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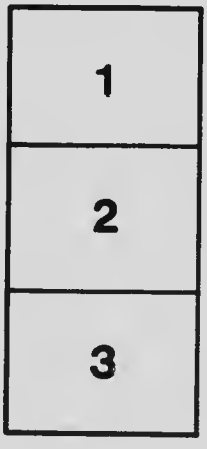

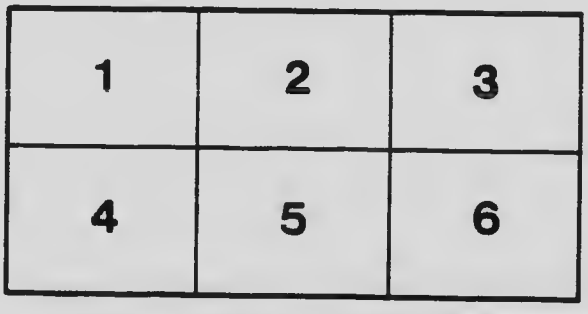

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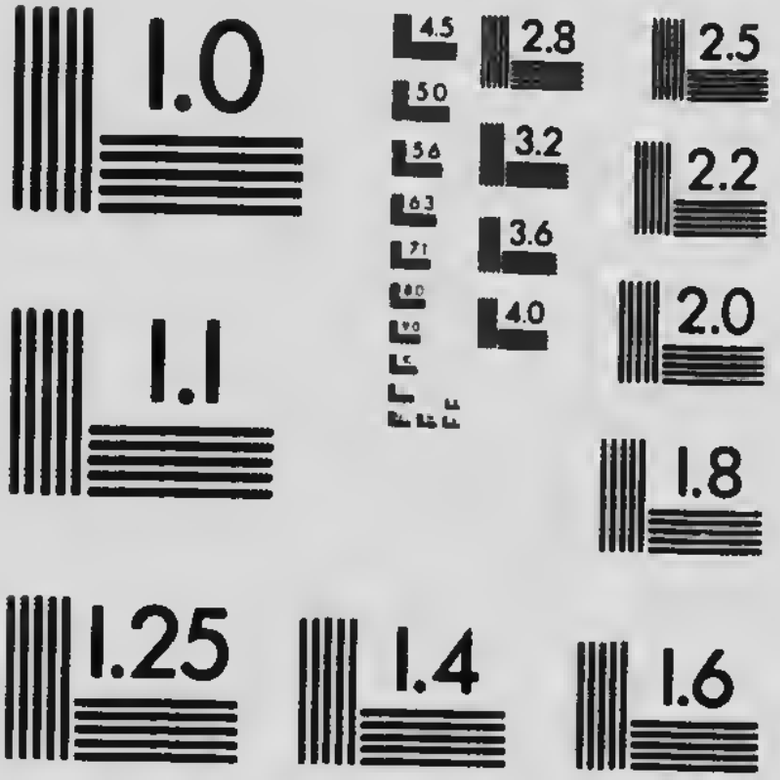

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THE LAW OF WAR AND CONTRACT

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THE LAW

OF

WAR & CONTRACT

INCLUDING THE PRESENT WAR DECISIONS
AT HOME AND ABROAD

BY

H. CAMPBELL

King's Inn, Dublin; Barrister-at-law, and Advocate; Professor of Law, Government Law School, Bombay; Clerk of the Crown, Bombay; Author of "The Law of Land Acquisition in India" and "The Law of Trading with the Enemy in India"

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PREFACE

THE work here presented, which chiefly concerns all the modern war cases as to the effect of war on contracts, originated in notes made for the purposes of my own practice. They grew so rapidly that I determined to arrange them under appropriate principles of law for publication. Numerous friends kindly read my manuscript and made many valuable suggestions, which I accordingly adopted. Chief of these friends were Messrs. Vernon Bayley and Gavin Steel Little (of Messrs. Crawford, Bayley & Co., Solicitors). I gladly welcome the opportunity this preface presents of acknowledging my indebtedness to all who have helped.

It is hoped that by the arrangement of the work and by means of distinct headings and clear marginal notes the readers of the following pages will be able speedily to find what they are looking for in any given case, and so avoid the tedious search of tracing the present war cases in our numerous and scattered reports both English and Indian.

Cases are indexed under both plaintiffs' and defendants' names, and comprise all those reported down to November 1916.

H. CAMPBELL.

HIGH COURT CHAMBERS,
BOMBAY, *December*, 1916.

CONTENTS

CHAPTER IV

CHAPTER V

CHAPTER VI

INDEX OF CASES CITED AND REFERRED TO

N.B.—Cases are arranged alphabetically under both Plaintiffs' and Defendants' names.

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 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 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 for the last two years, which now present a very substantial body of decisions.

Collection of modern war cases

Under principles of law

Arrangement of Work

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

Three Main Divisions:—

(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 recognised 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 subject.

These considerations frequently involve an examination of the status of the parties to the contract, and a distinction has to be drawn 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 with enemy subjects. These latter are dealt with in the next chapter and will be seen to be absolutely void.

Enemy parties to contracts

It scarcely seems necessary to discuss at any length the persons who are treated as

"enemies", but very shortly they may be summarised as follows:—

Arrangement of Work

(1) Enemies by birth. [*Sylvestre's Case*, 1702, 7 Mod. Rep. 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*, 1 B. & P. 163.]

Enemy parties to contracts

3) Enemies by naturalization.

(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; *Rex* v. *Kupfer*, 1915, 2 K.B. 321; *The Bernon*, 1 Ch. Rob. 101.]

Who are enemies?

(5) Enemies by commercial domicile in hostile territories. [*Wells* v. *Williams*, 1698, 1 Salk. 45; *Sorensen* v. *Reg.* 1857, 11 Moo. P.C.C. 141; *Albrecht* v. *Sussman*, 1873, 2 Ves. & B. 323; *O'Mealey* v. *Wilson*, 1808, 1 Camp. Rep. 482; *Tabbs* v. *Bendelack*, 1801, 4 Esp. 108; *The Manningtry*, 32 T.L.R. 36.]

(6) Enemies by marriage to an enemy husband. [*Harvey* v. *Fernie*, 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,

Arrangement of Work

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.]

Enemy parties to contracts

(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.] As to companies registered in the United Kingdom but whose directorate and shareholders are enemies, the company may or may not be an enemy. It depends on circumstances. [*The Continental Tyre & Rubber Co.* v. *Daimler Company*, 1916, A.C. 307.]

It is hardly necessary to add that various definitions of "enemy" are to be found in the present war legislation prohibiting trading with the enemy [see the Proclamations of 9th September 1914, and in particular The Trading with the Enemy (Extension of Powers) Act, 1915, (5 & 6 Geo. 5 ch. 98.)].

Statutory powers to avoid contracts

The concluding chapter of this work calls attention to the statutory powers that have been given in England, and in India, to the proper authorities to avoid, in whole or in part, contracts entered into before or during the present war with or by enemies which are injurious to the public interest.

CHAPTER II

Agreements with Enemies during War

General Rule

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 so 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 Stowel 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.]

Such agreements are void

Exceptions to General Rule

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

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

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.]

Position of interned persons

It has however been held by *Younger J.* that internment of a registered alien enemy does not operate as a revocation of the license 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, Ld.*, 1902, A.C. 484 at p. 505 ; *Porter* v. *Freundenberg*,

1915, 1 K.B. 857 C.A ; *In re Mary Duchess of 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. *Moffitt*, 1915, 1 Ch. D. 58.]

Exceptions to General Rule

Trading contracts illegal

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*, 7 Ell. & 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 and traitorous correspondence with them 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.

CHAPTER III

Executory and Executed Contracts

In ascertaining the effect of war upon contracts it is usually necessary to ascertain what state the contract is in 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

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

Rules of law

"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 continuance 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 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 contract, where time was of the essence of the contract, it could not very well be 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 war 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

(A) Enemy Contracts

Rules of law :—

remedy is indeed suspended : an alien enemy cannot sue in the Courts of either country 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.]

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*

(A) Enemy Contracts

Rules of law :—

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.]

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

(A) Enemy Contracts

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.)

Rules of law :—

Executory contracts are suspended but may be dissolved

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*, 1916, 1 K.B. 763, 1916, 32 T.L.R. 299 ; 114 L.T. 180 ; 1916, W.N. 76.]

As in partnerships

In a Bombay case, where the contract was between an Indian company and a German company for the purchase and sale of cotton waste over a period of time, it was properly remarked as follows :—"The more modern view seems to be that all contracts with alien enemies become illegal on the outbreak of war .....These decisions follow a simple principle consonant with common sense and capable of universal application, thereby avoiding the many troublesome questions which must arise otherwise as to what should be done during the continuance

Sale of goods

(A) Enemy Contracts

of hostilities, and what should be the position of the parties when hostilities cease. There may be hardship in individual cases, but it is obvious that it is better to allow the parties, if they so wish, to renew their contracts at the end of the war, rather than bind them to continue business under the prior contracts *when it is almost certain that the surrounding circumstances will be entirely altered.*" [*The Textile Manufacturing Co.* v. *Salomon Bros.*, 1915, 18 Bom. L.R. 105 at p. 113.]

Rules of law :—

Executory contracts are suspended but may be dissolved

It must be 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.

As in other cases

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

(A) Enemy Contracts

redemption, the right would probably be recognised 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.]

Rules of law :—

Executory contracts are suspended but may be dissolved

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 :—

As in supply of goods

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 concentrates 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

(A) Enemy Contracts

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; C.A. 1916, 1 K.B. 541; 1916, W.N. 11

Rules of law :—

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

Executory contracts are suspended but may be dissolved

"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.

As in supply of goods

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 recognise 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 by its naval or military forces." [*Zinc*

(A) Enemy Contracts

Corporation, Ltd. v. *Hirsch & ors.*, 1916, 1 K.B. 541; 1916, W.N. 11; 32 T.L.R 232.]

Rules of law:—

Executory contracts are suspended but may be dissolved

A contrary opinion was expressed in another case of the same corporation against a different defendant, where *Sarjant J.* held that the contract ought not to be treated as abrogated by war, but on appeal, three days later, the Appeal Court reversed the decision and held that the suit did not lie at all, and the decision should not have been given, as it was one for the construction of a contract in the absence of parties whose interests made it necessary to have the contract construed. [*Zinc Corporation, Ltd. and Romaine* v. *Skipworth*, 1914, 32 T.L.R. at p. 106 and in appeal at p. 107.]

As in cases

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 lessee is liable for rent of the premises. [*Halsey* v. *Lowenfeld*, 1916, 1 K.B. 143; C.A. 1916, 32 T.L.R. 709]. 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; 114 L.T. 74; 32 T.L.R. 78.]

When the Trustee in bankruptcy wished to disclaim the leasehold business premises of the debtors in Brussels, Antwerp, Liège and

(A) Enemy Contracts

Rules of law :—

Berlin, and notices of disclaimer could not be served on the landlords in the usual way, as the Post Office refused to accept registered letters for any of these four places, *Horridge J.* directed a 28-day notice to be given by ordinary post to the last known places of address of the landlords. [*In re Curzon Brothers*, 1915, 31 T.L.R. 374.]

Executed contracts

The case of *The Continental Tyre and Rubber Company, Ltd.* v. *Daimler Co., Ltd.*; *and the same* v. *Tilling Limited* [1914, 31 T.L.R. 77, on appeal 1915, 1 K.B. 893 : 31 T.L.R. 77 : on further appeal to the House of Lords, 1916, A.C. 307 ; 1916, W.N. 269] is an instance 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 J.* however dissenting in the Court of Appeal) but the House of Lords has 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

1915, 18 Bom. L.R. 105 at pp. 112-113.] The case is cited above (*see* p. 12.)

