be actually such that the payment of the debt was made impracticable if not impossible. Then interest is not suspended in cases when the creditor, although a subject of the enemy, remains in the country of the debtor or has a known agent there authorized to receive the debt. These propositions I accept with the proviso to the latter that interest will be suspended if the payment to the alien enemy resident in the debtor's country has been expressly prohibited."

The Courts in England have since this case considered the question as to the running of interest during war in favour of an enemy.

It has been stated by Lord Justice Swinfen Eady [*Hugh Stevenson & Sons, Ltd.* v. *Aktiengesellschaft für Cartonnagen-Industrie*, 1917, 1 K.B. at p. 850] in considering the question whether a partner who has become an enemy owing to war is entitled to interest on his share in the assets of the partnership business during the period of war :—" A debt which by law carries interest, and which is owing to an enemy, does not cease to carry interest by reason of the war, although the enemy cannot enforce payment until the return of peace." The learned Judge referred to an early English case [*Wolff* v. *Oxholm*, 1817, 6 M. and S. 92] where the plaintiff recovered against the defendant, who had formerly been an enemy, a large sum for interest which accrued during the war.

(A) Enemy Contracts.

The defendant in that case was a Danish subject, and he had been indebted to the plaintiff partnership for monies paid and advanced to him in England and bearing interest at 5 per cent.

Recent cases :

Promissory notes.

Lawrence J. has however said in *Stevenson's Case* (*supra*), "Any right either to profits or to interest must depend either upon statute or upon contract. I know of no statute giving an alien enemy interest or profits during war; profits under and interest issuing from a contract cannot continue to flow when the contract itself has been dissolved because of its illegality. The case is quite different when the contract is a legal contract the remedies upon which are merely suspended during war."

Interest suspended during war.

In another case the Court, on application to it for an order authorizing a Custodian to pay out of the property of an enemy debts due by the enemy, will not direct the payment of interest on those debts in cases where the debts do not by law carry interest. [*In re Fried. Krupp Aktiengesellschaft*, 1916, 32 T.L.R. 553.] The sequel to this case shows how the German authorities by an ordinance of September 30, 1914, postponing the satisfaction of claims, provided that "no interest can be claimed in respect of the period during which the postponement continues." *Younger J.* in a considered judgment held that the suppression of interest introduced by the ordinance operated against the foreign (British) contracting party; that a refusal to recognize it could be rested on the ground that it formed no part of the general German law, as also not being conformable to the usage of nations; and that the debt carried interest. [*Idem*, 1917, 2 Ch. 188.]

(A) Enemy Contracts.

SALE OF GOODS (other than c.i.f.)

Recent cases :

Contracts dealing with the sale of goods to which one side has acquired an enemy *status* have given rise to a number of decisions.

Sale of goods.

It is to be remembered that the general principles already outlined at the beginning of Chapter III apply to these contracts.

It is not proposed to set out again the cases of this character that have already been cited, beyond giving a short list of them :—

Distington Hematite Iron Co.'s case .	at p. 18, *ante*.
Textile Manufacturing Co.'s case .	at p. 23, *ante*.
Zinc Corporation, Ltd.	at p. 21, *ante*.
Rio Tinto Co., Ltd.	at p. 22, *ante*.
Naylor Benzon & Co., Ltd. . . .	at p. 140, *ante*.
Veithardt & Hall, Ltd.	at p. 141, *ante*.

An important case, and one of the first to be decided, is that of *Wolf & Sons* v. *Carr Parker & Co., Ltd.* [C.A. 31 T.L.R. 407.]

The plaintiffs, a firm of cotton-waste manufacturers, who were Germans, resident and domiciled in Germany, with a branch of their business at Manchester, contracted with the defendants, cotton-waste spinners and British subjects, doing business in the same city, for the supply of cotton-waste by the plaintiffs to the defendants. All the contracts were entered into before war. The plaintiffs' claim was in part for goods sold and delivered and in part for damages for breach of contract to take delivery. It was held that on the outbreak of war the contracts became illegal and were dissolved.

(A) Enemy Contracts.

The cases where there were non-enemies to the contracts, but illegality affected them are set out later (*vide* p. 247).

Recent cases :

Sale of goods.

As regards the question whether clauses in contracts suspending deliveries during war-time are in effect an aid to the enemy to resume trade speedily, and so void, the case of *Rio Tinto Co., Ltd.* v. *Ertel Bieber & Co.* [1917, 33 T.L.R. 299] may be consulted. This case was upheld in appeal while these pages were under revision in the press, and the report states that Lord Justice Sernton thought that the effect of suspension itself was against public policy (33 T.L.R. 537 at 538).

See also where attention has already been drawn to this question (pp. 29 and 175, *ante*).

SALE OF GOODS (c.i.f.)

Sale of goods c.i.f.

Coming next to the sale of goods under c.i.f. contracts, in *Kreglinger & Co.* v. *Cohen* [1915, 31 T.L.R. 592] the plaintiffs, who were Belgians, before the war agreed with the defendant, who was a German carrying on business in Hamburg and before the war in London also, to sell to the defendant c.i.f. certain hides. On the outbreak of war the defendant repudiated the contract. The plaintiffs sued for damages. It was held that as the plaintiffs were subjects of a State allied with this country, the contracts, having been made with a person who was an enemy, became illegal on the outbreak of war, and after that date there could be no breach of them, and therefore the plaintiffs were not entitled to recover.

(A) Enemy Contracts.

SHAREHOLDERS' CONTRACTS

Recent cases :

Share-holders' contracts.

In the case of an alien enemy shareholder in an English company it has been held [*Robson* v. *Premier Oil & Pipe Line Co., Ltd.*, 1915, 2 Ch. 133] that during war the enemy shareholder is not entitled to exercise his right of voting at a meeting of the shareholders of the company by employing a British subject as proxy, as such employment involves commercial intercourse. Alien enemy shareholders in a British company cannot vote. Alien enemy directors cannot direct. The rights of all these are in complete suspense during war. As to shareholders or directors who are not alien enemies, they stand *pendente bello* legally bereft of all their co-adjutors who are. All British trading by the company is permitted if there are British shareholders who can carry it on. [*The Daimler Co.* v. *Continental Tyre & Rubber Co., Ltd.*, 1916, A.C. 307; *per* Lord Shaw, and see *ante* at p. 10.]

How the rights of debenture holders to crystallize their floating security by the appointment of a receiver and manager can be overridden by the appointment of a Controller under the Enemy Trading Amendment Act 1916 case may be seen in the case cited. [*In re Kastner & Co., Auto-Piano Co.* v. *Kastner & Co.*, 1917, 1 Ch. 390.]

A recent case [*In re Th. Goldschmidt, Ltd.*, 1917, 2 Ch. 194] has held that where a Controller appointed by the Board of Trade under the Trading with the Enemy Amendment Act, 1916, to wind up the business of a company with power to settle a list of contributories and to make a call, proceeds, on an

(A) Enemy Contracts.

excess of debts over assets, to call up uncalled capital from two of the enemy shareholders such a call is invalid, as "assets of the business" under the act does not include such uncalled capital. A later case [*In re Fr. Meyers Sohn, Ltd.*, 1917, 2 Ch. 201] lays down that such a Controller has no power to distribute assets, not required for the debts of the business and the costs of the winding up, amongst the company's members.

Recent cases:

Shareholders' contracts.

It would appear from the case of *Lepage* v. *San Paulo Coffee Estates, Ltd.* [33 T.L.R. 457] that when a British company declares a dividend on its shares and the warrant is sent abroad to a shareholder, who is an enemy and whose property has been sequestrated by Government authority in France, the *administrateur-séquestre* is entitled to receive and give a valid receipt for the amount so long as his authority remains unrevoked.

VENDOR AND PURCHASER

Vendor and purchaser.

In *Tingley* v. *Muller* [C.A. 1917, 2 Ch. 144], a case of great importance, argued before a special appeal Bench, and in which judgment was reserved, the *status* of enemy persons was considered in regard to a sale of premises. The defendant, by birth a German, had resided for years in England—probably forty years, but had never been naturalized. Part of that time was occupied in business. He owned premises, held under a long lease, in London. When war broke out he was not interned. He secured a permit from Government to leave Tilbury for Flushing with a view to going to Germany. He left Tilbury

(A) Enemy Contracts.

Recent cases :

Vendor and purchaser.

on May 26, 1916. There was no evidence to show if he had reached his ultimate destination. In 1915 being desirous of selling his house he gave a power of attorney to his solicitor, a British subject, authorizing him to sell by public auction or private contract and to execute transfers to the purchaser and give receipts for the purchase-money, and in the meantime to receive the rents and profits and generally to manage the premises. The power was declared irrevocable for twelve months. It was subject to sections 46 and 47 of the Conveyancing Act, 1881, and section 9 of the 1882 Act. The auctioneer was named in it.

On June 2, 1916, the premises were sold by auction, the plaintiff declared the purchaser, and he paid a deposit. The memorandum of sale was signed by the named auctioneer as the agent for the defendant. The conditions of sale had been settled by Müller's agent—his solicitor.

The plaintiff claimed a declaration that the agreement for sale had been dissolved by the act of the defendant in becoming an alien enemy or alternatively that it was void *ab initio* as having been made with an alien enemy, and he claimed a return of his deposit money, and costs of investigating the title.

Eve J. held that the plaintiff had failed to discharge the *onus* of proof on him by establishing affirmatively that the defendant had reached Germany.

In appeal all the Judges came to the conclusion that this view was wrong and that a presumption could be made that the defendant had reached enemy territory. The *Master of the Rolls* observed :—

(A) Enemy Contracts.

Recent cases:

Vendor and purchaser.

"The meaning of 'alien enemy' has from time to time varied. 'Nationality' and 'domicile' have both been treated as the critical test. The question was elaborately discussed in the full Court of Appeal in *Porter* v. *Freudenberg* [1915, 1 K.B. 857], and it was held that neither domicile nor nationality is the true test. That decision is final so far as this Court is concerned. Residence in Germany, not merely crossing the German frontier from Holland, made a man an alien enemy. Intention to reside is not sufficient. Residence implies a certain lapse of time. But, having regard to the abandonment of his British residence and to the fact that he was resident in Hamburg at least from August, if not earlier, I think it is right to hold that on June 2 Müller had become an alien enemy."

This, however, did not dispose of the case, for the majority of the Court went on to hold that the plaintiff's claim must fail for the following reasons:—

"I attach great weight to the power of attorney of May 20. At that date it is beyond dispute that Müller was not an alien enemy. The authority conferred upon White was complete and irrevocable. No further 'intercourse' with Müller was needed. White could not be interfered with in reference to the sale. White's position was, having regard to the provisions of the Conveyancing Acts, practically the same as if Müller had conveyed the property to White upon trust for sale. Lord Parker, in the passage to which I shall refer, seems to me to assert that a trust for sale may be executed although the sole beneficiary is an alien enemy. The transaction is not trading with the enemy within the mischief of the common law, or within the mischief of the Proclamation of September 9, 1914. Par. 3 adopts the rule in *Porter* v. *Freudenberg* (*supra*) by stating it in a positive and also in a negative form. The expression 'enemy' means any person resident or carrying on business in an enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy

(A) Enemy Contracts.

Recent cases :

Vendor and purchaser.

country. Par. 5 (1) applies only to a payment during the continuance of the war. Par. 5 (9) has no application if, as I hold, the power of attorney was the only contract or obligation with or for the benefit of Müller."

"But can it be said that the power of attorney was necessarily revoked when Müller became an alien enemy? I think not. It is true that most agencies, involving as they do continuous intercourse with an alien enemy, are revoked, or at least suspended. But such considerations have no bearing upon a special agency of this nature. Mr. Galbraith drew our attention to a case decided in 1897 in the Supreme Court of the United States, *Williams* v. *Paine* [169 S.C.R. 55]. A power of attorney granted by an officer and his wife resident in Pennsylvania to convey land in the city of Washington was held not to be revoked by the war in which the grantors of the power took an active part with the Confederates, but to be well executed notwithstanding the war.

"It must not be forgotten that a contract for sale of land stands in a peculiar position. It is for many purposes to be regarded as an equitable conveyance. The objection taken by the purchaser is not really as to title, but only as to conveyance. Time was not of the essence of the contract. The legal estate if not got in by a deed executed by Mr. White, as I think it might be, could probably be got in by an application under the Trustee Acts, and certainly by an application under the Trading with the Enemy Act, 1916, section 2. If an order was made under that section all difficulty would be removed."

The judgment then proceeded to cite the remarks of Lord Parker in the *Daimler Case* (*vide* p. 172). From this decision Lord Justice Scrutton dissented in a vigorous judgment in which he traced the law as to trading with the enemy and pointed out the danger of allowing British subjects to speculate whether their intercourse could injure their country or help the enemy. Dealing with the points that appealed

to the majority of the Court he is reported to have dealt with them as follows:— (A) Enemy Contracts

Recent cases:

Vendor and purchaser.

"I observe that Lord Parker in the *Daimler Case* (1916, 2 A.C. 347) appears to treat the carrying on of business by trustees on behalf of alien enemies as quite lawful, provided the enemies get no benefit till the end of the war. I am not aware of any authority for this, and I do not know that it was necessary for the decision of the case before the House. If correct it will allow all the German businesses in this country to be carried on by trustees, though their owners, the *cestuis que trust*, were fighting against us, a procedure which, if legally correct—which I doubt—will very much startle public opinion.

"In my view the appointment of an English trustee or attorney during the war would be illegal as involving intercourse with the enemy, and any existing appointment would become illegal when the *cestuis que trust*, or principal, became an alien enemy. . . . .

"It was also suggested that under s. 46 of the Conveyancing Act, 1881, the holder of the power of attorney might convey in his own name, and so the conveyance be effected from Englishman to Englishman. I do not find it necessary for my decision to determine this or the position of trustees, for in this case the oral contract is one made on June 2 by the auctioneer in the name of and by direct instructions from Müller, and the written document necessary for any enforceable contract is made with Müller, who, I have held, was then an alien enemy. If that was illegal as trading with the enemy, it need not be considered what would be the effect if the contract had been made and carried out in another way.

"I am of opinion, therefore, that the contract was illegal at common law; and as the plaintiff did not know the defendant was an alien enemy at the time and repudiated the contract as soon as he knew, he has not such criminality as prevents him from recovering the money paid, no part of the agreement having been performed. [*Tappenden* v. *Randall*, 2 B. and P. 467, and *Kearley* v. *Thomson*, 24 Q.B.D. 742.] . . .

"I think the Statutes and Proclamations are nar-

(A) Enemy Contracts.

rower than the common law, which in my opinion would penalize a contract made with such a German.

. . . . . .

Recent cases :

Vendor and purchaser.

"I come, therefore, to the conclusion that the only way in which the transaction can be attacked successfully is that under the common law the contract of June 2, being a financial transaction with Müller, a German then returning to Germany, and having no residence or place of business in any other country, was trading with the enemy, and that by reason of the definition of 'enemy' in the Proclamation, incorporated in the statute, this transaction is not a statutory offence."

(B) NON-ENEMY CONTRACTS

(B) Non-Enemy Contracts.

Dealing now with this second heading (see p. 178, *ante*), the cases are as under.

AGENT AND PRINCIPAL

Agency.

In the *Vulcan Car Agency, Ltd.*, v. *Fiat Motors, Ltd.* [32 T.L.R. 73] a claim was made for commission on a contract to supply 300 motor lorries for the French Government. The contract was procured by the plaintiffs as agents for the defendants. The contract was made after the outbreak of war. The defendants were not the makers of the cars, which were to be supplied by an Italian company. The French Government cancelled the contract as the defendants were unable to get deliveries from the Italian company. The plaintiffs claimed their full commission as if the contract had been carried out, maintaining that they had performed their part of the agreement. The plea prevailed and plaintiffs were awarded £42,800.

(B) Non-Enemy Contracts.

Recent cases:

Banker and customer.

BANKER AND CUSTOMER

In *Seligman Bros.* v. *Brown, Shipley & Co.* [1916, 32 T.L.R. 549], a question of interest to bankers and financial houses was raised.

The plaintiffs, a firm of financiers, made two contracts in January 1914 with the defendants, who were bankers, whereby it was agreed that in consideration of ½ per cent. the defendants would, when certain Hungarian Treasury Bonds belonging to the plaintiffs were paid off in June 1915, and telegraphic advice had been received from the defendants' friends in Vienna to that effect, pay to the plaintiffs in London the equivalent of the bonds. War broke out between Great Britain and Austria-Hungary on August 12, 1914, and laws against trading with the enemy were made in both countries, but the plaintiffs obtained from the British and Austro-Hungarian Governments conditional licenses for the bonds being paid off and for the receipt of the money by the plaintiffs. The plaintiffs accordingly sent some of the bonds to Austria, and the proceeds were paid to the credit of the defendants in a bank at Vienna. The bank, however, was prohibited by the Austro-Hungarian Government from paying over the money to the defendants, and by reason of the state of war the defendants declined to perform the contracts. The plaintiffs therefore sued for damages for breach.

Sankey J. held that the bonds were not paid off within the meaning of the contract, and that payment was a condition precedent to the defendants' liability, and took the view that the war, by reason of the

(B) Non-Enemy Contracts.

prohibitions issued in consequence thereof, made the performance of the contract impossible, if not *illegal*.

Recent cases :

BILLS OF EXCHANGE

Banker and customer.

For recent cases of transfers of bills drawn by enemies and transferred before or after the war reference should be made to p. 184, *ante*.

Bills of exchange.

See also the provisions of the Bills of Exchange Act, 1914, providing for non-presentment owing to the present war (*vide* p. 342, Chap VI, *post*).

BUILDING CONTRACT

Building contract.

In *Metropolitan Water Board* v. *Dick, Kerr & Co.* [1917, 2 K.B. 1. C.A.] the defendants had agreed to build for the plaintiffs a reservoir to be completed within six years. Time was to be considered as of the essence of the contract. In the event of the contractor being unduly delayed provision was made for the extension of time. Plant of great value was brought to the site. By the contract it was to be considered the property of the plaintiffs until the work was completed. The year of the contract was 1914.

In February 1916 the Minister of Munitions under statutory authority ordered the contractors to cease work. At his orders portion of the plant was sold, the balance and the proceeds being held at his disposal. The plaintiffs claimed that the contract was subsisting, that the balance plant at site, and the proceeds of what had been sold was theirs also. Defendants urged that the restraint had rendered performance

(B) Non-Enemy Contracts.

Recent cases:

Building contract.

impossible and that the contract could not be extended indefinitely. The Court of Appeal (reversing *Bray J.*) held that the Minister's order rendered the carrying out of the contract illegal; that the requisitioning of the plant formed an event that neither party had contemplated and so fell within the principle of the *Tamplin Case* (see p. 70, *ante*), under which parties were excused. The Master of the Rolls expressly refused to base his judgment upon any grounds of physical or commercial impossibility. The case is awaiting judgment in the House of Lords.

CHARTER-PARTY

Charter-party.

A ship was chartered from the owners (the plaintiffs) for a voyage from Bassein to Alexandria with a cargo of rice, and during the voyage the charter-party was varied by the substitution of the Piræus for Alexandria. The charterers (the defendants) knew, but the owners did not know, that permission from the Government was necessary to discharge the cargo at the Piræus. The charterers failed to obtain the consent of the Government to the change of destination, and the result was that the vessels detained at Port Said for 22 days. It was held that the shipowners had a cause of action against the charterers for damages for the detention of the ship. [*Mitchell, Cotts & Co.* v. *Steel Bros. & Co.*, 1916, 2 K.B. 610.]

In *St. Enoch Shipping Co., Ltd.* v. *Phosphate Mining Co.* [1916, 2 K.B. 624] British owners agreed to carry goods from Tampa in Florida to Hamburg, on August 3, 1914. The ship engaged was warned by the Admiralty

(B) Non-Enemy Contracts.

Recent cases:

Charter-party.

to take the goods to an English port. On August 4 war was declared. The cargo was discharged and warehoused subject to a lien for freight. The cargo-owners discharged the lien and took the goods under protest. *Rowlatt J.* held that the shipowners were not entitled to the freight, either in whole, since they had not completed the voyage, or in part, since no new contract between them and the cargo-owners to give and take delivery at the port where the goods were discharged instead of Hamburg could be inferred. The *ratio decidendi* being that freight is a sum to be paid on completion of the transit on which it is charged and that as the transit was not completed *prima facie* the freight never became payable.

Prohibition of export.

Prepayment of freight.

In a Bombay case an interesting point arose in connection with a prohibition by Government against exporting cotton, and the prepayment of a sum of money for freight. [*Boggiano & Co.* v. *Arab Steamers Ltd.*, 1915, I.L.R. 40 Bom. 529.]

The plaintiffs consigned, under a charter-party, bales of cotton for Genoa on board a steamer belonging to the defendants, and paid a considerable sum for freight in advance. The steamer, however, did not leave the harbour and abandoned the voyage as the Government had prohibited the import of cotton into Genoa. The steamer put back into dock from the harbour and discharged the cargo. The plaintiffs sued for a return of the freight paid in advance, on the ground that the contract having become void under Section 56 of the Indian Contract Act, the defendants were bound to restore to the plaintiffs the advantage they had received under the contract

in view of Section 65. The defendants contended that the action of Government made the carrying out of the contract impossible, if not illegal; that the loss must lie as it fell; that advance freight paid was irrecoverable; and that as the defendants were common carriers the law contained in the Contract Act did not apply to them but the English common law did apply.

(B) Non-Enemy Contracts

Recent cases:

Charter-party.

Prohibition of export.

Prepayment of freight.

Macleod J. held that the defendants were not common carriers as the ship had been wholly chartered and was not a general ship; that the money paid by the plaintiffs was freight paid in advance under the terms of the contract and was not merely money payable in Bombay on the completion of the voyage, which was paid prematurely at the will of the plaintiffs; and that the case was governed by Section 65 of the Indian Contract Act, and the plaintiffs could recover.

INSURANCE (LIFE)

Insurance (Life).

A case has been noticed earlier (p. 109) wherein a plea that a clause in a policy, prohibiting military service abroad, was against public policy, failed. [*Duckworth* v. *Scottish Widow's Fund Life Assurance Society*, 1917, 33 T.L.R. 430.]

INSURANCE (MARINE)

Some early cases have already been set out in this chapter (see p. 218).

MASTER AND SERVANT (Seamen's Contracts)

Early cases:

A few cases under this head arose out of earlier wars. They may be noted first.

In *Burton* v. *Pinkerton* [L.R. 2 Ex. 340], the plain-

(B) Non-Enemy Contracts.

Early cases:

Master and servant (seamen).

tiff agreed with the defendant to serve as one of the crew of a ship whereof the defendant was the master for a voyage from London to Rio and back. The ship was destined for the service of the Peruvian Government and on her voyage joined two Peruvian war steamers to which she, from time to time, supplied arms and ammunition. At Rio the plaintiff and defendant became aware that hostilities had broken out between Spain and Peru, two Powers at peace with England. The defendant, nevertheless, announced his intention to go on to another Peruvian port. The plaintiff objected to serve any further on the voyage on the ground that it had become illegal, and involved greater danger than he had anticipated when he entered into his agreement. He accordingly left the ship. The Court of Exchequer held that the defendant must be taken to have engaged the plaintiff for an ordinary voyage and that the plaintiff was entitled to treat as a breach of contract the defendant's employment of him on a voyage which would expose him to greater danger than he had originally had reason to anticipate.

In a case that occurred out of the Chino-Japanese war of 1894 [*O'Neill* v. *Armstrong, Mitchell & Co.*, 1895, 2 Q.B. 70 : C.A. at p. 418] the same proposition as in the case last cited was recognized.

Recent case.

The modern case on the subject is that of *Horlock* v. *Beal* [1916, 1 A.C. 486]. Reference can also be made to another case [*Liston* v. *Owners S.S. Carpathian*, 1915, 2 K.B. 42].

(B) Non-Enemy Contracts.

SALE OF GOODS (OTHER THAN C.I.F.)

Sale of goods.

The principles on which contracts of the sale of goods are avoided on the ground of illegality due to the state of war are the same whether the parties to the contracts are free of enemy character or not, for it does not merely depend on the circumstance that the contract involves having commercial relations with an enemy, if the carrying out of the contract is to break the law.

(1) Contract affected.

What has been already mentioned in the case of enemy contracts should therefore not be overlooked (*vide* p. 232, *ante*).

Some cases under the present heading can be shortly noticed.

Recent cases :

In *Schmidt* v. *Van Der Veen & Co.* [1915, 31 T.L.R. 214] the plaintiff had sold goods to the defendants. Both were British subjects. The goods so sold had been in turn ordered from Germany in bulk and appropriated to the contract. The contracts were as between principal and principal, but the plaintiff was under an obligation to remit the money to the enemy. It was held that at common law, apart from the proclamation, plaintiff was entitled to sue, and on his consenting to the hearing of a summons under the Trading with the Enemy Amendment Act for the vesting of the money in the Custodian, judgment was passed for the plaintiff.

It would appear from a judgment of the Privy Council [*Moss* v. *Donohoe*, 1916, 32 T.L.R. 343], on petitions for special leave to appeal from a judgment of the High Court of Australia on a conviction for

(B) Non-Enemy Contracts.

attempting to trade with the enemy, that a contract for the supply of goods from an American firm, namely gin, entered into by an Australian, who knew that the gin would have to be obtained from Hamburg, was a direct breach of the proclamation as to trading with the enemy.

Recent cases :

Sale of goods.

Coming next to the instances where it was held that the contracts were not affected by war, the following cases may be consulted.

(1) Contract affected.

(2) Contract unaffected.

