dissents, not because he does not agree with the decision in *Penn's* case—indeed, he was a party to that judgment himself—but because the question there being upon section 13, what was the true meaning of remuneration, he held that "remuneration" and "earnings" were not synonymous terms, whereas the other judges held that they were.

I think that the appeal should be dismissed.

LORD ATKINSON—I concur and I have nothing to add.

LORD PARKER—I concur.

LORD SUMNER—I concur.

LORD PARMOOR—I think that the true effect of Mr Schiller's argument would be to limit earnings to the amount which an employee is entitled to claim under or in consequence of his contract of service. I use those two words because Mr Schiller used them himself. I think this construction of the Workmen's Compensation Act is not accurate, and that the word "earnings" is not so limited in its meaning, and if it is not so limited then the question arises whether notorious tips such as are received by a railway porter should be taken into account. It was within the competence of the arbitrator to find that the tips in question were earned by the applicant in his employment, and it appears to be a finding which settles the matter in this case. The history of these tips points in the same direction. I think it is quite accurately stated by the Master of the Rolls in his judgment in these words—"At one time and for a good many years the Great Western Railway Company had a rule which said that no gratuity is allowed to be taken from passengers or other persons by any servant of the company. It was found that that rule was habitually disregarded, it was a mere waste of paper, and in 1913 new rules were passed. The old rule was abolished and there is this one now—that no servant of the company is allowed to solicit gratuities from passengers or other persons." I should like to associate myself with the caution expressed by the noble and learned Lord on the Woolsack, that the decision in this case is applied to where the tips are notorious and well known, and not to where tips are sporadic in character.

Appeal dismissed.

Counsel for the Appellants—Schiller, K.C.—Cotes-Preedy. Agent—L. B. Page, Solicitor.

Counsel for the Respondent—H. Gregory, K.C.—Wethered. Agents—Church, Adams, Prior, & Balmer, Solicitors, for Arthur Withy, Bath.

HOUSE OF LORDS.

Friday, January 25, 1918.

(Before Lords Dunedin, Atkinson, Parker, and Sumner.)

ERTEL BIEBER & COMPANY *v.* RIO TINTO COMPANY, LIMITED.

DYNAMIT ACTIEN-GESELLSCHAFT (VORMALS ALFRED NOBEL & COMPANY) *v.* RIO TINTO COMPANY, LIMITED.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Contract—War—Rescission or Suspension—Suspensory Clause—Legal Proceedings against Enemies Act 1915 (5 *Geo. V, cap.* 36).

In the first appeal the respondents, an English company, brought an action under the Legal Proceedings against Enemies Act 1915 to have it declared that contracts entered into by them with the appellants, a German firm, were avoided by the outbreak of war with Germany. The contracts contained a clause providing that if owing to war the respondents were prevented from delivering the ore which was the subject of the contracts the obligation to ship and/or deliver should be suspended during the continuance of the impediment and for a reasonable time afterwards. The Court of Appeal decided in favour of the respondents on the ground that the contracts involved intercourse with the enemy (116 L.T.R. 810). *Held* that this view was correct, and that in any view the contracts were void as being contrary to public policy.

In the other two appeals there were contracts in somewhat similar terms, but executed in Germany in the German language. It was contended that the rights of the parties fell to be determined by German law. *Held* that even if this were so the *onus* of proving the German law different from the English had not been discharged by the appellants. Further, that even had they proved that German law regarded such a contract as enforceable, that fact would not weigh with the English courts if they considered the contract contrary to public policy. The ruling in the first appeal therefore applied.

Furtado v. *Rogers*, 3 Bos. & P. 191, and *Janson* v. *Driefontein Consolidated Mines Company*, [1902] A.C. 484, *followed.*

Esposito v. *Bowden*, 7 E. & B. 763, *considered* and *explained.*

The *facts* appear from their Lordships' considered judgments.

Ertel Bieber & Company v. *Rio Tinto Company, Limited.*

LORD DUNEDIN—The respondents, whom I shall hereafter allude to as the plaintiffs, taking advantage of the provisions of the

Legal Proceedings against Enemies Act 1915, have raised this action to obtain a declaration as against the appellants, whom I shall hereafter call the defendants, that by the existence of a state of war between Great Britain and Germany on the 4th August 1914 two contracts, of dates the 27th June 1910 and the 9th October 1913, with indorsements on the first mentioned of the 15th March and the 8th October 1912, were abrogated and avoided, and that they were relieved from any duties or obligations under the contracts without prejudice to liabilities already incurred at the aforesaid date of 4th August 1914.

The plaintiffs are an English company owning extensive mines of cupreous ore situate in Spain. The defendants are a German firm who deal in such ore and re-sell to various customers in Germany. Both contracts were for a very large quantity of ore. The first was for 1,280,000 tons, 15 per cent. more or less in buyer's option, a quantity which by two indorsements was increased to 1,592,750 tons. The ore was to be delivered in approximately equal quantities between the 1st February and the 30th November in the years 1911 to 1914. It was to be shipped from Huelva in Spain, and delivered *ex* ship at Rotterdam, Hamburg, Stettin, and/or other European Continental ports except ports in Great Britain, France, Belgium, Spain, and Portugal. There were minute arrangements as to quality and price and various other clauses, to some of which I shall presently advert. The second contract was for 2,200,000 tons, 15 per cent. more or less in buyer's option, to be delivered in equal portions from the 1st February 1915 up to the 30th November 1919 at same ports as in the first contract. When war broke out between Great Britain and Germany on the 4th August 1914 all deliveries had been made under the first contract except about 200,000 to 300,000 tons. Obviously no deliveries had begun under the second contract. No deliveries have been made since the war began. Sankey, J., gave the plaintiffs the declaration they asked, and his judgment was affirmed by the Court of Appeal. Against these orders the present appeal is brought.

The proposition of law on which the judgment of the Courts is based is that a state of war between this kingdom and another country abrogates and puts an end to all executory contracts which for their further performance require, as it is often phrased, commercial intercourse between the one contracting party, subject of the King, and the other contracting party, an alien enemy, or anyone voluntarily residing in the enemy country. I use the expression "often phrased commercial intercourse," because I think the word "intercourse" is sufficient without the epithet "commercial." As to this I agree with the judgment of the Court of Appeal in the case of *Robson* v. *Premier Oil and Pipe Line Company*, [1915] 2 Ch. 124, where Pickford, L.J., delivering the judgment of the Court (Cozens-Hardy, M.R., himself, and Warrington, L.J.) said—"The prohibition of intercourse with alien enemies rests upon public policy, and we can see no ground either on principle or authority for holding that a transaction between an alien enemy and a British subject which might result in detriment to this country or advantage to the enemy is permissible because it cannot be brought within the definition of a commercial transaction."

That so expressed it is an incontrovertible proposition admits, I think, upon the authorities, of no doubt. There are many cases, but what may be termed the landmarks of the law on the subject will be found in the judgment of Lord Stowell in Admiralty, in the case of "*The Hoop*," 1 C. Rob. 196, in the year 1799; in Lord Alvanley's judgment in 1802 in *Furtado* v. *Rogers*, 3 Bos. & P. 191; and still more explicitly in the judgment of the King's Bench in 1857 in *Esposito* v. *Bowden*, 7 E. & B. 763, where the members of the Court were Jervis, L.C.J., Pollock, C.B., Alderson, B., and Cresswell, Crowder, and Willes, JJ. In recent decisions the proposition has been recognised in many cases. I would refer especially to the very learned and careful inquiry into the subject by Reading, C.J., in the case of *Porter* v. *Freudenburg*, [1915] 1 K.B. 857, at p. 866. And in your Lordships' House the proposition was at the root of the judgment in the case of *British and Foreign Insurance Company* v. *Sanday*, [1916] 1 A.C. 650, and was directly applied in the case decided this morning, where the partnership was held dissolved by the war—*Hugh Stevenson & Sons* v. *Aktiengesellschaft für Cartonnagen-Industrie*, [1918] A.C. 239.