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, 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 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 ; 1914, 31 T.L.R. 41 ; 1914, W.N. 406.]

Executed contracts

Vested rights

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

Vested rights

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

(B) Non-Enemy Contracts

provide gas standards at their own expense and to supply them with gas, and the defendants, a district 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. 32 T.L.R. 287 ; 1916, W.N. 62 ; 1916, 1 K.B. 912.].

Rules of law:—

Vested rights

In an appeal against this decision the 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

Severance of executed from executory part of contract

(B) Non-Enemy Contracts

Rules of law :—

Severance of executed from executory part of contract

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*, 1915, 32 T.L.R. 7; 1916, 1 K.B. 541; 1916, W.N. 11.], which principle 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 fall where it lights"; but even on this ground the decision in appeal can scarcely be regarded as satisfactory.

(C) Executory and Executed Contracts

re

Sale of Goods

The distinction between executory and executed contracts is of particular importance

in cases of the sale of goods and in Prize Court proceedings.

(C) Re Sale of Goods

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.

General principles

A recent war case illustrates the importance of the point under discussion. [*Duncan Fox & Co.* v. *Schrempft & Bonke*, 1914, 31 T.L.R. 66, 491 C.A; 1915, 3 K.B. 355.]

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 the 5th August 1914 was issued, warning the public against trading with the enemy. This Proclamation had the effect of dissolving all executory contracts, and indeed rendered the performance of the

Passing of the property

(C) Re Sale of Goods

contract illegal and impossible. On the 5th August the vendors tendered to the purchasers the bill of lading in respect of the goods.

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 both Courts 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, that contract 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

Passing of the property

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 perform 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, 31T.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 another case where the same clause was under consideration this view does not appear to have been accepted by the Court. [*Zinc Corporation Ltd.* v. *Hirsch* 1916, 1 K.B. 541; 1916, W.N. 11; 32 T.L.R. 7.] 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

Stoppage in transit

(C) Re Sale of Goods

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 the President 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.]

Stoppage in transit

(D) Sale of Goods: Prize Court Proceedings

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 eneny 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 is well illustrated in a recent prize case. A cargo was shipped under a c.i.f. contract by a neutral to a

Jus disponendi

(D) Sale of Goods: Prize Court

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 sellers 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; 31 T.L.R. 72.] Indeed all that a Prize Court is concerned with is the national character of the thing seized and in determining this the English Courts have taken *ownership* as the criterion, meaning by ownership the property or *dominium* as opposed to any special rights 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*, 1916, A.C. 145; 1915, 32 T.L.R. 103; 114 L.T. 10.].

Jus disponendi

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*, 1915, 31 T.L.R. 470.]

(D) Sale of Goods: Prize Court

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.]

Mortgages

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. 495.]

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.]

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; 31, T.L.R. 15.]

Where goods are shipped by the vendors to persons described as "selling agents",

(D) Sale of Goods: Prize Court

who are paid by commission and to hom 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.

Shipment to selling agents

So where an American company shipped in July 1914 at New York for Hamburg on a German steamer a consignment of pig lead, under bills of lading which 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, and the 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", and 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.]

Goods paid for by enemy

In the case of *The Sorfareren* [1915, 32 T.L.R. 108, 46 L.T.46] 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

(D) Sale of Goods: Prize Court

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.]

British company's goods

The goods of a company incorporated in Great Britain are not subj[illegible] 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 ; 84 L.J., (P.) 150.]

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

(E) Contracts with Clauses Excepting War, etc.

Recent cases

A number of decisions have been given since the war dealing with contracts that contain clauses providing for the outbreak of war. The cases decided are mostly in connection with contracts of the nature of bills of lading or charter-parties, 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 majeur*, restraint of princes, interference with supplies, rise in freights, etc.

(E) Contracts with clauses re war

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

Recent cases :—

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 cargo for Hull and were entitled to call there first to deliver that cargo. The bill of lading contained the exception " 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.

Bill of lading

(E) Contracts with clauses re war

Recent cases :—

In *James Morrison & Co., Ltd.* v. *Shaw Savill and Albion Company*, [1916, 1 K.B. 747; C.A., 1916, 32 T.L.R. 712], 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 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 by *Bailhache J.* 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.

Bill of lading

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.

(E) Contracts with clauses re war

Attention may next be called to a contract in a charter-party, between neutrals, which let a ship for 5 years to trade within the limits of the European trade. It contained this clause :—" That no voyage be undertaken and no goods, documents 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.*, 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, W.N. 295.]

Risk of seizure or capture

In *Embiricos* v. *Sydney Reid & Co.*, [1914, 3 K.B. 45.] a case that arose out of the Greco-Turkish war of 1912, the plaintiffs, by a charter-party made with the defen-

(E) Contracts with clauses re war

dants 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."

Recent cases :—

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

Charter-party

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.

In another case [*Admiral Shipping Co., Ltd.* v. *Weidner, Hopkins & Co.*, 1916, 1 K.B. 429] where a vessel was chartered for two Baltic rounds, and the hire of the vessel was paid by the charterers to the owners in advance up to the 14th August 1914, and on the 2nd August the Russian Governemnt detained the vessel, war having broken out between Russia and Germany on the 1st August, and the owners directed the captain to remain in port, and on the 28th August the British Consul at the port repatriated the crew, it was held by *Bailhache J.*, on a special case being submitted from the arbitrators,

Repatriation of crew not a withdrawal of ship

that the charterers were liable for hire, and the repatriation of the crew did not amount to a withdrawal of the ship by the owners. The charter-party contained a clause providing in what events payment of hire was to cease, but did not include restraint of princes, rulers, and people, although that was in the general exceptions clause.

(E) Contracts with clauses re war

Recent cases :—

Charter-party

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, 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 ; 114 L.T. 791.]

What is a "requisition" of a ship ?

In *The Modern Transport Co.* v. *Duneric Steamship Co.* (1916, 1 K.B. 726) it was also 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.

The House of Lords has recently delivered a judgment, [*F. A. Tamplin Steamship Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.*, 1916, 32 T.L.R. 677],

(E) Contracts with clauses re war

Recent cases :—

Charter-party

Requisitioning of ship

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 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; 32 T.L.R. 201]. 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 ither the rights of someone 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."

(E) Contracts with clauses re war

Recent cases :—

Charter-party

Requisitioning of ship

"In the recent case of *Horlock* v. *Beal* (1916, 1 A.C., 486 ; 32 T.L.R., 251) 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 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

Principle on which parties excused

(E) Contracts with clauses re war

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

Requisitioning of ship

"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.'"

(E) Contracts with clauses re war

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

Recent cases :—

Charter-party

Requisitioning of ship

"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

(E) Contracts with clauses re war

Recent cases :—

Charter-party

Requisitioning of ship

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

(E) Contracts with clauses re war

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 someone 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."

Recent cases :—

Charter-party

Requisitioning of ship

"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

(E) Contracts with clauses re war

of the five years he would be of a different opinion."

The case of *Capel & Co.* v. *Souledi* [1916, 1 K.B., 439; 1915, 32 T.L.R. 59, C.A. 1916, 2 K.B. 365] furnishes an instance of the *commandeering* of a vessel.

Recent cases:—

Charter-party

"Commandeering" of ship

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: "32. 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."

(E) Contracts with clauses re war

Recent cases :—

Charter-party

"Commandeering" of ship

It was argued in the case that the notice was only a preliminary step in the direction of commandeering, 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 dictum that "Service of a notice that a ship will be commandeered does not necessarily amount to commandeering her."

In *Mitsui & Co., Ltd.* v. *Watts, Watts & Co.*, [1915 32 T.L.R. 288,] the defendants, shipowners, refused to supply a steamer to the plaintiffs, the charterers, on the allegation that the British Government had prohibited ships from going to the Black Sea to load. The charter-party provided for a vessel to go to Mariupol on the Sea of Azoff and load there. The Government had issued no such prohibition. In an action by the charterers the defendants pleaded that owing to a reasonable apprehension that Turkey would close the Dardanelles

(E) Contracts with clauses re war

the exception as to "restraint of princes" justified them in not sending a vessel to load. *Bailhache J.* held that this plea did not justify the breach of the charter, and on appeal his judgment was affirmed with a variation [*same*, 1916, 32 T.L.R. 288.]

Recent cases :—

Charter-party

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 was to be "for about six months" and the vessel was not to be used in waters where military 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 18th June 1915 the six months expired, but the charterers sent the vessel on one more voyage and she did not return till 30th June. 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.

The doctrine that circumstances sometimes arise which entitle a charterer to refuse to load a steamer if he thinks that she

(E) Contracts with clauses re war

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. [*Ropner & Co.* v. *Ronnebeck*, 1914, 84 L.J. (K.B.) 392.]

Recent cases :—

Charter-party

"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; 1915, 32 T.L.R. 207.]

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", because the insured met his death by being killed by a train on whose line the deceased was engaged at the time in inspecting the guards and sentries placed there to guard the line, the Court holding, on an appeal from arbitration, that the death fell within the excepted causes. [*Coxe* v. *Employers' Liability Assurance Co., Ltd.*, 1916, W. N. 294].

Insurance "ex war"

In a case that arose out of the sinking of the 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

(E) Contracts with clauses re war

Recent cases :—

Insurance (Life)

the words "ex war." The defendants thereupon 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".

Insurance "ex war"

During the currency of the policy the plaintiff's husband on his voyage from America to England in the 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.] No point seems to have been made that the Lusitania was sunk off the south coast of Ireland and so was not outside the limits of Europe.

(E) Contracts with clauses re war

Where a ship was insured and the policy contained an exception as to warlike operations, and she was torpedoed in the Channel by a German submarine and was damaged, but remained afloat and was brought alongside a quay at Havre, when owing to a rise of wind and bad weather she began to bump against the quay and became a total loss, it was held that though the circumstances had thwarted the attempt to save the ship, they did not constitute a new casualty, and therefore the exception clause applied and the plaintiffs could not recover. [*Leyland Shipping Co., Ltd.* v. *Norwich Union Fire Insurance Society*, 1916, 32 T.L.R. 569.]

Recent cases :—

Insurance (Marine)

Ship-torpedoed

In another case where the marine policy had a similar exception 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.]

Missing ship

Perils from any cause include war perils

The case of *Moore* v. *Evans*, [1916, 1

(E) Contracts with clauses re war

K.B. 479; 1915, 32 T.L.R. 224] goes to establish that an insurance policy which insures perils "arising from any cause whatever" covers perils that arise from war.

Recent cases :—

Sale of goods

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. *Sharman 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.

Delay in deliveries not due to war

A further example of a contract entered

(E) Contracts with clauses re war

into before war containing an exception clause may be referred to. [*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 1,500 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 brought 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 had enlisted, and (3) some colliers would not contract ahead and none except upon extremely hard terms. The Court upheld the Umpire's view thatt he defendants were liable. *Bailhache J.* observed :—" Care must be taken not to let a man lightly off his bargain and yet not to

Recent cases :—

Sale of goods

Rise in prices suspending deliveries

(E) Contracts with clauses re war

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."

Recent cases :—

Sale of goods

Payment in lieu of delivery

In *Smith, Coney & Barrett* v. *Becker, Gray & Co.*, [1915, 31 T.L.R. 151 C.A.] 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 Master of the Rolls 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".