In *Leiston Gas Co., Ltd.* v. *Leiston-cum-Sizewell Urban District Council* [C.A. 1916, 2 K.B. 428], the facts were these :—

The plaintiffs, a gas company, agreed with the defendant Urban District Council

(1) to provide at its own expense a number of lighting standards with lanterns and burners;

(2) to connect the standards with the mains;

(3) to supply gas to the standards; and

(4) to keep the whole installation in repair.

The Council, on their part, undertook to pay for gas at a certain rate per lamp per annum for five years from August 1911.

Down to 1914 the plaintiffs had performed the work required of them, but owing to orders of the military authorities the lamps, at first a number only, but later all were prohibited to be lit. The lamps had therefore remained entirely unlighted. The plaintiffs sought to recover the price of gas which would have

(B) Non-Enemy Contracts.

Recent cases :

Sale of goods.

been supplied under the contract, and put their case in this way—that they had expended a large amount of capital in putting up standards, etc., that their obligation to keep in repair remained all the time, and their only chance of getting their money back was to have the agreed payment continued throughout the full five years.

(2) Contract unaffected.

The defendants contended that the contract had come to an end, and owing to the action of the authorities the performance was impossible, and illegal.

Low J. observed :—

"Next I have to consider whether the provision of plant and supply of gas in the defendants' district has become unlawful within the meaning of the case cited. I do not think that it is correct to say that, because in time of emergency, power is given for a competent authority to suspend the actual lighting in a given area for such times as may be considered necessary for national safety, and because such power is exercised, a provision for lighting within that area becomes unlawful within the meaning of the authorities."

This case went to appeal and the decision was upheld, but the Lord Chief Justice took the view that part of the performance of the contract had become unlawful leaving a part lawful.

This last decision was held in a later case to govern a somewhat different set of circumstances in a lighting contract. [*Wycombe Borough Electric Light and Power Co., Ltd.* v. *Chipping Wycombe Corporation*, 1917, 33 T.L.R. 489.]

In another important case, which has been fre-

(B) Non-Enemy Contracts

Recent cases:

Sale of goods.

(2) Contract unaffected.

quently referred to in the Courts, the contracts were for the export of confectionery and a temporary embargo prevented the carrying out of the contracts. It was held by the Court of Appeal, reversing the decision of the Court below, that the parties were not entitled to treat the contracts as unlawful and should have waited a reasonable time to see if they could be carried out. [*Andrew Miller & Co., Ltd.* v. *Taylor & Co.*, 1916, 1 K.B. 402 C.A.]

It is always a difficult question to decide what is a reasonable time, and in this particular case the contracts were to manufacture goods in a reasonable time. No time was specified in the contracts, and the usual course of business between the parties was that the goods should be delivered within six to eight weeks. If the plaintiffs had waited a reasonable time the result would have been that the contracts would have been duly carried out.

The "Wait and see" doctrine laid down in this case has created a difficulty in the case law as regards what length of interruption to a contract is sufficient to bring it to an end at law. In connection with charter-parties that have been affected by Admiralty requisitionment this case has been laid on one side as being no authority on such a subject. [See the remarks of *Bailhache J.* in the *Anglo-Northern Trading Co's Case* cited at p. 81, *ante*.] It would appear to be wiser to regard this decision as laying down no general principle for other cases but to confine its application strictly to the facts of that case. The correctness of the decision on principle apart from the facts is very much open to doubt, in view of the long

(B) Non-Enemy Contracts.

Recent cases :

Sale of goods.

(2) Contract un-affected.

line of cases which lay down that it is at the moment of the interruption, irrespective of what happens afterwards, that the decision is to be made whether it can then reasonably be said that the contract has been interfered with. It is not inopportune to recall here what *Scrutton L.J.* (*then Scrutton J.*) well observes in *Embiricos* v. *Sydney Reid and Co.* [1914, 3 K.B. 54]: "Commercial men must not be asked to wait till the end of a long delay to find out from what in fact happens whether they are bound by a contract or not." The House of Lords has approved of this *dictum* and do not approve of "the interpolation of a period of suspense during which neither party could be certain of his rights until the course of events determined the speculations in one way or the other." [*Watts, Watts & Co., Ltd.* v. *Mitsui Co., Ltd., per Lord Sumner*, 1917, A.C. 227, at p. 245.] Lord Justice Scrutton has referred to *Andrew Millar & Co.'s Case* (*supra*) in a later one in considering the question of the probable duration of illegality caused by war. [*Metropolitan Water Board* v. *Dick, Kerr & Co.*, 1917, 2 K.B. 1, at p. 31.] He states his view to be "strictly, in my opinion a party to a contract who claims that on a particular day the contract is abrogated takes the burden of proving that on that day the interruption is so serious as to avoid the contract," but then proceeds to cite the following *dictæ* :—"It would be only a question of evidence which one might ascertain at that time, or wait until the facts had proved it by the occurrence of those facts subsequently" [*per Lord Halsbury* in *Bensaude* v. *Thames & Mersey Marine Insurance*, 1897, A.C.

(B) Non-Enemy Contracts.

Recent cases :

Sale of goods.

609, at p. 611]; "The Court of Appeal was entitled to make such order as the Judge would have made if the case had been heard by him at the date on which the appeal was heard" [*per Lord Gorell* in *Attorney-General* v. *Birmingham Tame & Rea District Drainage Board*, 1912, A.C. 802].

(2) Contract unaffected.

By way of analogy only it may be recalled that in matters of insurance the rule, as to what point of time has to be ascertained in order to decide between the parties, is "that matters must be considered as they stood on the date of the commencement of the action. That is the governing date." [*Polurrian Steamship Co.* v. *Young*, 1915, 1 K.B. 922, at p. 927, *per Kennedy L.J.*] *Rowlatt J.*, in one of the latest cases, in deciding on the effect of an outbreak of war on a charter-party, whereby a vessel let to a company, which was enemy in fact, took as the point of time to be considered the date of the outbreak of war, and refused to allow the circumstances of the moment, or of the war, as it has developed, to influence his decision. [*Clapham S.S. Co., Ltd.* v. *Naamlooze Venrootschap Handels-En-Transport Maatschappij Vulcaan*, 1917, 33 T.L.R. 546.]

A recent County Court decision [*Pearcey* v. *Miller & Lilley*, 52 L.J.C.C.R. 26] may be here shortly noted. Where a contract for the sale of wool was entered into, and certain washed fleeces had been appropriated to the contract before the order of the Army Council of June 8, 1916, forbade the buying, selling or dealing in wool grown or to be grown on sheep during 1916, the Tiverton County Court Judge held that the order did not apply so that the buyers

were entitled to damages for failure by the sellers to deliver under the contract.

(B) Non-Enemy Contracts.

Another instance where a sale of goods was considered by the Court of Appeal to have been dissolved on the ground of illegality is that of *Jager* v. *Tolme & Runge* [1916, 32 T.L.R. 291 C.A.] which has been already cited in another connection (see p. 138, *ante*).

Recent cases: Sale of goods.

In the case of *Lipton (Limited)* v. *Ford* [1917, 2 K.B. 647] the effect of an order of requisitionment of goods the subject matter of a contract of sale was considered. By a contract made in July 1916, the outcome of telephonic negotiations and contained in the form of bought and sold notes, the defendant agreed to sell to the plaintiff a large number of tons of raspberries from the Blairgowrie district. The defendant, who was a fruit salesman, depended for the supply on a firm who were growers of that fruit and for whom he had acted as sole agent for some years. Owing to drought the growers were considerably short in their supplies. The Government had also bought raspberries from the firm. On August 17, 1916, the Army Council gave to the firm of growers under Regulation 2 B of the Defence of the Realm Regulations a notice of requisitionment, and this was given because the firm had notified the Government that if it desired to insure deliveries it should requisition them. The defendant was sued for failure to deliver the balance of the plaintiffs' quantity. He contended (*inter alia*) that owing to the necessity for complying with the notice of August 17, he was excused in whole or in part from performing the contract.

(2) Contract unaffected.

Atkin J. took the view that the notice was valid

(B) Non-Enemy Contracts.

Recent cases:

Sale of goods.

(2) Contract unaffected.

under the Regulations; that it was a notice of intention to take possession of the raspberries when gathered: that it interfered with the disposal of the crop when gathered except to the Government and with the contract; and that the defendant would but for the intervention have distributed what raspberries he had after that date in equal proportion towards the satisfaction of the amounts undelivered. On the figures the learned Judge gave a decree for the plaintiffs. The judgment is also noteworthy for its pronouncement as to the validity of the regulations.

SALE OF GOODS (C.I.F.)

Sale of goods (c.i.f.).

Cases of this class have for convenience been set apart from ordinary contracts of the sale of goods. Recent decisions are as under.

In *Duncan Fox & Co.* v. *Schrempft and Bonke* [1915, 3 K.B. 355], the claimants sold to the respondents, both being English firms, barrels of Chilean honey "per steamer to Hamburg. Payment net cash in Liverpool in exchange for shipping documents on presentation of same, the sellers to give the buyers policy or policies of insurance covering 2 per cent. over the net invoice amount." The claimants shipped the goods before the war and obtained a German bill of lading for the carriage to Hamburg, and the broker who arranged the contract between the parties notified the buyers of the shipment. On August 4 war was declared, and on August 5 a proclamation as to trading with the enemy was issued. On the same day the sellers sent the broker a provisional invoice for the honey, which was sent forward in

turn to the buyers with a covering letter stating that shipping documents were ready and awaited the disposal of the purchasers. The latter refused to accept the documents on the ground that there was no valid bill of lading. No point was made as to the tender being insufficient apart from this objection. The matter went to arbitration, and eventually a special case was stated for the Court.

(B) Non-Enemy Contracts.

Recent cases :

Sale of goods (c.i.f.).

Atkin J. held that, the contract being to supply honey to Hamburg, to deal with the goods would be a violation of the proclamation and illegal, and the buyers were right to refuse. In appeal it was held that the contract itself had become dissolved by the outbreak of war because any further performance of its terms would involve illegal acts.

Goods for enemy country.

In a Bombay case [*Bekhor* v. *Haji Sultanali Shastry & Co.*, 1915, I.L.R., 40 Bom. 11] the relevant facts were as follows.

By a contract made in July 1914 the defendants purchased from the plaintiff sugar c.i.f. Mahomerah, July shipment, and agreed to pay for it in Bombay on being tendered the bills of lading and other documents. The plaintiff shipped the sugar at Hamburg and obtained receipts for the goods for transport by a German steamer. It appeared that the German steamer remained at Hamburg. It was held that the receipts were not bills of lading at all, and that in any event, as the goods were coming from Germany, the decision in *Duncan Fox & Co.* v. *Schrempt and Bonke* (cited *supra*) must cover the case.

Goods coming from enemy country.

An important decision has now been reached by the Court of Appeal in England. [*Arnold Karberg & Co.*

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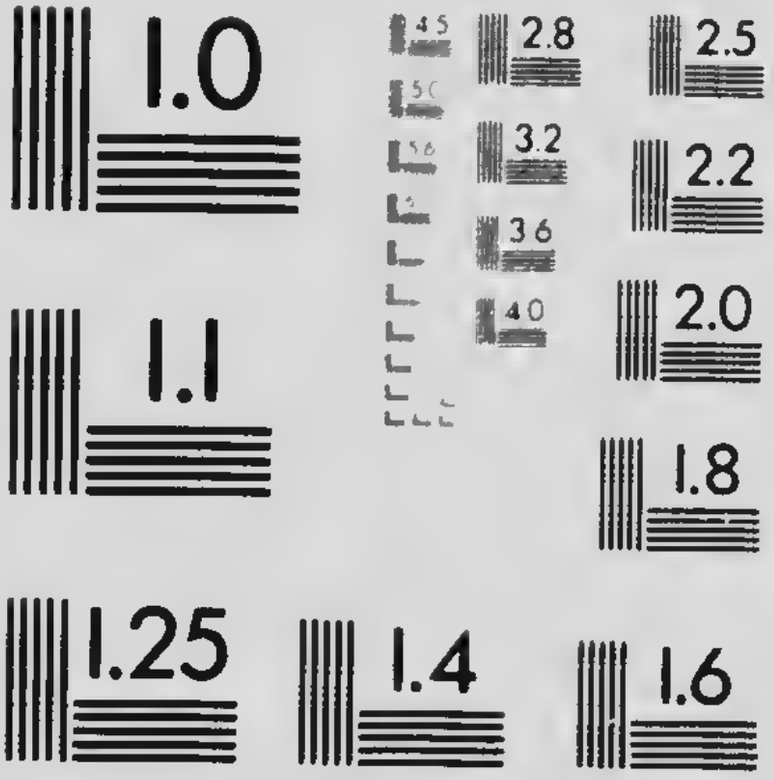

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(B) Non-Enemy Contracts.

v. *Blythe, Greene, Jourdain & Co., Ltd.*, 1916, 1 K.B. 495.] The facts in the case were as follows.

Recent cases:

Sale of goods (c.i.f.).

The sellers sold to the buyers, both English firms, horse beans to be shipped from China to Naples, the price to include freight (as by the bill of lading) and insurance. Payment was to be net in cash in London on arrival of the goods at port of discharge in exchange for the documents. The goods were shipped. A German bill of lading was obtained. A declaration of shipment was sent by the sellers to the buyers and a provisional invoice furnished. On October 11 the German bill and an English policy were tendered to the buyers, who refused to pay. The vessel on which the goods had been shipped had taken refuge in a neutral port. The matter went to arbitration, and thereafter a special case was stated for the Court.

Enemy bill of lading.

Swinfen Eady L.J. held that the master of the ship on the outbreak of war was absolved from carrying the goods from Hankow to Naples, and that therefore the buyer of the goods would not obtain by delivery of the shipping documents to him a valid contract or undertaking to carry goods to Naples, and held that in c.i.f. contracts the documents tendered are to be effective shipping documents, and that when the bill of lading has become avoided by war it is not a sufficient compliance with the contract to tender it. The learned Judge also inclined to the view that the effect of requiring the buyer to accept the bill of lading in the present case might involve his entering into a contract with an alien enemy, for if the endorsements of the bill of lading were effective under the circumstances to make a

valid transfer, it might make the buyer directly liable to the German owner for freight payable under the bill of lading. This view would appear to be *obiter* and seems somewhat difficult to support. It is submitted that the mere tender of a bill of lading by a British subject to another cannot amount to a trading with the enemy. The contract contained in the bill of lading would have been avoided by war, and the acceptance of the tender would not necessarily mean that the purchaser intended to try and enforce any rights of his under the document. As to obligations to pay freight as the voyage had not been completed no freight would appear to be claimable, and even if it were not until the war was over.

(B) Non-Enemy Contracts.

Recent cases:

Sale of goods (c.i.f.).

Enemy bill of lading.

In the companion case [*Theodor Schneider & Co.* v. *Burgett and Newsam*], which was covered by the same decision, the contract was further affected as the policy was a German one.

Karberg's Case has been much debated, and has not received the entire assent of the profession. [See for instance a Bombay case, *Marshall & Co.* v. *Fulchand*, 18 Bom. L.R. 915.] It may be pointed out that Lord Justice Kennedy in his celebrated minority judgment in the leading case on c.i.f. contracts [*Biddell Bros.* v. *Clemens Horst Co.*, 1911, 1 K.B. 934], afterwards described by the House of Lords as an illuminating judgment and practically adopted *in toto* by their Lordships [*idem* 1912, *A.C.* 18], has stated the legal position thus:—"The goods are at the risk of the purchaser, against which he has protected himself by the stipulation in his c.i.f.

(B) Non-Enemy Contracts.

Recent cases:

Sale of goods (c.i.f.).

Property passes at time of shipment.

contract that the vendor shall, at his own cost, provide him with a proper policy of marine insurance intended to protect the buyer's interest, and available for his use if the goods should be lost in transit: *and the property in the goods has passed to the purchaser either conditionally or unconditionally.* It passes conditionally where the bill of lading for the goods, for the purpose of better securing payment of the price, is made out in favour of the vendor or his agent or representative: see the judgments of Bramwell L.J., and Cotton L.J., in *Mirabita* v. *Imperial Ottoman Bank* [1878, 3 Ex. D. 164]. It passes unconditionally where the bill of lading is made out in favour of the purchaser or his agent or representative, as consignee" (at p. 956). Later in the judgment the learned Judge remarks that the property in the goods has passed to the purchaser "*from the moment of shipment*" (at p. 959).

Are documents likewise at buyer's risk?

It is therefore argued by some that, if this is the law, as sanctioned by the House of Lords in adopting *Kennedy L.J.'s* judgment, since the property in the goods has passed, so the property in the documents, which represent the goods, has passed also to the purchaser, and the risk of invalidity attaching to the documents, while in transit of post, by reason of the outbreak of war in the interval between their procurement and ultimate tender, is the purchaser's also.

As to negotiating the bill of lading it is submitted that such transaction between British subjects cannot come within the law of trading with the enemy (see p. 175, *ante*).

(B) Non-Enemy Contracts.

Some miscellaneous points arising under c.i.f. contracts decided during the war may advantageously be next noticed.

Recent cases:

Sale of goods (c.i.f.).

"War risk for buyer's a/c."

In a case, on an appeal from the award of an arbitrator, the respondent had sold to the appellants bales of Hessian cloth for shipment from Calcutta to London on c.i.f. terms. The seller had entered into a corresponding contract for the supply of the goods with a Calcutta firm and this firm shipped part of the bales at Calcutta and on the next day took out an insurance policy on the goods which failed to cover war risks. The contract had provided "war risk for buyer's account."

The respondent wrote to the appellants pointing out that the war risk was for their account and that the risk must be covered by them to protect their own interests. This was on August 3. On August 12 the appellants asked for the name of the steamer so that the goods might be covered. The respondent on that date did not know the name, but by August 20 he received the information and immediately advised the appellants, and tendered the documents. On the following day the vessel was posted at Lloyds, and in fact had been captured and sunk on August 6 by a German cruiser. The appellants refused therefore to accept responsibility. Reference was made to arbitration. The arbitrator found against the buyers. Hence the appeal by them. *Atkin J.* found that under the terms of the trade a policy containing a f.c.s. clause (free of capture and seizure) was a good tender and did not include war risks; also that the clause above referred to

(B) Non-Enemy Contracts.

Recent cases:

Sale of goods (c.i.f.).

"War risk for buyer's a/c."

meant that the war risks were the buyer's concern; and as to the point that at the time of the loss there were no goods appropriated to the contract and at the time of tender no goods in existence, found that the obligation of the seller was performed by the delivery of the documents within a reasonable time after shipment, and therefore upheld the award. [*Groom Ltd. v. Barber*, 1915, 1 K.B. 346.]

Capture before tender of documents.

The case of *In re Weis & Co., Ltd. & Crédit Colonial et Commercial* [1916, 1 K.B. 346], raises an interesting question in c.i.f. cases as to the effect of capture by the enemy of the c.i.f. goods *before tender* of the documents. The facts were:—By a pre-war contract the plaintiffs sold to the defendants certain bean oil from Eastern ports to Antwerp. The goods were shipped on an English vessel and the shipment declared. Before the documents were tendered the ship was seized and taken to Hamburg. It was argued on behalf of the buyers that the tender of the documents was bad, as it involved a trading with the enemy, the trading being a transhipment from Hamburg to Antwerp. *Bailhache J.* held that there was no illegality as between the parties to the contract in tendering documents that called for delivery at Antwerp. Antwerp at the time had not fallen and was still in the possession of the Belgians, and there was no illegality in calling upon the shipowner to deliver at Antwerp, because if he could have got his ship to Antwerp it would have been a legal thing to do.

On the point that the contract had become impossible of performance by reason of the capture of the ship, the learned Judge held that the impossibility

did not prevent the tender of the documents from being a valid tender, and the buyers could have protected themselves by a war-risk policy of insurance.

(B) Non-Enemy Contracts.

Recent cases:

Sale of goods (c.i.f.).

Position of bankers.

POSITION OF BANKS IN C.I.F. CONTRACTS

As bankers are frequently interested in c.i.f. contracts by reason of the documents being sent forward to them by the sellers along with a draft for the price of acceptance and payment by the purchaser, or by reason of the fact that banks often buy the bills themselves, their position in tendering such documents to a c.i.f. purchaser may with advantage be considered at this stage.

As pointed out by Lord Justice Bankes in *Karberg's Case*, the *value* of the documents at the time of tender is not material [1916, 1 K.B., at p. 510]. And it would appear that a bank is not in the same position at all as a seller for it in no way guarantees the genuineness of the documents. [See *Leather* v. *Simpson*, 1871, L.R. 11 Eq., 398.] In a recent Bombay case [*Mishaw & Co.* v. *The Mercantile Bank*, 1916, 18 Bom. L.R. 521, and see p. 185, *ante*] this argument was accepted by the trial Judge. The facts of that case were as follows.

In June 1914, a German, residing at Hamburg, drew a bill upon the defendants in favour of the plaintiffs against bales of goods on a German steamer. The bill was purchased by the defendant bank, which had a branch in Bombay, and it was sent forward to the branch and was duly presented and accepted before war broke out. The vessel that had the goods arrived at Bombay, but in view of impending hos-

(B) Non-Enemy Contracts.

tilities left with the cargo in question still in her holds and took refuge in a neutral port, where she remained at time of suit. When the bill was presented for payment the defendants dishonoured it. The plaintiffs averred that they were ready and willing to hand over the bill of lading and relative documents against payment. *Beaman J.* thus sketched the position of the bank :—

Recent cases :

Sale of goods (c.i.f.).

Position of bankers.

> "A discounting bank is only analogically (and that too by a very loose analogy) in the same position which a seller occupies to his buyer. What really occurs in transactions of this kind in normal conditions is that the bank, to facilitate commercial dealings, advances the price of the goods bought to the seller on the pledge of the shipping documents in anticipation of the said price being repaid to them by the buyer. The bank has no desire to traffic in commodities of this kind and takes the shipping documents merely as a pledge to be handed over as soon as the buyer of the goods covered thereby has paid the price which the bank, in the first instance, has advanced to the seller. That being the course of transactions, it is clear that immediately a bill is thus drawn upon the purchaser by the vendor in favour of the discounting bank, the intention of all the parties is that the moment the bill is accepted the contractual relations, with reference to the goods at any rate, should be directly re-established as between the buyer and the seller, and the bank should disappear from the dealing."

CHAPTER V

Impossibility of Performance

General Principles.

An agreement may be impossible of performance at the time it is made, for it may be impossible in itself or it may be impossible by law. With this class of agreement this work is not concerned beyond what is stated in Chapter II.

A contract originally possible of performance may, however, become impossible of performance subsequently, either in law as being against legal principle, or in fact by reason of the existence of a particular state of things which renders performance impossible.

It is in this connection that war may have an important bearing upon a contract.

When a question arises as to whether a contract has been rendered impossible of performance the Courts generally treat the matter as one of the construction of the contract and try to ascertain and give effect to the real intention of the parties.

"A Court 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

General Principles.

they must have done so, then a term to that effect will be implied, though it be not expressed in the contract." [*Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co., Ltd.*, 1916, 2 A.C. 379, *per Lord Parker.*] As regards implying a term in a contract which has the effect of putting an end to it under certain conditions the matter has already been discussed (see p. 153, *ante*).

Rules of law.

The rules so far as they can be stated are shortly these :—

(1) An agreement becomes void as soon as the performance of it is rendered impossible by law.

(2) An agreement is not void merely by reason of the performance being impossible in fact, nor does it become void by the performance becoming impossible in fact without the default of either party, unless according to the true intention of the parties the agreement was conditional on the performance of it being or continuing possible in fact. [*Pollock on Contracts*, 7th Ed., p. 399.]

Indian Contract Act.

In framing the Indian Contract Act the rules of law were thus stated :—

"56. . . . A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promissor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

And Section 65 of the Indian Contract Act provides—"When an agreement is discovered to be

General Principles.

void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

Indian Contract Act.

Shortly put, the first part of Section 56 would apply to "physical" and the latter part to "legal" impossibility.

Physical impossibility.

It would appear from a remark of Lord Loreburn in a case in the House of Lords that *impossible* in the physical sense includes commercial impossibility, for in respect of the words "whether the performance of a contract has become impossible" the learned Judge observed that the meaning is "whether the performance has become impracticable in a commercial sense." [*Horlock* v. *Beal*, 1916, 1 A.C. 486.] This language was repeated by the learned Lord in delivering judgment in the same House in a later case [*F. A. Tamplin Steamship Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.*, 1916, 2 A.C. 397] when he implied a condition in a charter-party that the parties should be excused "if substantially the whole contract became impossible of performance, or, in other words, impracticable by some cause for which neither was responsible."

Commercial impossibility.

The *dicta* are not in accordance with other cases that have laid down that a prevention must be a physical prevention and not a mere economic unprofitableness. As remarked by Lord Justice Pickford, in whose judgment the Master of the Rolls concurred—

> "It was argued that the defendants were hindered when delivery became commercially impossible. If

General Principles.

Commercial impossibility.

> that were a correct contention, commercial impossibility would prevent delivery. Commercial inconvenience would hinder it, . . . that seemed an unnatural use of words and would lead to this, that whenever a transaction showed a loss or even an insufficient profit there would be a commercial inconvenience and therefore a hindrance." [*C. S. Wilson & Co., Ltd.* v. *Tweeddale (Lancashire) Ltd.*, 1917, 1 K.B. 208, at p. 218.]

The case last cited was taken to the House of Lords [1917, A.C. 495], and a curious feature is that the Earl Loreburn seems to have been converted to a contrary view by these remarks of Lord Justice Pickford, for the learned Earl observed (at p. 510):—

> "The argument that a man can be excused from performance of his contract when it becomes 'commercially' impossible, which is forcibly criticized by Pickford, L.J., seems to me a dangerous contention, which ought not to be admitted unless the parties have plainly contracted to that effect."