The defendants' counsel made an attack, not perhaps on the authority of *Esposito* v. *Bowden*, but rather on its application to any contract but a contract of affreightment on a voyage policy; and it was urged that to treat the case as of general application to executory contracts which had such a natural life as might outlive the war was to run counter to a dictum of Lord Halsbury in *Janson* v. *Driefontein Consolidated Mines*, [1902] A.C. 484, at p. 493. Now *Esposito* v. *Bowden* has been cited by learned judges in many cases, and no doubt has ever been cast on its authority. Nor has it ever been taken as dealing with any particular contract, but it has been held as dealing with contracts in general. So far as *Janson's* case is concerned the only matter there decided was that there must be an actual state of war to determine a contract—a mere imminence of war is not enough. It is true that Lord Halsbury's dictum if applied as a universal proposition would be counter to the doctrine of *Esposito* v. *Bowden*. But I am satisfied not only that the dictum was obiter and not binding, but that Lord Halsbury was not dealing with or thinking of executory contracts but of contracts under which rights had already accrued. There is indeed no such general proposition as that a state of war avoids all contracts between subjects and enemies. Accrued rights are not affected, though the right of suing in respect thereof is suspended. Further there are certain contracts, particularly those which are really the concomitants of rights of property, which even so far as executory are not abrogated. Such

as, for instance, the contract between landlord and tenant, of which an example may be found in the recent case of *Halsey* v. *Lowenfeld*, [1916] 2 K.B. 707. In other words the executory contract which is abrogated must either involve intercourse, or its continued existence must be in some other way against public policy, as that has been laid down in decided cases. I shall revert to the cases, but in the meantime I rest with the proposition I have stated above.

Now taking the legal proposition alone, and supposing that the contracts in question had contained no other clauses than those which I have set forth as to dates of delivery, it would at once follow that the first contract so far as unimplemented is avoided, for the dates of delivery under it, so far as not performed, extend from August 1914 to February 1915, during which time a state of war has prevailed. It is also obvious that all dates of delivery under the second contract, from the 1st February 1915 up to the present time, have been rendered illegal by the war. The only matter left would be this. The defendant's counsel argued that as it was possible that the war would end before the 30th November 1919, there might still be a duty to deliver such instalments as are appropriate to the remanent period from the end of the war to November 1919. But that would be to turn a contract for two million tons into a contract for far less. To meet this the defendants said that each monthly shipment was essentially a separate contract. The answer is to be found in what was said by Lord Selborne in the case of *Mersey Steel and Iron Company* v. *Naylor, Benson, & Company*, (1884) 9 A.C. 434, at p. 439. That was the case of a contract for 5000 steel blooms with delivery 1000 tons monthly commencing on January next. His Lordship said—"The subsidiary terms as to time of delivery and as to payment do not split up the contract into as many contracts as there shall be deliveries. . . . It is one contract for the purchase of that quantity of iron."

The real defence to the action is to be found in a clause which I have not yet mentioned. There is a clause in practically identical terms in both contracts. I shall therefore take that in the later contract. It is clause 15, which is in the following terms:—"15. If, owing to strikes, war, or any other cause over which the sellers have no control, they should be prevented from shipping the ore from Huelva, or delivering same to the buyers, the obligation to ship and/or deliver shall be suspended during the continuance of such impediment, and for a reasonable time afterwards, to allow the sellers time to resume shipments and/or deliveries, and if one or more works of buyers' clients should be destroyed or materially damaged by fire, or should war or any other cause, over which the buyers or their clients have no control, prevent their receiving such ore, the obligation to receive under this contract shall be reduced in proportion, or suspended during the continuance of such impediment, and for a reasonable time afterwards, to allow the buyers time to recommence receipts."

The defendants argue that the effect of this clause is to remove from the contract all necessity for the forbidden thing—intercourse during the war—and that the *ratio decidendi* of *Esposito* v. *Bowden* is therefore gone, and that there is no reason why the contract to deliver after the war should not be good.

The learned Judges of the Courts below have treated this clause by the method of what may be termed confession and avoidance. The clause only purports to suspend deliveries—nothing else. But, say they, there were other duties under the contract beside deliveries. These duties still remain and entail intercourse, so that again the case is brought within the principle of *Esposito* v. *Bowden*. In particular, they cite clauses 12, 18, and 19, and they say that the case in respect of these clauses falls directly within the decision of the Court of Appeal which binds them in the case of *Zinc Corporation, Limited* v. *Hirsch*, [1916] 1 K.B. 541. To which the defendants before your Lordships' House reply that the clauses are not analogous, and further that the *Zinc Corporation* case was ill decided.

I do not think it can be gainsaid that *Esposito* v. *Bowden* being, as I have already said, good law, then if there are duties which remain unaffected by the suspensory clause, and these duties involve intercourse, then the contract must be avoided. In so far as the *Zinc Corporation* case laid down this proposition it was in my opinion right, and it is useless to examine the clauses in that case. It is necessary, however, to examine what the duties are under this contract. In order to make section 12 intelligible it is necessary first to quote section 2, which is in these terms—"2. One-fifth of the above 2,200,000 tons, namely, 440,000 tons, 15 per cent. more or less, is to be shipped in each year during the period between the 1st February and the 30th November, and spread as nearly as sellers can arrange uniformly over this period. The sizes of cargoes for Rotterdam, Hamburg, and Stettin shall be in sellers' discretion, but for other ports sellers shall arrange as far as possible for such reasonably-sized cargoes, but not exceeding 3000 tons, as buyers desire. About one-half of the ore is to be lumps and about one-half is to be fines, viz., ore which has passed through a half-inch square mesh screen."

Clause 12 so far as material is as follows:—"The buyers are to declare in writing, not later than the 1st January of each year, the total quantity of fines and lumps separately which they desire delivered during the year, and what quantity of each size is to be delivered at each port."

The defendants contend that there is here no duty but a mere option on their part. If they do not declare, all that ensues is that the ore falls to be divided equally between fines and lumps. I do not agree with the defendants' view. It is not alone the proportion as between fines and lumps but the total quantity that has to be determined, *i.e.*, the decision as to the 15 per cent. more or less. Moreover, evidence has been led, which there is no reason to disbelieve, by

which it is shown that from the sellers' point of view it is necessary to have these two matters fixed in order to settle the programme for working the mine during the ensuing year, and this yearly duty seems to me quite independent of delivery. I am therefore prepared to agree with the Court of Appeal on this ground of judgment. As regards clauses 18 and 19 I confess I am doubtful. Clause 18 is an arbitration clause. Now though I agree with the learned Judge who says that arbitration cannot be conducted without intercourse, it seems to me that arbitration is not a necessary, nor indeed a usual, part of the performance at a time when *ex hypothesi* all deliveries under the contract are suspended. There is nothing for the time being to arbitrate about. So also as regards clause 19. This is a very special matter, providing in the event of a Mr Julius Ertel ceasing to be a member of the firm of Ertel, Bieber & Company that his place in the active administration should be filled in a certain way. But Mr Julius Ertel has not so far as known ceased to be a member of the firm, and active administration on the afore-mentioned hypothesis of suspended deliveries is at a standstill.

While the construction which I put on clause 12 affords, as I have said, sufficient ground to enable me to say that the judgment of the Court of Appeal should be affirmed, it is, I think, desirable that our judgment should be also based on rather broader grounds. It is the more necessary to express an opinion on this point because, as I shall hereafter have to say, I think the argument on clause 12 fails to be applicable in the two other cases which your Lordships will presently consider.

I confess I cannot read clause 15 without coming to the conclusion that although war is mentioned *eo nomine* in that clause, it is not war between Great Britain and Germany with the legal consequences thereon ensuing that is envisaged, but war between other powers, of whom Great Britain and Germany may be one, and which acts as a practical impediment *via facti* in stopping the possibility of delivery. It is not necessary in my view to decide this question, for the simple reason that the defendants seem to me to be involved in a dilemma. Either the war which is to suspend delivery does not include a war between Great Britain and Germany, in which case the clause does not apply, or if it does mean such a war with the legal consequences following thereon, then in my view the clause is void as against public policy. I apprehend that in saying this I am not inventing a new head of public policy. I respectfully subscribe to the remarks made on this subject by the Earl of Halsbury in *Janson* v. *Driefontein*. I take my view of what is against public policy from what has been said in a series of cases which have certainly become the law of England.

Let me revert to the leading case which I have already cited. The case of "*The Hoop*" was a case where the goods from an enemy country which had been consigned to British subjects and under contract became their property were confiscated by capture by a British ship. The contract with the enemy subject by which the property in the goods passed was made *pendente bello*. The ground of judgment was that all trading with the enemy is unlawful at common law as against public policy. Why? Not because of the terms of the particular contract, but because contract in general might enhance the resources of the enemy or cripple those of the subjects of the King.