Suspension of deliveries is not suspension of contract

The case of *Zinc Corporation Ltd.* v. *Hirsch* [1916, 1 K.B. 541 ; 32 T.L.R. 7 ;

1916, W.N. 11] 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.

(E) Contracts with clauses re war

Recent cases :—

Sale of goods

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 6,000 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 declara-

Effect of rise in freights

(E) Contracts with clauses re war

tion 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.*) construed the term "under normal conditions" as applying to shipping and delivering, and observed as follows :—

Recent cases :—

Sale of goods

"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."

Effect of rise in freights

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

In *Scheepvaart Maatschappij Gylsen* v.

(E) Contracts with clauses re war

Recent cases :—

Sale of goods

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, 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 :—

Effect of rise in freights

"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.

(E) Contracts with clauses re war

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.

Recent cases :—

Sale of goods

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

Effect of rise in freight

Scrutton 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.

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."

(E) Contracts with clauses re war

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 12th August 1914. The plaintiffs sued them for damages.

Recent cases :—

Sale of goods

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.

Shutting up of source of supplies

In another case before the same learned

(E) Contracts with clauses re war

judge [*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 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.

Recent cases :—

Sale of goods

Loss of market and shortage of shipping

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].

In *Bolckow Vaughan & Co., Ltd.* v. *Compania Minera de Sierra Minera* [1916, 32 T.L.R. 404], the defendants, a Spanish company, contracted to sell to the plaintiffs

(E) Contracts with clauses re war

in November 1914 a quantity of iron ore to be delivered at Middlesborough 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 6th February 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 on 3 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.

Recent cases :—

Sale of goods (over sea)

Meaning of "in case of war"

In *C. S. Wilson & Co., Ltd.* v. *Tennants, Ltd.*, [1916, 114 L.T. 878], the defendants in December 1913 contracted with the plaintiffs for the supply to them of magnesium chloride over the year 1914 at a specified price. The contract was subject to this condition that deliveries might be suspended pending certain conditions (of which war was one) causing a short supply of, amongst

(E) Contracts with clauses re war

other things, manufactured produce, "or otherwise *preventing* or *hindering* the manufacture or delivery of the article".

Up to the time of the outbreak of the war the main sources of supply of magnesium chloride had been from the United Alkali Company, who were limited as to the amount they could sell by an agreement with a German Company, and about 7,500 tons manufactured in Germany. The result of the war was that the supply from Germany ceased, and there was a shortage of the article. The United Alkali Company were left with a practical monopoly of the supply and prices naturally rose very rapidly. The defendants claimed the right to suspend deliveries under the clause set out above.

Recent cases :—

Sale of goods

"Interfering with or preventing" not the same as "preventing or hindering"

It was held by the Court of Appeal, (reversing *Low J.*), one judge dissenting (*Neville J.*), that the large rise in price of the article, which was the effect of shortage produced by the war, did not "prevent or hinder" the manufacture or delivery of the article, economic unprofitableness not "preventing or hindering" either "manufacture or delivery" within the meaning of the clause, and that therefore the defendants were not protected thereby.

Increase of prices

Pickford J. observed—"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."

(E) Contracts with clauses re war

Other cases appear in the reports of contracts containing war clauses, and may be consulted, though little turned upon them as regards the ultimate decisions [*Edward Grey & Co.* v. *Tolme and Runge*, 1915, 31 T.L.R. 551; and *Jager* v. *Tolme and Runge*, 1915, 31 T.L.R. 381, reversed in appeal, 1916, 32 T.L.R. 291 C.A.]

Recent cases:—

(F) Clauses Implied in Contracts re War

As regards clauses implied in contracts in regard to war, or the continuance of peace conditions, the following recent cases may be consulted.

In a case of a contract for carriage of goods by sea from the Thames to the Forth [*Associated Portland Cement Manufacturers, Ltd.* v. *William Cory & Son, Ltd.*, 1915, 31 T.L.R. 442], where some of the defendants' ships were requisitioned by Government, it was contended that the parties had impliedly stipulated that there would be a continuance of peace. *Rowlatt J.* took the view that the parties in the case did not contract on the condition that there would be no war, they evidently did not contemplate that there would be war when they made their forward contract for six years, but they had not contracted

Contract of carriage

Continuance of peace

(F) Clauses implied in contracts re war

on the basis that there would be peace.

In a case [*F. A. Tamplin Steamship Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.*, 1916, 32 T.L.R. 677 H.L.], where a ship under charter was requisitioned by the Admiralty, the principle of law that underlay all the authorities was examined by Lord Loreburn. In his Lordship's view a Court ought to examine a contract and the circumstances under which it was made 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 is manifest that such a term can rarely be implied except where the discontinuance is such as to upset altogether the purpose of the contract. When the Court absolves parties from the performance of their promises it is usually on the ground that there was an implied term which entitled them to be absolved. Sometimes it is put that performance has become impossible and that the party concerned did not promise to perform an impossibility. Sometimes it is put that the parties contemplated a certain state of things which fell out otherwise. The principle that there was an implied condition operating to release the parties is the same in commercial contracts, and the language used as to " frustration of the adventure " merely

Recent cases :—

Charter-party

Court should ascertain whether parties bargained on footing of peace continuing

adapts it to the classes of cases such as the learned judge was dealing with—namely charter-parties.

(F) Clauses implied in contracts re war

The learned judge laid down the following test—"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.

Recent cases:—

Charter-party

The whole judgment has been already set out (p. 34 *ante*.)

In a Bombay case [*Karl Ettlinger* v. *Chagandas & Co.*, I.L.R. 40 Bom. 301] the plaintiffs, a firm of naturalized Germans doing business in London, made a contract on the 24th July 1914 with the defendants, through their London agent, by which the defendants agreed to supply the plaintiff-firm with 1,000 tons of freight at a certain rate per ton, the material to be carried being manganese from the Port of Bombay for Antwerp, shipment in September 1914. On the 7th of September, 1914, the defendants telegraphed to the plaintiffs that owing to *force majeure* the contract was cancelled. The plaintiffs refused to accept the cancellation and held the defendants to account for damages.

Freight contracts

(F) Clauses implied in contracts re war

The defendants contended (*inter alia*) that it was an implied condition, and of the essence of the contract, understood by both parties to be so, that there should be freight available from Bombay to Antwerp.

Recent cases:—

Freight contracts

Beaman J. observed—"It does not appear to me that there is any recognised doctrine of law which goes the length the defendants would wish to press this contention. No doubt it would ordinarily be the understanding of parties, particularly those engaged in buying and selling freight, that ships should be available. But unless all the mercantile marine in the world had disappeared, we must suppose that ships were available, and what is really meant by the defendants is that it was impliedly agreed upon by the parties that normal freight conditions should continue. No Court has ever read such an implication as that, as far as I know, into any contract. It could not, I think, even be said that any Court has yet held contracts made in times of peace necessarily implied the continuance of peace, unless the outbreak of war and its attendant conditions made the performance of the contract impossible or destroyed the subject-matter of it. I have nothing of that kind to deal with here."

The above judgment was pronounced before the decision of the House of Lords cited above.

The law is well settled, as the present Chief Justice remarks, in *Leiston Gas Company*,

Ltd. v. *Leiston-cum-Sizewell Urban D.C.*, [1916, 2 K.B. 428, per Lord Reading], that where the performance of a 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. 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.

(F) Clauses implied in contracts re war

Recent cases :—

Destruction of subject-matter

The following is a case of seamen's contracts for a commercial voyage [*Liston* v. *The Owners, Steamship Carpathian*, 1915, 2 K.B. 42 ; 1915, W.N. 103].

Seamen's contracts

The plaintiffs, seven seamen, were engaged on the S.S. Carpathian, a British vessel of which the defendants were the owners, on a commercial voyage from London to Port Arthur, Texas, and to a final port of destination in the United Kingdom. While the vessel was loading at Port Arthur a cargo of oil as to the nature of which—viz., contraband or non-contraband, there was a conflict of evidence, news arrived of the outbreak of the present war. The German cruiser *Karlsruhe* was known to be in the

Risk of capture on commercial voyage

(F) Clauses implied in contracts re war

vicinity. The plaintiffs refused to proceed to sea and complete the voyage unless they received extra remuneration on account of the extra risk due to war which they would incur. Thereupon the Master signed an agreement with the men promising to give them an extra sum in order to enable the ship to proceed to sea. The vessel sailed and on arrival the plaintiffs sued for the extra wages under the agreement.

Recent cases:—

Seamen's contracts

The question for decision was whether the seamen were discharged from their *original* contract of service and were justified in refusing to serve and sail.

Risk of capture on commercial voyage

Lord Coleridge held that in embarking on a vessel upon a commercial voyage the risk of capture by an enemy is not included amongst the risks of the voyage, and that as the risk of capture was shown to be very great the seamen were justified in refusing to proceed on the voyage, and that being so, that they were discharged from their obligation to sail. He held that as the Master had implied authority from the owners to make the agreement that therefore the plaintiffs could recover.

Detention and imprisonment of seamen

The House of Lords has held [*Horlock* v. *Beal*, 1916, A.C. 486] that when a British vessel is seized and detained in an enemy port and the seamen are imprisoned that the seamen cease to be entitled to wages as soon as the further performance of their obligation to serve becomes impossible (and see Chapter V).

(F) Clauses implied in contracts re war

Where there was an agreement between the plaintiff and the defendants, who were members of the London Stock Exchange, providing for the payment to the plaintiff of a commission on all business introduced by him subject to a certain minimum, and during the currency of the agreement the Stock Exchange was closed for some months owing to the war and the defendants refused to pay the plaintiff any further commission, and the agreement contained no clause stipulating that the Stock Exchange should remain open, *Ridley J.* held that it was an implied term of the agreement that to entitle the plaintiff to remuneration the Stock Exchange should remain open, and the plaintiff was not entitled to recover. [*Berthoud v. Schweder & Co.*, 1915, 31 T.L.R. 404.]

Recent cases :—

Stock Exchange transactions

Closing of Exchange

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 license. [*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) recognises a similar rule. Every agreement of which the object or consideration is unlawful is void. The consideration or object of an agreement is unlawful Indian Law

General Principles

if it is forbidden by law, or the Court regards it as opposed to public policy.

Trading contracts

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

But there may also be contracts free of this vice which are invalidated by the passing of war legislation. Thus a contract to export or import certain goods between Great Britain and other countries may be rendered unlawful of performance by the issue of a prohibition of export or import of the agreed article as contained in a Royal Proclamation or an Order in, or of, Council.

Recent decisions

Recent decisions state the law thus :—

"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.]

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

General Principles

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 Inse., Co. Ltd.* v. *Sanday & Co.*, 1916, 1 A.C. 650, H.L., per Lord Wrenbury].

Recent decisions

Agreements made in time of war with subjects of hostile States are, as already pointed out (Chap. II), unlawful and no rights or obligations thereunder can be recognised or enforced.

Having thus stated the general principle 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) Contracts made before war with persons who become Enemies, *e.g.*, Enemy Contracts.