The phrase "commercial impossibility" is one which has been little heard of till the present war. There has been no attempt at a definition, but obviously it is wide enough to cover almost anything.

There are numerous cases in which the phrase has passed as current, and a number of Judges appear to regard commercial impossibility as an accepted doctrine, but most of these cases were decided before Earl Loreburn's last pronouncement. [See *Scottish Navigation Co., Ltd.* v. *Souter & Co.*, 1917, 1 K.B. 222; *Metropolitan Water Board* v. *Dick, Kerr & Co.*, 1917, 2 K.B. 1, at pp. 10 and 12 per *Bray J.* and at p. 22 per *Lord Cozens-Hardy M.R.* in appeal; *Naylor,*

Beacon & Co., Ltd. v. *Hirsch & Son* 1917, 33 T.L.R. 432.] General Principles

Abundant *dicta* can however be found against such a plea. Commercial impossibility

Sweinfen Eady L.J. in dealing with that plea has observed:—

> "That could only mean that the defendants would meet less in carrying out the contract. But a mere rise in the price of a commodity, to be supplied, or in the rate of freight was not alone a sufficient excuse for non-delivery. A person was not entitled to be excused from the performance of a contract merely because it had become more costly to perform it." [*Scottish Navigation Co., Ltd., supra.*]

In another case *Shearman J.* is reported to have said that "he knew of no case which said that where there had been a rise of price owing to unforeseen circumstances a vendor was excused from delivery until he could get the goods at a low price again." [*Greenway Bros., Ltd.* v. *Jones & Co.*, 1915, 32 T.L.R. 184.]

Indeed, physical impossibility must go much further than mere difficulty or the need to pay exorbitant prices. [*Karl Ettlinger & Co.* v. *Chagandas & Co.*, 1915, I.L.R., 40 Bom. 301.] In the case last cited it was pleaded that the performance of the contract (a freight contract) became impossible as no freight was procurable at the time of breach. The defendants in that case had agreed before the war to supply the plaintiff with 1000 tons freight at a price *per* ton from Bombay to Antwerp in September 1914. On September 7, 1914, after the war had broken out, the defendants notified the

General Principles.

Commercial impossibility.

plaintiff by telegram from England, where the plaintiff resided and carried on business, that owing to *force majeure* the contract was cancelled. The plaintiff sued the defendants for damages :—

Beaman J. observed :—

> " I suppose it can hardly be denied that ships might have been procured throughout the month of September to carry freight to Antwerp, if a sufficiently high price had been offered, or to put it at the highest. I suppose a ship could have been bought and dispatched to Antwerp in the month of September. It should be borne in mind that no restraint of princes prevented sea communication with Antwerp throughout the month of September. . . . No blockade of the port of Antwerp had then or has ever since, unless now we can consider that it has been blockaded by the Allies, been established. But doubtless after the town had fallen into the hands of the Germans it would have been insanity to dispatch British ships and British cargo to it. But who would have foreseen in the month of September that Antwerp was to be captured by the Germans on the 9th of October, and how can it be said that on the 7th of September it had become a physical impossibility to obtain freight, no matter what price was offered for it, from Bombay to Antwerp? What really happened was that freights rushed up, and that probably it would have been commercially impossible for the defendants to procure freight of 1000 tons of manganese from Bombay to Antwerp at any time during the month of September."

The learned Judge therefore overruled this plea of the defendants. [*Karl Ettlinger* v. *Chagandas & Co.*, 1915, I.L.R. 40 Bom. 301 at p. 311.]

It would therefore seem that commercial impracticability or impossibility, if the terms are interchangeable, is no excuse when it rests upon mere individual considerations affecting a man's pocket,

General Principles.

Commercial impossibility.

or upon difficulties in his way of performing his contract which can be got over by spending money, when he has not been wise enough to foresee and provide for such possibilities. To adopt the Master of the Rolls' *dictum* in the *Metropolitan Water Board Case* (*supra*) :—"Nothing is impossible to a party provided sufficient time and money can be secured. . . . The mere circumstance that a party might lose money would not suffice to terminate a contract."

The startling and important new powers given to Courts to suspend or annul contracts, where to inforce any term would be to cause serious hardship, owing to restrictions or directions imposed by the Crown, may have an important bearing on what would be "commercial impracticability" (see p. 334, *post*).

Where, of course, other terms in the contract introduce language which would lead the Courts to consider that the parties to it did plainly contract that if a state of things, which could be described by either "commercial impracticability" or "commercial impossibility," should come into existence, then there should be an excuse for non-performance of obligations thereunder, no doubt such terms would be considered as affording an excuse, but such excuse would depend on the facts fitting the agreed terms and not on any doctrine—if doctrine it be—of "commercial impossibility."

Rise in freights.

A good illustration of the submission just made is contained in the following decision of *Bailhache J.* upon the point as to whether a rise in freights can amount

General Principles.

to a prevention of fulfilment of a contract to deliver oversea goods with a clause in the contract excepting deliveries "in case of war":—

Commercial impossibility.

Rise in freights.

"I am of opinion that there may be such a rise in freights due to war as to entitle a seller who has to pay freight to say that he was thereby prevented by war from making delivery. The expression 'rise in freights' in this connection, and in this case in particular, really means that war has caused a scarcity of ships for commercial purposes of which the rise in freights is at once the sign and the measure. Scarcity of ships due to war and rise of freights due to war are interchangeable expressions, but as the thing that matters to a seller who is seeking a ship to enable him to make delivery is the price he must pay for her, he more usually speaks of the rise in freights. It would simplify matters to say that no rise in freight can amount to prevention of performance, but I think that is impossible in a case where rise in freights due to war connotes scarcity of ships due to war. Suppose that all British ships were commandeered by the Admiralty, leaving only neutral ships for private commerce. In such a case a seller might truly say, 'War has prevented my chartering,' and it would be equally correct for him to express himself as being prevented by scarcity of ships or by a rise in freights—a rise which in such a case would of course be enormous. Prevention in a commercial sense is, in my judgment, sufficient, and what is prevention in that sense *is a question of degree* which could theoretically be expressed either in terms of tonnage or freight, but for practical purposes can be most intelligibly stated in terms of freight." [*Bolckow, Vaughan & Co., Ltd.* v. *Compania Minera De Sierra Minera*, 1916, 32 T.L.R. 404; 114 L.T. 758.]

Legal impossibility.

For further English cases as regards a rise in freights see *Blythe & Co.* v. *Turpin & Co.* [1916, 114 L.T. 753]; *Scheepvaart Maatschappij Gylsen* v. *North African Coaling Co.* [1916, 114 L.T. 755];

Ebbw Vale Steel, Iron & Coal Co. v. *Macleod & Co.* [H.L. 1917, 33 T.L.R. 268]. General Principles.

It would appear that when the legal impossibility that affects the contract can be got over, and the transaction indirectly but legally carried out, the excuse of illegality causing impossibility of performance is no longer available. This can be seen in a recent Scotch case [*Dampskibsaktiesel-Kapet Aurdal* v. *Compania De Navegacion La Estrella*, 1916, S.C. 882] where the plaintiff, Norwegians, bought a ship from the defendants, Spaniards, and before a transfer could take place a Spanish Royal decree prohibited sales of Spanish vessels to foreigners. The defendants refused to transfer. The plaintiffs then re-sold the vessel to a Spanish shipowner, and called on the defendants to transfer the ship to the sub-vendee. The defendants refused. Legal impossibility.

It was held that the defendants in exchange for the price were bound to execute a legal bill of sale in favour of the sub-purchaser.

DOCTRINE OF FRUSTRATION OF ADVENTURE

Any discussion of the general principles of the law of impossibility affecting contracts would be incomplete without a short reference to the doctrine of what is known as "frustration of an adventure." The doctrine is concerned mainly with contracts of a shipping character, and the present war has given rise to a number of decisions dealing with it. It has already been pointed out (*vide* p. 68, *ante*) that the doctrine of "restraint of princes" leads into the question whether the adventure, the subject matter Doctrine of Frustration.

General Principles.

Doctrine of frustration.

Definition.

of the contract of the parties, has been frustrated by the restraint so as to bring into operation the further principle of supervening impossibility excusing the further performance of the contract. It is proposed therefore to discuss shortly the doctrine of "frustration." A definition of it has been given in a present war decision by *Bailhache J.* in these words :—

> "The commercial frustration of an adventure by delay means, as I understand it, the happening of some unforeseen delay without the fault of either party to a contract of such a character as that by it the fulfilment of the contract in the only way in which fulfilment is contemplated and practicable is so inordinately postponed that its fulfilment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract, and for the accomplishment of which object or objects the contract was made."

This definition was accepted by Lord Justice Bankes in appeal when he observed :—

> "It appears to me to be entirely in accordance with the previous decisions upon the point." [*Admiral Shipping Co.* v. *Weidner. Hopkins & Co.*, 1917, 1 K.B. at p. 242.]

Atkin J. in a later case has accepted the definition and has observed :—

> "I think I am bound by authority to treat the doctrine of frustration of voyage as dependent upon the existence of an implied contract, and the legal results appear to be the same, whether the implied contract relates to contracts *de certo corpore*, contracts of service, or contracts having for their foundation the assumption that a particular state of things will continue to exist. The consequences are the same whether the assumption is as to the continued existence of or the continued

"availability" of a specific thing." [*Lloyd Royal Belge Société Anonyme* v. *Stathatos*, 1917, 33 T.L.R. 390.] General Principles.

Definition.

PRINCIPLES OF EARLIER DECISIONS

Nearly all the recent war decisions as regards the result of intervening impossibility cite the older English cases, and especially the group of cases which arose out of the cancellation of the late King's coronation. It is therefore felt that before approaching the present war decisions a short review of the earlier cases will prove of use. Principles of Earlier Decisions.

The three great cases of *Baily* v. *De Crespigny*; *Taylor* v. *Caldwell*; and *Appleby* v. *Myers* have principally to be noted.

In *Baily* v. *De Crespigny* [1869, 4 L.R. Q.B. 180] the form of contract was a demise of certain land by the defendant to the plaintiff containing a covenant on the defendant's part not to permit any building upon a paddock fronting the demised premises. After the lease the paddock was compulsorily acquired and built upon under an Act of Parliament which put it out of the defendant's power to perform the contract. It was observed in upholding the defendant's defence:— *Baily* v. *De Crespigny.*

> "We have first to consider what is the meaning of the covenant which the parties have entered into. There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance, and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against in the contract,

Principles of Earlier Decisions.

Baily v. *De Crespigny.*

or where the impossibility arises from the act or default of the promissor. But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

These two principles were recognized in the cases of *Taylor* v. *Caldwell* and *Appleby* v. *Myers*.

Taylor v. *Caldwell.*

In *Taylor* v. *Caldwell* [3 B. & S. 826], the plaintiff agreed with the defendant to take from the defendant a hall for the purpose of giving four grand concerts and day and night fêtes therein on four specified days. No express stipulation for the event of the destruction of the premises by fire was provided. After the making of the agreement and before the first of the four days the hall was destroyed by fire. The plaintiff sued for expenses he had incurred. *Blackburn J.* laid down three rules:—

(1) Where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible.

(2) But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied.

(3) Where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continuing existence as the foundation of what was

Principles of Earlier Decisions.

Taylor v. *Caldwell.*

> to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without the default of the contractor.

The principle as laid down applies not only to contracts in their executory stage, but when they have been in part performed. [*Horlock* v. *Beal*, 1916, 1 A.C. at p. 496.] The language used by Lord Blackburn in the third proposition shows that that learned Judge was carefully contemplating the danger of implying a condition which might be at variance with other conditions in the document—a point discussed elsewhere (see p. 155).

Appleby v. *Myers.*

In *Appleby* v. *Myers* [2 L.R.C.P. 651] the plaintiff contracted to erect certain machinery on the defendant's premises at specific prices for particular portions, and to keep it in repair for two years,—the price to be paid upon the completion of the whole. After some portions of the work had been finished, and others were in the course of completion, the premises with all the machinery and materials thereon were destroyed by an accidental fire. The plaintiff then sued for work done and materials provided. *Blackburn J.* in reversing the judgment of the Court below in favour of the plaintiff held that the contract disclosed no absolute promise or warranty by the defendant that the premises should at all events continue so fit, and made the following observation: "We think that where, as in the present case, the

Principles of Earlier Decisions.

Appleby v. Myers.

premises are destroyed without fault on either side, it is a misfortune equally affecting both parties; excusing both from further performance of the contract but giving a cause of action to neither."

Thus it will be seen that *Taylor* v. *Caldwell* says that the parties are to be excused from the performance of the contract, and *Appleby* v. *Myers* says from the further performance. [*Civil Service Co-operative Society* v. *General Steam Navigation Co.*, 1903, 2 K.B. 756, at p. 764 *per* Lord Halsbury.]

As to the hardness of this decision on the plaintiff the House of Lords has recently observed that the violent interruption of a contract always might damage one or both of the contracting parties, and the loss is not the test, but the test is this—Ought a Court to imply a condition in the contract that an interruption should excuse the parties from it? [*F. A. Tamplin Steamship Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.*, 1916, 2 A.C. 397.]

PRINCIPLES OF THE CORONATION CASES

Principles of Coronation Cases.

Blakeley v. Muller.

Coming next to the group of cases that arose out of the postponement of the date of the Coronation of King Edward VII, usually known as the Coronation cases, we find the above principles recognized in *Blakeley* v. *Muller* [1903, 2 K.B. 760]. The facts of the case were these.

The plaintiff took seats on a stand to view the Coronation procession, and paid for them. A suit was brought to recover the money paid for the seats and judgment was given for the defendant. The

Principle of Coronation Cases.

Court took the view that where performance of a contract becomes impossible from some cause for which neither party is responsible, and the party sued has not contracted or warranted that the event, the non-occurrence of which has caused the contract not to be possible of performance, shall take place, then the parties are excused from further performance of the contract, but the consequence is that neither party can sue or be sued for anything done afterwards. Each party rests in the position in which he was found when the event occurred unless there is something in the terms of the contract which gives a special right to either party.

Blakeley v. Muller.

It was this principle which was applied in another Coronation case, where the plaintiff agreed with the defendant, who represented the Navy League, to supply at an agreed rate the refreshments on a steamer hired by the defendant for taking members of the league to see the naval review that had been fixed on the occasion of the King's Coronation.

Elliott v. Crutchley.

The defendant paid a cheque for £300, which, not being presented by the plaintiff immediately, was subsequently stopped by the defendant on the cancellation of the review, so that so far as the defendant was concerned nothing had been paid by him. The plaintiff had incurred some small expenses but had laid out nothing on refreshments. The plaintiff sued on the cheque, and it was held he could not recover. Had he cashed the cheque then, the money being in his hands, the defendant would have had to bear the loss. As it had not been cashed, the plaintiff was in the same position and could not sue.

Principles of Coronation Cases.

This decision is entirely in accordance with the equities of the case, for the plaintiff had expended nothing on refreshments. [*Elliott* v. *Crutchley*, 1903, 2 K.B. 476; affirmed on appeal, 1904, 1 K.B. 565; 1906, A.C. 7.]

Elliott v. *Crutchley.*

Krell v. *Henry.*

So again in the case of *Krell* v. *Henry* [1903, 2 K.B. at p. 752], so frequently cited, the defendant made a deposit on hiring a flat for two days on which it had been announced that the Coronation processions would take place and pass by the hired flat. When the procession was put off the plaintiff sued for the balance of the rent. During the case the defendant withdrew his counterclaim for the deposit he had paid. It was held that the plaintiff must fail, as, on the facts, the taking place of the procession on the days originally fixed was regarded by both parties as the foundation of the contract. *Vaughan Williams L.J.* observed:—"The test seems to be whether the event which causes the impossibility was or might have been anticipated and guarded against. It seems difficult to say, in a case where both parties anticipate the happening of an event, which anticipation is the foundation of the contract, that either party must be taken to have anticipated and ought to have guarded against the event which prevented the performance of the contract."

These observations are of course a finding of fact that brings the case within the principle of *Baily* v. *De Crespigny*. Opinions may differ as to whether the finding is correct. It seems reasonable for the parties to have provided for the interruption of the procession because money was actually being de-

posited, and it might well be said that they should have been wise enough to provide for what should be done with the deposit if anything happened to stop the procession.

Principles of Coronation Cases.

Krell v. *Henry*.

The case under discussion is of importance in another direction, as the same learned Judge points out that it is not essential to the application of the principle of *Taylor* v. *Caldwell* that the direct subject of the contract should perish or fail to be in existence at the date of the performance of the contract. It is sufficient if a state of things or condition expressed in the contract and essential to its performance perishes or fails to be in existence at that time.

Krell v. *Henry* is stated to extend the principle laid down in *Taylor* v. *Caldwell* and *Appleby* v. *Myers* to cases where performance has become impossible in a commercial sense. [*Scottish Navigation Co., Ltd.* v. *W. A. Souter & Co.*, 1916, 32 T.L.R. 69, at p. 73.] The difficulties of applying the principle in *Krell* v. *Henry* may be seen by comparing the decision in that case with that in *Herne Bay Steamboat Co.* v. *Hutton* (cited below). This has been pointed out by Lord Justice Scrutton. [*Metropolitan Water Board* v. *Dick, Kerr & Co.*, 1917, 2 K.B. at p. 30.]

Chandler v. *Webster*.

The case of *Chandler* v. *Webster* explains how the doctrine of failure of consideration does not apply to those cases when money has been paid before the performance becomes impossible. The plaintiff hired a room to see the Coronation procession and paid a sum on account of the price. By the terms of the contract the price was payable before the time at which the procession became impossible. The plain-

Principles of Coronation Cases.

tiff failed in his suit for the return of the monies he had paid and the defendant succeeded in obtaining the balance remaining unpaid.

Chandler v. Webster.

Collins M.R., in discussing the doctrine laid down in *Taylor* v. *Caldwell*, observed :—

> "If the effect were that the contract were wiped out altogether, no doubt the result would be that money paid under it would have to be repaid as on a failure of consideration. But that is not the effect of the doctrine; it only releases the parties from further performance of the contract. Therefore the doctrine of failure of consideration does not apply. The rule adopted by the Courts in such cases is, I think, to some extent an arbitrary one, the reason for its adoption being that it is really impossible in such cases to work out with any certainty what the rights of the parties in the event which has happened should be . . . that being so, the law treats everything that has already been done in pursuance of the contract as validly done, but relieves the parties of further responsibility under it." [*Chandler* v. *Webster*, 1904, 1 K.B. 493, at p. 499.]

Herne Bay S. B. Co. v. Hutton.

Two further Coronation cases remain both in connection with the hire of a steamer for the great naval review. The first of these [*Herne Bay Steam Boat Co.* v. *Hutton*, 1903, 2 K.B. 683] may be contrasted with the case of *Krell* v. *Henry* (cited above, p. 278), for there it was held that the happening of the naval review was not the sole basis of the contract, so that there had been no total failure of consideration nor a total destruction of the subject-matter of the contract. The facts were:—The plaintiffs agreed to place a ship at the defendant's disposal to take passengers from Herne Bay "for the purpose of viewing the naval review and for a day's cruise round the fleet" on the 28th and 29th June, 1902. The

price agreed was £250, payable £50 down and the balance before the ship left Herne Bay. The defendant paid the deposit. The review was, on June 25, officially cancelled; whereupon the plaintiffs wired to the defendant for instructions, stating the ship was ready to start and requesting payment of the balance. No reply was received and the plaintiffs used the ship for their own purposes, thereby making a profit. On June 29 the defendant repudiated the contract. During the two days in question the fleet remained unchored at Spithead. The plaintiffs sued to recover the balance less the profits they had earned by the use of the ship. It was held the plaintiffs could recover, as the reference in the contract to the naval review was inserted in order to define more exactly the nature of the voyage and was not such as to constitute the naval review the foundation of the contract, and as the fleet was there passengers might have been found willing to go round it. As regards these findings one would have thought that "a day's cruise round the fleet" would have defined sufficiently clearly for most people the nature of the voyage, and that the whole occasion which gave an interest to the hirer of the ship was the "naval review" to be held in honour of the Coronation. It is submitted that the abandonment of the Coronation would damp, if not destroy, the enthusiasm for such an undertaking.

Herne Bay S. B. Co. v. Hutton.

In the remaining steamship case [*The Civil Service Co-operative Society, Ltd.* v. *The General Steam Navigation Co.*, 1903, 2 K.B. 756] the principle that when a contract is off and the parties are excused from performance then the loss must lie where it falls was

Civil Service C.S. Ltd. v. General Steam Navn. Co.

Principles of Coronation Cases.

enforced. The plaintiffs hired a steamer for three days which was to arrive in time for the review, having taken up passengers, and to return to London on the third day of hiring. The plaintiffs paid considerable sums to the defendants, and the defendants had incurred considerable expenses in fitting out the vessel. The review was postponed and the plaintiffs notified the defendants that the vessel would not be required. The plaintiffs sued to recover the sums paid by them as on a failure of consideration. Lord Halsbury, in holding that the plaintiffs must fail, remarked :—"It is impossible to import a condition into a contract which the parties could have imported and have not done so. All that can be said is that when the procession was abandoned the contract was off [His Lordship is referring to *Krell* v. *Henry*], not that anything done under the contract was void. The loss must remain where it was at the time of the abandonment."

Civil Service C.S. Ltd. v. General Steam Navn. Co.

Clarke v. *Lindsay.*

In *Clarke* v. *Lindsay*, another Coronation seat case, the plaintiff signed a contract to take the defendant's room to view the Royal procession and paid £50 at about 12 noon on July 24. The postponement of the procession appeared about 12.20 on that day, and on seeing it the plaintiff went back to the defendant and the following clause was added to the agreement: "If the Coronation procession should be postponed the said J. E. L. Clarke and party to have the use of the room on the same conditions as arranged for June 27, 1902." The Court held that it was impossible to contend that, when the further bargain was made, both parties were then con-

tracting in the belief that the procession of June 27 was going to take place, because *ex hypothesi* at that time that procession had become impossible, and so it was held that the plaintiff could not succeed in getting his monies back. [*Clarke* v. *Lindsay*, 1903, 19 T.L.R. 202.]

Principles of Coronation Cases.

Clarke v. *Lindsay.*

In *Fenton* v. *Victoria Seats Agency* the plaintiff similarly failed to get money back that he had paid for seats to view the procession. [1903, 19 T.L.R. 16.]

Fenton v. *Victoria Seats Agency.*

All the cases as to impossibility of performance from the earliest times, including the Coronation cases, have been examined in an elaborate judgment of Lord Atkinson in a recent House of Lords' decision [*Horlock* v. *Beal*, 1916, 1 A.C. 486, at p. 495], and in a later House of Lords' decision Lord Loreburn summarised all the cases by observing :—

> "An examination of those decisions confirmed him in the view that, when the Court had held innocent contracting parties absolved from further performance of their promises, it had been on the ground that there was an implied term in the contract which entitled them to be absolved. Sometimes it was put that performance had become impossible and that the party concerned did not promise to perform an impossibility. Sometimes it was put that the parties contemplated a certain state of things which fell out otherwise. In most of the cases it was said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them, he thought, that was at bottom the principle upon which the contract proceeded. It was in his opinion the true principle, for no Court had an absolving power, but it could infer from the nature of the contract and the surrounding circumstances that a condition which was not expressed was a foundation on which the parties contracted." [*F. A. Tamplin*

Summary of the cases.

Principles of Coronation Cases.

Steamship Co., Ltd. v. *Anglo-Mexican Petroleum Products Co., Ltd.*, 1916, 2 A.C. 397, and see p. 70, *ante*.]

Summary of the cases.

It has been suggested that these Coronation cases leave the law in England open, in large measure, to the application by judges of what they may consider in the circumstances of each case to be its own justice. [*Karl Ettlinger* v. *Chagandas & Co.*, 1915, T.L.R., 40 Bom., at p. 305, per *Beaman J.*, see p. 267 *ante*.]

It is submitted that the fairer criticism is to state that the English rule after all is not the best. But it has now the sanctity of precedent to support it, and probably it may be now too late to alter. It is not a very satisfactory state of jurisprudence to say that the rule is adopted because it is impossible to work out with certainty the rights of the parties. As far back as 1872 the framers of the Indian Contract Act put such a rule entirely out of consideration and adopted in its place the contrary rule that on an agreement becoming void any advantage gained thereunder should be returned or compensation paid (see Section 65). The doctrine works out but a rough adjustment of the rights of the parties and in many cases undoubtedly involves a hardship. [*Lloyd Royal Belge Société Anonyme* v. *Stathatos*, 1917, 33 T.L.R., at p. 392.]

PRINCIPLES OF RECENT WAR CASES

Principles of Recent War Cases.

Turning now to the recent war decisions, the "impossibility" that must exist in the view of the English Courts is a state of things which renders the carrying out of the contract absolutely and completely unlawful or *once for all* impossible. So that where

Leiston Gas Co. case.

Principles of Recent War Cases.

the supervening restriction on the carrying out of the contract is temporary only the parties must be ready to go on with the performance of the contract. [*Leiston Gas Co., Ltd.* v. *Leiston-cum-Sizewell U.D.C.*, 1916, 1 K.B. 912; C.A., 1916, 2 K.B. 428; and see pp. 25 and 248 *ante*.]

Leiston Gas Co.'s case.