The case of *Furtado* v. *Rogers* advanced the application of the rule a step further. Here the contract, which was one of insurance to indemnify for losses by war, was entered into when the countries were at peace. It was held that to allow such a contract, if war meant war between the insurer's country and this country, was unlawful. The ground on which this is put is very important. "We are all of opinion," said Lord Alvanley, "that 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 country, and that such contract is as much prohibited as if it had been expressly forbidden by an Act of Parliament. It is admitted that if a man contracts to do a thing which is afterwards prohibited by an Act of Parliament he is not bound by his contract. This was expressly laid down in *Brewster* v. *Kitchell*, 1 Salk. 198. And on the same principle when hostilities commence between the underwriter and the assured the former is forbidden to fulfil his contract. He then cites a passage from Bynkerskoek's Quaestiones Juris Publici—"Hostium pericula in se suscipere quid est aliud quam eorum commercia maritima promovere"; and another from Valin, who, speaking of the conduct of the English during the war of 1756, who at that time permitted these insurances, said—"The consequence was that one part of the nation restored to us by the effects of insurance what the other took from us by the rights of war;" and he then goes on to deal with another argument in a way which seems to apply directly to some of the arguments used in this case—"But it is said that the action is suspended, and that the indemnity comes so late that it does not strengthen the resources of the enemy during the war. The enemy, however, is very little injured by captures for which he is sure at some period or other to be repaid by the underwriter."

Then came *Esposito* v. *Bowden*, which applied the doctrine to a contract executory and as yet unfulfilled.

From these cases I draw the conclusion that upon the ground of public policy the continued existence of contractual relation between subjects and alien enemies or persons voluntarily residing in the enemy country which (1) gives opportunities for the conveyance of information which may hurt the conduct of the war, or (2) may tend to increase the resources of the enemy or cripple the resources of the King's subjects, is obnoxious and prohibited by our law. I do not quote the recent dicta of learned judges in the cases already cited of *Porter*

v. *Freudenburg, Robson* v. *Premier Oil and Pipe Line Company*, and *Zinc Corporation* v. *Hirsch*, because although they are to the same effect, and I agree with them, the recent cases are in one sense submitted in this case to the review of your Lordships' House.

Let me now apply this rule to clause 15 on the hypothesis that it does suspend delivery during the war. But for it the contract would immediately end, by it the contract is kept alive, and that not for the purpose of making good rights already accrued, but for the purpose of securing rights in the future by the maintenance of the commercial relation in the present. It hampers the trade of the British subject, and through him the resources of the kingdom, for he cannot in view of the certainly impending liability to deliver (for the war cannot last for ever) have a free hand as he otherwise would. He must either keep a certain large stock undisposed of and thus unavailable for the needs of the kingdom, or if he sells the whole of the present stock he cannot sell forward as he would be able to do if he had not the large demand under the contract impending. It increases the resources of the enemy, for if the enemy knows that he is contractually sure of getting the supply as soon as war is over, that not only allows him to denude himself of present stocks, but it represents a present value which may be realised by means of assignation to neutral countries.

For these reasons I come to the conclusion that clause 15 is void as against public policy and cannot receive effect. Without clause 15 there is an obvious necessity for intercourse, and the contract is therefore avoided as a whole. I am of opinion that the appeal should be dismissed with costs.

LORD ATKINSON—The facts have already been fully stated, and it is unnecessary to repeat them.

Mr Justice Sankey and the Court of Appeal, following the general lines of the decision in the case of *Zinc Corporation, Limited* v. *Hirsch*, [1916] 1 K.B. 541, held that the above-mentioned provisions of this contract as well as those contained in several other of its clauses, especially the fifth, sixth, eighth, tenth, twelfth, eighteenth, and nineteenth clauses, would involve and indeed necessitate frequent communications between the appellants and the respondents on their commercial concerns and dealings, and that communications of that character between a British subject and an enemy subject being admittedly illegal during the continuance of a state of war between the countries of the respective parties to those communications, the contract of the 19th October 1913 was rendered illegal and void, and the respondents were entitled to the relief they claimed. The chairman of the respondent company was examined, and proved that those communications as above mentioned took place almost daily between the two companies during the currency of their business under the first agreement, and were absolutely necessary for the proper conduct of that business, and that similar communications would be necessary for the carrying out of the second agreement and the conduct of their business under it. I am far from disagreeing with either Sankey, J., or the learned Lord Justices as to the grounds on which they respectively based their judgments. I agree with them in thinking that the terms of this second agreement required that in order to carry out the commercial transaction which was its subject-matter frequent communication touching its details should necessarily take place between the appellants and respondents, and if that be so it is well established by many authorities that those communications would under the circumstances be illegal, and would vitiate and make void the contract that involved and required them. It is only necessary to refer to "*The Hoop*," 1 C. Rob. 196; *Potts* v. *Bell*, 8 Term R. 548; *Esposito* v. *Bowden*, 7 E. & B. 763; and *Janson* v. *Driefontein Consolidated Mines*, [1902] A.C. 484, as authorities on the point.

The illegality of these communications does not in the slightest degree depend on the triviality of the business details communicated. The danger to the State involved in them lies probably to the greater extent in this, that if permitted they would afford easy opportunities for the communication of information most useful to the hostile belligerent State, and therefore injurious to the State of which the person making the communication was the subject. In *Potts* v. *Bell* Sir John Nichols, at p. 555 of the report, in an argument approved of, and indeed apparently adopted, by Lord Kenyon and the Courts, put this objection most forcibly; and the recent decisions in the case of the "*Panareillos*," 112 L.T.R. 777, 114 L.T.R. 670, and *Robson* v. *Premier Oil and Pipe Company, Limited*, [1915] 2 Ch. 124, following the decision of Sir William Scott in "*The Hoop*" and in the "*Cosmopolite*," 4 C. Rob. 8, show that the prohibition at common law extended to intercourse of all kinds which could tend to the detriment to this country or the advantage of the enemy.

Owing to some observations which were made in argument, it is, I think, well to point out that the illegality of any transaction as amounting to trading with the enemy does not at all depend upon whether it is profitable either to the British citizen or to the enemy subject who engages in it or the contrary. Trading with the subject of an enemy State, or with persons resident in that State, is assumed to be beneficial to the enemy State. It helps the enemy's trade and commerce, and so far defeats one of the objects of this country in going to war, which is to cripple that commerce in order to force the enemy to come to peace. It may be that the trading would benefit this country as well; that, however, is not for the individual trader to decide. It is for the State to decide, and the State can, if it so desires, grant licences to trade to particular persons for particular commodities and so secure that benefit. In *ex parte Baglehole*, 18 Ves. 526, Lord Eldon said—"Though it might be a very beneficial act in a subject of this country to purchase corn in France and send it to this country at the present period, yet if he was there

without licence to reside and trade, such commerce would be clearly illegal"—which I presume was based on this ground that though beneficial to this country it would also presumably be beneficial to the then enemy, France, and because of that necessarily detrimental to the higher interests of England. Lord Alvanley, in the well-known passage of his judgment in *Furtado* v. *Rogers*, 3 Bos. & P., at p. 198, lays it down, "that according to the principles of English law it is not competent for any subject to enter into a contract to do anything detrimental to the interest of his own country, and such a contract is as much prohibited as if it had been expressly prohibited by an Act of Parliament." Lord Alvanley was no doubt in that case dealing with the case of a policy of insurance, but he laid down this principle in general terms, and his decision was approved of without qualification in *Janson* v. *Driefontein Consolidated Mines*. At p. 199 of the report (3 Bos. & P.) Lord Alvanley further says—"But it is said that the action (*i.e.*, the action to recover on the policy) is suspended and the indemnity comes so late that it does not strengthen the resources of the enemy during the war. The enemy, however, is very little injured by captures for which he is sure at some period or other to be repaid by the underwriters." This remark applies to the suspensory clause in the special agreement.