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

Enemy contracts

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

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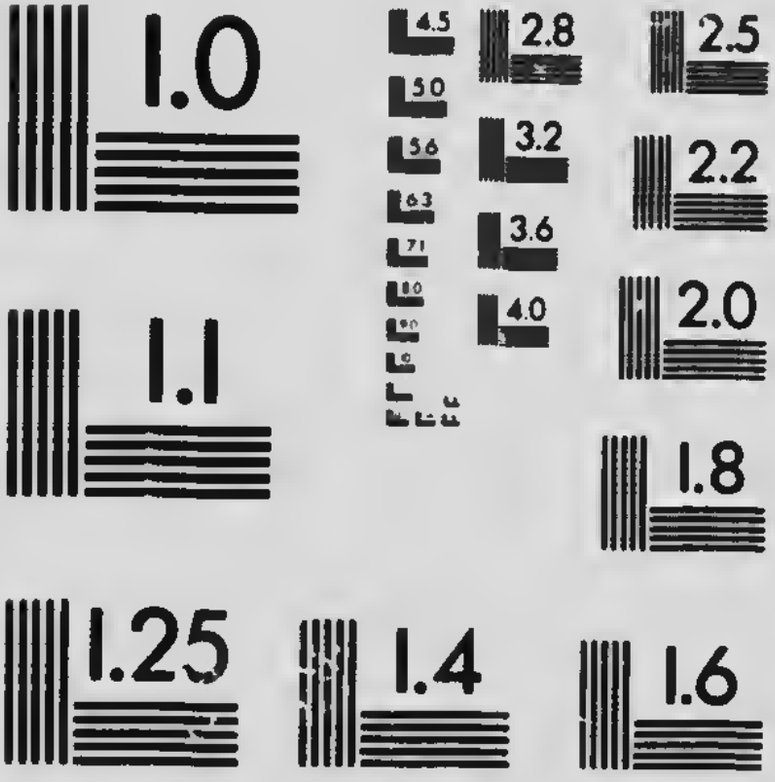

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(A) Enemy Contracts

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 with an enemy shipowner for his purchaser. The chief of these was recently decided in the Court of Appeal. [*Arnhold 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.

Recent cases:—

Contracts of 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 which the buyer could maintain an action upon.

(A) Enemy Contracts

Recent cases :—

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.

Contracts of affreightment (c.i.f.)

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.

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.

Agency

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*, 1916, I.K.B. 763; 1916, 32 T.L.R. 299; 114 L.T. 180; 1916, W.N. 76.]

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

(A) Enemy Contracts

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.

Recent cases :—

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.

Agency

When war broke out between England and Germany, the well-known piano makers, Bechsteins, 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. Bechstein 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 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. Bechstein, W. Berridge* v. *E. & C. Bechstein*, 58 Sol. J. 863.]

Enemy trustees

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.]

(A) Enemy Contracts

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.]

Recent cases :— Agent by proxy

The Earl of Halsbury, in *The Continental Tyre and Rubber Co.* [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. [Compare the case *In re Hilckes. Exparte Muhesa Rubber Plantations Ltd.* 1916, 32 T.L.R. 696].

Agent of enemy company

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:—

Bailment

The plaintiff, a British subject, instructed his 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

(A) Enemy Contracts

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. *Anderton* (1 B & Ad. 450) was cited in the judgment :—

Recent cases :—

Bailment

"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.]

In a banking case the facts were :—

Banker and customer

The plaintiffs, a firm of English solicitors, had a branch office in Berlin before the war. They had an account with the Berlin office of the defendant bank, which bank had a branch office in London. On 1st August 1914 there was a credit balance on the account and the plaintiffs asked the bank to remit this balance to England, but the bank refused to do so. On 4th August the war between Great Britain and Germany broke out. A license had been granted to the bank branch in London by the Home Secretary on 10th August to carry on business on terms. The plaintiffs sued the London branch of the bank for the amount of the balance. The defendant bank contended

(inter alia) that they were entitled to the protection of the Moratorium under the Proclamation of 6th August. **(A) Enemy Contracts**

Scrutton J. gave judgment for the plaintiffs, holding that the debt was not incurred within the United Kingdom and therefore came within one of the exceptions specified in the Proclamation. [*Leader, Plunkett and Leader* v. *Direction Der Disconto-Gesellschaft*, 1914, 31 T.L.R. 83.] Recent cases :—

The last-mentioned case can be compared with *Leete & Sons, Ltd.* v. *Direction Der Disconto-Gesellschaft* [1915, 114 L.T. 332.] where the plaintiffs had a banking account with the defendants in Berlin and on the 29th July 1914 requested the bank to remit £4,000 out of the balance to their credit to London. The bank failed to make the remittance and pleaded that it was on the ground that there was no official exchange quotation nor a possibility of purchasing drafts on London to effect the remittance. It was held, in the absence of any evidence procurable in Berlin to show that the bank did not remit because the German Government did not want money sent out of the country, that the defendants were under an obligation to use reasonable care to purchase and forward remittances but that no absolute undertaking existed to remit whether there was exchange or whether drafts could be purchased or not. Banker and customer

The effect of the Moratorium on sums deposited with a bank was considered in *J. & P. Coats, Ltd.* v. *Direction Der Disconto-Gesellschaft* [31 T.L.R. 446, reversed Effect of moratorium

(A) Enemy Contracts

C.A. 32 T.L.R. 351.] There two sums were deposited at $3\frac{1}{4}$ and $3\frac{1}{2}$ per cent. with the defendant bank, repayable on 14th August. The Moratorium was proclaimed on 6th August. On 14th August payment was demanded, but was not made till 31st October. It was held that between 14th August and 31st October that the plaintiffs were entitled to interest at 6 per cent.

Recent cases :—

Effect of moratorium

Bills of exchange

As regards bills of exchange, before dealing with the reported cases it may be useful to refer to the present war legislation.

The Royal Proclamation as to Trading with the Enemy No. 2 of the 9th September 1914 as to negotiable instruments warns residents and merchants in the British Dominions—

Recent war legislation :—

(1) 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.

Royal Proclamation of 9th Sept. 1914

(2) 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 grounds for believing that the instrument is held by or on behalf of an enemy. [Vide clause 5, sub c. 3 & 4.]

Royal Proclamation of 7th January 1915

The Royal Proclamation of 7th January 1915 declares as follows :—" Notwithstanding

(A) Enemy Contracts

anything contained in para. 6 of the Trading with the Enemy Proclamation No. 2, transactions *hereinafter* entered into by persons, firms or companies resident, carrying on business, or being in the United Kingdom ;

Bills of exchange

(*a*) in respect of banking business with a branch situated *outside* the United Kingdom of an enemy person, firm or company, or

Recent war legislation

(*b*) in respect of any description of business with a branch situated outside the United Kingdom of an *enemy bank*,

Royal Proclamation of 7th January 1915

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."

Trading with the Enemy Amendment Act, 1914

By Sec. 6 of the English 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 obliga-

(A) Enemy Contracts

tion, 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 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.

Bills of Exchange

Recent war legislation

Trading with the Enemy Amendment Act, 1914

(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.

(A) Enemy Contracts

Bills of Exchange

(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."

Trading with the Enemy Amendment Act, 1914

Coming next to recent cases, in the celebrated *Continental Tyre and Rubber Co. Case*, as ultimately decided by the House of Lords [1916, 2 A.C. 307], the plaintiffs sought to recover from the defendants on bills of exchange accepted by them before the war for goods supplied before the war, and which had matured and been presented after the war. The plaintiffs were a company registered in England, whose directorate consisted of enemy Germans, and all of their shareholders (save one) were enemies. The defendants resisted the suit on the ground that the company was to be regarded as an enemy, that it could not sue, and that to pay was illegal. The plaintiffs sought leave to sign judgment under Order 14. The Master granted leave. The Chamber Judge (*Scrutton J.*) affirmed the Master's order. The Appeal Court (*Buckley J.* dissenting) held that the company was English, that payment to it was not a payment to the enemy shareholders or

Recent cases :—

Character of British company

(A) Enemy Contracts

for their benefit and that the character of the entity and not that of its shareholders was to be regarded. [1915, 1 K.B. 893.]

Recent cases :—

Bills of Exchange

Buckley J. took the view that the company was only an abstract legal entity having no existence save in contemplation of law, that the Court could look behind the entity for the character of its shareholders, and that the company could not resort to the King's Courts to sue, being an enemy German in fact though British in form.

The House of Lords on further appeal reversed the judgment of the Court of Appeal on the short ground that the secretary of the company had not been authorized to file the suit, that the writ had been issued without instructions and that the action should be struck out as irregular. It will thus be seen that the case does not deal with bills of exchange. As to the character of the company, *Lord Parker* laid down the following propositions : –

Character of British company

(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.

(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

(A) Enemy Contracts

agents so authorised 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.

Recent cases :—

(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.*

Bills of Exchange

Character of British company

(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

(A) Enemy Contracts

Recent cases :—

properly authorized and resident here or in the neutral country, is *prima facie* to be regarded as a friend, *but may through its agents or persons in de facto control of its affairs, assume an enemy character.*

Bills of Exchange

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

Character of British company

These propositions seem to amount to this—that a British company may, or may not, be regarded as an enemy according to circumstances, such as carrying on business in an enemy country, or where its controllers are either resident in an enemy country or else are adhering to the King's enemies elsewhere. To a person who is brought into business relationship with a company British in form, these propositions are scarcely satisfactory, as they entail on him the necessity of finding out whether circumstances exist that may stamp the entity with an enemy character in fact before he continu s to deal with the company.

It may be remarked that the Earl of Halsbury did not participate in these 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,

(A) Enemy Contracts

and in this case the object of the means adopted is to enable thousands of pounds to be paid to the King's enemies." The learned judge 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.

Recent cases :—

Bills of exchange

"It seems to me" said the learned judge, "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 continue trading and actually to sue for their profits in an English Court of Justice."

Character of British company

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

(A) Enemy Contracts

company is still permitted if there are British shareholders who can carry it on." [Compare *In re Hilckes, exparte Muhesa Rubber Plantations Ltd.*, 1916, 32 T.L.R. 696.]

Recent cases :—

It is interesting to note that under the Act in England to facilitate legal proceedings against enemies (5 Geo. 5, c. 36) the expression "British subject" includes a corporation incorporated in His Majesty's dominions [vide Sec. 2 (c)].

As already pointed out (vide p. 28) 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.]

Bills of exchange

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

Assignment *bona fide* before war

(A) Enemy Contracts

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 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.

Recent cases :—

Bills of exchange

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.

Assignment 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 the 24th June 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 defendant on the 20th July 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 neutral port of Marmagoa in order to evade capture. At the date of suit the German ship was still there.

(A) Enemy Contracts

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

Recent cases :—

Bills of exchange

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.

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.

Assignment before war

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 plaintiff 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

(A) Enemy Contracts

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.]

Recent cases :—

In *Weld* v. *Fruhling and Goshen* [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 above cited. The facts were :—

Bills of exchange

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.

Assignment subsequent to war

The plaintiffs sued on a bill of exchange drawn on 26th June 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 1st January 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.

In another case in the Prize Court in Egypt [*The Barenfels*, decided on 26th May

(A) Enemy Contracts

Recent cases :—

1915] 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 the 9th July, 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 the 22nd July, 1914, discounted on the same date with the bank, and accepted on the 11th August, 1914, when the documents were handed over to the British 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.

Bills of exchange

Acceptance after war

(A) Enemy Contracts

Recent cases :—

Bills of exchange

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."

Acceptance after war

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

(A) Enemy Contracts

Recent cases :—

Bills of exchange

Banking transactions under license

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 13th July 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 31st July, but it was never indorsed by the payees. The second of exchange was indorsed by the payees in plaintiffs' favour on 13th July and forwarded by them to their Berlin office. The third of exchange was indorsed and forwarded to the plaintiffs on 16th July, 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 31st October. The defendants refused to pay.

The plaintiffs by license dated 10th August 1914 received a limited permission to do banking business, and by further license in September permission was limited to the completion of banking transactions entered into before 4th August 1914 so far as those transactions would have in the ordinary course been carried out through or with the London establishment.