This may be amplified by a reference to the following remarks made in another recent case :—

> " It is a general proposition of law that, if a contract is rendered unlawful by the Government of the country, it is dissolved on both sides. But in the application of this rule care must be taken in each case to consider whether the particular act of state had rendered the performance of a contract impossible, or only suspended its operation. If it only delays its execution for a reasonable period and does not frustrate the performance of the contract as a mercantile adventure the promisor is not held to be excused." [*Andrew Miller & Co., Ltd.* v. *Taylor & Co.*, 1916, 1 K.B. 402.]

Miller & Co. v. *Taylor & Co.*

In a recent war case an attempt was made to apply the principle of *Krell* v. *Henry* (see p. 278), but without success. The plaintiffs before war let to the defendant, an Austrian subject, a residential flat for a term of years. By the terms of the agreement the defendant was not to assign or underlet the premises without the lessor's consent. The defendant, after the outbreak of war, was prohibited by an Order in Council from residing in the area where the demised premises were situate. The plaintiffs sued to recover rent. The defendant contended that the contract showed that the intention of the parties was that the tenant should personally reside in the premises and that as his residence there was prohibited the foundation of the contract was gone. It was held that the

London and Northern Estates Co. v. *Schlesinger.*

Principles of Recent War Cases.

personal residence in the flat was not, to use the language of *Vaughan Williams L.J.*, in *Krell* v. *Henry*, "the foundation of the contract." *Lush J.* remarked: "No doubt it probably was his purpose in taking the flat, but that is not the sense in which the expression 'foundation of the contract' has been used in this connection." [*London and Northern Estates Co.* v. *Schlesinger*, 1916, 1 K.B. 20.]

London and Northern Estates Co. v. Schlesinger.

Associated Portland Cement Co.'s Case.

The principles in *Taylor* v. *Caldwell* and in *Krell* v. *Henry* were adverted to in another case. The defendants by an agreement undertook to carry cement for the plaintiffs for six years by sea from the Thames to the Forth. The defendants did a large trade themselves in carrying coal from the Forth to the Thames. After the outbreak of war the Government requisitioned a number of the defendants' vessels, and the ports from which the defendants usually carried coal were closed, restrictions causing delay were placed on ships going from the Thames to the Forth, and the voyage was dangerous. The defendants contended that the contract was entered into in times of peace and the continuance of peace was the basis and *substratum* of the contract, and that as the basis and *substratum* had become entirely changed the agreement was impossible of performance. These contentions were negatived, and it was held that the action of the Government must be shown to have prevented the voyage from being made at all, and that requisition of some of the defendants' ships had merely rendered it more difficult, and it was a so held that though the defendants were willing to enter into the contract at a cheap rate, because

the ships were carrying coal on the return voyage, this fact failed to show that that coal trade lay at the root of the contract. The Court also held that it could not find the contract was entered into on the basis of a continuance of peace.

Principles of Recent War Cases.

Associated Portland Cement Co.'s Case.

As *Rowlatt J.* observed :—

> "Contracts were made every day contingent upon there being no war. The parties in this case, however, did not do that; they evidently did not contemplate when they made the six years forward contract that there would be war, but he could not say that they had contracted on the basis that there would be peace."

Implied terms *re* peace.

In this case, too, it may be observed that only some of the defendants' ships were requisitioned. [*Associated Portland Cement Manufacturers, Ltd.* v. *William Cory & Sons, Ltd.*, 1915, 31 T.L.R. 442.]

The following pronouncement was made by Lord Wrenbury in the House of Lords as regards a Court implying conditions in a contract as to the continuance of the possibility of performance :—

Horlock v. *Beal.*

> "Where a contract has been entered into, and by a supervening cause beyond the control of either party its performance has become impossible, I take the law to be as follows :—If a party has expressly contracted to do a lawful act, come what will—if, in other words, he has taken upon himself the risk of such a supervening cause—he is liable if it occurs, because by the very hypothesis he has contracted to be liable. But if he has not expressly so contracted, and from the nature of the contract it appears that the parties from the first must have known that its fulfilment would become impossible if such a supervening cause occurred, then, upon such a cause occurring both parties are excused from performance. In that case a condition is implied that if performance

Principles of Recent War Cases.

becomes impossible the contract shall not remain binding." [*Horlock* v. *Beal*, 1916, A.C. 486, at p. 525.]

Implied terms *re* peace.

Or, as the present Lord Chief Justice has put it :—

Horlock v. *Beal*.

Leiston Gas Co.'s Case.

"The law is well settled that where the performance of the contract becomes impossible by the cessation of the existence of the thing which is the subject-matter of the contract, the contract is to be construed as 'subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor' [*per Blackburn J.* in *Taylor* v. *Caldwell*, 1863, 3 B. & S. at pp. 833, 834]. This principle is not confined to the cessation of the existence of the subject-matter of the contract, but applies equally to the cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things going to the root of the contract." [*Leiston Gas Company, Ltd.* v. *Leiston-cum-Sizewell Urban D.C.*, 1916, 2 K.B. 428.]

It is often a question of nicety whether a particular case can be said to be an absolute contract or conditional in the sense indicated.

A number of cases on both sides of the line have been decided, but the law has now been finally laid down by the House of Lords. [*F. A. Tamplin Steamship Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.*, 1916, 2 A.C. 397.]

The facts there were as follows :—

A steamer was chartered from the owners for five years from December 1912 for the carriage of petroleum and crude oil or its products, the charterers having liberty to sublet the steamer on Admiralty or other service without prejudice to the charter-party, the charterers however remaining responsible. A clause in the charter-party included restraint of

princes. In February 1915 the British Government requisitioned the steamer for Admiralty transport service, and she was then fitted up and used for the transport of troops. The owners were the plaintiffs, and the defendants were treated as the charterers. The case went to arbitration and the arbitrator decided that the charter-party came to an end. On appeal *Atkin J.* reversed this decision. [31 T.L.R. 540.] In further appeal this decision was affirmed [1916, 1 K.B. 485], and then followed the appeal to the House of Lords upholding the Courts below.

Principles of Recent War Cases.

Implied terms *re* peace.

Tamplin Steamship Co.'s Case.

The judgment of Lord Loreburn has already been set out (see p. 70, *ante*).

The cases of *Appleby* v. *Myers*, and *Krell* v. *Henry* were referred to in another recent case, where the facts were as follows :—

Foster's Agency Ltd. v. *Romaine.*

The plaintiffs, a music-hall agency, entered into an agreement with the defendant by which it was agreed that in consideration of the plaintiffs having introduced the defendant to Harry Richard's Tivoli Theatres, Ltd., of Australia, and having procured for her a twelve weeks' engagement in Australia with that company to begin on or about September 1915 at a weekly salary, the defendant would pay to the plaintiffs a commission of 10 per cent. on the salary accruing from the engagement. The agreement provided that should the engagement not be fulfilled owing to default on the part of the defendant other than certified illness the commission should be payable as if the engagement had been duly fulfilled.

When the time came for the defendant to go to Australia she refused to go for fear of submarine

Principles of Recent War Cases.

Implied terms *re* peace.

Foster's Agency Ltd. v. *Romaine.*

attacks on the voyage. She however arranged with the Australian company to postpone her engagement. Thereupon the plaintiffs sued the defendant. It was argued that the contract only contemplated ordinary sea risks, and when the time came for performance an extraordinary peril had arisen which had not been bargained for, and that the defendant was justified in refusing to pay commission.

The Court overruled these arguments.

Ridley J. said :—"The appearance of the German submarines was a reasonable ground for the respondent's suggesting that she should not go to Australia, and if the other parties had agreed to her not going all would have been well; but the presence of the submarines did not give her the right to say that she would not go. It would be quite impossible to allow people to refuse to perform contracts on their own estimate of the risks to be incurred in the performance"; and *Avory J.* observed :—"The voyage had not been rendered impossible; there was always some danger in a voyage to Australia, and the worst that could be said here was that the amount of danger had been increased" [*Foster's Agency, Ltd.* v. *Romaine*, 1916, 32 T.L.R. 331]; but on appeal this decision was reversed [*idem* 1916, 32 T.L.R. 545], and it was held that the plaintiffs could not recover, as the agreement to postpone the engagement was not a default on the part of the defendant, and the writ had been issued before any salary had accrued, and there had been no refusal by the defendant to carry out the engagement.

A further case where an implied term was read

into the contract may be found in *Berthoud* v. *Schroeder & Co.* [1915, 31 T.L.R. 404.] The case is cited below (see p. 293).

Principles of Recent War Cases.

As regards reading into contracts implied terms it is sufficient to note that it has already been pointed out (*vide*, p. 155, *ante*) that thereby a difficulty is created inasmuch as conflict may occur between the terms expressed in the instrument and those implied by the Court. The general rule of law is that no term can be incorporated by implication into a contract which conflicts with some term expressed in the contract (see the third proposition in *Taylor* v. *Caldwell* at p. 274, *ante*.)

Implied terms re peace.

Foster's Agency Ltd. v. *Romaine.*

No more fitting close to a discussion as to the principles of recent war cases on the question of impossibility in the performance of contracts can be had than to cite the succinct statement by Viscount Haldane in *The Tamplin Case* (1916, 2 A.C. 397) of what the law is, as follows :—

Implied terms.

> "When people enter into a contract which is dependent for the possibility of its performance on the continued availability of a specific thing, and that availability comes to an end by reason of circumstances beyond the control of the parties, the contract is prima facie regarded as dissolved. The contingency which has arisen is treated, in the absence of a contrary intention made plain, as being one about which no bargain at all was made. The principle applies equally whether performance of the contract has not commenced or has in part taken place.
>
> "There may be included in the terms of the contract itself a stipulation which provides for the merely partial or temporary suspension of certain of its obligations, should some event . . . so happen as to impede per. mance. In that case the question arises whether the event which has actually made the specific

Principles of Recent War Cases.

Implied terms.

thing no longer available for performance is such that it can be regarded as being of a nature sufficiently limited to fall within the suspensory stipulation, and to admit of the contract being deemed to have provided for it and to have intended to continue for other purposes. Although the words of the stipulation may be such that the mere letter would describe what has occurred, the occurrence itself may yet be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation. . . . And where the interruption is simply one of an *interim* character and likely to cease so soon as to leave the rest of the period stipulated free for the revival of the rights and duties of the parties after what amounts to no more than a temporary cessation of the power of performance, then, not only where there is an express stipulation covering the case which has occurred, but possibly even where there is no such stipulation, the contract may be regarded as not becoming destroyed but only suspended. . . . But if the facts be such that it appears that the power of performance has been wholly swept away to such an extent that there is no longer in view a definite prospect of this power being restored, then the contract must be looked upon as being wholly dissolved, and the Courts cannot take any course which would in reality impose new and different terms on the parties."

(A) RECENT CASES WHERE PERFORMANCE WAS HELD TO BE EXCUSED

Recent War Cases.

(A) Where performance was excused.

It remains now, having dealt with the principles of law as laid down in the earlier decisions, the "Coronation cases," and the present-day war decisions, to follow the order of arrangement of this work, and group together the recent cases, under alphabetical order according to the nature of the contract, showing (A) where performance has been excused, and

(B) where it has been enacted. Taking these subdivisions in order the cases fall as under: — Recent War Cases.

(A) Where performance was excused.

AGENT AND PRINCIPAL

Agent and Principal.

In a case where the plaintiff was a half-commission man entitled to a minimum on all stock exchange business introduced by him to the defendants, who were members of the London Stock Exchange, and the agreement contained no stipulation that the Stock Exchange was to remain open, *Ridley J.* held, on an action by the commission man, that it was an implied condition of the contract that the Stock Exchange should remain open, and as it was closed for several months, during the currency of the agreement, owing to the war, following the principle of *Krell* v. *Henry* (see p. 278), the plaintiff was not entitled to sue for remuneration. [*Berthoud* v. *Schroeder & Co.*, 1915, 31 T.L.R. 404.]

BANKER AND CUSTOMER

Banker and customer.

In *Leete & Sons, Ltd.* v. *Direction Der Disconto Gesellschaft* [1915, 114 L.T. 332] the plaintiffs on July 29, 1914, requested the defendants in Berlin, with whom they had an account, to remit £4,000 to London out of the credit balance in their account. The bank failed to remit, alleging that there was no official quotation for exchange on that or subsequent days, and that drafts on London could not be procured to effect the remittance.

In the absence of evidence from Berlin, which was unprocurable, that the bank acted on instructions

Recent War Cases.

(A) Where performance was excused.

Banker and customer.

from the German Government not to send money out of the country, war being imminent, it was held that the defendants were under an obligation to use reasonable care to purchase and forward remittance at the plaintiffs' risk and expense, but that no absolute undertaking existed to remit whether there was exchange or whether drafts could be purchased or not.

BILL OF LADING

Bill of Lading.

In a contract of carriage of goods by sea as set out in a bill of lading containing an exception as to "restraint of princes," it was held that, the cargo being first detained and then declared to be an export which was prohibited, the contract became impossible of performance. [*East Asiatic Co., Ltd.* v. *The S.S. Toronto Co., Ltd.*, 1915, 31 T.L.R. 543, and see p. 42, *ante*. And see all the cases cited in Chapter III. at p. 51.]

BUILDING CONTRACT

Building lease.

The case of *Metropolitan Water Board* v. *Dick, Kerr & Co.* (1917, 2 K.B. 1) has been already set out (see p. 242, *ante*).

A case somewhat similar to that last cited involved an agreement by the defendant to take certain land from the plaintiff on a building lease, to remove the existing buildings thereon as soon as the current tenancies expired and then to erect new buildings. On completion the lessors were to grant a lease of the new buildings for 99 years at a sliding scale of rent. The defendant entered on and took possession of the premises, and had taken down the buildings, but

Recent War Cases.

(A) Where performance was excused.

Building lease.

before he could commence to rebuild an order by the Ministry of Munitions prohibited any building work without licence. This latter was applied for and refused. The plaintiffs sued for rent. The defence contended that under the unforeseen circumstances the whole contract was suspended. No argument was advanced that the contract was destroyed altogether. *Ridley J.* held, on the authority of the *Metropolitan Water Board Case*, that the whole contract could be treated as at an end, but decided to apply the law in the *Tamplin Case* and to hold that the contract was suspended. [*Innholders Company* v. *Wainwright*, 1917, 33 T.L.R. 356.]

CHARTER-PARTY

Charter-party.

In a recent case [*Scottish Navigation Co., Ltd.* v. *W. A. Souter & Co.*, 1917, 1 K.B. 222] where a ship which was chartered for a "Baltic round trip" was detained by orders of the Russian Government for two years and three months, and which detention was a continuing one, it was held that the enforced delay was of such long and indefinite duration as completely to frustrate the adventure in a mercantile sense so that the charter-party was determined and hire was no longer claimable against the defendant charterers. [Cf. *Admiral Shipping Co., Ltd.* v. *Weidner, Hopkins & Co., ibid.*] And see the cases cited *ante* (p. 68) on the effect of requisitioning steamers under charter, as also under "restraint of princes" (p. 51).

The Indian case of *Boggiano & Co.* v. *Arab Steamers, Ltd.* [1916, I.L.R. 40 Bom. 529] has been already noticed (see p. 244, *ante*).

Recent War Cases.

SALE OF GOODS

(A) Where performance was excused

Sale of goods.

Where a quantity of wheat was sold and a delivery order given in respect thereof but revoked as the wheat was requisitioned by the Government, it was held that the contract must be assumed to have been made subject to the condition that, if the Government should make delivery impossible, performance should be excused. *Darling J.* remarked: "We were in a state of war and the requisition was made for the general good. *Salus reipublicæ suprema lex* was the rule applicable at such a time, and the enforcement of it gave no right of action to any one who might be injured by it." [*Shipton, Anderson & Co.* v. *Harrison Bros. & Co.*, 1915, 3 K.B. 676, and see p. 28, *ante*.] So in a case for the sale of wheat, where the contract provided that "in case of prohibition of export, blockade, or hostilities preventing shipment or delivery of wheat to this country, the sellers shall have the option of cancelling this contract, or any unfulfilled part thereof . . . and in that event the buyers shall not be entitled to damages for non-delivery," and through the outbreak of war a substantial quantity of wheat was prevented from being shipped or delivered to England, and the defendants cancelled the contract, it was held that the defendants were in the right. [*Ford & Sons (Oldham), Ltd.* v. *Henry Leetham & Sons, Ltd.*, 1915, 31 T.L.R. 522, and see p. 136, *ante*.]

So, too, in a contract for the sale of ore, which provided that in the event of war, restraint of princes, or other occurrences beyond the personal control of

Recent War Cases.

(A) Where performance was excused.

Sale of goods.

the buyers or sellers affecting the mine from which the ore was to come, the contract should, at the option of the party affected, be suspended, it was held that in the circumstances the war was the effective cause of the stoppage of the mine and that the defendants were entitled under the contract to give notice suspending it. [*Ebbw Vale Steel, Iron & Coal Co.* v. *Macleod & Co.*, 1915, 31 T.L.R. 604; C.A. 32 T.L.R. 485, H.L. 33 T.L.R. 268, and see p. 145, *ante*.]

(B) RECENT CASES WHERE PERFORMANCE WAS HELD NOT TO BE EXCUSED

(B) Where performance was not excused.

In the following recent war cases performance of the contract was held not to be excused.

AGENT AND PRINCIPAL

Agent and Principal.

Where the plaintiff, a German by birth, was appointed agent for the defendants on commission for twelve months and a further period of five years if not first terminated, and was for a month interned and then released because it was found he was an Alsatian of French extraction and with anti-German sympathies, it was argued, in an action for breach of contract, that the contract was at an end because the personality of the plaintiff would make it impossible for him to carry out his part. *McCardie J.* held, however, that any interference with the contract likely to be caused by the outbreak of war was not enough to destroy the basis of the contract. [*Nordman* v. *Rayner & Sturges*, 1916, 33 T.L.R. 87.]

The case last cited was referred to again by

Recent War Cases.

McCardie J. in a later decision [*Marshall* v. *Glanville*, 1917, 2 K.B. 87, at p. 92], who observed :—

(B) Where performance was not excused.

> "I may say that the *ratio* of my decision in that case" (Nordman's), "that the internment did not dissolve the contract was that the internment was merely temporary, and that upon the special facts it was doubtful from first to last whether it would last for any substantial period."

Agent and Principal.

BILL OF LADING

Bill of lading.

Where there was a contract for carriage of cement by sea subject to an exception in the case of "perils of the sea, enemies . . . arrests and restraints of princes, rulers and people," and after the outbreak of war many of the defendants' ships were requisitioned, restrictions were placed on ships causing delay, ports were closed and the voyage was dangerous, it was held that it could not be said that the parties had contracted on the basis that there would be peace, and that the contract was not suspended, and must be enforced. [*Associated Portland Cement Manufacturers* (1900), *Ltd.* v. *William Cory & Son, Ltd.*, 1916, 2 K.B. 262, and see p. 287, *ante*.]

In another case there was a partial requisition of coal by the Admiralty, unknown to the parties to the contract, who had agreed as to extra freight. Here it was held that the cargo as a whole had not ceased to exist and that therefore there was no mistake going to the root of the contract, and plaintiffs could recover. [*Seville and United Kingdom Co., Ltd.* v. *Mann, George & Co.*, 1915, 32 T.L.R. 192, varied on appeal 32 T.L.R. 522.]

CHARTER-PARTY

(B) Where performance was not excused.

Charter-parties.

So again in a time charter-party case where the vessel was requisitioned, the argument that the consideration had totally failed was overruled and it was held that the hire of the ship must be paid. [*Modern Transport Co.* v. *Duneric Steamship Co.*, 1917, 1 K.B. 370 C.A.]

And see the House of Lords' decision in the *Tamplin Steamship Co. Case* cited *supra* (p. 69), as also the numerous other cases.

Reasonable apprehension of restraint of princes does not justify a breach of the charter. [*Mitsui & Co., Ltd.* v. *Watts, Watts & Co., Ltd.*, 1917, A.C. 227, and see p. 60, *ante*.]

Before leaving the subject of charter-parties it may not be altogether out of place to observe that the present war has given rise to a case of abandonment of a ship by the crew owing to submarine attack which resulted at law in putting an end to the contract of carriage and so enabling the cargo-owners to get delivery of their cargo free of freight on the ultimate arrival of the abandoned vessel. [*H. Newsum, Sons & Co., Ltd.* v. *Bradley*, 33 T.L.R. 309; 34 T.L.R. 49, C.A.]

INSURANCE (MARINE)

Insurance (marine).

In another case (recently before the House of Lords) of a claim for a loss on a policy in respect of goods of a British subject on a German ship, which covered perils of men-of-war and restraint of princes, it was held that there was no loss under the policy though the ship did not continue the voyage, as the

Recent War Cases.

English law did not apply to the German master of the vessel, and that the plaintiffs could therefore recover. [*Becker Gray & Co.* v. *London Assurance Corporation*, 1915, 3 K.B. 410; 1916, 2 K.B. 156 C.A.; 34 T.L.R. 36, H.L.]

(B) Where performance was not excused.

Sale of goods.

SALE OF GOODS

In a case of two contracts for the sale and delivery by the defendants to the plaintiffs of certain quantities of spelter, the defendants had made a sub-contract for the spelter with German firms, and owing to the outbreak of war could not get it from them, but as they could have got it in England at an abnormal price it was held that the clause in the contract, which provided that delays *en route* or other contingencies beyond the defendants' control were to be a sufficient excuse for any delay traceable to these causes, did not apply. [*Greenway Bros., Ltd.* v. *Jones & Co.*, 32 T.L.R. 184.]

And so in a contract for the delivery of oversea goods, which contained a clause giving a right to suspend the supply "in case of war," it was held that as the contract was made after war broke out the words "in case of war" meant "in case of war preventing the performance of the contract," and that as the defendants had failed in the contract to cover themselves against a rise in freights and had chosen to take the risks of the market, the defendants could not rely on the plea of commercial impossibility. [*Bolckow, Vaughan & Co., Ltd.* v. *Compania Minera De Sierra Minera*, 33 T.L.R. 111, and see pp. 146 and 270, *ante*.]

Where a motor chassis was delivered under a hire-

Recent War Cases.

(B) Where performance was not excused.

purchase agreement and the chassis had a body built to it, and chassis and body were requisitioned by the War Office, it was held that the vendor could sue the defendants for the last instalment due. [*British Berna Motor Lorries, Ltd.* v. *Inter-Transport Company, Ltd.*, 31 T.L.R. 200.]

Sale of goods.

In *Weis & Co., Ltd.* v. *Crédit Colonial et Commercial* [1916, 1 K.B. 346], where the goods sold c.i.f. before the war were captured in a British vessel and taken to Hamburg before the tender of the documents, thus making the contract between the buyer and seller impossible of performance, it has been held by *Bailhache J.* that such capture did not prevent the tender of the relative documents from being a valid tender, as the buyers could have protected themselves against the risk of capture by insurance. For further c.i.f. cases see p. 254, *ante*.

Another case as to prevention of deliveries occurred in *E. Hulton & Co., Ltd.* v. *Chadwick & Taylor, Ltd.* [33 T.L.R. 363.]

The plaintiffs had various contracts for the supply to them by the defendants of paper. One set were dated before March 1916, when the regulations of the Paper Commission came into force, the other subsequent to that date. The plaintiffs had to pay extra sums to the defendants in order to get their supplies of paper at all. The defendants relied *inter alia* on (1) the outbreak of war closing Russian, German, Swedish and Austrian sources of supply; (2) the heading to their letters as follows: "All orders are subject to strike or lock-out clauses and *force majeure*, fire or breakdown," and (3) the aforesaid regulations.

Recent War Cases.

On these three points *Atkin J.* is reported to have made these remarks: —

(B) Where performance was not excused.

Sale of goods.

(1) "That after the outbreak of war there was a restriction in the quantity of pulp which could be imported as the enemy sources were closed, and there was a difficulty in obtaining supplies from Swedish ports. But the difficulties fell short of showing that the contracts had been rendered impossible of performance, and certainly it had not been established that there had been impossibility in the commercial sense in performing the contract. The defendants said that they could not deliver pulp; the plaintiffs replied that the defendants did deliver the contract quantities, although at increased prices, and that therefore the defendants had not been prevented by the war from performing their contracts. That appeared to him (his Lordship) to be a complete answer to the defendants' claim. Therefore that defence failed. . . .

(2) "The defendants next relied on the heading to their letters, which contained the following clause: — 'All orders are subject to strike or lock-out clauses and *force majeure*, fire, or breakdown.' That clause was a difficult one to construe. . . .

"He thought that the true construction of the clause in the heading to the letters was that if the sellers were prevented from delivering by strikes, lock-outs, *force majeure*, etc., they were to be excused from their obligations under the contract to the buyers; but he could not read into the clause a provision that the sellers were to be excused if the performance of the contract was hindered or affected by those clauses. In the present case there was no prevention, and therefore the defendants were not protected by the clause.

(3) "In February, 1916, however, the importation of pulp was prohibited by an Order in Council, except under licence granted by the Board of Trade. Afterwards a Royal Commission was appointed which made certain regulations, the substance of which was that after March 1 no paper-making material should be imported except by persons to whom licences were granted, and that importers should only supply to their customers two-thirds of the weight supplied to

Recent War Cases.

(B) Where performance was not excused.

them in 1914. He did not think that those regulations altered existing contracts although they might so alter conditions under which the contracts had to be performed that under ordinary legal principles such contracts would be affected. It was clear that the parties in the present case contracted on the footing that there should be a continuance of the right to import paper-making material, without which the contracts could not be performed.

Sale of goods.