I think, however, that in this case a wider and equally important question arises for determination. Scrutton, L.J., refers at some length to it in his judgment. It is this, whether the outbreak of the war does not by itself make illegal the contract contained in the fifteenth clause of the second agreement. That clause provides that if the respondents should be prevented, owing to strikes, war or any other cause over which they have no control, from shipping from Huelva or delivering to the appellants the ore purchased, the obligation of the respondents to ship and deliver the same during the continuance of the impediment and for a reasonable time thereafter to allow the respondents to resume shipments and deliveries should be suspended. There is a corresponding provision that should war or any other cause over which the appellants or their clients have no control prevent them from receiving the ore, the obligation to receive under the contract should be reduced in proportion or suspended during the continuance of the impediment and a reasonable time thereafter to allow the appellants time to recommence receipts. It will be observed that this clause only deals with the shipment, delivery, and receipt of the ore and, save so far as the suspension of those things may affect the other clauses of the contract, leaves those latter untouched. Many of the obligations these clauses impose still rest upon the parties, and it is because of this result that I concur in the conclusion at which the Court of Appeal have arrived. As regards this fifteenth clause it is necessary in the first place to ascertain what is its precise meaning. Do the words "war or other cause over which the seller had no control" cover and embrace the present war between Great Britain and Germany? If they do not embrace it the agreement is clearly illegal and void, inasmuch as it would bind a British subject to deliver goods to an alien enemy irrespective of that war, just as if the two countries were at peace. In my view the clause clearly covers the existing war between this country and Germany. Next, does the prevention by war mean not only prevention by physical war-like operations, such as capture and blockade for instance, but also prevention by the legal principles applicable to trading during a state of war—the prohibition of English subjects from engaging in commercial intercourse with alien enemies? I see no reason whatever for confining these words to the first of the results of a state of war. I think they include both results, Next, what is the meaning of the words the "obligation to deliver the ore shall be suspended." Do they mean that the entire amount of ore contracted to be delivered, 2,200,000 tons less 15 per cent., are to be delivered as soon as the war shall have ended or within a reasonable time thereafter, or do they mean that the respondents are relieved for ever from the obligation to deliver each year while the war lasts the 440,000 appropriate to that year, so that at the end of the war they shall only be obliged to deliver the latter amount for every year between the termination of the war and the 30th November 1919? If the first, the agreement purports to secure, as far as an agreement of the kind with a company whose solvency has not been impeached can secure, great and immediate benefits to the appellants, and through them for their country. It will have secured for them the certainty that their trade and commerce with the appellants will be resumed immediately on the termination of the war, that a vast stock of ore will then or within a reasonable time thereafter be available for them ready for delivery to them on their order, enabling them during the war to make forward contracts with their customers, and to raise money on the security of this agreement, and thus to keep alive to a considerable extent during the war their trade and commerce to their own gain with the resulting benefit to their country, since the trade and commerce of its residents during a state of war is indisputably presumed to be for its benefit, while it would at the same time work to the detriment of England in that it would prevent this vast mass of ore being made available for English manufacture. Well, if it be the second, benefits the same in kind though less in degree would be secured to the appellants and their country, and the same injury in kind though less in degree inflicted on the respondents and their country. If this clause 15 were deleted from the agreement it could not, I think, be contended for a moment that the contract was not illegal and void. I cannot think that a clause which does not deprive the appellants of the full enjoyment of all benefits of the contract, but merely postpones that enjoy-

ment for an uncertain time, leaving it ultimately certain and secure, can change the nature of the contract and make it legal and binding. On this ground, therefore, as well as that I have first dealt with, I think this agreement has by the outbreak of the war with this country and Germany become illegal and void, that the decision of the Court of Appeal was right and should be upheld, and this appeal dismissed with costs.

LORD PARKER—I agree.

The appeal before your Lordships arises in an action instituted by the respondent under the provisions of the Legal Proceedings against Enemies Act 1915, the writ being indorsed with a claim for a declaration as to the effect of the present war on the rights and liabilities of the parties to two contracts entered into by the respondent before the war with the appellants, who on the outbreak of the war became enemies of the Crown.

In order to determine the effect of the war upon the rights and liabilities of the parties to a contract, it is obviously necessary to examine the contract itself and to determine what rights and liabilities it creates. It is not disputed that the interpretation of both contracts and the rights and liabilities of the parties thereunder are governed by English law. I will, in the first instance, deal with the contract of the 27th January 1910.

The contract of the 27th January 1910, as amended by its two indorsements, provides for the sale by the respondent to the appellants of between 1,650,250 tons and 1,219,750 tons of cupreous sulphur ore to be shipped by the respondent from Spain to, and delivered to, the appellants at Rotterdam, Hamburg, Stettin, or other Continental ports named by the appellants, during the years 1911, 1912, 1913, and 1914. Some part of the ore contracted to be sold remained undelivered at the commencement of the war. The twelfth clause of the contract provides that if owing to strikes, war, or any other cause over which the respondent has no control, the respondent is prevented from shipping or exporting the ore from Spain or delivering it to the appellants, the obligation to ship or deliver is to be suspended during the continuance of such impediment, and for a reasonable time afterwards, to allow the respondent time to recommence shipments, and similarly if war or any other cause over which the appellants have no control prevents the appellants receiving the ore, the obligation to receive it is to be suspended during the continuance of said impediment, and for a reasonable time afterwards, to allow the appellants time to recommence receipts.

It seems reasonably clear that the effect of the clause is not to diminish the quantity of ore to be delivered under the contract, but merely to postpone deliveries until after the impediment in question is removed. Indeed, the contrary was not suggested in argument on either side. The important point of construction is whether the expression "war" as used in the clause covers war between the United Kingdom and Germany, its effect being to postpone deliveries under the contract during and for a reasonable time after the present war, leaving the respondent under an obligation to complete the deliveries contemplated by the contract as soon as possible after the conclusion of peace.

It appears to me that the clause is contemplating war as a physical impediment to the performance of what would otherwise be possible and lawful, and not as so changing the status of the parties as to render the performance of any part of the contract in fact illegal. Further, if the clause be construed as covering or providing against the effects of a war between this country and Germany, it is, in my opinion, void as contravening a well-known rule of public policy. It is not permissible by English law for a subject of the Crown to contract with a foreigner that in case of war between this country and the state of which the foreigner is a subject, the latter shall be indemnified against or be relieved from or receive compensation for a loss which he would otherwise suffer by reason of the war or of anything done in the prosecution of the war. This is the principle which underlies Lord Alvanley's judgment in *Furtado* v. *Rogers*, 3 Bos. & P. 191. It is true that in that case the actual decision turned on the true construction of the contract, which was for insurance against capture at sea. It was held that such a contract impliedly excluded capture by His Majesty's naval forces. But the really important point is the reason for this conclusion. It was because otherwise the contract would have been altogether void as against the public policy of the realm. In *Janson* v. *Driefontein Consolidated Mines Company*, [1902] A.C. 484, the same principle is recognised, though the decision itself turned on different considerations. An attempt was there made to extend the principle to a seizure of goods of the insured by his own Government during peace but at a time when war was anticipated, but this attempt failed.

It is to be remembered that the question whether the twelfth clause of the contract was or was not void *ab initio* as against public policy is not the same as the question how the war itself affected the rights and liabilities of the parties to the contract. The two questions are quite distinct, though they were somewhat confused in the course of the argument. The latter question could only arise on the actual outbreak of war between this country and Germany; the former question might arise even if no such a war occurred. The twelfth clause would clearly be applicable if the present war had been between Germany and France only, but if, according to its true construction, it covered war between Germany and this country, it could only be enforced to the extent to which what was legal in it could be severed according to well-known principles from what was illegal, and such a severance might be held to be impossible.

It follows from what I have said above that in considering the rights and liabilities

of the parties when the war broke out, the twelfth clause of the contract must be ignored either because according to its true interpretation it does not apply at all, or because, if it does apply, it is invalid on grounds of public policy. The respondent was therefore at the commencement of the war liable to ship and deliver to the appellants during the year 1914 the undelivered portion of the ore contracted to be sold. The effect of the war on this liability was clearly to abrogate it altogether. It could not be performed without trading with the enemy. The war made it illegal. The case of *Esposito* v. *Bowden*, 7 E. & B. 763, is clearly in point, and the decision appealed from is right.

Passing to the second contract, which is dated the 9th October 1913, your Lordships will find that it also was a contract for the sale of a large quantity of cupreous sulphur ore. The ore was to be shipped by the respondent from Spain and to be delivered to the appellants at Rotterdam, Hamburg, Stettin, or other Continental ports to be nominated by the appellants, during the years 1915, 1916, 1917, 1918, and 1919. The contract contains a clause (namely, clause 15) for all practical purposes identical with the twelfth clause of the earlier contract. In determining the rights and liabilities of the parties to the contract when the war broke out, this clause must be ignored either because according to its true interpretation it does not cover the present war or because if it does cover the present war it is void on grounds of public policy. So far as deliveries under the contract fall to be made during the war, the liability of the respondent to make such deliveries is abrogated by the war on the principle of *Esposito* v. *Bowden*. The only remaining question is as to the liability of the respondent in respect of the deliveries, if any, which according to the contract fall to be made after the war is over. In my opinion the liability of the respondent in respect of these deliveries, if any, is also gone. It would be contrary to your Lordships' decisions in *Horlock* v. *Beal*, [1916], 1 A.C. 486, and the recent case of *Metropolitan Water Board* v. *Dick, Kerr, & Company* (*ante*, p. 537), [1918] A.C. 119, to saddle the respondent with a contingent liability to deliver ore the quantity of which must during the war remain uncertain when his real contract was for delivery of a large and definite quantity of ore at fixed dates for the delivery of which he could prepare beforehand, and at a price presumably fixed with reference to the quantity to be ultimately delivered. It may be that a contract for the sale of goods to be delivered at a future date is abrogated by a war which begins and is brought to a conclusion between the date of the contract and the date fixed for delivery. I prefer, however, not to express an opinion on this now.