(A) Enemy Contracts

Recent cases :—

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.

Bills of exchange

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.

Effect of moratorium

It has been held that, when the writ in an action has been issued before the statutory Moratorium temporarily suspending remedies on negotiable instruments, the

(A) Enemy Contracts

action is not affected and on the termination of the period of suspension the contention that the money was not due and payable in the interval is no defence to the action. [*Glaskie* v. *Petry*, 1914, 31 T.L.R. 40.]

Recent cases :—

Bills of exchange

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*] 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].

Granted by prisoners of war

Insurance (Life)

As to Insurances on life where one of the parties to the contract becomes an alien enemy, there would appear to be no English cases on the effect of war on such insurances.

Early cases :—

There are American decisions not easy to reconcile with each other. Trotter in his *Law of Contract During War* states the result of them as follows :—

"A failure to pay premiums during the war avoids the policy [*Worthington* v. *Charter Oak Life Insurance Company*, 1874, 19 American Reports, 495]. Where such failure arises from the fact that it would involve intercourse with an alien enemy in enemy territory, then, although the contract is ended, the assured is entitled to the equitable

(A) Enemy Contracts

value of the policy arising from the premiums actually paid. This equitable value is the difference between the cost of a new policy and the present value of the premium yet to be paid on the forfeited policy when the forfeiture occurred, and may be recovered by action on the conclusion of peace [*New York Life Insurance Company* v. *Statham*, 1876, 93 United States Reports, Supreme Court, 24]. The payment of premiums during the war by the assured to an agent of the company, who resides in the same territory as the assured, binds the company, [*Robinson* v. *International Life Assurance Society*, 1870, 1 American Reports, 490; *Sands* v. *New York Life Insurance Company*, 1872, 10 American Reports, 535]; provided such agent continues to have due authority to receive the premiums [*New York Life Insurance Company* v. *Davis*, 1877, 95 United States Reports, Supreme Court, 425]. Where an agent in such circumstances refuses to accept payment the Company will be held liable [*New York Life Insurance Company* v. *Clopton*, 1869, 3 American Reports, 290]."

Early cases :—

Insurance (Life)

As there are not many cases of Marine Insurance as yet reported the effect of earlier cases may be thus stated.

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*,

Insurance (Marine)

(A) Enemy Contracts

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*.

Early cases :—

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 [*Branding* 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 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 Rob. C. 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 Taun

Insurance (Marine)

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 [*Keis* v. *Andrade*, 1816, 6 Taun. 498; *Pieschall* v. *Allnutt*, 1813, 4 Taun. 792; *Butler* v. *Allnutt*, 1816, 1 Sark 223].

(A) Enemy Contracts

Early cases: —

Insurance (Marine)

A loss happening to a foreign subject under a policy 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].

Recent war legislation as to insurance

By the Royal Proclamation of the 5th August 1914 as to trading with the enemy, it was declared to be contrary to law for British subjects—"to make or enter into

(A) Enemy Contracts

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 German 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."

Insurance (Marine)

The Royal Proclamation of the 9th September 1914, revoking the former Proclamation, as amended by Royal Proclamation of the 8th October 1914, warned all British subjects—"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."

Recent war legislation as to insurance

Recent cases

Coming now to the cases decided during the present war, in one of them the plaintiffs,

(A) Enemy Contracts

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 the 8th October 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; 31 T.L.R. 41.]

Recent cases :—

Insurance (Marine)

Insurances are a component part of a c.i.f. contract, and so contracts of this kind have come up during the present war and 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.

Insurance in c.i.f. cases

The plaintiffs, the sellers, sold to the defendants, the buyers, both being English

(A) Enemy Contracts

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.

Recent cases :—

Insurance in c.i.f. cases

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.]

Landlord and tenant

Enemy 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, 1 K.B. 143 ; in appeal, 1916, 32 T.L.R. 709], nor is he 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 ; 32 T.L.R. 78]. In a case where the Trustee in

(A) Enemy Contracts

Bankruptcy wished to disclaim the leasehold interests of the bankrupt in premises in Antwerp, Liège, Brussels and Berlin, as service by registered letter was impossible owing to the Post Office refusing to accept such letters to those places, it was ordered that a 28-day notice should be served through the ordinary post on the landlords at their last well-known places of address. [*In re Curzon Bros.*, 1915, 31 T.L.R. 374.] As to the powers of a liquidator of a hostile firm in India to disclaim leaseholds and other onerous property, see the Enemy Trading (Winding up) Order, 1916, ss. 12 and 11 of the 22nd July 1916. For the effect of the moratorium on a landlord's powers of distress see *Shortland* v. *Cabnis Ltd.*, 1915, 31 T.L.R. 297, and on the landlord's power of re-entry, see *Durell* v. *Gread*, 1914, 31 T.L.R. 22.

Recent cases:—

Disclaimer by Trustee in Bankruptcy of enemy lease

Effect of moratorium on powers of distress

And re-entry

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. *Aktien-*

Partnership contracts

Are dissolved

(A) Enemy Contracts

gesellschaft Für Cartonnagen-Industrie, 1916, 1 K.B. 763 ; 1916, 32 T.L.R. 299 ; 114 L.T. 180 ; 1916, W.N. 76.]

Recent cases :—

Until this decision was reached the earlier cases avoided deciding what the actual effect of war is upon a contract of partnership. Some curious decisions were given.

Partnership contracts

Appointment of receiver

For instance in one case an action was brought for the dissolution of a partnership, the plaintiff being a naturalised British subject, defendants being enemies, one of whom resided in London and the other in the Duchy of Baden, and the Court on a motion appointed the plaintiff receiver and manager. [*Rombach* v. *Rombach*, 1914, W.N. 423.] In another case the partners in a concern were an English firm and a German. The concern employed on an average 500 English workmen. Before war broke out the partnership had entered into various contracts for erection of works for their business. When war broke out the parties with whom these contracts had been entered into withheld making payments as they entertained doubts as to whether they would be acting rightly in making them. The English firm commenced an action against the German partner claiming (1) to have an account taken of the partnership dealings therein so far as concerned their respective rights, interests and liabilities as co-partners; and (2) the appointment of a receiver and manager of the assets of the partnership.

(A) Enemy Contracts

The report of the case shows that the receiver was appointed. [*In re Koppers Coke Oven and Bye-Product Co.*, 1914, W.T. 450.]

Recent cases :—

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 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.]

And where the partner is a neutral the same rule applies. [*The Anglo-Mexican*, 1915, 114 L.T. 807.]

For a case where a company was treated as akin to a partnership, see *The Continental Tyre and Rubber Co. Case* (per The Earl of Halsbury, p. 81 ante).

Promissory notes

Interest suspended during war

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. [*Wilfred R. 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, who after the war were 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

(A) Enemy Contracts

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.

Recent cases :—

Promissory notes

Interest suspended during war

"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 the 27th December, 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.

(A) Enemy Contracts

Recent cases — Promissory notes

Interest suspended during war

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 commonsense that I may safely assume that it agrees with the common law of England.

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 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

(A) Enemy Contracts

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. Sufficient materials were not placed before me during the argument to enable me to decide whether during the whole or any part of the period from the outbreak of war until the 9th February, 1915, such payments were expressly prohibited or whether for any part of the time owing to the action of Government there was no one in Bombay authorised to collect the money due by the defendant, and if the parties cannot agree upon this there must be a further hearing."

Recent cases —

Promissory notes

Interest suspended during war

Sale of goods

The following are cases of the sale of goods (other than c.i.f. contracts) in which the contracts have been held to be dissolved as a result of war.

One of the first to be decided was the case of *Wolf & Sons* v *Carr, Parker & Co., Ltd.*, [31 T.L.R. 407 C.A.] where the facts were :—

The plaintiffs, a firm of cotton-waste manufacturers, who were Germans resi-

(A) Enemy Contracts

dent 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.

Recent cases — Sale of goods

Another case as regards the delivery of cotton-waste was decided in Bombay and the contract was held also to be dissolved. The defendants, a German company, agreed to purchase from the plaintiffs, a Bombay mill company, the cotton-waste produced in the mill for the year ending December 1914—the deliveries to be at least once monthly. After the outbreak of war the plaintiffs called on the defendants to take delivery of the waste that had accrued under the contract. The defendants pleaded they were unable to take deliveries owing to the war. The suit was then brought. The Court held (*inter alia*) that the contract became illegal and was dissolved on the 4th August 1914. [*Textile Mfg. Co.* v. *Salomon Bros.* 1915, 18 Bom. L.R. 105.]

In *Zinc Corporation Ltd.* v. *Hirsch*, [1916, 1 K.B. 541 C.A.; 1915, 32 T.L.R. 7; 1916, W.N. 11] by a contract made in 1908, as

(A) Enemy Contracts

varied and extended by a contract made in 1910, the plaintiffs, an English company, agreed to sell, and the defendants, who resided and carried on business in Germany, agreed to purchase during 1910 to 1919 inclusive the whole output of plaintiffs' zinc concentrates at their mine in Australia, the production yearly to be within certain limits of quantities. The plaintiffs were by the agreement prevented so long as the contract was in force from selling their zinc concentrates to any other person. The agreement stipulated that it should be suspended during the continuance of certain specified disabilities such as strikes, floods, etc., but war was not specified as a cause of suspension. The suit by the plaintiffs was for a declaration that the contract was dissolved by the existence of war, the defendants having become alien enemies.

Recent cases:

Sale of goods

It was held that, assuming war was a cause of suspension within the clause, it applied to suspension of deliveries only and not of the whole contract: and that the existence of the contract if continued would involve commercial intercourse with the enemy and for that reason the contract would be illegal. The contract was accordingly declared to be dissolved.

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 carry-

(A) Enemy Contracts

ing 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.

Recent cases:—

Sale of goods c.i.f.

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. 81 under bills of exchange.]

Shareholders' contracts

Character of British company

(A) Enemy Contracts

Recent cases :—

Effect of moratorium on call for shares

It may be noted that in England a call on shares which is payable on a date falling within the moratorium is a debt within the meaning of the moratorium, and a resolution of the directors of the company purporting to forfeit the shares for non-payment of the call during the moratorium is invalid. [*Burgess* v. *O.H.N. Gases Ltd.*, 1914, 31 T.L.R. 59.]

(B) Non-Enemy Contracts

Banker and customer

Effect of moratorium on overdraft

In *Allen* v. *London County and Westminster Bank*, [1915, 112 L.T. 989], the effect of the moratorium on an overdraft on a bank account was considered. The plaintiff had overdrawn his account on the date of the moratorium. The bank had allowed an overdraft on the guarantee of the plaintiff's brother, which expired on the 11th August 1914. The defendants posted up in the bank a notice which in effect set out the terms of the moratorium, and a further notice that notwithstanding the moratorium they were prepared to allow customers to draw small amounts. The plaintiff, seeing the notices, concluded that the bank was enforcing the moratorium and that accordingly his liability to re-pay the overdraft was postponed. He paid in sums to his account, which the bank without notice to him appropriated to the overdraft, and drew a cheque in respect of the sum paid in, which when presented was dishonoured by the bank. The plaintiff sued for damages. It was held that the plaintiff must succeed as

there was no debt due and the appropriation by the bank was wrong.

(B) Non-Enemy Contracts

In *Seligman Bros.* v. *Brown, Shipley & Co.* [1916, 32 T.L.R. 549] a question of interest to bankers and financial houses was raised.

Recent cases :-

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 $\frac{1}{2}$ 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 12th August 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.