"In his Lordship's opinion the prohibition to supply the plaintiffs with more than two-thirds of the quantity supplied in 1914 rendered the performance of the contract impossible, because the delivery of two-thirds was not a performance of the whole contract. The contracts therefore came to an end as from March 1, 1916, owing to the regulations, and from that date the plaintiffs had no claim. There would be judgment in favour of the plaintiffs for the defendants' breach of their contracts up to March 1, 1916, for an amount to be ascertained."

THE EFFECT OF EMBARGOES

Effect of an embargo.

With regard to the effect of an embargo upon a contract, it would appear that there is no authority to show that a mere embargo is a termination of the rights of the parties under their contracts. [*Smith, Coney & Barrett* v. *Becker, Gray & Co.*, 1915, 31 T.L.R. 151 C.A.].

If temporary, contract is unaffected.

Indeed in a contract for sugar f.o.b. Hamburg whereby the buyer was bound to accept in fulfilment of his contract any tender passed on to him, the Court of Appeal held that an embargo placed on the export of sugar from Germany by the German Government did not prevent a tender from being a good tender, as the embargo might have been proved to be merely a temporary measure and removed at once, or the buyer might have been content to take delivery in warehouse and not export

Recent War Cases.

for a time. [*Jager* v. *Tolme & Runge*, 32 T.L.R. 291 C.A., and see *Andrew Miller & Co., Ltd.* v. *Taylor & Co.*, 1916, 1 K.B. 402, and at pp. 250, *ante*.]

(B) Where performance was not excused.

Effect of an embargo.

A case frequently referred to in the old reports is *Hadley* v. *Clarke* [8 T.R. 259], which is usually cited for the proposition that a contract to carry goods is not dissolved by an embargo imposed by the Government of the country in whose ports the vessel may happen to be, when the embargo is only a temporary restraint. The embargo in that case was made till "further order" though it lasted two years.

If temporary, contract is unaffected.

The case appears to have been recognized as good law by *Bramwell B.* [*Jackson* v. *Union Marine Insurance Co.*, L.R. 10 C.P. 125] and recently by the House of Lords, which points out that all that was decided in *Hadley* v. *Clarke* was the abstract point that a temporary interruption of a voyage by an embargo does not put an end to a contract of carriage. [*Horlock* v. *Beal*, 1916, 1 A.C. at pp. 505, 506.]

There is a *prima facie* right of abandonment where there is an apparent probability that the owner's loss of the free use and disposal of his ship may be of long continuance. [*Rotch* v. *Edie*, 1795, 6 T.R. 413.] There is no right to abandon where the arrest creates only a temporary obstruction of the voyage without giving rise to any permanent loss of control over the ship. [*Forster* v. *Christie*, 1809, 11 East, 205.] As regards wages of a crew during detention of the ship, see *Da Costa* v. *Newnham* [1788, 2 T.R. 407] and *Horlock* v. *Beal*, *supra*.

CHAPTER VI

Emergency Legislation and Contracts

To complete the scheme of arrangement as outlined in the first chapter (see p. 11) it is proposed shortly to set out some of the principal provisions affecting contracts that emergency legislation, in the form of Statutes, Proclamations, Rules and Regulations, has provided for during the war and, in some cases, for six months after the conclusion of peace.

That body of law is of a miscellaneous character, and it would best seem capable of treatment for the purposes of this book by taking it under its most important general headings :—

(A) Trading with the Enemy : Proclamations and Statutes

(A) Trading with the Enemy.

The Royal Proclamations which have been issued warning British Subjects as to the illegality of trading with the enemy cover so many kinds of transactions that the material portions have to be set out *verbatim*.

Proclamation of Aug. 5, 1914.

By the Royal Proclamation of August 5, 1914, British subjects are warned :—

Prohibited transactions.

> "Not to supply to or obtain from the said Empire [the German Empire] any goods, wares, or merchandise, or to supply to or obtain the same from any person

(A) Trading with the Enemy.

resident, carrying on business, or being therein, nor to supply to or obtain from any person any goods, wares or merchandise for or by way of transmission to or from the said Empire, or to or from any person resident, carrying on business, or being therein, nor to trade in or carry any goods, wares or merchandise destined for or coming from the said Empire, or for any person resident, carrying on business or being therein :

Proclamation of Aug. 5, 1914.

Prohibited transactions.

"Not to permit any British ship to leave for, enter, or communicate with any port or place of the said Empire :

"Not to make or enter into any new marine life, fire or other policy or contract of insurance with or for the benefit of any person resident, carrying on business, or being, in the said Empire, nor under any existing policy or contract of insurance to make any payment to or for the benefit of any such person in respect of any loss due to the belligerent action of His Majesty's forces or of those of any ally of His Majesty :

"Not to enter into any new commercial, financial or other contract or obligation with or for the benefit of any person resident, carrying on business, or being in the said Empire : "

This proclamation stands as covering the period of time from its publication until September 9, 1914, when it was revoked by the next-mentioned proclamation.

Proclamation of Sept. 9, 1914.

By paragraph 5 of the Royal Proclamation of September 9, 1914, which cancelled the previous proclamation, the following prohibitions are laid down :—

Prohibited transactions.

"(1) Not to pay any sum of money to or for the benefit of an enemy.

"(2) Not to compromise or give security for the payment of any debt or other sum of money with or for the benefit of an enemy.

"(3) Not to act on behalf of an enemy in drawing, accepting, paying, presenting for acceptance or payment, negotiating or otherwise dealing with any negotiable instrument.

"(4) Not to accept, pay or otherwise deal with any

negotiable instrument which is held by or on behalf of an enemy, provided that this prohibition shall not be deemed to be infringed by any person who has no reasonable ground for believing that the instrument is held by or on behalf of an enemy.

(A) Trading with the Enemy.

Proclamation of Sept. 9, 1914.

"(5) Not to enter into any new transaction, or complete any transaction already entered into with an enemy in any stocks, shares or other securities.

Prohibited transactions

"(6) Not to make or enter into any new marine, life, fire or other policy or contract of insurance with, or for the benefit of an enemy; nor to accept or give effect to any insurance of, any risk arising under any policy or contract of insurance (including re-insurance) made or entered into with or for the benefit of an enemy before the outbreak of war.

"(7) Not directly or indirectly to supply to or for the use or benefit of, or obtain from an enemy country or an enemy, any goods, wares, or merchandise, nor directly or indirectly to supply to or for the use or benefit of, or obtain from any person any goods, wares or merchandise, for or by way of transmission to or from an enemy country or an enemy, nor directly or indirectly to trade in or carry any goods, wares, or merchandise destined for or coming from an enemy country or an enemy.

"(8) Not to permit any British ship to leave for, enter, or communicate with any port or place in an enemy country.

"(9) Not to enter into any commercial financial or other contract or obligation with or for the benefit of an enemy.

"(10) Not to enter into any transactions with an enemy if and when they are prohibited by an order of Council made and published on the recommendation of a Secretary of State, even though they would otherwise be permitted by law or by this or any other Proclamation."

These prohibitions must be read, however, subject to the following important proviso in the proclamation:—

"Nothing in this Proclamation shall be deemed to prohibit payments by or on account of enemies to

(A) Trading with the Enemy.

persons resident, carrying on business or being in our dominions, if such payments arise out of transactions entered into before the outbreak of war or otherwise permitted."

Prohibited transactions.

By Royal Proclamation of October 8, 1914, clause 6 of paragraph 5 of the last-mentioned proclamation was revoked and the following inserted in lieu thereof:—

Proclamation of Oct. 8, 1914.

As to insurances.

"(6) Not to make or enter into any new marine, life, fire or other policy or contract of insurance (including re-insurance) with or for the benefit of an enemy; nor to accept, or give effect to any insurance of, any risk arising under any policy or contract of insurance (including re-insurance) made or entered into with or for the benefit of an enemy before the outbreak of war; and in particular as regards Treaties or Contracts of re-insurance current at the outbreak of war to which an enemy is a party or in which an enemy is interested not to cede to the enemy or to accept from the enemy under any such Treaty or Contract any risk arising under any policy or contract of insurance (including re-insurance) made or entered into after the outbreak of war, or any share in any such risk."

By paragraph 5 of the revoking Proclamation it is provided:—

"5. Notwithstanding anything contained in paragraph 6 of the Trading with the Enemy Proclamation, No. 2, where an enemy has a branch locally situated in British, allied or neutral, territory, which carries on the business of insurance or re-insurance of whatever nature, transactions by or with such branch in respect of the business of insurance or re-insurance shall be considered as transactions with an enemy."

Proclamation of Jan. 7, 1915.

The Royal Proclamation of January 7, 1915 declares as follows:—

As to banking.

"Notwithstanding anything contained in paragraph 6 of the Trading with the Enemy Proclamation

(A) Trading with the Enemy.

No. 2 transactions hereinafter entered into by persons, firms or companies resident, carrying on business, or being in the United Kingdom;

(*a*) in respect of banking business with a branch situated outside the United Kingdom of an enemy person, firm or company, or

(*b*) in respect of any description of business with a branch situated outside the United Kingdom of an enemy bank,

shall be considered as transactions with an enemy: Provided that the acceptance, payment or other dealing with any negotiable instrument which was drawn before the date of this Proclamation shall not, if otherwise lawful, be deemed to be a transaction hereafter entered into within the meaning of this paragraph."

Proclamation of Jan. 7, 1915.

As to banking.

It will be noted that a proclamation has been issued by which the preceding proclamations as to Trading with the Enemy are made to apply to territory in hostile occupation as they apply to an enemy country. [The Trading with the Enemy (Occupied Territory) Proclamation dated February 16, 1915.]

Proclamation of Feb. 16, 1915.

The provisions in Regulation 15 B of the Defence of the Realm Regulations empowering the Board of Trade to require the holders of goods held on account of, or for the future account of, or benefit present or future of, persons of enemy nationality or residence, to sell the same should not be overlooked (see p. 322, *post*).

Coming next to the Acts of Parliament that have been passed in connection with the subject of Trading with the Enemy, the following should be noticed.

By Section 1 (2) of the Trading with the Enemy Act, 1914 (4 & 5 Geo. 5, Ch. 87) it is enacted:—

Act 4 and 5, Geo. V, Ch. 87.

"(2) For the purposes of this Act a person shall be deemed to have traded with the enemy if he has

(A) Trading with the Enemy.

Act 4 and 5, Geo. V, Ch. 87.

entered into any transactions or done any act which was, at the time of such transaction or act, prohibited by or under any proclamation issued by His Majesty dealing with trading with the enemy for the time being in force, or which at common law or by statute constitutes an offence of trading with the enemy :

"Provided that any transaction or act permitted by or under any such proclamation shall not be deemed to be trading with the enemy."

It should be noted that a Court has no power to make a declaration at the instance of a custodian under this Act, that a contract between an English company and an enemy company, whose property has been vested in the custodian, is a subsisting contract enforceable as between him and the English company. [*In re Fried. Krupp Aktiengesellschaft*, No. 2, 1916, 32 T.L.R. 695.]

5 Geo. V, Ch. 12.

By Section 6 of the Trading with the Enemy Amendment Act, 1914 (5 Geo. 5, Ch. 12) it is provided as follows :—

"6.—(1) No person shall by virtue of any assignment of any debt or other chose in action, or delivery of any coupon or other security transferable by delivery, or transfer of any other obligation, made or to be made in his favour by or on behalf of an enemy, whether for valuable consideration or otherwise, have any rights or remedies against the person liable to pay, discharge or satisfy the debt, chose in action, security or obligation, unless he proves that the assignment, delivery or transfer was made by leave of the Board of Trade or was made before the commencement of the present war, and any person who knowingly pays, discharges or satisfies any debt or chose in action, to which this subsection applies, shall be deemed to be guilty of the offence of trading with the enemy within the meaning of the Principal Act : Provided that this subsection shall not apply where the person to whom the assignment, delivery or transfer was made or some person

(A) Trading with the Enemy.

deriving title under him, proves that the transfer, delivery or assignment, or some subsequent transfer, delivery or assignment was made before the nineteenth day of November, nineteen hundred and fifteen, in good faith and for valuable consideration, nor shall this subsection apply to any bill of exchange or promissory note. 5 Geo. V, Ch. 12.

"(2) No person shall by virtue of any transfer of a bill of exchange or promissory note made or to be made in his favour by or on behalf of an enemy, whether for valuable consideration or otherwise, have any rights or remedies against any party to the instrument unless he proves that the transfer was made before the commencement of the present war, and any party to the instrument who knowingly discharges the instrument shall be deemed to be guilty of trading with the enemy within the meaning of the Principal Act: Provided that this subsection shall not apply where the transferee, or some subsequent holder of the instrument, proves that the transfer, or some subsequent transfer of the instrument was made before the nineteenth day of November, nineteen hundred and fifteen, in good faith and for valuable consideration.

"(3) Nothing in this section shall be construed as validating any assignment, delivery or transfer which would be invalid apart from this section, or as applying to securities within the meaning of section eight of this Act."

Act 5 and 6 Geo. V, Ch. 105.

By Section 2 of the Trading with the Enemy Amendment Act, 1916 [5 and 6 Geo. 5, Ch. 105], it is enacted as follows:—

> "Where it appears to the Board of Trade that a contract entered into before or during the war with an enemy or enemy subject or with a person, firm or company in respect of whose business an order shall have been made under section one of this Act is injurious to the public interest, the Board of Trade may by order cancel or determine such contract either unconditionally or upon such conditions as the Board may think fit, and thereupon such contract shall be deemed to be cancelled or determined accordingly."

(B) Defence of the Realm, No. 2, Act, 1915.

(B) DEFENCE OF THE REALM ACTS AND REGULATIONS

By Section 1, subsection (2) of the Defence of the Realm (Amendment) (No. 2) Act, 1915, it is provided as follows :—

> "(2) It is hereby declared that where the fulfilment by any person of any contract is interfered with by the necessity on the part of himself or any other person of complying with any requirement, regulation or restriction of the Admiralty or the Army Council under the Defence of the Realm Consolidation Act, 1914, or this Act, or any regulations made thereunder, that necessity is a good defence to any action or proceedings taken against that person in respect of the non-fulfilment of the contract so far as it is due to that interference."

The above is enacted in connection with the powers given by the Principal Act for expediting the production of war material by taking possession of and using factories, workshops or plant.

Ministry of Munitions Order, 1915.

By the Ministry of Munitions Order, 1915, the above provision has been extended to the Minister of Munitions. That order has been considered in a case already cited (*Metropolitan Water Board* v. *Dick, Kerr & Co., Ltd.*, 1917, 2 K.B. 1 ; see p. 242).

In *Healy Box Co., Ltd.* v. *Brock* (*C. T.*) *& Co's* "*Crystal Palace*" *Fireworks, Ltd.* [1916], W.N. 408; 33 T.L.R. 88) the defendants had a contract with the Ministry of Munitions and made a sub-contract with the plaintiffs for the supply to them of articles required for the execution of the contract, but the Minister afterwards cancelled the contract, and the defendants thereupon notified the plaintiffs that they would not fulfil their sub-contract with them. *Bail-*

hache J. held that the Defence of the Realm (Amendment) (No. 2) Act, 1915, Section 1 (2), as amended by the Ministry of Munition's Order in Council, 1915, Art. 3, afforded the defendants no defence to an action by the plaintiffs for damages for non-fulfilment.

(B) Defence of the Realm, No. 2, Act, 1915.

Ministry of Munitions Order, 1915.

DEFENCE OF THE REALM CONSOLIDATED REGULATIONS

(B) Defence of the Realm Regulations.

Coming next to the above regulations, many of which have been considered in cases in the Courts, it is beyond the scope of this work to set out all the clauses that may affect directly or indirectly contracts. It is, however, proposed to set out a number of the most important and relevant regulations that bear on contracts.

Bearing the general principles in mind that are stated in the opening of the regulations, some of these may be specially noticed here :—

"OCCUPATION AND CONTROL OF LAND AND BUILDINGS, CONTROL OF FOOD SUPPLIES, SECURITIES, WAR MATERIAL, AND MEANS OF PRODUCTION

"2. It shall be lawful for the competent naval or military authority and any person duly authorized by him, where for the purpose of securing the public safety or the defence of the Realm it is necessary so to do— Reg. 2.

(*a*) to take possession of any land and to construct military works, including roads, thereon, and to remove any trees, hedges, and fences therefrom ;

(*b*) to take possession of any buildings or other property, including works for the supply of gas, electricity, or water, and of any sources of water supply ;

(B) Defence of the Realm Regulations.

Reg. 2.

(*c*) to take such steps as may be necessary for placing any buildings or structures in a state of defence;

(*d*) to cause any buildings or structures to be destroyed, or any property to be moved from one place to another, or to be destroyed;

(*e*) to take possession of any arms, ammunition, explosive substances, equipment, or warlike stores (including lines, cables, and other apparatus intended to be laid or used for telegraphic or telephonic purposes);

(*f*) to do any other act involving interference with private rights of property which is necessary for the purpose aforesaid.

"If, after the competent naval or military authority has issued a notice that he has taken or intends to take possession of any movable property in pursuance of this regulation, any person having control of any such property sells, removes, or secretes it without the consent of the competent naval or military authority he shall be guilty of an offence against these regulations."

Reg. 2B.

"2B. It shall be lawful for the Admiralty or Army Council or the Minister of Munitions to take possession of any war material, food, forage and stores of any description and of any articles required for or in connection with the production thereof.

. . . . . .

"If, after the Admiralty or Army Council or the Minister of Munitions have issued a notice that they have taken or intend to take possession of any war material, food, forage, stores or article in pursuance of this regulation, any person having control of any such material, food, forage, stores or article (without the consent of the Admiralty or Army Council or the Minister of Munitions) sells, removes, or secretes it, or deals with it in any way contrary to any conditions

imposed in any licence, permit, or order that may have been granted in respect thereof, he shall be guilty of an offence against these regulations. (B) Defence of the Realm Regulations.

"The Food Controller may, as respects articles to which his powers under Regulations 2F to 2J extend, exercise the like powers as are by this regulation conferred on the Admiralty, Army Council, and Minister of Munitions."

"2BB. Where the Admiralty or Army Council or the Minister of Munitions have entered into a contract with any person (hereinafter referred to as 'the principal contractor') for the supply to them of any goods or services, and for the purposes of such contract a sub-contract has after the thirteenth day of June, nineteen hundred and seventeen, been made with any other person (whether such sub-contract is made with the principal contractor or any sub-contractor), and it appears to the Admiralty or Army Council or the Minister of Munitions that the rate of profit earned or to be earned by the sub-contractor in respect of the sub-contract is unreasonable or excessive, the Admiralty or Army Council or the Minister of Munitions may (whether or not the sub-contract has been completed) issue a certificate to that effect and may by order vary the terms of the sub-contract by the substitution therefor of such terms as they may think fair and reasonable, and require the sub-contractor— Reg. 2BB.

(*a*) to carry out the sub-contract in whole or in part in accordance with the terms as so varied; and

(B) Defence of the Realm Regulations.

Reg.2BB.

(*b*) either in addition thereto or as an alternative therefor to adjust the price of any goods already supplied or any services already rendered in accordance with the terms so varied, and to account to the other party to the sub-contract for any consequential reduction in price :

Provided that no order made under this regulation shall affect the price of any goods supplied or services rendered under any sub-contract where the sub-contract has been completed and the payment has been made more than one year before the date of the order.

"If any sub-contractor in respect of whom such an order is made fails to comply with any of the requirements contained in the order, he shall be guilty of an offence against these regulations :

. . . . . .

"In the event of the Admiralty or Army Council or the Minister of Munitions exercising the powers conferred upon them by this regulation, the price payable by them to the principal contractor under the principal contract shall be reduced by such an amount, not exceeding the amount of the saving to the principal contractor due to the exercise of such powers, as may be determined by the Admiralty or Army Council or the Minister of Munitions.

"This regulation shall apply where the Admiralty or Army Council or the Minister of Munitions have required the occupier of any factory or workshop to place at their disposal the whole or any part of the output of the factory or workshop as if the occupier

had contracted with the Admiralty or Army Council or the Minister of Munitions to supply such output or part thereof at the price payable therefor as ascertained in accordance with Regulation 7." (B) Defence of the Realm Regulations.

Reg.2BB.

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"2E. The Admiralty or Army Council or the Minister of Munitions may by order regulate, restrict, or prohibit the manufacture, purchase, sale, delivery of or payment for, or other dealing in, any war material, food, forage, or stores of any description or any article required for or in connection with the production thereof, and if any person refuses to sell any article, the sale whereof is regulated by any such order, he may be required by the Admiralty or Army Council or the Minister of Munitions to sell it on the terms and subject to the conditions on and subject to which the sale thereof is authorized by the order, and to deliver it to them or to any person or persons named by them, delivery to be made in such quantities and at such time and places as may be specified by them or on their behalf." Reg. 2E.

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"2F. (1) The Food Controller may make orders regulating, or giving directions with respect to the production, manufacture, treatment, use, consumption, transport, storage, distribution, supply, sale or purchase of, or other dealing in, or measures to be taken in relation to any article (including orders as to maximum and minimum price) where it appears to him necessary or expedient to make any such order for the purpose of encouraging or maintaining the food supply of the country, and making such provisions as to Reg. 2F.

(B) Defence of the Realm Regulations.

entry, inspection, or otherwise as appear to him necessary or expedient for the purpose of his duties.

Reg. 2F.

"(2) The Food Controller may by order require all or any persons owning or having power to sell or dispose of any article, or any stocks thereof, to place at the disposal of the Controller the article, or the whole or any part of the stocks thereof, as may be directed by the Controller, on such terms as he may direct, and to deliver to the Controller or to any person or persons named by him the article or stocks in such quantities and at such times as the Controller may require, where it appears to him necessary or expedient to make any such order for the purpose of encouraging or maintaining the food supply of the country.

. . . . . .

"(3) Any order under this regulation may be made either so as to apply generally, or so as to apply to any special locality, or so as to apply to any special supplies of any article or to any special producer, manufacturer, dealer, or person, and any such order may direct that all contracts, or any class of contracts, or any special contract, affected by the order shall be abrogated or remain in force notwithstanding anything in the order, but subject to any exceptions or modifications for which provision may be made by the order.

"(4) The Food Controller shall, as respects any article to which his powers extend, have the same power as the Board of Trade have of giving directions, pending the issue of a Proclamation or the making of an Order of or in Council, with respect to the export of the article."

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(B) Defence of the Realm Regulations.

"2K. Where in anticipation of the issue of an order or requisition by the Admiralty, or Army Council, or Minister of Munitions under these regulations, the whole or any part of the output of any factory or workshop or any goods have been delivered to or put at the disposal of the Admiralty, or Army Council, or Minister of Munitions, then, if such order or requisition is subsequently made, the output or part thereof or goods shall be deemed to have been delivered or put at the disposal of the Admiralty, or Army Council, or Minister of Munitions in compliance with such order or requisition." Reg. 2K.

"2L. (1) Where the Board of Agriculture and Fisheries are of opinion that, with a view to maintaining the food supply of the country, it is expedient that they should exercise the powers given to them under this regulation as respects any land, the Board may enter on the land and cultivate the land, or arrange for its cultivation by any person either under a contract of tenancy or otherwise." Reg. 2L.

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"7. The Admiralty or Army Council or the Minister of Munitions may by order require the occupier of any factory or workshop in which arms, ammunition, food, forage, clothing, equipment or stores of any description or any articles required for the production thereof, are or may be manufactured, or in which any operation or process required in the production, alteration, renovation or repair thereof is or may be carried on, to place at their disposal the whole or any part of the output of the factory or workshop as may be specified in the order, and to deliver to them, or to Reg. 7.

(B) Defence of the Realm Regulations.

any person or persons named by them the output or such part thereof as aforesaid in such quantities and at such times as may be specified in the order.

. . . . . .

Reg. 7.

"The Food Controller may, as respects any factory or workshop in which any article to which the powers of the Food Controller under Regulations 2F to 2J extend is or may be manufactured, produced or adapted for sale, exercise the like powers as are by this regulation conferred on the Admiralty, Army Council, and the Minister of Munitions."

. . . . . .

Reg. 8E.

"8E. It shall be lawful for the Minister of Munitions by order to regulate or restrict the carrying on of building and construction work as hereinafter defined, and by such order to prohibit, subject to such exceptions as may be contained in the order, the carrying on of such work without a licence from the Minister.

"Provided that where a first application for a licence under any order has been made and is pending for the carrying on of work which has already been commenced at the date when such licence first became necessary, nothing in the order shall prohibit the carrying on of the work until the licence has been refused.

. . . . . .

"For the purposes of this regulation the expression 'building and construction work' means the construction, alteration, repair, decoration, or demolition of buildings, and the construction, reconstruction, or alteration of railways, docks, harbours, canals, embankments, bridges, tunnels, piers, and other works of construction or engineering."

CONTROL OF MINES

(B) Defence of the Realm Regulations.

"9G. (1) Where the Board of Trade are of opinion that, for securing the public safety and the defence of the Realm, it is expedient that this regulation should be applied to any coal mines, the Board may by order apply this regulation, subject to any exceptions for which provision may be made in the order, either generally to all coal mines or to coal mines in any special area or in any special coalfields or to any special coal mines. Reg. 9G.

"(2) Any coal mines to which this regulation is so applied shall, by virtue of the order, pass into the possession of the Board of Trade as from the date of the order, or from any later date mentioned in the order; and the owner, agent, and manager of every such mine and every officer thereof, and where the owner of the mine is a company every director of the company, shall comply with the direction of the Board of Trade as to the management and user of the mine, and if he fails to do so he shall be guilty of a summary offence against these regulations.

"(3) It is hereby declared that the possession by the Board of Trade under this regulation of any coal mine shall not affect any liability of the actual owner, agent, or manager of the mine under the Coal Mines Acts, 1887 to 1914 or any Act amending the same.