In the Court below the learned Lords Justices based their decision on somewhat narrower grounds. They assumed the applicability of the suspensory clauses in the contracts to the present war and their validity in law. But in their opinion the contracts contained other clauses which involved communication with the enemy during the war, and they held that, having regard to these clauses, the effect of the war was to abrogate the contracts altogether. In the view I take of the suspensory clauses, it is unnecessary to consider this point. I prefer to rest my opinion on the broader ground that the suspensory clauses cannot, for the reasons I have given, apply to the present war and upon the consequences which necessarily follow if they do not apply. Your Lordships were invited by Mr Grant to go still further. He maintained that the war abrogated every executory contract with an enemy, or at any rate every executory contract of a commercial nature whether or not it involved trading with the enemy during the war. He argued alternatively, that any contract which in the opinion of the Court was beneficial to the enemy was abrogated by the war. It appears to me inadvisable to consider these points unless or until they arise in some concrete form.

I may perhaps add this. Some stress was laid in argument on certain passages of my judgment in the case of *Daimler Company, Limited* v. *Continental Tyre and Rubber Company, Limited*, [1916] 2 A.C. 307, 53 S.L.R. 845. I entirely fail to see what bearing these passages have on any question which your Lordships have now to decide. They dealt with certain suggestions made in argument to the effect that certain specified acts, otherwise lawful, might during the war be rendered unlawful merely because of their tendency to enrich the enemy when the war was over. They certainly did not go to any question of public policy or to any question as to the effect of war on contracts between a British subject and a person who became an enemy on the outbreak of hostilities.

In my opinion the appeal fails and should be dismissed with costs.

LORD SUMNER—There are two contracts to which this appeal refers. Under the first, as enlarged by two indorsements, the last shipment was to be made by 30th November 1914. This contract was in course of execution when the present war began, and a substantial quantity still remains undelivered. Under the second, deliveries were not to begin till the 1st February 1915, and nothing has been done under it. Clause 21 provided that "all former contracts are to be considered as expired on the 1st March 1915." Accordingly I do not propose to distinguish the first contract from what I have to say about the second. The appellants have raised two contentions, both of which are, I think, of the essence of their argument, (1) that the effect of the outbreak of war depends on the particular terms of the contract in question and not upon the general character of the class of contracts to which it belongs, and (2) that the outbreak of war discharges further performance only where those terms necessarily involve commercial intercourse with the enemy. If the first proposition is not true the particular terms of the contract are immaterial. If the second should be read "involves naturally

or ordinarily" instead of "necessarily," then on the mere construction of this contract I think the argument fails. Even if clause 15 has full effect as a suspension, still it only suspends the sellers' obligation to ship and deliver and does not cancel it. Clause 12 is left unaffected throughout, and under it declarations in writing would naturally be given by the buyers as soon as the end of the suspension drew near, even if there were not an annual obligation on them to do so, which I believe to be the better construction.

The rule of law which forbids a British subject to trade with the King's enemies is very ancient. Its effect upon trading contracts which, like the present, are executory on both sides was already well settled by the middle of the last century. *Esposito* v. *Bowden*, 7 E. & B. 763, finally answered the last of the questions which had been raised down to that time. The Court of Queen's Bench held that the charter was only dissolved on the outbreak of war if it could not possibly be performed without trading with the enemy, and in supporting this decision in the Court of Exchequer Chamber Mr Manisty argued that the mere declaration of war did not rescind the executory contract in question; "it only suspends it and renders it illegal when it cannot be performed in any legal manner." The Court of Exchequer Chamber first of all made it plain that the question was a general one, not dependent on the mere possibilities of the particular case, and that the occlusion of Odessa to Englishmen generally by force of law for an indefinite and presumably protracted time could not be done away with by suggesting some possibility of a British ship loading cargo in that enemy port while somehow or other avoiding all contact with any enemy. Secondly, the Court decided in express terms that illegality does not suspend; it dissolves. What the law forbids is impossible of performance to those who owe obedience to that law, and this higher public obligation discharges any private obligation to the contrary.

Before 1914 I do not think that the theory upon which this dissolution is held to occur had been the subject of actual decision. The common law rule is much older than the development of overseas commerce, and during last century the practical question raised was "How does the rule affect commercial contracts?" and not "How is that effect to be stated and justified in terms of general jurisprudence?" It occurred, however, within recent years to some ingenious mind, obviously with the desire to prefer private commerce to public principle, that a clause of suspension might secure to particular contracts that continued existence during war which the Exchequer Chamber had denied generally. To negotiate towards the end of a war for the conclusion of a contract to sell and deliver goods as soon as peace should be signed would be a crime, but to stand bound to do so by a contractual tie throughout the war might possibly be lawful if only the contract was concluded before the war with a provident eye to the possibility of its occurrence. Hence the disputes, of which the present appeal is a type. Does a suspensory clause oust the application of the general rule?

Public policy though a clue to the principle involved is not in itself the key to the difficulty. The rule as to the dissolution of trading contracts on the outbreak of war, when they are executory on both sides, is said to exist for the purpose of assisting to cripple the enemy's commerce and of closing an avenue to illicit and traitorous correspondence. These are, however, the practical advantages of the rule, not its basis in theory. Courts of law are not at liberty to apply the rule and dissolve a contract merely because they think its continuance disadvantageous to this country's belligerent policy. I think that public policy is a separate ground for deciding this particular case, but so far as trading with the enemy goes I wish to keep within what I conceive to be implicit in the old decisions upon the question.

If upon public grounds the law interferes with private executory contracts on the outbreak of war by dissolving them, how can it be open to a subject for his private advantage to withdraw his contract from the operation of the law and to claim to do what the law rejects—to suspend merely where the law dissolves? The prohibition which arises at common law on the outbreak of war has for this purpose the effect of a statute. The choice between suspending and discharging the contract on the outbreak of war was quite deliberately made, and if occasionally the contract is said to be only suspended, or a court refuses to dispose of a case on the ground of dissolution alone, this only brings into relief the fact that by an overwhelming preponderance of authority such trading contracts have been held to be dissolved on the outbreak of war. An appearance of authority to the contrary is sometimes found to be in truth a misreading of the language of a decision. Thus Lord Halsbury's use of the word "affected" in *Janson* v. *Driefontein Company*, 1902 A.C., at p. 493, is due to the fact that by consent the case had been tried as if the then war had terminated, and the question was one of a cause of action which had accrued one day before the outbreak of war and thereupon had been suspended as to the remedy only. Of course if the war was treated as over neither contract nor remedy was "affected." The policy was not an executory contract after war broke out so far as concerned the gold seized at Vereeniging at all. There can be no doubt that the matter must have been considered. To many people suspension seems to have much to recommend it. Freedom of contract is challenged less; the sacrosanctity of commerce is respected more. The Courts could not have adopted the rule of dissolution unless they had reasoned that suspension would be inconsistent with this principle of the law of contract. I will quote the language of Willes, J., in *Esposito's* case—"In all ordinary cases the more convenient course for both parties would seem to be that both should be at once absolved,

so that each on becoming aware of the fact of a war, the end of which caunot be foreseen, making the voyage and the shipment presumably illegal for an indefinite period, may at once be at liberty to engage in another adventure without waiting for the bare possibility of the war coming to an end in sufficient time to allow of the contract being fulfilled, or some other opportunity of lawfully performing the contract perchance arising. The law upon this subject was doubtless made according to the well-known rule, to meet cases of ordinary occurrence." To his mind I think it is clear that the rule was one made to provide certainty at the outbreak of war where in itself everything is uncertain; that it was one made to apply in all cases, although taking its form from the need of ordinary cases, and that for the purpose of applying it the case must be looked at as things stood when war broke out, and not as they were ascertained to be or as they ultimately happened during the interval before the trial of the action.

In the abstract, discharge of a contract by reason of the outbreak of war between the countries to which the parties respectively belong should be effected simply by operation of law independently of their arrangements. The rule sets the public welfare above private bargain. It does so for the safety of the State in the twofold aspect of enhancing the nation's resources and crippling those of the enemy. To hold that the parties may be allowed to make their own arrangements for attaining these ends and to set their private judgment, not untinged by considerations of their future interest, above the prescriptions of the public law would be anomalous. To say that for the purpose of preventing such intercourse the law generally determines stipulations which involve commercial intercourse between enemies, but when the parties have agreed not to hold any such intercourse is content to leave it to them, would indeed be rash. True, there is the criminal law against holding commercial intercourse with the enemy, but the offence is one not always easy to detect. In a matter of national safety the State cannot surely rely on the bare integrity and good faith of persons whose commercial interest may so strongly conflict with their public duty.