Banker's commission on payment of bonds

(B) Non-Enemy Contracts

Recent cases:—

Banker's commission

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 prohibitions issued in consequence thereof, made the performance of the contract impossible, if not *illegal*.

Bills of exchange

For recent cases of transfers of bills drawn by enemies and transferred before or after the war reference should be made to pages 82-87 ante.

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 Piraeus 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 Piraeus. The charterers did not obtain the consent of the Government to the change of destination, and the result was that the ship was 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, 32 T.L.R. 533.]

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.

(B) Non-Enemy Contracts

[*Boggiano & Co. v. Arab Steamers Ltd.*, 1915, I.L.R. 40 Bom. 529 ; 18 Bom. L.R. 126.]

Recent cases :- Charter-party Prohibition of export Prepayment of freight

The plaintiffs consigned, under a charter-party, 2500 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. Unsuccessful efforts had been made to get the order modified. 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.

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

(B) Non-Enemy Contracts

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 s. 65 of the Indian Contract Act and the plaintiffs could recover.

Recent cases: -

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.

Contracts for commission

Contracts of service (seamen)

The House of Lords has recently held [*Horlock* v. *Beal*, 1916, A.C. 486] that a seaman's contract is dissolved, on the ship being detained in an enemy port and the crew imprisoned, from the time that the performance of his contract becomes impossible (vide next chapter).

It has been held that a commercial voyage does not include the risk of capture, and a crew, when the risk of capture is great, are justified in refusing to proceed to sea, and can sue on a fresh agreement for extra

wages for the extra risk. [*Liston* v. *Owners s.s. Carpathian*, 1915, 2 K.B. 42.] See p. 61 ante.

(B) Non-Enemy Contracts.

In a case between two banks [*Credito Italiano* v. *Swiss Bankverein*, 1915, 114 L.T. 776; 1915, 31 T.L.R. 554] the contract in question was a "Here and There" one. The plaintiff bank and the defendant bank entered into a contract by which in exchange for the payment of sovereigns in London by the defendant bank on 31st August 1914, the plaintiff bank were to pay roubles in Petrograd at the exchange rate of 95.25. On August 6th a moratorium proclamation was issued in regard to payments.... "which will become due and payable on any day before the beginning of the 4th September 1914..... in respect of any contract made before that time," and it postponed payment until 4th September or until a month after the day on which the payment became due, whichever was the later date.

Recent cases:—

"Here and There" contracts

Effect of moratorium

The proclamation also provided for interest. Just before August 31st, the defendant bank claimed that under the proclamation they had a right to postpone payment, but the plaintiff bank did not agree to a postponement. Further extensions of the moratorium were made by a second and a third proclamation.

The plaintiff bank brought an action to recover moratorium interest, or as damages.

Scrutton J. held that the proclamations did not apply to the contract as they must be construed as being limited to payments

(B) Non-Enemy Contracts

which automatically became due without the condition precedent of a tender by the payee, and that the defendant had broken the contract by not paying on due date. However as the rouble was worth less in sovereigns on the date of the actual performance of the contract than on the contract date the plaintiffs were only entitled to a nominal sum. In appeal, however, this decision was reversed [1916, 32 T.L.R. 429], the Court holding that the transaction did not fall within the moratorium created by the proclamations as they did not refer to the execution of contracts.

Recent cases :- -

Insurance (Life)

It may be useful to refer here to a recent case of a claim on a policy on the life of a person with an English insurance office, that excepted death by reason of war.

The executor of a deceased sued on a policy made in 1905 with the defendants on the life of the deceased whereby he was insured against death caused accidentally within the United Kingdom by violence due to external and visible means. The policy was subject to this condition : "This policy does not insure against death .....directly or indirectly caused by, arising from or traceable to any of the following .....*war*."

Death due to war excepted

The deceased, who had received a commission, in the exercise of his duties in inspecting the guards and sentries placed on a railway line in England, was killed accidentally by a train. In arbitration proceedings

it was held that the death was traceable to war, and *Scrutton J.* in an appeal upheld this view. [*Coxe* v. *Employers' Liability Assce. Co., Ltd.*, 1916, W.N. 294.]

(B) Non-Enemy Contracts

The following decision may usefully be referred to here though it does not involve an unlawful contract.

Recent cases :—

In a case that arose out of the Russo-Japanese war and was 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 Vladivostok 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

Insurance (Marine)

What is meant by peril of capture

(B) Non-Enemy Contracts

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." [*Kacianoff* v. *China Traders Insce. Co. Ltd.*, 1914, 3 K.B. 1121 at p. 1130.]

Recent cases :—

Insurance (Marine)

What is meant by peril of capture

Peril of "men of war"

With this case may be compared a present war decision [*Becker Gray & Co.*, v. *London Assurance Corporation*, 1916, 2 K.B. 156]. 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 under-

writers 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. This case was upheld on appeal [1916, A.C. 156; 1916, 2 K.B. 156; 32 T.L.R. 511.]

(B) Non-Enemy Contracts

Recent cases :—

Insurance (Marine)

Peril of "men of war"

The following decision also may usefully be referred to here. [*General S.N. Co., Ltd.*, v. *Janson*, 1915, 31 T.L.R. 630.]

The steamship Oriole was insured with the defendant against war risks. She left London for Havre in a seaworthy condition on 29th January 1915, and was last seen on 30 January 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 Oriole had been lost by a war risk and that the defendant was liable.

Presumption on disappearance of vessel insured

The following case, showing what is a "Restraint of Princes", may be referred to here as it is one of great importance to underwriters and shipowners.

What is a "restraint of princes"

The plaintiffs, who were British subjects, were the owners of goods shipped on board two British vessels bound from the River

(B) Non-Enemy Contracts

Recent cases :—

Insurance (Marine)

What is a "restraint of princes"

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 (*i.e.*, free of capture and seizure), 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 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.

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.

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

(B) Non-Enemy Contracts

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 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 somehow does not sound really very convincing [59 *Sol. J.*, 454], but, be that as it may, the "house that Jack built" seems to have been substantial for the House of 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 because all prospect of safe arrival on the voyage to Germany was hoplessly frustrated, and that the assured party reasonably abandoned because actual total loss appeared to be unavoidable. [*British and Foreign Marine Insurance Co., Ltd.*, v. *Sanday & Co.*, 1916, A.C. 650; and see 1915, 2 K.B. 781.]

Recent cases :—
Insurance (Marine)
What is a "restraint of princes"

In *Wilson Brothers, Bobbin & Co.* v. *Green* [1915, 31 T.L.R. 605], timber had been insured on a voyage from a Baltic port to Garston, and 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

(B) Non-Enemy Contracts

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.

Recent cases :—

Insurance (Marine)

No total loss where reshipment was possible

So 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, 31 T.L.R 211].

Cancellation of requisitionment

Under a c.i.f. contract made before war a seller is not bound to insure against war risks. Under the terms current in the trade an insurance against war is not included. [*Groom* v. *Barber*, 1915, 1 K.B. 316 ; *Nissim Isaac Bekhor* v. *Haji Sultanali Shastry & Co.*, 1915, I.L.R. 40 Bom., 11, at pp. 14, 15.]

War risks in c.i.f. contracts

The case of *Mitsui & Co., Ltd.*, v. *Mumford* [1914, 2 K.B., 27; 31 T.L.R. 144] arose on an insurance policy taken out by the plaintiffs, a Japanese company, with a

(B) Non-Enemy Contracts

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 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.

Recent cases :—

Insurance (other)

Loss of market is not loss of goods

Dealing next with the recent decisions in cases concerning the sale of goods, in the following instances the contracts were held to be affected by war.

Sale of goods

In *Jager* v. *Tolme & Runge* [1915, 31 T.L.R. 381 ; 114 L.T. 647 ; 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

(B) Non-Enemy Contracts

follows under which the clearing house become the purchasers from the sellers and the sellers to the purchasers.

Recent cases :—

Sale of goods

Contract dissolved

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 31st July 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 4th August. On 7th August 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 ware-housing 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".

The plaintiff sued for a declaration that the contracts were void and incapable of performance by reason of the embargo, or

(B) Non-Enemy Contracts

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.

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. The plaintiff was therefore held to be entitled to a declaration that the contract between himself and the clearing house was dissolved and that defendants were not entitled to go to arbitration.

Recent cases :–

Sale of goods

Contract dissolved

In *Smith, Coney and Barrett* v. *Becker, Gray & Co.* [1914, 31 T.L.R. 59, and 151 C.A.] at some time prior to July 1914 the plaintiffs, who carried on business in Liverpool, agreed to purchase from the defendants a quantity of beetroot sugar f.o.b. Hamburg in August 1914, and the contract contained an arbitration clause. After the war broke out and the proclamations dealing with trading with the enemy were issued, disputes between the parties arose, and the defendants desired to submit the disputes to arbitration. It was held that though the performance of the

Arbitration clauses unaffected

(B) Non-Enemy Contracts

contract *in specie* was illegal after the 4th August, yet it was valid and binding at the time when it was made, and the plaintiffs were not entitled to an injunction restraining the defendants from proceeding with the arbitration.

Recent cases :—

Sale of goods

Arbitration clauses unaffected

Another instance is to be found in *Edward Grey & Co.* v. *Tolme and Runge* [1915, 31 T.L.R. 551], where the plaintiffs purchased German beetroot sugar for delivery in August 1914 f.o.b. at Hamburg from the defendants. In certain circumstances, which included an embargo on sugar by the German Government, the sugar could not be shipped in accordance with the shipping instructions. The plaintiffs claimed declarations that the contracts were incapable of performance and void by reason of the embargo, and were dissolved by reason of the war.

It was held that the plaintiffs were entitled to the declarations because (*inter alia*) the transactions would have involved trading with the enemy or, what was equally illegal, commercial and friendly intercourse with the enemy.

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.

(B) Non-Enemy Contracts

Recent cases :—

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 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.

Sale of goods

Goods coming from 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.

Sale of goods (c.i.f.)

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

Goods coming from enemy country

(B) Non-Enemy Contracts

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. It was also decided that the seller is not bound in a c.i.f. contract to provide the purchaser with a policy covering war risks. A similar view has been taken in England [*Groom* v. *Barber*, 1915, 1 K.B. 316]. The words "war risk for buyer's account" in such a contract mean that the war risk is the buyer's concern and that if he so desires he must get it covered [idem].

Recent cases :—

Sale of goods (c.i.f.)

Goods coming from enemy country

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 4th August war was declared, and on the 5th August 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

(B) Non-Enemy Contracts

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.

Recent cases :—

Sale of goods (c.i.f.)

Goods for enemy country

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.

An important decision has now been reached by the Court of Appeal in England [*Arnhold Karberg & Co.* v. *Blythe, Greene, Jourdain & Co., Ltd.*, 1916, 1 K.B. 495; 1916, W.N. 22; 114 L.T. 152; 1915, 32 T.L.R. 186]. The facts in this case were as follows.

Enemy bill of lading

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, and 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

(B) Non-Enemy Contracts

was sent by the sellers to the buyers and a provisional invoice furnished. On October 11th 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.

Recent cases :—

Sale of goods (c.i.f.)

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 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

Enemy bill of lading

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.

(B) Non-Enemy Contracts

Recent cases :— Sale of goods (c.i.f.) Enemy bill of lading

Bankes L. J. observed :— "What is the meaning of the buyer's contract thus expressed, that he is to pay in exchange for a bill of lading? In my opinion it means what it says, that in exchange for the price he is to receive a bill of lading which is still a subsisting contract of affreightment of the goods to the port of destination, and a policy, or policies of insurance, which is, or are still a subsisting contract, or subsisting contracts, of insurance."