"(4) Any order of the Board of Trade under this regulation may be revoked or varied as occasion requires."

"9GG. (1) Where the Minister of Munitions is of opinion that for securing the public safety and the Reg. 9GG.

(B) Defence of the Realm Regulations.

Reg. 9GG.

defence of the Realm it is expedient that this regulation should be applied to any metalliferous mines, or to any mines of stratified iron stone, shale, or fire clay, not being coal mines, or to any quarries, he may by order apply this regulation, subject to any exceptions for which provision may be made in the order, to all or any of such mines or quarries, either generally or in any special area, or to any special mine or quarry.

. . . . . .

"(3) It is hereby declared that the possession by the Minister of Munitions under this regulation of any mine or quarry shall not affect any liability of the actual owner, agent or manager of the mine or quarry under the Coal Mines Acts, 1887 to 1914, or the Metalliferous Mines Regulation Acts, 1872 and 1875, or the Quarries Act, 1894, or the Factory and Workshop Act, 1901, or any Act amending the same."

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POWER TO REQUIRE INFORMATION AS TO BUSINESSES AND AGRICULTURE

Reg. 15B.

"15B. (1) For the purpose of ascertaining whether goods of any description are held on account of or for the future account of, or for the benefit or future benefit, direct or indirect, of any person resident or carrying on business in any country which at the time is at war with His Majesty, or any person of enemy nationality, or are held otherwise to the prejudice of the national interest, the Board of Trade may by order—

(*a*) require all persons who are owners of, or who are in possession of, or have control over any goods, to furnish to any officer of the

Board authorized in that behalf any information in their possession which such officer may require— (B) Defence of the Realm Regulations.

(i) as to the nature, quantity, use, origin, and destination of the goods, and the purposes for which they are held; Reg. 15H.

(ii) where the goods are not in the possession of the owner, as to the actual ownership of the goods and conditions under which the goods are held;

(iii) in order to establish whether the amount of the goods held is in excess of the normal requirements of the trade of the owner thereof and the reasons for the excess, if any.

. . . . . .

"(4) Where the Board of Trade, as the result of such inquiries as aforesaid, are of opinion that any goods are held on account of, or for the future account of, or for the benefit or future benefit, direct or indirect, of any persons resident or carrying on business in any country which at the time is at war with His Majesty, or any person of enemy nationality, or that the continued withholding of the goods from the market is to the prejudice of the national interest, the Board may, by order sent by registered post to or delivered at the last-known place of address in the United Kingdom of the owner of the goods, require him to dispose of the goods in such manner and within such time as may be specified in the order.

. . . . . .

(B) Defence of the Realm Regulations.

"(6) For the purposes of this regulation the expression "owner" in relation to any goods includes any person who, as factor or otherwise, has power to sell the goods."

Reg. 15B.

MUNITIONS, METALS, AND WAR MATERIAL

Reg. 30B.

"30B. It shall not be lawful for any person on his own behalf or on behalf of any other person to sell or buy, or to offer to sell or buy,

(*a*) any of the following metals:—iron (including pig-iron), steel of all kinds, copper, zinc, brass, lead, antimony, nickel, tungsten, molybdenum, ferro-alloys; or

(*b*) any other metal which may be specified in an order of the Admiralty or Army Council or the Minister of Munitions as being a metal required for the production of any war material,

unless in the case of a seller the metal to be sold is in the possession of the seller or is in the course of production for him, or in the case of a buyer the purchase is made for or on behalf of a consumer; and it shall be lawful for the Admiralty or Army Council or the Minister of Munitions, or any person authorized by them or him for the purpose, to require any person who on his own behalf on or behalf of any other person, has sold or bought, or offered to sell or buy any such metals, to prove that the sale or purchase complies with the requirements of this regulation, and if any such person on being so required fails to produce satisfactory proof that it does so comply

he shall be guilty of an offence against these regulations, and if such person is a company every director and officer of the company shall also be guilty of an offence against these regulations." (B) Defence of the Realm Regulations.

Reg. 30B.

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NAVIGATION

"36A. The competent naval or military authority may make regulations for restricting or controlling the use of boats in any harbour or the approaches thereto, and any person who disobeys or fails to observe any such regulations shall be guilty of an offence against these regulations." Reg. 36A.

"37. Every vessel shall comply with such regulations as to the navigation of vessels as may be issued by the Admiralty or Army Council, and shall obey any orders given, whether by way of signal or otherwise by any officer in command of any of His Majesty's ships, or by any naval or military officer engaged in the defence of the coast, and where any such regulation or order conflicts with the regulations for preventing collisions at sea, the provisions of the first-mentioned regulation or order shall prevail, and a departure from the regulations for preventing collisions at sea made for the purpose of complying with such first-mentioned regulation or order shall be deemed to be a departure necessary to avoid immediate danger within the meaning of the regulations for preventing collisions at sea. Reg. 37.

. . . . . .

"This regulation shall not apply to a vessel not being a British vessel where the non-compliance with the

(B) Defence of the Realm Regulations.

regulations or disobedience to the orders takes place on the high seas outside the territorial waters adjacent to the United Kingdom."

. . . . . .

Reg. 37.

Reg. 39.

"39. The Admiralty or Army Council, or any pilotage authority acting under their instructions, may make orders as to the pilotage of vessels entering, leaving or making use of any port or navigating within any part of the territorial waters adjacent to the United Kingdom, and any such order may provide for pilotage being compulsory for all or any class of such vessels within such limits as may be specified in the order, for enabling the competent naval or military authority to direct that in the case of any particular vessel pilotage is compulsory, for the granting of special pilotage licences and the suspension of existing pilotage licences and certificates, and for the supply, employment, and payment of pilots. Where under this regulation pilotage is compulsory in respect of any vessel it shall be obligatory for the vessel to obtain the services either of a pilot authorized for the purpose by the Admiralty, or, within the limits of any specially defined pilotage district, of a pilot licence by the pilotage authority of the district, or, without such limits, of a pilot holding a deep-sea licence or certificate.

"Any enactment, order, charter, custom, byelaw, regulation, or provision in force for the time being in any area to which any such order relates shall have effect subject to the provisions of the order."

. . . . . .

(See *The Penrith Castle*, 33 T.L.R. 552).

(B) Defence of the Realm Regulations.

"39BBB. (1) The Shipping Controller may make orders regulating or giving directions with respect to the nature of the trades in which ships are to be employed, the traffic to be carried therein, and the terms and conditions on which the traffic is to be carried, the ports at which cargo is to be loaded or discharged or passengers embarked or disembarked (including directions requiring ships to proceed to specified ports for the purpose of loading or unloading cargo or embarking or disembarking passengers), the ports at which consignees of cargo are to take delivery thereof, the rates (maxima or minima) to be charged for freight or hire of ships and the carriage of passengers, the form of bills of lading and passenger tickets, and other matters affecting shipping, where it appears to the Controller necessary or expedient to make any such order for the purpose of making shipping available for the needs of the country in such manner as to make the best use thereof having regard to the circumstances of the time :

Reg. 39 BBB.

"Provided that any order made under this regulation shall have effect subject to any regulations made or orders given under Regulation 37, 38, or 39.

. . . . . .

"(3) The Shipping Controller may by order requisition or require to be placed at his disposal, in order that they may be used in the manner best suited for the needs of the country, any ships, or any cargo space or passenger accommodation in any ships, or any rights under any charter, freight engagement, or similar contract affecting any ship, and require ships so requisitioned to be delivered to the Controller

(B) Defence of the Realm Regulations.

Reg. 39 BBB.

or any person or persons named by him at such times and at such places as the Controller may require, where it appears to the Controller necessary or expedient to make any such order for the purpose of making shipping available for the needs of the country in such manner as to make the best use thereof having regard to the circumstances of the time.[1]

"Such compensation shall be paid in respect of the use of a ship or cargo space or passenger accommodation requisitioned under this regulation and for services rendered during the use thereof, and for loss or damage thereby occasioned as in default of agreement may be determined by the Board of Arbitration constituted under the Proclamation of the third day of August, nineteen hundred and fourteen, respecting the requisitioning of ships by the Admiralty.

. . . . . .

"(5) Any order under this regulation may be made either so as to apply generally to all ships or to apply to ships belonging to any particular owner, or to ships of any class or description, or so as to apply to any specified ships, and any such order may direct that all contracts or any class of contracts or any special contract affected by the order shall be abrogated, or shall remain in force notwithstanding anything in the order, but subject to any exceptions or modifications for which provision may be made by the order.

. . . . . .

"(7) The powers conferred by this regulation shall

[1] Reg. 39BBB only empowers the Shipping Controller to requisition *ships*, not the services of the shipowners or their staffs: *China Mutual S.S. Co.* v. *Maclay*, 1917, 34 T.L.R. 81.

(B) Defence of the Realm Regulations.

be in addition to and not in derogation of any prerogative right or other powers of His Majesty, and where before the twenty-eighth day of June, nineteen hundred and seventeen, any ship or any cargo space or passenger accommodation in any ship or any rights under any charter, freight engagement, or similar contract affecting any ship has been requisitioned by the Shipping Controller this regulation shall, after that date, apply as if the same had been requisitioned in pursuance of this regulation."

Reg. 39 BBB.

"39CC. A person shall not without permission in writing from the Shipping Controller, directly or indirectly and whether on his own behalf or on behalf of or in conjunction with any other person, purchase or enter into or offer to enter into any agreement or any negotiations with a view to an agreement for the purchase of any ship or vessel."

Reg. 39 CC.

"39D. A person shall not, without permission in writing from the Board of Trade, directly or indirectly, and whether on his own behalf or on behalf of or in conjunction with any other person, enter into or offer to enter into any agreement, or any negotiations with a view to an agreement :—

Reg. 39D.

(*a*) for the charter (whether by time or voyage) of any ship, which is not a British ship, or otherwise for the use of any such ship for the carriage of goods to or from any port in His Majesty's dominions or in the territory of any of His Majesty's allies; or

(*b*) for the purchase of any goods exceeding one thousand tons in weight from abroad on

(B) Defence of the Realm Regulations.

terms which include freight as well as cost.

. . . . . .

Reg. 39D. "This regulation shall have effect as from the twelfth day of January, nineteen hundred and seventeen."

. . . . . .

Reg. 39F. "39F. After the first day of June, nineteen hundred and seventeen, it shall not be lawful for the owner of a British ship to employ in any neutral state as manager, broker or agent, any person who is of enemy nationality, or who, being a corporation or company, is under enemy control.

. . . . . .

"For the purposes of this regulation a corporation or company shall be deemed to be under enemy control if—

(*a*) the majority of the directors or persons occupying the position of directors by whatever name called are persons of enemy nationality; or

(*b*) the majority of the voting power is in the hands of persons who are of enemy nationality or who exercise their voting powers directly or indirectly on behalf of persons who are of enemy nationality; or

(*c*) the control is by any other means whatever in the hands of persons who are of enemy nationality; or

(*d*) the executive is a company or corporation under enemy control, or the majority of the executive are appointed by a corporation or company under enemy control."

BANKING AND EXCHANGE TRANSACTIONS

(B) Defence of the Realm Regulations.

"41B. (1) A person engaged in banking, bill discounting, or any transaction in foreign moneys or exchange, or any other business of a similar nature, shall not knowingly or wilfully do or allow to be done through him, or through any account kept with him, any transaction on behalf of or by or with any person in Europe, directly or indirectly for the transmission of money or credit from or to any enemy country, or for the benefit of any enemy, or of any person on the Statutory List issued in accordance with the Trading with the Enemy (Extension of Powers) Act, 1915, or any transaction which will clear or facilitate the settling or balancing of any such transactions.

Reg. 41B.

. . . . . .

"(5) For the purposes of this regulation the expressions 'enemy' and 'enemy country' have the same meaning as in any Proclamations relating to trading with the enemy for the time being in force."

"41C. (1) Regulation 41B shall apply to any country which is for the time being under blockade on the part of the Allies in the same manner as it applies to an enemy country, and to any persons who would be enemies if the country so under blockade were an enemy country in the same manner as it applies to enemies, and if the Treasury by order so direct, shall continue to apply after the blockade is raised until the order is revoked to such extent and subject to such provisions as may be specified in the order.

Reg. 41C.

(2) This regulation shall be deemed to have had effect as from the eighth day of December, nineteen hundred and sixteen."

(C) COURTS (EMERGENCY POWERS) ACTS, 1914 TO 1917

(C) Courts (Emergency Powers) Acts.

By Section 1 of the Courts (Emergency Powers) Act, [1914, 4 & 5 Geo. 5, Ch. 78] :—

4 and 5 Geo. V, Ch. 78.

"7. (1) From and after the passing of this Act no person shall—

(*a*) . . . . . .

(*b*) levy any distress, take, resume, or enter into possession of any property, exercise any right of re-entry, foreclose, realize any security (except by way of sale by a mortgagee in possession), forfeit any deposit, or enforce the lapse of any policy of insurance to which this subsection applies, for the purpose of enforcing the payment or recovery of any sum of money to which this subsection applies, or, in default of the payment or recovery of any such sum of money, except after such application to such court and such notice as may be provided for by rules or directions under this Act.

"This subsection shall not apply to any sum of money (other than rent not being rent at or exceeding fifty pounds per annum) due and payable in pursuance of a contract made after the beginning of the fourth day of August, nineteen hundred and fourteen.

"This subsection applies to life or endowment policies for an amount not exceeding twenty-five pounds, or payment equivalent thereto, the premiums in respect of which are payable at not longer than monthly intervals, and have been paid for at least the two years preceding the fourth day of August, nineteen hundred and fourteen.

"(2) If, on any such application, the Court to which the application is made is of opinion that time should be given to the person liable to make the payment on the ground that he is unable immediately to make the payment by reason of circumstances attributable, directly or indirectly, to the present war, the court may, in its absolute discretion, after considering all the circumstances of the case and the position of all

(C) Courts (Emergency Powers) Acts.

the parties, by order, stay execution or defer the operation of any such remedies as aforesaid, for such time and subject to such conditions as the Court thinks fit."

4 and 5 Geo. V, Ch. 78.

By the amending Act, 1916 [6 & 7 Geo. 5, Ch. 13] the provisions of the principal Act with minor modifications are made applicable to officers and men of His Majesty's forces.

6 and 7 Geo. V, Ch. 13.

By Section 1 of the Courts (Emergency Powers) (No. 2) Act, 1916 [6 & 7 Geo. 4, Ch. 18], it is enacted :—

6 and 7 Geo. V, Ch. 18.

"I. (1) In subsection (1) of Section 1 of the Courts (Emergency Powers) Act, 1914 (hereinafter referred to as the principal Act)—

(*a*) the expression 'enter into possession' shall include the appointment of a receiver of mortgaged property; and

(*b*) the provisions relating to foreclosure shall extend to the institution of proceedings for foreclosure or for sale in lieu of foreclosure; and

(*c*) the expression 'a mortgagee in possession' shall include a mortgagee who before the passing of the principal Act appointed a receiver who is still in possession or receipt of the rents and profits of the mortgaged property, but shall not include a mortgagee of property other than land or some interest in land, except in any case where the power of sale had arisen and notice of intended sale had been given prior to the fourth day of August nineteen hundred and fourteen."

6 and 7 Geo. V, Ch. 13.

The County Courts are empowered to determine leases to members of His Majesty's forces by Section 2, Courts (Emergency Powers) (Amendment) Act, 1916.

7 and 8 Geo. V, Ch. 25.

The Courts (Emergency Powers) Act, 1917 (7 & 8 Geo. 5, C. 25) has this year received the Royal Assent, and contains novel provisions with regard to contracts which are or may be affected by the state of war.

(C) Courts (Emergency Powers) Acts.

The Act is to amend in certain particulars the previous Acts of 1914 to 1916, as also the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (*vide post*, p. 339) and "to grant relief in connection with the present war from liabilities and disqualifications arising out of certain contracts." Section 1 of the Act runs as follows:—

7 and 8 Geo. V, Ch. 25.

Powers of Court to suspend or annul contracts.

"1. (1) Where, upon an application by any party to a contract for the construction of any building or work or for the supply of any materials for any building or work entered into before the fourth day of August, nineteen hundred and fourteen, the court is satisfied that, owing to the prevention or restriction of, or the delay in, the supply or delivery of materials, or the diversion or insufficiency of labour, occasioned by the present war, the contract cannot be enforced according to its terms without serious hardship, the court may, after considering all the circumstances of the case and the position of all the parties to the contract and any offer which may have been made by any party for a variation of the contract, suspend or annul the contract, or stay any proceedings for the enforcement of the contract or any term thereof, or any rights arising thereunder, on such conditions (if any) as the court may think fit. For the purpose of this subsection where an offer made before the fourth day of August nineteen hundred and fourteen was binding on a contracting party if accepted within a specified period expiring after that date and was so accepted after that date, the contract shall be deemed to have been entered into before that date.

"(2) Where upon an application by any party to any contract whatsoever, the court is satisfied that, owing to any restriction or direction imposed or given by or in pursuance of any enactment relating to the defence of the realm or any regulation made thereunder, or owing to the acquisition or user by or on behalf of the Crown for the purposes of the present war of any ship or other property, any term of the contract cannot be enforced without serious hardship, the court

(C) Courts (Emergency Powers) Acts.

Powers of Court to suspend or annul contracts.

may, after considering the circumstances of the case and the position of the parties to the contract and any offer which may have been made by any party for the variation of the contract, suspend or annul the contract or stay any proceedings for the enforcement of the contract or any term thereof or any rights arising thereunder on such conditions (if any) as the court may think fit. This subsection shall apply to any obligation relating to the supply of water, heat, light, traction or power arising under any Act of Parliament, or order having the force of an Act of Parliament, in like manner as it applies to a contract, except that it shall not be lawful for the court to annul any such obligation.

"(3) This section shall be construed as one with the Courts (Emergency Powers) Act, 1914."

Section 2 runs as follows :—

Relief in respect of certain contractual obligations.

"2. Where, by virtue of any contract of tenancy, any person is bound to do or abstain from doing or is under any liability if he abstains from doing or does any act or thing, and by virtue of any enactment relating to the defence of the realm or any regulation made thereunder the doing of such act or thing is wholly or partially restricted or ordered, he shall not during the continuance of the contract or on or after the termination thereof be liable to any mandatory order or any injunction or interdict in respect of such act or thing, or be liable to pay any sum of money or incur any forfeiture or other penalty in respect of the failure to do or the doing of such act or thing, if and in so far as the failure to do or the doing of such act or thing is attributable to compliance with such restriction, or order as aforesaid :—

"Provided that the relief afforded by this provision from the obligation to do any such act or thing in consequence of such a restriction as aforesaid shall be subject to the following provisions :—

(*a*) If the restriction is removed during the currency of the contract the obligation shall be fulfilled as soon as may be after the restriction is removed;

(C) Courts (Emergency Powers) Acts.

(*b*) If the restriction has not been removed before the termination of the contract the person to whom the relief is given shall be liable to pay as damages a sum not exceeding the expenditure (if any) which would have been entailed by the fulfilment of the obligation.

Relief in respect of certain contractual obligations.

Section 3 runs as follows:

Relief from liability when fulfilment of contract interfered with by action of Government department.

"3. Where before or after the passing of this Act the non-fulfilment of any contract (not being a contract of tenancy) was or is due to the compliance on the part of any person with any requirement, regulation, order or restriction of any Government department or of a competent naval or military authority made, issued, given or imposed for purposes connected with the present war, or with any direction or advice issued, or given by any Government department with the object of preventing transactions which, in the opinion of the department, would or might be contrary to national interests in connection with the present war, proof of that fact shall be a good defence to any action or proceeding in respect of the non-fulfilment of the contract. A certificate by the appropriate Government department shall be sufficient evidence that such direction or advice was issued for the purpose and with such object as aforesaid."

Decisions under.

Under the earlier Acts some cases may be shortly noted.

An action for ejectment for non-payment of rent is within the Acts. [*Perry* v. *Fitzgerald*, 1915, 2 I.R. 11.]

The case of *Ness* v. *O'Neill* [114 L.T. 451] lays down that where a landlord sues to recover possession of demised premises under a proviso for re-entry on non-payment of rent, he does not require the leave of the Court to bring the action. He must, however,

(C) Courts (Emergency Powers) Acts.

Decisions under.

obtain leave for the issue of a writ of possession upon the judgment in the action.

A plaintiff obtaining a judgment on a dishonour of a note made after August 4, 1914, is entitled to execute the judgment without any application to the Court for liberty to do so, and it makes no difference that the note was in renewal of one made prior to that date. [*Provincial Bank of Ireland* v. *O'Donnell*, 1917, 2 I.R. 43.]

The making of an order absolute is a proceeding to execution on, or otherwise to the enforcement of, a judgment within the Act. [*Keats* v. *Conolly*, 1915, W.N. 174 C.A.]

It is not necessary to ask the Court for leave to issue execution in the case of a sum of money payable by or recoverable from an enemy. [*Leader, Plunkett & Leader* v. *Direction der Disconto Gesellschaft*, 1914, 31 T.L.R. 83.]

The Act does not apply to debts due to the Crown. [*Irish Land Commission* v. *O'Neill*, 1915, 2 I.R. 66.]

An order made on a summons claiming administration and seeking for an account is not a judgment for the purpose of enforcing the payment of a sum of money. [*Bor* v. *Hughes*, 1914, 49 I.L.T. 63.]

As to the circumstances necessary to call for the Court of Appeal's interference with the absolute discretion of a Judge in matters under the Act cases can be consulted. [*Lyric Theatre, London, Ltd.* v. *Lyric Theatre, Ltd*, 1914, 84 L.J. (K.B.) 712: *De Bingham* v. *London Life Association, Ltd.*, 1915, W.N. 165; *Philco Publishing Co.* v. *Nolan*, 1915, 49 I.L.T. 65; *Stirling* v. *Norton*, 1915, 31 T.L.R. 293.

(C) Courts (Emergency Powers) Acts.

Decisions under.

The words "mortgagee in possession" in Section 7 (1) (*b*) of the Act are not limited to mortgagees in possession of real estate, or to mortgagees who have obtained possession without the consent of the mortgagor. [*Ziman* v. *Komata Reefs Gold Mining Co.*, 1915, 2 K.B. 163.]

In another case where the interest upon a mortgage was in arrear and the mortgagor was in America, the Court gave the mortgagee on his application supported by subsequent mortgagees, leave to go into possession of the mortgaged premises. [*In re Coward & Co.*, 1914, 59 S.J. 42.]

It would appear that Section 1 (1) (*b*) of the Act does not apply to the commencement of a foreclosure action or a debenture-holder's action, and if no application for foreclosure is made the Court is not prevented from appointing a receiver and manager. [*In re Farnst, Eades, Irvine & Co.*; *Carpenter* v. *The Company*, 1915, 1 Ch. 22.]

The House of Lords have held that a broker, who is left with shares that his client has failed to take up, and sells them and then sues for the difference due to him is entitled to sell the shares without leave of the Court. [*Foster* v. *Barnard*, 1916, 2 A.C. 154, and at p. 157, *ante*.]

In *Hosack* v. *Robins* (1917, 1 Ch. 332) the defendants bought shares subject to a charging order obtained by the plaintiff before the war. The plaintiff without obtaining leave under the Courts (Emergency Powers) Acts, 1914 to 1916, issued a summons to enforce the charging order against the defendants by sale of the shares. It was held that the plaintiff

being in the position of a mortgagee under the charging order was really applying for his proper remedy of "sale in lieu of foreclosure," and as his charging order was before the war, leave was necessary, although the defendants had only acquired the shares after the war. The "sum of money" due under a contract does not apply to or include the costs found due under a consent order in proceedings to enforce the terms of a separation deed between husband and wife (*Torres* v. *Torres*, 1917, W.N. 263).

(C) Courts (Emergency Powers) Acts.

Decisions under.

A case has occurred owing to an order determining a soldier's lease (see p. 159, *ante*).

The Court of Bankruptcy is bound to exercise the "absolute discretion" given to it by the provisions of the Courts (Emergency Powers) Act, 1914, and will in a proper case stay a petition where the debtor's inability to pay his debts owing to circumstances attributable to the war is proved. [*In re A Debtor* (No. 224 of 1916), 1916, H.B.R. 156 C.A.]

(D) INCREASE OF RENT AND MORTGAGE INTEREST (WAR RESTRICTIONS) ACT, 1915

(D) Increase of Rent and Mortgage Interest Act.

The act above mentioned, as its preamble shows, restricts "the increase of the rent of small dwelling-houses, and the increase of the rate of interest on and the calling in of, securities on such dwelling-houses."

This legislation has become necessary because owing to the war and the employment of hosts of munition workers in areas rents are inclined to go up. Landlords may, in turn, be required to pay higher interest to their mortgagees and so both questions

(D) Increase of Rent and Mortgage Interest Act.

are bound together and the Legislature in the Act under notice prevents any increase of the one or other.

Both landlord and mortgagor are treated as to be content with the rents, or interest they were receiving before the war. They can of course by agreement raise the one or the other, but they cannot do so unless the tenant or mortgagor agrees to this.

The Act is to be in force as long as the war continues and for six months afterwards.

The standard rent taken is that obtained as on August 3, 1914, or if the premises were unlet then at the rent at which they were last let. [Section 2, subsection (1) (*a*).]

As to mortgages the Act applies to mortgages of "small dwelling-houses" whether the mortgaged property is wholly or merely partly of that character (Section 2, subsection 2), except those set out in subsection 4 (*a*) and (*b*):—

"4 (*a*) . . . . . .