Though the contracts now in question are elaborate in form and grandiose in scale they are not in their nature distinguishable from such a contract as that in *Esposito* v. *Bowden*. The latter was a charter, the former are contracts to sell goods and deliver them overseas under many charters. "It was nowise important," says Story, J., in *The Rapid*, 1 Gall. 295, "whether the property engaged in the inimical communication be bought and sold or merely transported and shipped." Nor is it material that these contracts provide for a series of shipments and for deliveries by instalments. Chancellor Kent puts the very case of a contract to ship in instalments in *Griswold* v. *Waddington*, 16 Johnson 438, and dismisses it as indistinguishable from a contract for a single shipment. It is not for this purpose that each instalment can be treated as if it were the subject of a separate contract, or that instalments which in point of date might fall to be delivered after the conclusion of peace could be severed from the rest. The whole contract so far as it is mutually executory is dissolved. Again, the suspension of the right of suit in the case of enemy nationals for causes of action already accrued, until the conclusion of peace, is not an argument in favour of substituting suspension by agreement for discharge by operation of law. Whether it sounds in debt or in damages such a cause of action implies a present obligation to pay simultaneous with its coming into existence. Suspension of the remedy implies no continuance of the contract during the war, but only a recognition of its existence before the war as the basis or origin of a right, which when it has accrued is a *chose in action*, a form of property.

In my opinion discharge by operation of law upon the outbreak of war operates upon trading contracts as a class by reason of their common characteristic of international intercourse and is not prevented by special stipulations between the parties. It is not necessary for present purposes to define the term "trading" or the word "enemy." The class affected is not such contracts as contemplate a continuance of trading during war, but trading contracts as such which are in being as mutually executory contracts at the outbreak of war, and which as such would in ordinary course and circumstances import commercial intercourse. "War," says Lord Lindley in *Janson's* case, 1902, A.C., at p. 509, ". . . prohibits all trading with the enemy except with the Royal licence, and dissolves all contracts which involve such trading." As the present case is one of such executory trading I think the rule that such contracts are discharged upon the outbreak of war must apply.

There is another and independent ground on which this appeal may be disposed of. "We are all of opinion," says Lord Alvanley, C.J., in *Furtado* v. *Rogers*, 3 Bos. & P. 191, speaking of a commercial contract operating after the outbreak of war though made before it, "that on the principles of English law it is not competent to any subject to do anything which may be detrimental to the interests of his own country." If the principle of this decision be applied to the construction of these contracts the suspensory clauses must be read as if they contained the words "an Anglo-German war always excepted"; in that case under *Esposito* v. *Bowden* the contracts became discharged. If the above passage be applied and the suspensory clauses be read as the appellants contend then in my opinion the contracts never were valid. They were void from the outset on grounds of public policy. It is incidental to the conduct of war that the Sovereign should be free to bring pressure to bear on the enemy by crippling his commerce and exhausting his resources; it is incidental to the conduct of war that the resources of the Sovereign's subjects should be free to be employed lawfully in preserv-

ing and extending the resources of the realm. It is further important to its conduct that there should be no clog on the Sovereign's power to impose his will on the enemy through fear of the inclusion of unfavourable economic conditions in any treaty of peace. The present contract involves large sums. Your Lordships were told that its future performance represents £10,000,000 to the buyers, and it well may be so. Multiply these contracts say a hundredfold—no extravagant hypothesis—and what is the result on the conduct of the war? If these suspensory clauses are valid the enemy knows three things—the first that he may expend certain of his material resources without stint, for his right to replenish them in enormous quantities is assured at or shortly after the conclusion of peace; the second that the present employment of these raw materials as British resources during the war, whether in the way of commerce or in the actual supply of combatant needs, is hampered by the existence of huge future commitments, performable at an uncertain and perhaps not distant date; the third that he may rest assured that the imposition of commercial disadvantages in the treaty of peace is *pro tanto* neutralised, and that military resistance may be prolonged in proportion. I think it plain, as it was thought by the Courts below, that such suspensive clauses as are in question here tend to defeat the successful conduct of the war on His Majesty's part, and are therefore contrary to public policy and render the contracts void.

I do not forget how limited is the extent to which courts of law can guide their decisions by their views of public policy, nor am I insensible to the fact that in given circumstances, perhaps in circumstances as they are now, more profits may be lost by British than by enemy subjects if all mutually executory trading contracts are discharged on the outbreak of war. How this may be in my opinion a court of law is not competent to inquire or decide. Is it to be guided by the sums involved, the profits in prospect, or the economic value of the particular commodity to the general commerce and industry of the nation? Is it to call upon private parties to give evidence of the existence of the contract (probably jealously concealed), to which others are parties and they are strangers? It is for the executors to investigate and for the Legislature to provide for such possibilities. All that judges can do is to adhere to established rules, to ascertain their logical foundations, and to apply them impartially to disputed cases.

There remains a question as to the effect of the Legal Proceedings Against Enemies Act 1915. The respondents were British subjects, not under any disability, and therefore competent suitors for a declaration under that Act. The question is how their contractual obligations were affected by the outbreak of war. Let the appellants' case be put at its highest. Suppose, for example, that the contract provided in terms for the continuance of the respondent's obligations, let English law be what it may; such might be the effect if the contracts were German contracts, and the appellants proved that German law was the opposite of English law in this matter. Suppose, again, that the contract provided in terms that no English Court should pass upon it, which, even if the arbitration clause were governed by *Scott* v. *Avery*, 5 H.L.C. 811, as it is not, would be as favourable to the appellants as could be. What then? These provisions would still be but parts of a mutually executory trading contract between British subjects and His Majesty's enemies, and if the view I have submitted to your Lordships is right, the contract, clauses and all, came to an end on the outbreak of war. If so, neither these clauses nor any like them could be prayed in aid as answers to the claim, which the respondents were entitled to make. The declaration adjudged to them was in my opinion right, and the appeal should be dismissed.

Appeal dismissed.

Dynamit Actien-Gesellschaft (Vormals Alfred Nobel & Co.) v. *Rio Tinto Company, Limited.*

LORD DUNEDIN—The contract in this case is in its main features the same as those in the case which your Lordships have just considered. The same relief is asked. There is therefore no need to repeat what has already been said in that case. This case would be directly ruled by the other were it not for one distinction. The contract in *Ertel Bieber's* case was an English contract. The contract in this case was a contract made in Germany in the German language by a German agent of the English principal.

This distinction is sought to be utilised by the defendants in various ways which I will deal with separately.

In the first place, it is pointed out that there is an arbitration clause which provides that all disputes arising from the interpretation of the contract are to be settled by arbitration, and the fact that in default of agreement as to an umpire, application is to be made to the Chamber of Commerce at Frankfort-on-the-Maine, is said to point to a German arbitration. From this the defendants argue that the plaintiffs cannot bring themselves within the words of the Legal Proceedings against Enemies Act 1915, which gives its privilege only to a British subject entitled for the time being to an action in the High Court. On this point I entirely agree with the simple view expressed by Neville, J., and have nothing to add to what he has said.

Next, it is said that the contract being a German contract interpretation must be according to German law, and that it is accordingly necessary for the plaintiffs to show that, interpreted according to German law, there are clauses which involve intercourse with the enemy and avoid the contract, the suspensory clauses not interfering with those clauses.

It is here that I find the judgment of the Court of Appeal, though I thoroughly agree with much of what is said by the learned Judges, not quite satisfactory to my mind.

My reason is this—I do not find in this contract any exact counterpart to clause 12 in the *Ertel Bieber* contract. Clause 5 is appealed to, which is in these terms—"5. Delivery Calls. You are to give us notice at once for the year 1913, and for each of the following contract years, at latest on the 30th September of the year previous to delivery, of any special wishes regarding the deliveries of the quantities of sulphur ore which you are to take under this contract."

This, in my view, does not impose a duty, but merely gives an option. I need not, however, pursue the subject, as the ground on which the judgment in the *Ertel Bieber* case was based, that a clause suspending deliveries during the war but making them obligatory afterwards, is against public policy and therefore void, is equally applicable to the clause in this case. The only point, therefore, is whether the fact of this being a German contract to be interpreted according to German law prevents the application of this ground of judgment.