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 a number of lawyers consider it has been wrongly decided. 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], which has been 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

(B) Non-Enemy Contracts

purchaser, against which he has protected himself by the stipulation in his c.i.f. 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).

Recent cases:—

Sale of goods (c.i.f.)

Property passes at time of shipment

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.

(B) Non-Enemy Contracts

In *Groom* v. *Barber* [1915, K.B. 316] it was argued that the seller could not tender documents representing goods which were lost at the time of the tender by reason of the carrying vessel having been sunk by a German cruiser, because at the time of the loss there had been no goods appropriated to the contract so as to pass the property in the goods to the buyers.

Recent cases :—

Sale of goods (c.i.f.)

Atkin J. took the view that the contract of the seller is performed by the delivery of the documents within a reasonable time after shipment and it therefore becomes immaterial whether before the date of the tender of the documents the property in the goods was the seller's or buyer's or some other person's.

Goods lost at sea

" The seller must be in a position to pass the property in the goods by the bill of lading if the goods are in existence, but he need not have appropriated the particular goods in the particular bill of lading to the particular buyer until the moment of tender, nor need he have obtained any right to deal with the bill of lading until the moment of tender. The seller's obligation cannot depend upon whether the goods are lost or not, and if, when there is no loss, the property has to pass to the buyer before delivery of the documents, at what stage of the transaction must it pass ? Unless it be at the time of shipment I can see no reason for fixing upon any other time than that of the delivery of the documents, and if it be the law that a tender of documents otherwise sufficient is ineffectual,

(B) Non-Enemy Contracts

unless in fact at the moment of shipment the property actually passed to the ultimate buyers, it appears to me that business operations would be seriously embarrassed."

Recent cases :—

Coming next to the instances where it was held that the contracts were not affected by war, the following cases may be consulted.

Sale of goods

In *Leiston Gas Co., Ltd.*, v. *Leiston-cum-Sizewell Urban District Council*, [1916, 1 K.B. 912 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.

Contract unaffected

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 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.

(B) Non-Enemy Contracts

Recent cases :—

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.

Sale of goods

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 cases 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."

Contract unaffected

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.

So, too, in another case where the contracts were for the export of confectionery

(B) Non-Enemy Contracts

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.; 1915, 32 T.L.R. 161.]

Recent cases:—
Sale of goods
Temporary embargo

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.

Sale of goods (c.i.f.)

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."

"War risk for buyer's a/c"

The respondent wrote to the appellants pointing out that the war risk was for their

(B) Non-Enemy Contracts

account and that the risk must be covered by them to protect their own interests. This was on the 3rd August. On the 12th August 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 20th August 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 the 6th August by a German cruiser.

Recent cases :— Sale of goods (c.i.f.) " War risk for buyer's a/c "

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 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. 316; 112 L.T. 301; 31 T.L.R. 66 and see p. 129 ante.]

(B) Non-Enemy Contracts

Recent cases :—

Sale of goods (c.i.f.)

Capture before tender of documents

The case of *In re Weis & Co. Ltd. & Credit Colonial et Commercial*, [1916, 1 K.B. 346, 114 L.T. 168], 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.

Position of Banks in c.i.f. Contracts

(B) In Enemy Contracts

As bankers are frequently interested in c.i.f. contracts by the documents being sent forward to them by the sellers along with a draft for the price for 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.

Recent cases :—

Sale of goods (c.i.f.)

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 [*Motishaw & Co.* v. *The Mercantile Bank* 1916, 18 Bom. L.R. 521 and see p. 83 ante] this argument was accepted by the trying judge. The facts of that case were as follows.

Position of bankers

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 hostilities left with the cargo in question still in her holds and took refuge

(B) Non-Enemy Contracts

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.

Recent cases :—

Sale of goods (c.i.f.)

Beaman J. thus sketched the position of the bank :—

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."

(B) Non-Enemy Contracts

The learned Judge in commenting on *Leather* v. *Simpson* (cited supra) observed :—

Recent cases :—

Sale of goods (c.i.f)

"The bank, being an endorsee for value in all cases of the kind, has really nothing to do with the validity or commercial *value* of the documents deposited with it as a pledge. It is not called upon to guarantee the validity of such documents. All that it is required to do is not to be privy itself to any fraud upon the acceptor."

Position of bankers

Effect of the Moratorium on c.i.f. Contracts

The effect of the moratorium under the Postponement of Payments Act, 1914, in connection with c.i.f. contracts was considered in a recent case [*Happe* v. *Manasseh*, 1915, 31 T.L.R. 305] where the facts were as follows. The defendant by a contract contained in correspondence, sold to the plaintiff five chests of Patna opium at a specified price per chest net, shipment from Calcutta during July 1914, payment cash against documents on the arrival of the steamer. The steamer left Calcutta and on August 14th the defendant sent the plaintiff information as to shipment and the expected arrival of the ship when it was stated that the documents would be tendered. The plaintiff however at once replied that payment would be postponed under the proclamation of moratorium.

Effect of moratorium

(B) Non-Enemy Contracts

Recent cases :—

Sale of goods (c.i.f.)

Effect of moratorium

Nothing further was done until October, when the plaintiff asked for two of the chests and was informed that he must take all five or none. The plaintiff thereafter sent to the defendant for all five chests, but the defendant refused to deliver and repudiated the contract. The plaintiff then bought in the market two chests of opium of which he had urgent need. Defendant subsequently was willing to offer the five chests, but on this occasion the plaintiff refused the offer as having come too late.

The point in the case was whether the moratorium applied to c.i.f. cases, and *Sankey J.* held that it did not, and observed :—" It (*i.e.*, the moratorium) only applies where the payment is a naked one and not where there is a stipulation that to obtain documents and title the purchaser must perform the condition precedent of payment." [Affirmed, C.A. 32 T.L.R., 112].

The phrase " naked payment " as used in this judgment was in a later case construed as applying to payments which became automatically due. [*Credito Italiano* v. *Swiss Bankverein*, 1915, 31 T.L.R. 554 ; C.A., 32 T.L.R. 429.]

Nor does the moratorium apply to the aggregate sum sued for when there have been several consignments of goods, the separate prices of which are below the limit of five pounds. [*Auster, Ltd.*, v. *London Motor Coach Works, Ltd.*, 1914, 84 L.J. (K.B.) 580 ; 31 T.L.R. 26 ; 112 L.T. 99].

(B) Non-Enemy Contracts

Recent cases :—

For a case where it was held that the obligation to pay a broker for shares purchased by him for the customer was postponed by reason of the moratorium, *Barnard* v. *Foster* [1915, 2 K.B. 288] may be consulted, and as upheld in the Court of Appeal [1915, 114 L.T. 36 ; 32 T.L.R. 88].

Stocks and shares

Effect of moratorium

It was argued in the Court of first instance that till delivery of the shares no payment became due and payable, and that therefore the moratorium proclamation did not apply. *Sankey J.* on this observed :— "I am of opinion that this arises from a misconception of the relationship existing between stock-broker and client. The contract between the stock-broker and client entitles the stock-broker to have money from the client so that the stock-broker may be put in funds to pay for the purchase effected by him : see *Stock and Share Auction & Advance Co.* v. *Galmoye*, 3 T.L.R. 808. I think, therefore, there was a payment which was due and payable by the defendant to the plaintiff on or before August 13th, and that the case does come within the moratorium proclamation so as to make interest payable".

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 impossible by 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.

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

General Principles

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*, 5th Ed., p. 380.]

Rules of law

In framing the Indian Contract Act the rules of law were thus stated :—

"56. An agreement to do an act impossible in itself is void.

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."

Indian Contract Act

In the latter case section 65 of the Indian Contract Act provides—"When an agreement is discovered to be 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."

The subject of the unlawfulness of an agreement or contract has already been dealt with (vide Chap. IV). In a recent Bombay war case section 56 of the Contract Act called for these remarks :—

"Section 56 deals with two grounds upon which executory contracts become absolutely void. First of these is that which

General Principles

Rules of law

I have just stated, namely, that the act to be done should, after the contract has been made, become impossible. The second is that the acts necessary to be done in order to carry out the contract should, after the contract has been made, and through no fault in the parties to the contract, become unlawful. The latter part of the section deals with cases where the acts to be done were at the time the contract was made lawful, but a legal prohibition has supervened after the making, but before the performance of the contract, and extends to such cases the general principle of law applicable to all contracts and expressed in section 23." [*Karl Ettlinger* v. *Chagandas & Co.*, 1915, 40 Bom. I.L.R. 301 at p.p. 303-304.]

Indian Contract Act

Physical impossibility

Shortly put, the first part of the section would apply to "physical" and the latter part to "legal" impossibility.

It would appear from a remark of Lord Loreburn 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; 32 T.L.R. 251; 1916, W.N. 33]. 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, 32 T.L.R. 677] 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." **General Principles**

These dicta are not in accordance with other cases that have laid down that a prevention must be a physical or legal prevention and not a mere economical unprofitableness. As remarked by Lord Justice Pickford—"It was argued that the defendants were hindered when delivery became commercially impossible. If that were a correct contention, commercial impossibility would prevent delivery and commercial inconvenience would hinder it, but 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. *Tennants (Lancashire) Ltd.*, 1916, 32 T.L.R. 573]. Commercial impossibility

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]. Rise in prices

In a recent case in England *Sharman 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

General Principles

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 and see p. 46 ante]. The best recent illustration of the principle which governs the question of commercial impossibility is contained in the following decision of *Bailhache J.* upon the point as to whether a rise in freights can amount 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 com-

General Principles

mandeered 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.

Commercial impossibility :—

Rise in freights

"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.]

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.*, [1915, 32 T.L.R. 485 ; cited *ante* at pp. 49 to 54.]

In the Bombay case cited at the commencement of this chapter 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 1,000 tons freight at a price per ton from Bombay to Antwerp in September 1914.

General Principles

On the 7th September 1914, after the war had broken out, the defendants notified the 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.

Commercial impossibility :—

Rise in freights

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 1 000 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.]

Commercial impossibility :— Rise in freights

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.

The three great cases of *Baily* v. *De Crespigny ; Taylor* v. *Caldwell ;* and *Appleby* v. *Myers* have first 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 :—" We have first to consider what

Baily *v.* De Crespigny

Principles of earlier Decisions

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, 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."

Baily *v.* De Crespigny

These two principles were recognised 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 4 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

plaintiffs sued for expenses they had incurred and lost. The Court laid down three rules:

Principles of earlier Decisions

(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.

Taylor *v.* Caldwell

(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 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, perfor-

Principles of earlier Decisions

mance becomes impossible from the perishing of the thing without the default of the contractor.

The principle as laid down by *Blackburn J.* 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.]

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 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].

Principles of earlier Decisions

Appleby *v.* Myers

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? The House answered that question in the negative. [*F. A. Tamplin Steamship Co. Ltd.*, v. *Anglo-Mexican Petroleum Products Co., Ltd.*, 1916, 32 T.L.R. 677 (H.L.)]

Principles of the 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 recognised 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 Court took the view that where performance of a contract becomes impossible from some cause for which neither party is responsible, and *the*

Principles of Coronation Cases

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

Elliott *v.* Crutchley

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.

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.]

Krell v. Henry

So again in the case of *Krell* v. *Henry*, 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.*" [*Krell* v. *Henry*, 1903, 2 K.B. at p. 752.]