"(*b*) To an equitable charge by deposit of title deeds or otherwise."

A standard rate of interest, namely that payable on August 3, 1914, is taken.

Decisions under.

A number of decisions have been given with reference to (*b*) above. These have been already set out (see p. 157 et seq., *ante*).

The new Courts (Emergency Powers) Act, 1917 (*vide* p. 333, *ante*) should be carefully noted as amending the Act of 1915.

Section 4 of it makes subsection (2) of Section 1 of the 1915 Act no longer applicable to a lease of a

dwelling-house for a term of twenty-one years or upwards.

(D) Increase of Rent and Mortgage Interest Act.

Section 5 makes sums paid after the passing of the Act on account of rent or mortgage interest, which would have been irrecoverable under the 1915 Act, recoverable within six months from payment and deductable by the tenant or mortgagor from any rent or interest payable within such six months.

Decisions under.

Section 7 deletes the word "standard" in subsection 6 of Section 2 of the 1915 Act, and inserts the following words :—"And this Act shall apply in respect of such dwelling house as if no such tenancy existed or had ever existed."

The case of *Walters* v. *White* [116, L.T. 377] shows that the proviso at the end of Section 1, subsection 4 of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (5 and 6 Geo. 5, C. 97), under which the section does not affect the power of sale of a mortgagee in possession on November 25, 1914, does not mean that in every case where a mortgagee was in possession his remedies are now limited to the exercising of his power of sale, but is only inserted *ex abundanti cautela*.

In *Wortley* v. *Mann* [1916, W.N. 390] a landlord enhanced the rent of a dwelling house but gave no notice to the tenant in accordance with Section 1, subsection 1 (vi) of the Act. For a time the tenant paid the increased rent and then refused to pay the increase. The landlord claimed the house and mesne profits and the tenant then offered the standard rent. The Divisional Court, reversing the County Court, upheld the defendant's position and held that the

(D) Increase of Rent and Mortgage Interest Act.

words in Section 1, subsection 1 (11), "Shall not be deemed to be an increase" mean "shall not be deemed a prohibited increase."

Decisions under.

(E) EXCESS PROFITS DUTY TAX

(E) Excess Profits Duty Tax.

By Sched. IV, Part I, r. 5 of the Finance (No. 2) Act, 1915 (5 and 6 Geo 5, Ch. 89):—

Finance (No. 2) Act, 1915.

> "Any deduction allowed for the remuneration of directors, managers and persons concerned in the management of the trade and business shall not, unless the Commissioners of Inland Revenue, owing to any special circumstances or to the fact that the remuneration of any managers or managing directors depends on the profits of the trade or business, otherwise direct, exceed the sums allowed for those purposes in the last pre-war trade year or a proportionate part thereof as the case requires."

This, as already pointed out, confers on the Commissioners a discretion, and a mandamus will not lie (*vide* p. 162, *ante*). The Commissioners may exercise their discretion as to the amount to be allowed, not merely where they have found the existence of special circumstances, but also where they have found the fact that the remuneration of the managers or managing directors depends on the profits of the trade or business. [*Rex* v. *Commissioners of Inland Revenue*, 1917, 33 T.L.R. 393.] Other cases have been given elsewhere (see p. 161, *ante*).

(F) BILLS OF EXCHANGE

(F) Bills of Exchange Act, 1914.

As regards Bills of Exchange the *Bills of Exchange Act*, 1914, provides that, without prejudice to the

(F) Bills of Exchange Act, 1914.

operation of Section 46 (1) of the Bills of Exchange Act, 1882, delay in presentment for payment of a bill, where the proper place for payment is outside the British Islands, is excused where the delay is due to circumstances arising out of the present war or to the impracticability for a similar reason, of transmitting the bill to the place of payment with reasonable safety (Section 1). The Act has effect during the present war and six months thereafter.

(G) INSURANCE

(G) Insurance (National)

The National Insurance (*Part I* Amendment) Act, 1915, Section 1, provides for a reduction of sickness and disablement benefit to persons within Section 46 of the 1911 Act, who have become entitled to army pensions in respect of total disablement *suffered in consequence of the present war.*

The National Insurance (*Part II* Amendment) Act, 1915, provides that where a workman during the continuance of the present war and a period of one year thereafter is employed outside the United Kingdom in an insured trade within the meaning of Part II of the Act of 1911, *on work connected with or arising out of the present war*, and the contributions continued to be paid by the employer, *the workman shall be deemed to be employed in an insured trade.*

Attention should be called to what has been already referred to (*vide* p. 332) as regards the powers of Courts in respect to life and endowment policies up to a limited amount under the Courts (Emergency Powers) Act, 1914.

(H) CONTRACTS AS REGARDS SALE OF GOODS

(H) Contracts of Sale of Goods.

Various Acts and Regulations passed as emergency legislation affect or have a bearing upon contracts which involve the sale and purchase of various commodities. They may shortly be set out alphabetically as under :—

Coal. As to coal see the Price of Coal (Limitation) Act, 1915, 5 and 6 Geo. 5, Ch. 75.

Cotton. Parliament has confirmed the action of cotton associations altering the date of deliveries under contracts dealing with cotton sales. See the Cotton (Emergency Action) Act, 1915, 5 and 6 Geo. 5, Ch. 69.

Spirits. By Section 2 of the Immature Spirits (Restriction) Act, 1915 [5 and 6 Geo. 5, Ch. 46] where any existing contract is interfered with by the Act the contractors shall to the extent of such interference be relieved therefrom.

(I) TRANSFER OF BRITISH SHIPS

(I) Transfer of British Ships.

It should be noted that during the war the British Ships (Transfer Restriction) Act, 1915, makes void and criminal the transfer of a British ship or share therein to a person not qualified to own a British ship unless the transfer is approved by the Board of Trade.

(J) PROSPECTIVE LEGISLATION

(J) Prospective Legislation.

It should be noted that the Board of Trade has appointed a Pre-War Contracts Committee under the chairmanship of Lord Buckmaster " to consider

(J) Prospective Legislation.

and report on the position of British manufacturers and merchants after the war in respect of contracts entered into by them prior to the war with persons or companies in the United Kingdom or in allied or neutral countries, the fulfilment of which has been prevented or impeded by the war, and as to the measures, if any, which are necessary or desirable in this respect." No report has been issued as yet.

GENERAL INDEX

PAGE

ACTION—
by company, British in form, enemy in fact 10, 182
by enemies in British Courts 5, 17
by enemy trustee 182
by firm comprising Turkish partners in firm's name . . 224
by person obliged to remit monies to enemy 247
ADVENTURE—
Doctrine of frustration of, discussed . . 54, 80, 133, 271
Principle of doctrine of frustration same in commercial cases 71
When doctrine applies to time charters 81
AFFREIGHTMENT—
Abandonment of ship by crew under enemy violence . . 156
Bill of Lading. *See* Title.
C.i.f. contracts. *See* Title.
Effect of embargo on contract of 303
Effect of war on contracts of, as stated in *Esposito* v. *Bowden* 17
Freight contracts. *See* Title.
Insurance. *See* Title.
Recent war cases as to. *See* Bill of Lading; Charter-party
Requisitioning of ships affecting. *See* Title.
"Restraint of Princes" affecting. *See* Title.
Sale of goods involving. *See* Title, also C.I.F.
War legislation effecting contracts of 171, 306, 307, 327, 329

PAGE

AGENCY—
Agent an enemy for sale on commission—contract unaffected 181, 297
Agent becoming an enemy by voluntary residence . . 5, 222
Agent for enemy vendor under irrevocable power of attorney 14, 235
Agreements of, ordinarily are dissolved by war 180
Appointments of managers of enemy business as Receivers 181, 224
Banker and Customer. *See* Title.
Broker and Client. *See* Title.
Commission on goods "sold" does not include goods requisitioned 157
Commission recovered by agent on contract being abandoned 240
of enemy business under power of attorney 181
of Insurance Company in assured's country during war 216
Implied term that Stock Exchange should remain open . . 293
involving continuous intercourse with enemy principal — revoked 180
Partnership. *See* separate Title.
Payment of insurance premium by agent of enemy assured . . 204
Trusteeship. *See* Title.

PAGE

AGREEMENTS—
distinguished from contracts .. 12
Illegality of, not pleaded, when Courts can notice it .. 177
to continue trading with enemies when war is over—discussed 29, 226
Trading agreements with enemy void 172
with enemies made during war void 12
with persons *sub protectione domini regis* 13
with prisoners of war .. 13, 190

AMSTERDAM—
Held to be a safe port .. 42, 103

ANTWERP—
Delivery of goods at, in c.i.f. case 103, 260
Freight contract for 267
Insurance on goods at 131

ARBITRATION—
Clauses *re*, in contracts not affected by war 139
Powers of arbitration to state a case on loss of requisitioned ship 95
Stay of action where clause for 112

BAILMENT—
Bailee has no better title than bailor 183
Captor of goods liable as a bailee for tort in respect thereto .. 41
Evidence of conversion .. 183
of shares deposited to order of enemy bank 182

BANK—BANKER AND CUSTOMER—
Absolute undertaking by, to remit customer's monies .. 294
Banker's position in c.i.f. contracts 261
Bailment of shares with .. 182
Bills of Exchange Act, 1914, excusing delay in presentment 342
Commission of, on payment of bonds, when earned 241
Defence of the Realm restrictions on banking business for enemies 184, 330

PAGE

BANK—BANKER AND CUSTOMER (*continued*)—
Demand made on branch of enemy bank instead of at Berlin on a current account—suit dismissed 183
discounting bills of lading .. 38
Enemy—Licenses to 189
Royal Proclamations of the war as to business with enemy .. 305

BILLS OF EXCHANGE—
Acceptance after war .. 187
Assignment after war 186
Assignment before war 184
Banker's position *re*, in c.i.f. cases 261
Bills of Exchange Act, 1914 .. 342
by prisoners of war 190
Defence of Realm Regulations as to 184
Delay in presenting, owing to war excused by Statute .. 343
Enemy parties to—recent cases 184
Endorsement of, to banker, etc. 38
Excuse for non-remittance that drafts not procurable .. 293
Execution of judgment on dishonour without leave of Court 337
Für Mich, an open endorsement 190
Interest on, during war, whether recoverable 228
Recent war legislation as to .. 342

BILLS OF LADING—
Apprehension of capture justifying delay 60
Carriage of goods in vessel partly requisitioned by Crown and lost by King's enemies .. 43
Clauses in, providing for war—recent cases of 42
Declaration of war, effect on .. 179
"Direct Service" 47
Deviation of voyage—what is, discussed 45
Enemy 28, 178, 254
Enemy endorsement of, as involving trading with.. .. 175
Incorporating terms in charter-party. *See* Charter-party.

PAGE

BILLS OF LADING (*continued*) —
" Intermediate port," meaning of, in 48
" King's enemies " exception in 44
Mere receipts for goods not .. 255
" Perils of the sea." *See* Insurance (Marine).
Prohibition of export of cargo 42, 294
" Restraint of Princes." *See* Title.
Safe port, meaning of term in .. 103
when made out to c.i.f. purchaser 258
when made out to c.i.f. vendor 258

BLOCKADE—
preventing deliveries 136

BRITISH SHIP—
Detention of crew of— avoids contracts of service 246
Transfer of, during war—regulated by statute 344

BROKER AND CLIENT—
Broker purchasing shares not taken up by client in position of a mortgagee .. 157
Client not bound to see that broker has correctly carried out his instructions 158

BUILDING CONTRACT—
Builder of reservoir excused from non-completion due to orders of Minister of Munitions interfering with contract .. 242
Builder of steamer excused from non-completion—delay due to war 48
building lease, order preventing construction of buildings .. 294

CAPTURE—
Actual, not necessary to show 125
Insurance against, of enemy goods 218
Neutral underwriters paying off for loss of enemy goods by, take subject thereto .. 41
of c.i.f. goods before tender of documents 260, 301
of ship as affecting c.i.f. documents 259

PAGE

CAPTURE (*continued*)—
of ship nominally owned by British company controlled by enemy company 10
" Peril of capture," what is .. 102
Risk of, of ship under charter-party 101
Transfer of goods at sea deemed to be in fraud of belligerent rights of 35
When, equivalent to delivery .. 40
without reasonable cause gives right to claim for damages as for a tort 41

CARRIAGE—
Affreightment. *See* Title.
Bill of Lading. *See* Title.
Charter-party. *See* Title.
Embargo not affecting contract of 250, 303
in c.i.f. contracts. *See* separate Title.
included in sale of goods. *See* C.I.F.
of persons and luggage .. 49

CHARTER-PARTY—
a contract to supply tonnage .. 92
Abandonment of vessel by crew —loss of right to freight .. 299
Admiralty hire, how divisible between owners and charterers 86, 91
Apprehension of war not a " restraint of princes " 60
Cases of, containing war clauses 49
Cases of, involving impossibility of performance .. 295
Cases of sub-chartering a vessel —delay frustrating the adventure 54
Change of destination in, liability for detention 243
Circumstances justifying refusal to load 105
Commandeering of ship under 100
Compensation by Admiralty when requisitioned vessel lost 92
Continuation of peace not a tacit condition of 72
Defence of the Realm Regulations affecting 91

PAGE

CHARTER PARTY (*continued*)—
Delay in carrying out, when a cause for cancellation .. 142
Detention of vessel under, in port, frustrating adventure 53, 295
Doctrine of frustration of adventure applies to "time" or "voyage" 81
"for about six months"—sending out vessel on last day .. 104
for carriage of goods up the river Ems 65
Freight. *See* Title.
Implied conditions in, as to war, etc. 70, 154
Implied conditions as to impossibility 73
Implying conditions in, involves often contradiction of express terms 82
Loading of ship under, interfered with by war 295
Loss of requisitioned vessel under, principle of valuation for compensation 89
Non-completion of voyage involving loss of freight .. 103
not an insurance 95
Payment of compensation for requisitionment 91
Performance of, where held excused 77
Powers of Court to annul or suspend contract where to enforce terms is to create hardship 91
"Restraint of Princes" clause in. *See* Title.
Return of hire "if steamer missing" excludes recovery for a restraint of princes 103
Requisitioning of ship under—the question and cases reviewed.. 68
Right to take benefit of salvage does not give the owners any right to use of vessel .. 83
Risk of being attacked and sunk by enemies not justifying expenses of tugging 102

PAGE

CHARTER PARTY (*continued*)—
Risk of seizure or capture clause in 101
Rule as to limit of endeavours to procure vessel to fulfil the 66
"Safe Port" 103
"Strike" in, not confined to dispute as to sufficiency of wages 104
Suspension of, with enemy during war supports the enemy 31
Tamplin Steamship Co. Case—discussed 73
War affects, in various ways .. 50
War preventing chartering .. 270
"War region" trading of vessel under, in 105
"War risk . . . for charterers account"—meaning of phrase 106
with clauses excepting war, etc. 49
when not sufficient to nominate vessel to enable exception clause to apply 65
CHOSE IN ACTION—
Assignment of, by or on behalf of enemy 310
C.I.F. (OR C.F.I.) CONTRACTS—
Appropriation of goods .. 260
Banker's position in 261
Capture of goods before tender of documents .. 260, 301
Contracts of affreightment in 28, 178, 254
Defence of the Realm Regulations as to 329
Goods coming from enemy country 254
Insurance in, as effected by 257, 301
Karberg's Case 255
Rise in freights. *See* Title.
Trading with the enemy when involved in 174
Value of documents at time of tender 261
War risk not ordinarily seller's bargain 259
When property in goods passes with an enemy 258
233

COMMISSION— PAGE
Contract for, not affected by war 240, 297
on "goods sold" not applicable to goods requisitioned .. 157
COMPANY—
Agent residing in enemy country 7
British in form, enemy in fact 8
Controller under Trading with the Enemy Amendment Act—no power to distribute surplus assets 235
Controller under Trading with the Enemy Amendment Act—no power to make call .. 158
deemed to be under enemy control 40
Dividend payable to an enemy shareholder—who can give a good receipt 235
Enemy 6
Enemy directors cannot direct 10
Enemy shareholders cannot appoint proxy 234
Excess Profits Duty tax in regard to 158
Goods of, when not condemnable in prize 40
Patent agreements of, in connection with war legislation 225
Place of business of, in enemy territory—question discussed 8
Prize Court looks behind, though nominally British, to see if enemy 10, 40
Receiver appointed by Debenture-holders, over-ridden by appointment of Controller .. 234
Transfer of business of, abroad, prevented by appointment of a controller 168
COMPENSATION—
Arbitrator's powers to state a case arising out of requisitionment 95
for chartered vessels 88
for chartered vessels when lost in Government Service .. 92
under Defence of the Realm Act 328

CONSTRUCTIVE TOTAL LOSS PAGE
Loss of market rather than loss of goods 131
Where no loss in the commercial sense 131
CONTRACTS—
Affreightment. *See* Affreightment; Bills of Lading; Charter-parties.
Agency. *See* Title.
Agreements with enemy during war 2, 12
Arbitration clauses in, how affected by war .. 139
Bailment. *See* Title.
Banker and Customer. *See* Title.
Bills of Exchange. *See* Title.
Bills of Lading. *See* Title.
Broker and Client. *See* Title.
Building. *See* Title.
Carriage. *See* Title.
Charter-parties. *See* Title.
clauses implied in, as to war, etc. 153
C.i.f. *See* Title.
Commission. *See* Agency.
Compliance with Defence of the Realm Regulations, a good defence to action for non-fulfilment of 312
Consideration or object of, must be lawful 2, 170
Contradiction between implied terms and those expressed 155, 291
Coronation cases, principles of. *See* Impossibility.
Delays *en route* excusing performance 300
Embargoes, effect of, on. *See* Embargo.
Enemy, executory and executed. *See* Title.
Enemy parties to. *See* Title.
Deliveries under. *See* Sale of Goods.
Dissolution of, suspension of. *See* Executory and executed.
Executory and Executed. *See* Title.

PAGE

CONTRACTS (*continued*)—
Freight. *See* Title.
Illegality under foreign law .. 176
Impossibility of performance. *See* Title.
Interest, whether payable during war 228
Insurance (Life, Marine—other). *See* Title.
Landlord and Tenant. *See* Title.
Lawfulness of .. 2, 22, 25, 171
Master and Servant. *See* Title.
Miscellaneous effects of war and legislation on 156
Mortgage. *See* Title.
part lawful, part unlawful .. 25
Partnership. *See* Title.
Plea of illegality not raised — powers of Court to notice illegality 177
Principal and Agent. *See* Agency.
Promissory Notes. *See* Title.
Power of attorney granted by enemy 235
Rise in freights. *See* Title.
Royal Proclamation affecting 305
Sale of goods. *See* Title.
Seamen's. 245
Shareholder's. *See* Company.
Statutory powers to avoid .. 354
Sub-contract for goods with enemy 142
Sub-contract not affected by Defence of Realm Regulations 312
Sub-contract and Defence of Realm Regulations .. 312, 315
Suspension of. *See* Executory and Executed.
Temporary interruption to, 26, 72, 250, 285
Trading, with enemy illegal 14, 172
Vendor and Purchaser. *See* Title.
Violent interruption of, test to be applied 73
War does not make any contract 18
with enemies 13, 14

PAGE

CONTRACTS (*continued*)—
with persons *sub protectione regis* 13
with prisoners of war 13
with war clauses, recent cases of 42

CONTROLLER—
Appointment of, of enemy company's affairs 11
Appointment of, over-riding Receiver and Manager appointed 234
Appointment of, preventing transfer of a company's business abroad 168
Call of uncalled capital by, invalid. 235
cannot distribute surplus assets of company being wound up 235
cannot obtain declaration that a contract between English and enemy companies is valid and subsisting 310
Custodian of enemy property, when he will not be directed by Court to pay interest .. 231

COURTS (EMERGENCY POWERS) ACTS 1914–1917—
Act of 1914—Section 1 providing for control of immediate powers of distress re-entry, foreclosure, forfeiture of deposit, lapse of policy. . .. 332
Act of 1915—applying provisions of earlier act to officers and men of His Majesty's Service 333
Act of 1916—what "enter into possession" includes .. 333
Act of 1916—what "a mortgagee in possession" includes 333
Act of 1916—(amending) Power to determine leases to members of His Majesty's Forces 333
Act of 1917 334
cases decided under .. 157, 336

DARDANELLES—
Apprehended closure of, not a restraint of princes 61

PAGE

DEBT—
Assignment of, by or on behalf of enemy 310
Interest during war on, when recoverable 228
DECLARATION OF WAR
amounts to order to subjects to behave in special manner 172
a restraint of princes 58
imports prohibition of commercial intercourse .. 12, 172
is equal in force to an act of parliament 12
DEFENCE OF THE REALM ACTS AND REGULATIONS—
Acts—Interference with contract, a good defence to actions under 312
Ministry of Munitions—powers of, under 312
Reg. 2. Powers to take land, buildings, arms, etc., and to do acts interfering with private rights of property 313
Reg. 2 B. Powers to take war material, food, forage and stores on paying compensation 314
Reg. 2 BB. Powers to regulate profits of sub-contracts by varying terms thereof and reduce price to be paid to the principal contractor 315
Reg. 2 E. Powers to regulate, restrict, or prohibit dealings in war material, food, forage or stores 317
Reg. 2 F. Powers to regulate or direct manufacture, treatment, use, consumption, transport, storage, supply or sale of any article of food supply, and requisition of stocks on paying compensation 317
Reg. 2 K. When deliveries in anticipation of requisitionment are to be deemed to have been delivered under requisitioning order 319

PAGE

DEFENCE OF THE REALM ACTS AND REGULATIONS *(continued)*
Reg. 2 L. Powers of Board of Agriculture and Fisheries to occupy lands for cultivation, on paying compensation and delegation of such powers .. 319
Reg. 7. Powers to requisition output, stores, etc., of certain factories on paying compensation 319
Reg. 8 E. Powers to regulate or restrict building and construction work and to prohibit carrying on of same .. 320
Reg. 9 G. Powers to control coal mines 321
Reg. 9 GG. Powers to control metalliferous mines 321
Reg. 15 B. Powers to require information as to goods held on account of or for benefit of enemy persons, and to force disposal of same .. 29, 322
Reg. 30 B. Sale purchase etc., of iron, steel, copper, zinc, brass, lead and other metals unlawful without permit .. 324
Reg. 36 A. Powers to regulate and restrict use of boats in harbours or approaches thereto 325
Reg. 37. Vessels must comply with navigation orders, signals, etc., and such regulations to over-ride any for avoidance of collisions at sea, or be liable to seizure and detention 325
Reg. 39. Powers to make orders as to pilotage and such orders to over-ride any order, charter, custom, bye-law or regulation existing 326
Reg. 39 BBB. Powers to regulate nature of trades in which ships are to be employed, and of requisitionment terms and condition on which traffic to be carried, ports of loading or discharge, ports where

PAGE

DEFENCE OF THE REALM ACTS AND REGULATIONS (*continued*)—
consignees are to take deliveries, rates for freights or hire or carriage of passengers, the form of bill of lading and passenger ticket .. 69, 91, 327
Reg. 39 CC. Prohibitions of agreements for purchase of any ship or vessel 329
Reg. 39 D. Prohibition of agreements for—
(*a*) Charter (time or voyage of any non-British ship for carriage of goods to any British port or ports in territory of any of the Allies, or ..
(*b*) for the purchase of goods exceeding 1000 tons in weight from abroad [on terms inclusive of freight and cost .. 329
Reg. 39 F. Illegal to employ any one or company of enemy nationality as broker, agent, etc., of a British ship .. 330
Reg. 41 B. Prohibition against banking, discounting, etc., any transactions with persons on the Statutory List 184, 330
Reg. 41 C. Applying 41 B to countries blockaded by Allies 184, 331

DELIVERY—
Capture equivalent to 40
Causes "preventing or hindering" 21
Clauses providing for payment in lieu of 137
Delays *en route* excusing 142, 300
Effect of suspending deliveries to protect enemy's trade 22, 301
of goods at Antwerp .. 103, 260

DUNKIRK—
a safe port 193

EMBARGO—
Effect of, in terminating contracts 303
Effect of, on contract of carriage 304

PAGE

EMBARGO (*continued*)—
Insurance of goods when, makes adventure illegal 218
made till "further order" .. 304
preventing shipment 250
Temporary, affecting tender .. 303

EMERGENCY LEGISLATION—
passed 305
prospective 345

ENEMY—
Action in name of, firm stayed .. 224
Agent for, vendor can sell premises 235
Agreements with, during war ..2, 12
Assignments of debt by or on behalf of 310
banks, Royal Proclamations as to 309
Bill of Exchange made with .. 184
Bill of lading in e.i.f. cases 28, 178, 254
by birth 3
by commercial domicile .. 3
by hostilities 3
by incorporation as a company 6
by marriage 6
by naturalization 3
by place of residence or trade.. 3
by reason of enemy associations 4
cannot sue 10, 17
cestuis que trust 172, 239
Change of neutral domicile of, restores original *status* .. 6
Character of goods sold while at sea when captured 35
company 6
company but in hands of Controller 11
Contracts with. *See* Contracts.
co-plaintiff in suit for infringement of patent rights .. 228
Correspondence with, forbidden 12
Defence of the Realm Regulations as to goods, etc., of .. 323
directors cannot direct .. 10
Execution issued to recover sum due from, without leave of Court 337
Goods captured at sea of, lost to underwriters who pay off .. 41
Goods coming from, country .. 248

ENEMY (*continued*) — PAGE

goods in prize proceedings .. 33
Insurances. *See* Title.
Interest on debts due from an, when payable 228
Internment of 13
lessee liable for rent .. 22, 107
Object of war is to cripple commerce of the 21, 171
partnership dissolved by war 19, 223
partnership dissolved by war, position of British partner .. 223
patents — recent cases as to .. 225
Prohibition against trading with an, contemplates only his benefit during war 29
proxy invalid 234
Return of, to his native country when presumed 5
shareholders cannot vote .. 10
Ships. *See* Title.
Suspension of deliveries helps trade of contracting .. 22, 301
Trading with the. *See* Title.
tenant. *See* Landlord and Tenant.
territory by invasion and occupation 309
trustee cannot act as such .. 182
under protection of the Crown 13
Voluntary residence in, country 5

EXCESS PROFITS DUTY TAX. *See* Finance Act.