It seems to me that the fact of its being a German contract has no bearing on the question. I will assume that questions of interpretation are to be settled in accordance with German law. This is, perhaps, an arguable point, seeing that much of the performance—*e.g.*, the mining of the ore, the provision of the tonnage, etc.—is not to be performed in Germany. But I will assume it. Now what could the German Courts decide? If the contract continued to be carried out according to its terms there would necessarily be commercial intercourse. But the German Courts could decide that the suspensory clause stopped such intercourse and either did or did not leave other duties involving intercourse. If they decided that it did leave such duties, then again there would be intercourse. If they decided that it did not, then they might decide that the existence of the suspensory clause and the continuance of the contract after the war were not against German public policy. But they could not determine in such a way as to bind an Englishman in an English Court that such a clause with these effects was not against public policy and therefore binding on an English subject. Your Lordships will remember the quotation from Lord Alvanley's judgment in *Furtado* v. *Rogers*, 3 Bos. & P. 191, wherein he equiparates the rule of a common law founded on public policy to an actual prohibition contained in an Act of Parliament. It is illegal for a British subject to become bound in a manner which sins against the public policy of the King's realm. I think that the Court of Appeal has expressed the same views, although they are not directly pointed to the question of acceding to a suspensory clause which *ex hypothesi* is against the public policy of the English law. But the general principle as expressed by the learned Judges is the same and with their remarks I agree.

The defendants' counsel strove to liken this case to the cases of *Jacobs, Marcus, & Company* v. *Crédit Lyonnais*, 12 Q.B.D. 589, and *Re Missouri Steamship Company*, 42 Ch. D. 321. These cases have in truth no application. In the *Crédit Lyonnais* case a freighter was held not excused from the duty of furnishing a cargo on the ground that the shipping of the cargo was prohibited in a foreign port by a foreign law. It was held that an impossibility due to a foreign law is not like an impossibility due to a domestic law. It is an impossibility in fact not in law, and a supervening impossibility in fact does not excuse. That is the whole decision. In the *Missouri* case a contract of carriage which was entered into in Massachusets was to be entirely performed in England, and the Court held that it was therefore in all respects an English contract. That being so they held that a clause exempting the carrier from liability for default due to the fault of his servants, being a clause which was not void by the law of England as against public policy, could receive effect, and that the fact that by the law of Massachusets such a law would be void on that ground was an irrelevant consideration. This also has obviously no application to the question of whether an Englishman can be held in an English court of law to be bound by a stipulation which the English court holds it is illegal for him to undertake. The cases cited by Sankey, J., are I think in point.

The case therefore fails on its speciality, and is ruled by the case of *Ertel Bieber*.

I have rested my opinion on what I consider the broader and more satisfactory ground. But were it necessary so to decide I am clear that it is for those who say that the German law is different from the English to aver it as fact and to prove it. This they have not done, and that being so the German law must be presumed to be the same as the English.

I move that the appeal be dismissed, with costs.

LORD ATKINSON—I concur.

For convenience sake the appellant companies in these two cases have in argument been styled the Koenigs Company and the Dynamit Company respectively. The respondent company in both these cases claims declarations similar to those claimed in the *Ertel Bieber* case, in respect as to the Koenigs Company of two agreements, dated respectively the 7th February 1911 and the 17th March 1913, and as to the Dynamit Company of two agreements, dated respectively the 19th January 1910 and the 28th January 1913. Each of these four agreements has been in part performed, deliveries of ore having been made under each of them, and accordingly as to each of them the claim of the respondents is properly made without prejudice to the liabilities already incurred on the 4th August 1914, when war between this country and Germany was proclaimed. Some controversy arose as to whether certain German words used in the clause contained in each of the four contracts dealing with the prevention of the delivery or receipts of the ore contracted for by *force majeure* such as war, strikes, &c., should be the more correctly rendered into English by the word

"suspended" or the word "postponed." The translator of the respondents deposed that the word "suspended" was the English equivalent, but whether he was right or not makes in my view no difference whatever as to the legal effect of the declaration of war upon these agreements. It is, I think, plain that the word "war" in this clause covers war between Great Britain and Germany, and prevention by war includes both the physical operation of war and the legal consequences of a state of war.

In these two cases, just as in the *Bieber* case, the contracts purport to secure the benefit of vast transactions in trade to the appellant companies and through them to their country. The suspensory or postponement clause does not completely deprive the appellant companies of the enjoyment of these benefits nor their country of the advantages which, it must be taken, would result from the carrying on of that trade. It merely postpones the full enjoyment of their benefits till the end of the war, but meanwhile it secures to the appellant companies, so far as contracts can do so, the certainty that those benefits will ultimately be enjoyed by them and those advantages ultimately reaped by their country should the war not outlast the periods the contracts cover. That certainly is in my view a great present and immediate benefit to the enemy traders, the appellant companies, in the carrying on of their trade, and in so far as it is it defeats one of the objects of this country in going to war, namely, to cripple the trade and commerce of Germany. It consequently is opposed to the well known and long recognised public policy of this country. If that be so, as I think it is, then, apart from the points of difference which are said to distinguish these two cases from the *Ertel Bieber* case, the outbreak of the war made it illegal for an English subject to carry out such a contract, and as against him the war makes it void.

I agree with the Court of Appeal in thinking that there are in each of these cases just as there were in *Ertel Bieber's* case several clauses in the contracts unaffected by the suspensory clause which would authorise, and if observed necessitate sustained and frequent commercial intercourse between the appellant companies and the respondent company, and that for that reason, in addition to the first, the contracts should, as against the respondent company, subject to the point I am about to mention, be held to have been rendered illegal and void by the proclamation of war on the 4th August 1914. The first of these latter points as I understand it is this—Under the Trading with the Enemy Act 1915, section 1, sub-section 6, the plaintiff in such actions as the present must be a British subject entitled for the time being to bring an action in the High Court. By the definition clause a company incorporated in His Majesty's dominions, as is the respondent company, is included under the expression "British subject." I concur with the Court of Appeal in thinking that it is difficult to determine what class of British subject it was meant to identify by the words "entitled to bring an action in the High Court." It is possible they were used to exclude persons who, though British subjects, resided and traded in the enemy country and were therefore, as laid down by Lord Alvanley in *O'Connell* v. *Hector*, 2 Bos. & P. 14, to be considered for all civil purposes as much alien enemies as if they had been born in that country. The respondent company, however, does not come within this latter class, but as the appellants contend is excluded from the class of competent plaintiffs for another reason, namely, by reason of the form of the arbitration clauses contained in each of the contracts. And this is upon the authority of the well-known case of *Scott* v. *Avery*, 5 H.L.C. 811, followed in *Caledonian Insurance Company* v. *Gilmore*, 1893 A.C. 85. Those latter cases establish that though the parties to a contract cannot by a provision in it oust the jurisdiction of the courts of law, they may agree, as they did in these cases, that no right of action shall accrue until a third person shall have decided upon a difference arising between them touching the contract. The decision of the person named thus becomes a condition-precedent to the right to sue. The arbitration clauses in these four contracts are wholly different from that of *Scott* v. *Avery*. They are designed to oust the jurisdiction of the courts altogether, not to create a condition-precedent to the right to sue in them. They provide that "all disputes arising from the interpretation of the contract shall be settled by arbitration to the exclusion of the ordinary courts."

The principle of *Scott* v. *Avery* has no application to such a clause. The point is in my view entirely unsustainable. The next point is that each of these contracts was made in Germany between two German companies, the respective appellant companies and a German company the duly appointed agents of the respondents, is to be performed in Germany, and therefore that if about to be enforced in this country it ought to be construed and interpreted according to German law; and further, as I understand, that if so interpreted, though it might authorise the doing of an act so injurious to the interests of this State that the act would by the public policy of this country be prohibited and made illegal, yet it should still be enforced here in the meaning put upon it according to German law, and could not be held to be illegal.