These observations are of course a finding of fact that brings the case within the prin-

Principles of Coronation Cases

ciple of *Taylor* v. *Caldwell* (cited above, p. 148). Opinions may differ as to whether the finding is correct or not. It certainly seems reasonable for the parties to have anticipated the interruption of the procession which was the primary object of the contract and it might well be said that they should have been wise enough to provide for its failure.

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.

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 plaintiff failed in his suit for the return of the monies he had paid and the defendant succeeded in obtaining the balance remaining unpaid.

Collins M. R., in discussing the doctrine laid down in *Taylor* v. *Caldwell*, observed :—

Principles of Coronation Cases

"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.]

Chandler *v.* Webster

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. 153), 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

Herne Bay S. B. Co. *v.* Hutton

Principles of Coronation Cases

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 25th June, 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 29th June the defendant repudiated the contract. During the two days in question the fleet remained anchored 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.

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 enforced. The plaintiffs hired a steamer for 3 days which was to arrive in time for the

Civil Service C.S. Ltd. *v.* General Steam Navn. Co.

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."

Principles of Coronation Cases

Civil Service C.S. Ltd. *v.* General Steam Navn. Co.

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 the 24th July. 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 27th, 1902." The Court held that it was impossible to contend that, when the

Clarke *v* Lindsay

Principles of Coronation Cases

further bargain was made, both parties were then contracting in the belief that the procession of June 27th 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.]

Fenton *v.* Victoria Seats Agency

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].

Summary of the cases

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

Principles of Coronation Cases

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 Steamship Co. Ltd.*, v. *Anglo-Mexican Petroleum Products Co., Ltd.*, 1916, 32 T.L.R. 677 and see the full judgment given at p. 34 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, 1 L.R., 40 Bom. at p. 305 per Beaman J.] but the above remarks of Lord Loreburn dispose of such a criticism.

Principles of Recent War Cases

Leiston Gas Co. case

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 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.

Principles of recent War Cases

Leiston-cum-Sizewell U.D.C., 1916, 1 K.B. 912; C.A., 1916, 2 K.B. 428; and see p. 130 *ante*.]

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; 1915, 32 T.L.R. 161.]

Miller & Co. v. Taylor & Co.

In a recent war case an attempt was made to apply the principle of *Krell* v. *Henry* (see p. 153), 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

London & Northern Estates Co. *v.* Schlesinger

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 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]

Principles of recent War Cases

London & Northern Estates Co. *v.* Schlesinger

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

Associated Portland Cement Co.'s case

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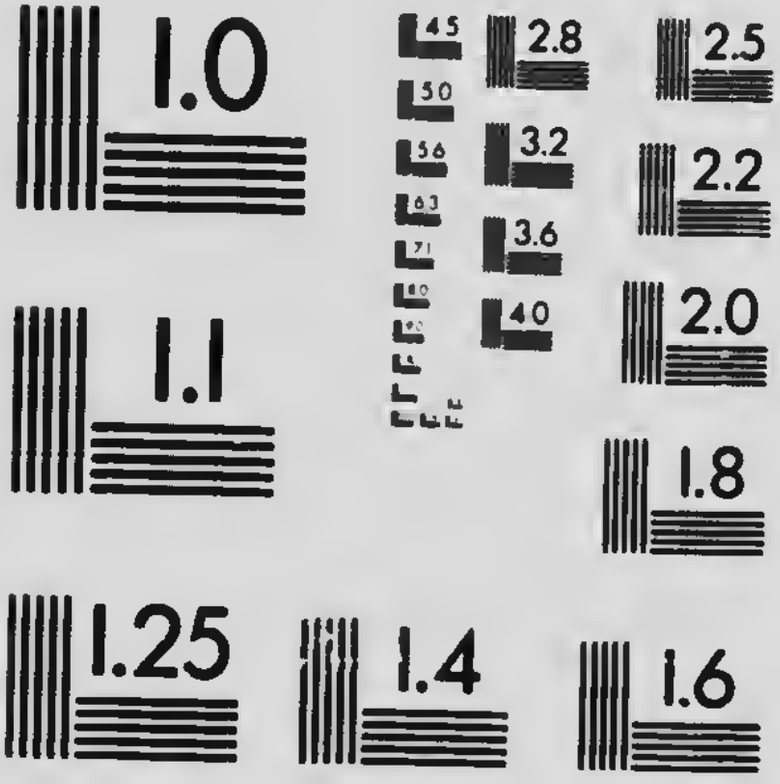

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Principles of recent War Cases

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 also 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.

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." 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.]

Implied terms re peace

Horlock *v.* Beal

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 :—" Where a contract has been entered into, and by a super-

vening 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 becomes impossible the contract shall not remain binding". [*Horlock* v. *Beal*, 1916, A.C. 486 at p. 525; 32 T.L.R. 251]. Or as the present Lord Chief Justice has put it:—" 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*, 1813, 3 B. & S. at pp. 833, 834]. This principle is not confined to the cessation of the existence of the subject-matter of the

Principles of recent War Cases

Implied terms re peace

Horlock v. Beal

Leiston Gas Co.'s case

Principles of recent War Cases

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; 32 T.L.R. 588, *per Lord Reading*).

Implied terms re peace

Leiston Gas Co.'s case

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, 32 T.L.R. 677].

Tamplin Steamship Co.'s case

The facts there were as follows:—

A steamer was chartered from the owners for 5 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 arbitra-

tion 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; 32 T.L.R. 201; 1916, W.N. 3], and then followed the appeal to the House of Lords upholding the Courts below.

Principles of recent War Cases

Implied terms re peace

The judgment of Lord Loreburn has already been set out (see p. 34 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 12 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 attacks on the voyage. She however arranged with the Australian company

Principles of recent War Cases

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.

Implied terms re peace

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

Foster's Agency Ltd. *v.* Romaine

by the defendant to carry out the engagement.

Principles of recent War Cases

A further case where an implied term was read into the contract may be found in *Berthoud* v. *Schweder & Co.* [1915, 31 T.L.R. 404.] The case is cited below (see p. 169).

(A) Recent Cases Where Performance was held to be Excused

(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 exacted. Taking these sub-divisions in order the cases fall as under :—

Banker and customer

In *Leete & Sons, Ltd.*, v. *Direction Der Disconto Gesellschaft* [1915, 114 L.T. 332] the plaintiffs on 29th July 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 from the German Govern-

Recent War Cases

ment 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 remittances 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.

(A) Where performance was excused

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. 29 ante.]

Carriage of goods

Charter party

In *Boggiano & Co.* v. *Arab Steamers, Ltd.*, [1916, I. L.R. 40 Bom. 529] the plaintiffs chartered the defendants' vessel and shipped bales of cotton on board for export to Genoa. The Government however prohibited the import of cotton to Genoa. Attempts to remove this restriction were unsuccessful. The ship returned from the harbour to the dock, unloaded the goods and abandoned the voyage. The plaintiffs had paid advance freight and sued for its return claiming the contract was void and that the defendants under section 65 of the Indian Contract Act were bound to restore the advantage received under the contract. The defendants contended that the voyage was impossible, if not illegal; that advance freight was irrecover-

able, and that the loss must lie as it fell; and relied upon the case of *The Civil Service Co-operative Society* v. *General Steam Navigation Co.*, [1903, 2 K.B. 756]. *Macleod J.* held that the defendants were not common carriers; that the law of the Indian Contract Act applied to them, and that the money paid was paid under the contract and not paid prematurely at the will of the plaintiffs, and must therefore be repaid by the defendants. [See pp. 108 and 109 ante.]

Recent War Cases

(A) Where performance was excused

Charter-party

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. 153), the plaintiff was not entitled to sue for remuneration. [*Berthoud* v. *Schweder & Co.*, 1915, 31 T.L.R. 404.]

Commission

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

Sale of goods

Recent War Cases

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 anyone who might be injured by it." [*Shipton, Anderson & Co.* v. *Harrison Bros. & Co.*, 1915, 3 K.B. 676, and see p. 22 ante.]

(A) Where performance was excused

Sale of goods

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. 53 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 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, and see p. 54 ante.] Recent War Cases

(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.

Carriage (by sea)

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.*, 1915, 31 T.L.R. 442; 1916, W.N. 105, and see p. 162 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

Recent War Cases

could recover. *Seville and United Kingdom Co., Ltd.*, v. *Mann George & Co* 1915, 32 T.L.R. 192, varied in appeal 32 T.L.R. 523.

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.*, 1916, 1 K.B. 485; 1915, 32 T.L.R. 180; 1916, W.N. 14.]

(B) Where performance was not excused

Charter parties

And see the House of Lords' decision in the *Tamplin Steamship Co. Case* cited supra (p. 164).

In another case of a time-charter it was held that the frustration of the adventure was not shown, as there was a wide area in which the vessel might trade. [*Scottish Navigation Co., Ltd.*, v. *W. A. Souter & Co.*, 1915, 32 T.L.R. 234.]

Reasonable apprehension of restraint of princes does not justify a breach of the charter. [*Mitsui & Co., Ltd.* v. *Watts, Watts & Co., Ltd.*, 1916, 32 T.L.R. 288; 1916, W.N. 62, and see p. 41 ante.]

Insurance (marine)

In another case for 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 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 C.A.; 1916, 2 K.B. 156.]

Recent War Cases

(B) Where performance was not excused

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. S. F. Jones & Co.*, 1915, 32 T.L.R. 184.]

Sale of goods

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*, 1916, 32 T.L.R. 404, and see p. 54 ante].

Where a motor chassis was delivered under a hire-purchase agreement and the chassis had a body built to it, and chassis and

Recent War Cases

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.*, 1915, 31 T.L.R. 200.]

(B) Where performance was not excused

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. 134 ante.

The Effect of Embargoes

Effect of an embargo

As regards what is 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.]. Indeed in a contract for 1,000 bags of 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 sugar by the German Government from export from Germany did not prevent a tender from being a good tender

If temporary, contract is unaffected

Recent War Cases

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 for a time. [*Jager* v. *Tolme & Runge*, 114 L.T. 647; 32 T.L.R. 291. C.A. and see *Andrew Miller & Co., Ltd.*, v. *Taylor & Co.*, 1916, 1 K.B. 402, 1915, 32 T.L.R. 161.]

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.

In some quarters it is questioned whether the case is not virtually overruled by *Esposito* v. *Bowden* [1857, 7 E. & B. 763], where a neutral ship was chartered to proceed to Odessa and there load a cargo for an English freighter. Before the ship arrived there war had broken out between England and Russia, and continued till after the time when the loading should have taken place. In this case the contract could not be performed without trading with the enemy, and in such a case it is convenient that it should be dissolved at once, so that the parties need not wait indefinitely for the mere chance of the war coming to an end,

Recent War Cases

or its becoming possible to perform the contract lawfully [vide *Pollock on Contracts*, 5th Ed., p. 306.]

Effect of an embargo

But the case would appear to have been recognised 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.]

CHAPTER VI

Statutory Powers to Avoid Contracts

By section 2 of the English 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."

In British India an Ordinance [Ord. No. 5 of 1916] was issued on the 1st July, 1916, by which it was provided as follows :—

"6. Where it appears to the Governor General in Council that a contract entered into before or during the war, or a transfer of property, moveable or immoveable, made during the war, with or by a hostile foreigner or a hostile firm is injurious to the public interest, or was made with the object of evading any provision of the law, the Governor General in Council may, by order,

cancel or determine such contract, either unconditionally or upon such conditions as he thinks fit, or declare such transfer to be void either in whole or in part, or may impose such conditions on the transferee as he thinks fit."

GENERAL INDEX