EXCHANGE TRANSACTIONS —
for enemies or on their account prohibited by Regulation .. 330

EXECUTORY AND EXECUTED CONTRACTS —
Affreightment contract ended by abandonment of ship by crew 157
Agency commission on goods "sold" does not include goods commandeered .. 157
Agreements to resume trading with enemy after war is over 22
Broker and client transactions under Courts Emergency Powers Acts 157

EXECUTORY AND EXECUTED CONTRACTS (*continued*) — PAGE

Clauses as to war, etc., as implied in 153
Clauses as to war, etc., as provided for, in 42
Company's contracts in regard to excess profits duty tax .. 158
Company's contracts, powers of Controller to make calls .. 158
Compulsory military service affecting contracts of service 162
Definition of "executory" .. 16
Definition of "executed" .. 16
Deliveries under. *See* Delivery.
Distinction between, with enemy or non-enemy parties 16, 24
Effect of war on executory contract of affreightment .. 17
Enemy lessee remains liable for rent 22
Excess Profits Duty Tax as affecting contracts 161
Expiration of contract before end of hostilities .. 23, 232
Inferences to be drawn from commercial course of shipment 36
Landlord and Tenants', miscellaneous effect of war on .. 159
Master and Servants', affected by compulsory military service 161
Master and Servants', affected by Excess Profits Duty Tax 161
Miscellaneous effects of war and emergency legislation .. 165
partly lawful, partly unlawful 25
Partnership contracts dissolved by war 19
Passing of goods in sale of goods 27
Prize Court proceedings as to sale of goods 33
Rules of law as to effect of war on 16, 24
Sale of a business affected by emergency legislation .. 167
Sale of goods with clauses as to suspension 121

PAGE

EXECUTORY AND EXECUTED CONTRACTS (*continued*)—
Transfer of a company's business abroad prevented .. 168
Temporary interruption to performance of 26
Vendor and Purchaser's agreement affected by emergency legislation 168
Vested rights in 24
with enemies, effect of war on 16
with non-enemies, effect of war on 24

FINANCE (No. 2) ACT, 1915—
Commissioners have a discretion in refusing to allow deduction in full of remuneration of directors from excess profits duty tax .. 162, 342
Excess profits duty tax analogous to income tax .. 161
Liability of employee to refund sums paid by way of tax .. 161
Manager's salary calculated on profits free of deduction for tax 161
Material portion of rule under 342
Sale of business on basis of net profits—tax to be deducted 167
"FORCE MAJEURE"—
Whether it includes "war" .. 151
Cases of contracts with clauses as to 49, 301
FREIGHT—
a sum to be paid on completion of transit 244
Defence of the Realm Regulations as to controlling rate of 327
not payable when vessel abandoned owing to submarine force 299
Return of, when voyage is illegal 245
Rise in 136, 269
Rise in, meaning of phrase .. 270
Transit not completed—freight not leviable 244
when chartered vessel is requisitioned 86

PAGE

GENERAL AVERAGE—
Contribution claim for tugging sailing vessel for fear of submarines 102

IMPOSSIBILITY OF PERFORMANCE—
annuls so much of contract as remains unperformed .. 24
Commercial 149, 269
Economic unprofitableness 149, 269
General principles *re* 263
Implied terms as to possibility 264, 291
Legal 270
Meaning of 261
Meaning of "foundation of contract" 278, 286
Physical 265
Principles *re*, in Coronation cases 276
Principles *re*, in earlier decisions 273
Principles *re*, under recent cases 284
Recent war cases where performance excused 292
Recent war cases where performance not excused .. 297
Rules of law as to 264
Submarine attacks, fear of .. 289
INCREASE OF RENT AND MORTGAGE INTEREST (WAR RESTRICTIONS) ACT, 1915—
Cases decided under .. 166, 340
Construction and applicability of 340
Contract for sale of premises affected by 168
"Equitable charge," what it includes 166, 340
Retrospective effect of 167
INSURANCE (FIRE)—
Landlord's liability to insure under covenant includes loss by incendiary bombs from enemy aircraft 107
Zeppelin raids fall within clause as to "military or usurped power" 107
INSURANCE (LIFE)—
Agency of enemy company in assured's country 216
Agency terminated by outbreak of war 194

INSURANCE (LIFE) (*continued*) PAGE

Agent for foreign insurance company 217
American cases showing effect of civil war on policies . . 198
Annuities purchased before war — what is the effect of war on such? 217
Arbitration clause in policy, stay of action on policy 112
Average rate of mortality is the basis of life assurance . . 213
Courts (Emergency) Powers Act, 1914, as to 218
Clause as to not engaging in "military service" not against public policy . . 109, 206, 245
Difference between a right to insure and actual insurance. . 206
Enemy party to policy. *See* American cases above.
Enemy nominal distinguished from actual, in arms 191, 195, 208
Equitable jurisdiction of Courts in setting aside policies . . 213
Equitable value of policy—how arrived at 213
Executed or executory character of a policy 205
Exemption of "death directly or indirectly caused by or arising from or traceable to war" 108
Forfeiture of premiums paid on failure to pay punctually 196, 200
Premium—acceptance of during war involving waiver. . . . 197
Premium—distinguished from a debt 205
Premium, payment of a condition precedent 201
Premium, payment of, by British surety for enemy 209
Premium, payment of, without trading with enemy 204
Premium, time of payment of, of the essence of the contract 204, 212
Premium, when returnable on policy becoming void. . . . 213

INSURANCE (LIFE) (*continued*) PAGE

Premium, whether payment of, is trading with the enemy 204, 210
Presumption by Courts of terms in contract as to occurrence of war 201
Proposal Slip "ex war, policy including war risks . . 108
Public policy not against clause prohibiting voluntary military service 206
Royal Proclamations as to . . 193
Trading with the enemy as affecting 192
When assured entitled to equitable value of policy 211

INSURANCE (MARINE)

Adventure becomes illegal when prohibited 218
against "all consequences of hostilities" 112, 117
against capture by insurer's State is void 218
against capture by State allied to insurer's State also void . . 218
against capture while in transit from foreign State to Great Britain 220
against "extinction of lights" 120
against loss or damage "arising from any cause whatever whether on land or water" . . 133
against perils "arising from any cause whatever" includes war perils 132
against "war risks" only 120, 130
Capture and condemnation, not a "transfer" of ship. . . . 127
Capture, attempt to avoid, not a loss by 125
Charterers when to bear cost of insurance—"war risk" for charterer's account 106
Charterers expectation of capture not constructive total loss 124
C.I.F. insurance. *See* Title.
Client of insurance broker not bound to see instructions carried out 158

PAGE

INSURANCE (MARINE) (*continued*)
Collision with vessel sunk by torpedo whether the peril a consequence of hostilities .. 117
"Consequences of hostilities," construction of phrase .. 111
"Consequences of hostilities," when indirectly the cause of loss 116
Constructive total loss—
deprivation of goods not a .. 131
expectation of capture not a 124
loss of market not a 131
risk of capture must have begun to be a 126
vessel detained, then released, not a 129
vessel turned back by enemy war vessel landing and storing goods, not a 129
Doctrine of frustration of adventure inapplicable to policy on goods 133
Disappearance of vessel, presumption as to cause of loss 127
Early cases as to, with or on behalf of enemies 218
Embargo may make adventure illegal 219
Enemy charterers, fact of, not disclosed to underwriters .. 130
Extinction of coast lights too remote a cause of loss .. 120
Illegality of adventure must occur on actual voyage .. 219
Illegality of adventure tested by immediate destination .. 219
Loss before the war 220
Loss by depositing goods at other port under power to do so .. 117
Loss by "Perils of the Sea"—what is a proximate cause .. 112
Loss by "Restraint of Princes." *See* Title.
Loss by striking wrecked vessel sunk by torpedo 117
Loss of ship after capture .. 116
Neutral underwriters paying off on capture of enemy goods cannot recover 41

PAGE

INSURANCE (MARINE) (*continued*)
of adventure that is illegal .. 218
of ammunition to neutral port and ultimate hostile destination 219
of British property engaged in trade with enemy .. 219
of British property on an enemy ship 299
of enemy goods by neutrals—latter cannot claim on paying off 41
of enemy goods is void 218
of "freight and or anticipated profit" 130
of goods partially legal and illegal 219
of goods to further illegal trading with enemy 218
of safe arrival of goods 58
Particular average loss covered by perils insured against .. 129
Peril of men-of-war, what is a 126
Presumption of loss by war-risk on disappearance of vessel .. 127
Proximate cause of loss—what is 112
Public policy avoiding policy .. 219
Restraint of Princes. *See* Title.
Royal Proclamations as to .. 306
Severance of policy on goods partly legal and illegal .. 219
Suing and labouring clause—expenses incurred to avert loss 129
Torpedoing of vessel—proximate cause of loss 114
Vested rights in respect of .. 20
War between countries of assured and underwriters .. 218
War cases of contracts of, with war clauses 112
War cases of contracts of, with enemies 220
War legislation as to 306
"War-like operations" as excepted in policy 112
Warranty implied in policies of, that adventure is legal .. 218

INSURANCE (OTHER)
- against goods in store for damage caused by war .. 131
- Café contracts, when war risks not included 259
- Deprivation of goods insured not a constructive total loss .. 132
- Employment of workmen outside United Kingdom during war 313
- Loss directly caused by "war, military or usurped power" .. 131
- National Insurance Amendment Act, 1915 313
- of enemies' property on land against seizure illegal 221
- Vested rights suspension and not dissolution of policy .. 20
- War legislation as to 306
- What is a "loss"? 132
- Where loss accrued before war 24

INTEREST—
- on compensation monies unpaid by Admiralty 91
- on debts during war, when recoverable 228

INTERNMENT
- Effect of 13
- of crew of ship 246

LANDLORD AND TENANT—
- Covenant on landlord's part to insure including loss or damage from Zeppelin .. 107
- Enemy lessee liable for rent 22, 107, 222
- Increase of rent and mortgage Interest (War Restrictions) Act, 1915 339
- Lease for "period of the war" not void for uncertainty .. 107
- Lessees under covenant to carry on hotel and restaurant allowed to close former on account of the war—injunction refused 160
- Release of soldier lessee from lease 159

MASTER AND SERVANT
- Acceptance of Corporation's resolution as to payment during military service binding .. 164
- Accident arising "out of" employment of engineer on trawler through enemy mine 161
- Employee's liability to refund sums paid for excess profit duty 161
- Employee not entitled to participate in Provident Fund on enlisting .. .. .. [illegible]
- Injury to employee from hostile bombardment not an accident arising "out of" his employment 164
- Joining army a good consideration for employer's promise to pay half wages 163
- Local Government (Emergency Provisions) Act, 1916 as to certain employees enlisting .. 164
- Manager's commission to be paid free of deduction of excess profits duty from the profits 161
- Military Service Act, effect of, on contracts of 162
- Promise to pay full wages to employees who enlisted—held binding 163
- Risks common to all mankind 164
- Seamen's contracts. *See* Seamen
- "Strike" not limited to disputes between employers and workmen as to wages 104
- Voluntary residence of servant in enemy country makes him an enemy and gives no right to wages 222
- Workmen's [illegible] ler National Insurance [illegible]915, while on service . 343

MINISTER OF MUNITIONS
- Instance of interference with contract by order of 242, 312
- Powers of, to take possession of war material .. 314

PAGE

MINISTER OF MUNITIONS (*continued*)
Powers of, to order priority of execution of coal orders .. 321
Powers of, to requisition output of factories 319
Powers of, to restrict building or construction work 320
Powers of, to control certain mines 321
Powers of, to vary terms of any sub-contract 315
MORTGAGE — MORTGAGOR AND MORTGAGEE—
Enforcing security during the war, restrictions on .. 160, 337
Equitable charge by deposit of title deeds 340
Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, cases under 161, 339
"Mortgagee in possession"—construed 337
Mortgagees of enemy goods seized as prize 34

PARTNERSHIP—
dissolved by war .. 19, 223
Company is akin to a 9
Condemnation of goods of a .. 225
position of English partners with enemy ditto 223
PATENTS—PATENT AGREEMENTS—
Agreement to resell patent rights first to enemy before others—void 227
Jurisdiction of Board of Trade to dispose of application as to 225
Suit for infringement of a, enemy company a co-plaintiff .. 228
PORT—
Amsterdam as a safe .. 42, 103
Antwerp as a safe 103
Defence of the Realm Regulations as to vessels 325
Dunkirk as a safe 103
Insurance on goods to neutral 219
"Intermediate port," meaning of 48
Safe port—meaning of 103
Seamen detained in enemy .. 246

PAGE

PRINCIPAL AND AGENT. *See* Agency.
PRISONERS OF WAR
Contracts by 13
Bill of exchange granted by .. 190
PRIZE COURT
condemnation of ship owned by company under enemy control 10
Pledges 34
Sale of goods in 33
PROMISSORY NOTE
Transfer of, by or on behalf of .. 307
Interest on, when suspended during war 228

REQUISITIONMENT—
Admiralty's liability to pay compensation for loss of requisitioned vessel 92
a prerogative of the Crown .. 69
Carriage of goods in vessels partly requisitioned 43
Cases where various periods of, have been held to end the contract 77
"Commandeering," meaning of 100
Compensation for, of chartered vessels 89, 91, 93
Continuing, of vessels under charter—suggested rule .. 75
Defence of the Realm Regulations as to 69, 91
Discussion as to effect of, on chartered vessels 69
Freedom from arrest of requisitioned vessel 101
Interest on compensation monies unpaid 94
Length of, must be so great and long as to require the parties to the contract not to go on with the adventure 74
Meaning of 68
not an excuse for withdrawing vessel because hire unpaid .. 92
of articles deliverable under hire-purchase agreement .. 300
of coal at sea unknown to the contracting parties 298

REQUISITIONMENT (*contd.*)
of goods by the enemy after the policy of insurance on them has expired 132
of goods sold 252, 301
of growing crops 253
of part of shipowner's fleet not affecting charter party as to a particular vessel 92
of railway trucks, whether a "restraint of princes" .. 101
of vessels under time / voyage charter-parties .. 74
of wheat under Art. [illegible] pply and Storage of [illegible]) Act, 1914 28
Powers of arbitrators to state a case 95
Tamplin Case discussed .. 73
"RESTRAINT OF PRINCES," ETC.
Actual seizure of goods not necessary to be a 55
Alteration of ship's course not a 58
Apprehension of, as distinct from 59
Apprehension of ship's capture 60
Apprehension that Dardanelles would be closed not a .. 61
by foreign government 52
case where requisitionment of vessel held not to be a 69, 84
case where requisitionment of vessel held to be a 77
Declaration of war an intervention amounting to a 58
Defence of Realm Regulations that may be 68
Definition of 52
Detention in port by Government orders 54
Effectual stoppage of carriage of goods sufficient as a .. 51
For clause as to, to apply there must be an existing restraint 62
Illegality of voyage a .. 51, 57
Limit of endeavours shipowners must make to procure a steamer before clause as to, applies 66

"RESTRAINT OF PRINCES," ETC. (*contd.*)
[illegible] ical form of 51, 53
Potential 55
Prohibition of export of cargo a 43
Restraint as applied to goods .. 52
Requisitioning of part of fleet of shipowner not a 298
Submission without opposition when a 52, 59
Summary of what is a 67
War affecting working of mine and supply of [illegible] 297
When, is the proximate cause of loss 59
Whether clause operates before steamer nominated 65
Whether shortage of railway trucks a 101
RISE IN FREIGHTS. *See* Freight.
RISE IN PRICES
a question of degree as affecting contracts 144
excusing non-delivery .. 149, 267
is not a prevention 144
No general rule as to effect of, on contracts 149
"Preventing or hindering" 141, 145

SALE OF GOODS—
Appropriation of goods from enemy country to contract .. 247
Bill of exchange *re*, accepted after war 187
Cancellation clause in 137
Cases *re*, with enemies dissolved by war 232
Cases *re*, with non-enemies affected by war 247
Cases *re*, with non-enemies not affected by war 248
C.i.f. *See* Title.
Clauses in contracts of, providing for war 134
Delays *en route* excusing deliveries 142, 300
Economic unprofitableness not a prevention 265
Effect of embargo on 139, 250, 303
Effect of war on future deliveries 134

PAGE

SALE OF GOODS (*continued*)—
Force Majeure. *See* Title.
General principles *re* 27
Goods known to come from enemy country 248
Hindering and preventing deliveries 141, 145, 149
Inferences from course of shipping goods 36
Interfering with or preventing deliveries 136, 141
Loss of market affecting control of goods 131
Passing of the property 27, 33, 258
Payment in exchange for bill of lading 27
Payment in lieu of delivery .. 137
Prize Court proceedings as affecting 27, 33
Prohibition of export, blockade or hostilities *re* .. 134, 244
Requisitioning goods sold .. 296
Rises in freights and prices. *See* Titles.
Seller obliged to remit price to enemy 247
Shipment *post bellum* 40
Shortage of shipping affecting 270
Shutting up of sources of supply 137, 301
"Sold" does not include commandeered 157
Subject to "safe arrival" or "Subject to arrive" 152
Suspension of contract for 18, 21, 139
Suspension of deliveries an aid to the enemy .. 22, 301
Suspension of deliveries not the same as suspension of contract 143, 149
Suspension "in case of war" .. 300

SEAMEN—
Contracts of, as affected by earlier wars 245
Contracts of, as affected by present war 246
Risk of capture on commercial voyage 246

PAGE

SHIP—
Abandonment of, owing to submarine attack 299
Cargo requisitioned 298
Capture of, ease of tender of e.i.f. documents .. 260, 301
Commandeering of 100
Defence of the Realm Regulations as to sale or offer of sale of 329
Detention of, when a restraint of princes 295
Enemy, nominally owned by British company condemned 40
Freedom from arrest of requisitioned 101
Legality of taking, to Antwerp 260
Presumption drawn on disappearance of 127
Prohibition of export—abandonment of voyage of .. 244
Requisitioning of. *See* Requisitionment.
Risk of attack by submarine .. 102
Sales or transfers of enemy, not recognized 34
Sales or transfers of enemy, rules as laid down by Privy Council 34
Scarcity of ships as a prevention 270
Striking wreck of torpedoed vessel—consequences of hostilities 117
Transfer of British, during war 344
Transfer of, to new management not affected by capture .. 126
Tugging expenses due to submarine 102

SOURCE OF SUPPLY—
Shutting up of, affecting sale of goods 137, 301

SPECIFIC PERFORMANCE—
When right to, might be preserved during war 20

STOCK EXCHANGE—
Broker holding shares not taken up in position of mortgagee .. 157
Commission on business introduced 293

PAGE

STOCK EXCHANGE (*continued*)—
Contracts *re*, implying continuance of peace 293
Relationship of Broker and customer 157
STRIKES—
as a *force majeure* 302
Clauses *re*, as found in charter-parties and contracts .. 142
SUBMARINES—
Fear of attacks by, affecting contract 102, 289
General average contribution to expenses for tugging sailing vessels to avoid, not claimable 102
Presence of, converting waters into the "war region" .. 105

TRADING WITH THE ENEMY—
Acts 309, 310, 311
as regards bills and promissory notes 184, 186, 187
Benefit of enemy during war .. 29
Contracts of, illegal .. 14, 172
Loading of cargo, when a .. 171
Negotiating draft in c.i.f. sale of goods 175, 187
Not illegal to provide for trading when war over 29
Protection of enemy's trade during war 22, 29
Royal Proclamations as to .. 305
Sale of goods known to come from enemy country .. 248
Transfer of enemy bill of lading between Englishmen.. .. 175
Trustees with enemy *cestui que trust*, powers of .. 172, 239
What is a 172
TRUSTEE—
Enemy cannot act as 182
for enemy *cestui que trust* 172, 239

VENDOR AND PURCHASER—
Effect of Increase of Rent and Mortgage Interest (War Restrictions) Act on contract of 168
Enemy vendor selling through British agent under irrevocable power of attorney 23, 235

PAGE

VESTED RIGHTS. *See* Executory and Executed Contracts.
VOYAGE—
Abandonment of, due to import prohibitions 244
Actual capture on, not necessary to be shown 125
Advance freight for 245
Commandeering of vessel on .. 100
Detention of ship on 295
Deviation of a, what is a .. 45
Effect of declaration of war on a 12, 172
Embargo making, illegal .. 304
Frustration of adventure. *See* Title.
Goods on, in c.i.f. cases. *See* C.I.F.
Insurance of goods on. *See* Insurance.
"Intermediate port" on a, what is.. 48
Loss of ship on, by torpedoing 114
Ordinary risks on 246
Outbreak of war before commencement of 171
Risk of capture on a 125
"Safe port" on a, meaning of .. 103
Seamen's contracts for a .. 245
Sending out vessel on, on last day of charter 104
What is peril of capture .. 102
What is peril of men-of-war .. 126
What is "war region" on a .. 105

WAR—
a contingency *ejusdem generis* in exception clause 142
Contracts with clauses *re*. *See* Executory and Executed Contracts.
Declaration of, what it amounts to 172
does not create any contract .. 18
effective cause of stopping supplies 146, 297
F.c.s. clause 118
justifying refusal to load chartered steamer.. 105

PAGE

WAR (*continued*)—
Loss on insurance policy (life) due to 108
Loss on insurance policy (marine) on disappearance of vessel 127
Meaning of "in case of war" 146, 300
Meaning of "Preventing or hindering" in pre-war contracts 141, 145, 149
preventing chartering 270
Presumption as to duration of 75

WORDS AND PHRASES—
"About six months," charter-party for 104
"Against war risks only including extinction of lights," insurance 120
"All consequences of hostilities," insurance against .. 113
"And/or other steamers," insurance for 158
"Any military or naval service whatsoever," clause in policy 199
"Arising from any cause whatever on land or water" .. 132
"Assets of the business"—Trading with the Enemy Amendment Act, 1916 .. 235
"At or after maturity" .. 186
"Baltic round" 295
"Belligerent action" 194
"British subject" includes company registered in England .. 10
"*Cestuis que trust*," position of enemy 172
"Commandeered," meaning of 100, 157
"Commercial impossibility" 149, 265
"Delays *en route* or other contingencies," excuse for non-deliveries 142, 300
"Deemed to be insolvent" .. 32
Determine the tenancy .. 160
"Directly or indirectly caused by or arising from or traceable to war" 108
"Direct service" 46
"Economic unprofitableness" 145

PAGE

WORDS AND PHRASES (*continued*)—
"Enemy" 3, 4
"Expedient in the public interest" 168
"Ex-war," insurance 108
"*Force Majeure*" .. 151, 301
"For the period of the war, the rent payable weekly" .. 107
"Foundation of contract" 278, 285, 292
"Freight and/or anticipated profit" 130
"From the moment of shipment" 258
"Frustration of adventure" .. 271
"*Für Mich*" an open endorsement 190
"Further order," embargo made till 304
Giving effect to 196
"Goods bargained and sold" .. 27
"Goods sold and delivered" .. 27
"Hinder" 141, 150
"Impossibility" 284
"In case of war" 146, 270, 300
"Interference" 136
"Intermediate port" 48
Jus disponendi 33
"Legal impossibility" .. 265
"Loss" 135
"Men-of-war," peril of .. 126
"Military or usurped power" 107, 131
"Military or Naval Service" .. 206
"Mortgagee in possession" 333, 338
"Normal conditions" 145
"Or otherwise" 166
"Out of," accident not arising, employment 164
"Peril of men-of-war" .. 126
"Perils of the sea" 112
"Preventing or hindering" .. 149
"Prevention" not economic unprofitableness 149
"Restraint of Princes" .. 52
Requisition of ship 68
"Rise in freights" 270
"Rise in prices" 141
"Risk of seizure or capture" .. 102
"Safe Port," meaning of, as to Amsterdam 103

PAGE

WORDS AND PHRASES (*continued*)—
"Safe Port," meaning of, as to Antwerp 103
"Safe Port," meaning of, as to Dunkirk 103
"Sale in lieu of foreclosure" .. 339
"Selling agents," shipment to .. 35
"Sold" implies a contract .. 157
"Strike," meaning of 105
"Subject to arrive" 152
"Subject to safe arrival" .. 152
"Takings at sea, arrests" .. 52
"To the order of" 183
"Trading with the Enemy" .. 172
"Unavoidable cause" .. 15
"Unpreventible cause" .. 48
"War," death due to 108
"War," in case of 153
"War-like operations" 112, 127
"War region," what included in 105

PAGE

WORDS AND PHRASES (*continued*)—
"War risk for buyer's account" 259
"War risk if any required for charterer's account" 106
"War, hostilities or other hindrance" 135
"War, military or usurped power," loss by 131
"Warranted from all consequences of hostilities" .. 112
WORKMEN'S COMPENSATION. *See* Master and Servant.

ZEPPELIN—
Fire to house caused by bombs from 107
Landlord's liability to insure against loss due to 107
risks to workmen from bombs from aircraft 165

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THE FIRST (INDIAN) EDITION

OF

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H. CAMPBELL, ESQ.

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