That, in my opinion, is not the law. In *Kaufman* v. *Gerson*, 1904 K.B. 591, Collins, M.R., and Romer, L.J., quoted with approval the following passage from Westlake's Private International Law, 3rd sec. 215, p. 260—"Where a contract conflicts with what are deemed in England to be essential public or moral interests it cannot be enforced here notwithstanding it may be valid by its proper law. The plaintiff in such a case encounters that reservation in favour of any stringent domestic policy with which alone any maxims for giving effect to foreign laws can be received," and held that the plaintiff, a man domiciled in France, could not recover in England from the defendant, a woman likewise domiciled in France, upon an agreement in writing

made in France to pay him a certain sum of money, the signing of which agreement he had coerced her into by threats of criminally prosecuting her husband, the consideration being the abandonment of the prosecution, though according to French law there was nothing illegal in the transaction. In *Grell* v. *Ley*, 16 C.B., N.S. 73, it was decided that an agreement to be carried into effect in this country which would be void on the ground of champerty if made here is not the less void if made in a foreign country where the contract was legal. Erle, C.J., in giving judgment said—"Assuming, therefore, that the agreement was not illegal in the country where it was made, it becomes illegal when sought to be enforced here." No doubt the contract in this latter case was intended by the parties to be performed in England, but in *Kaufman* v. *Gerson* it is expressly found that the contract was by the parties to it intended to be performed in France, yet the same principle was applied. In *Hope* v. *Hope*, 8 D. M. & G. 731, it was held that though in that case, even supposing the parties to be domiciled in France and the agreement to be governed by French law, and to be valid according to that law, and to have been performed as to the parts which were invalid according to English law, it could not be enforced in England as to any part of it. Turner, L.J., at p. 743, said—"A contract may be good by the law of another country, but if it be in breach, fraud, or evasion of the law of this country, or contrary to its policy, the courts of this country cannot as I conceive be called upon to enforce it." I emphasise the words "or contrary to its policy." In *Rousillon* v. *Rousillon*, 14 Ch. D. 351, Fry, L.J., at p. 369, says—"He (Mr Cookson, plaintiff's counsel) has insisted that even if the contract was void by the law of England as against public policy, yet inasmuch as the contract was made in France it must be good here because the law of France knows no such principle as that by which unreasonable contracts in restraint of trade are held to be void in this country." It appears to me, however, plain on general principles that this Court will not enforce a contract against public policy wherever it may be made. It seems to me also absurd to suppose that the courts of this country should enforce a contract they consider to be against public policy because it happens to be made somewhere else. Well, the public policy of this country prohibits trading with the enemy by British subjects.

The strongest case, however, against the appellant's contention is in my view that of *Santos* v. *Illidge*, 8 C.B. N.S. 861, when properly examined. There the action was brought against a British subject by a native of Brazil to recover damages for non-delivery to the plaintiff in Brazil of certain slaves living in Brazil and owned by the defendant, and then sold by him to the plaintiff by a contract made in Brazil. The contract was to be performed in Brazil, and might be lawfully performed there. The question for decision was whether, having regard to the time when, and the mode in which, and the purposes for which, the slaves were acquired by the defendant, the holding and sale of them by him was not made unlawful by the provisions of a certain English statute binding on defendant as an English subject, namely 5 and 6 Vict. c. 98. The Court of Exchequer Chamber decided that on the proper construction of the fifth section of this statute the defendant was not prohibited from holding and selling these in Brazil, and accordingly the plaintiff succeeded; but the whole case proceeded upon the basis that had these things been prohibited by this statute the contract could not have been enforced against the defendant in an English court despite the fact that it was made in Brazil and was to be performed in Brazil and was there lawful.

I now turn to *Esposito* v. *Bowden*, 7 E. & B. 763. I find that Willis, J., at p. 781, says that "The force of a declaration of war is equal to that of an Act of Parliament prohibiting intercourse with the enemy except by the Queen's licence. As an act of State done by virtue of the prerogative exclusively belonging to the Crown such a declaration carries with it all the force of law." Well, many proclamations forbidding trading with the enemy have been made by the Crown since the present war. Willes, J., then quotes with approval the following passage from the judgment of Lord Alvanley in *Furtado* v. *Rogers*, 3 Bos. & P. 191, "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, and, on the same principle, when hostilities are commenced between the country of the underwriters and the assured the former is not bound to fulfil his contract." Mr Compston complained that he had not been given an opportunity of proving what was the proper construction of these four contracts according to the law of Germany. In the absence of that proof it must be assumed to be similar to the law of England, but even if one makes to him the very largest concession he can expect or demand, and assumes, what is extremely unlikely, that the law of Germany and the state of policy of Germany upon which the law is founded does not in any way or to any extent prohibit trading with Germany's enemies, I think the above cited authorities clearly establish that even if it were so a British subject, once war breaks out, is bound not to trade with Great Britain's German enemies; that contracts binding him to do so become as to him illegal and void, and that the courts of this country will not enforce them. The rights and liabilities of British subjects depend in these matters for their legality upon what British laws and British policy demand and not upon what the law or public policy of Germany prescribes in reference to commercial contracts made with its subjects. The last of these three points raised by the respondents was that the proceedings under this statute—the Legal Proceedings against Enemies Act 1915 (5 Geo. V, cap. 36)—are not proceedings enforcing contracts within the meaning of the foregoing authorities. But they are proceedings in which the effect of the present war upon the rights and liabilities of the parties to a contract made

before the war is declared and determined. The very object of the statute was to enable these declarations to be made in the case of an enemy defendant without waiting till an action could be brought to enforce the contract. Such declarations may in ordinary practice be made though no further relief be asked for. If an action were brought against the respondents for damages for breach of contract, the first step the Court would have to take would be to ascertain what the rights of the plaintiff and what the liabilities of the defendant under the contract were, and what the effect of war on both, before any damages could be awarded. It appears to me to be a most important step in the enforcing of the contract, and part of the process of enforcing it. I concur with the Court of Appeal in thinking that this point is as sound as the other. I do not think it necessary to refer to those authorities dealing with the sale or management or discharge of the liabilities attaching to the real or personal property situated in this country of an enemy alien, as they do not touch the case, though often cited. I think the decision appealed from was right and the appeal should be dismissed, with costs.

LORD PARKER—I agree.

The only substantial difference between this case and that of *Ertel Bieber & Company* v. *Rio Tinto Company, Limited*, which your Lordships have just decided, is that the contract to which this case relates and under which ore was sold by the respondents to the appellants, to be delivered over a series of years, was a contract in the German language and was entered into in Germany, so that it is argued that it must be construed and the rights and liabilities of the parties thereto determined according to German law. It appears that an application was made on behalf of the appellants to Sankey, J., to adjourn the trial of the action in order to allow time to procure evidence on German law. This application was refused, leave being given to renew it when the action came on for hearing. The application was not in fact renewed, counsel for the appellants contending that the *onus* of proving what the German law was rested on the respondents. In my opinion this contention was erroneous. Until the contrary be proved the general law of a foreign State is presumed to be the same as the law of this country. The point was recently considered by the Judicial Committee of the Privy Council in the case of the steamship "*Parchim*" (*ante*, p. 777), 1918 A.C. 157. It follows that the *onus* of proving that the German law differs from the law of this country rested with the appellants, and the appellants not having discharged this *onus* the presumption holds good.

Assuming, however, that the Court had heard evidence as to German law, and had decided as a matter of fact that according to German law the *force majeure* clause in the contract covered the case of war between the United Kingdom and Germany, and that there was nothing contrary to German public policy in the clause so interpreted, this would not, in my opinion, conclude the matter in the appellants' favour. Whenever the courts of this country are called upon to decide as to the rights and liabilities of the parties to a contract, the effect on such contract of the public policy of this country must necessarily be a relevant consideration. Every legal decision of our courts consists of the application of our own law to the facts of the case as ascertained by appropriate evidence. One of these facts may be the state of some foreign law, but it is not the foreign law but our own law to which effect is given, whether it be by way of judgment for damages, injunction, order declaring rights and liabilities, or otherwise. As has been often said, private international law is really a branch of municipal law, and obviously there can be no branch of municipal law in which the general policy of such law can be properly ignored. If the policy of our law renders it unlawful for a subject of the Crown to contract with a foreigner that if war break out between this country and the State of which the foreigner is a subject the latter shall be indemnified against or be relieved from or receive compensation for a loss which he would otherwise incur, no subject of the Crown can be allowed to evade the rule by entering into such a contract out of the jurisdiction, and stipulating expressly or impliedly that the contract shall be governed by a foreign law. The late Mr Westlake sums up the law on this point in the following proposition (Private International Law, 4th ed., sec. 215)—"When a contract conflicts with what are deemed in England to be essential public or moral interests, it cannot be enforced here notwithstanding that it may have been valid by its proper law." There is ample authority for this proposition. The only case cited as laying down a contrary rule was *Santos* v. *Illidge*, 8 C.B.N.S. 861, but that case turned not upon any general rule of public policy, but on the construction of a particular statute.

It is clear that in deciding under the provisions of the Legal Proceedings Against Enemies Act 1915 as to the effect of the war on the rights and liabilities of the parties to a contract, it is the effect of the war according to English law which is to be determined or declared, and it follows, in my opinion, that the rights and liabilities in question are also the rights and liabilities of the parties according to English law. The *force majeure* clause in the contract in question, even if valid according to German law, must be held void in the courts of this country as contravening a general rule of public policy. If this be so, the suggested ground for distinguishing this case from the case of *Ertel Bieber & Company* v. *Rio Tinto Company, Limited*, entirely breaks down.

In my opinion this appeal also fails and should be dismissed, with costs.

LORD SUMNER—I concur.

Appeal dismissed.

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