[HIGH COURT OF AUSTRALIA.]

HIRSCH AND OTHERS . . . . APPELLANTS;
DEFENDANTS,

AND

THE ZINC CORPORATION LIMITED . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Sept.* 25, 27, 28; *Oct.* 1, 2, 12.

Barton, Isaacs, Higgins, Gavan Duffy and Powers JJ.

Contract—Sale of goods—Sale by British subject to persons resident in Germany—Sale of whole production of zinc concentrates—Effect of outbreak of war—Dissolution of contract—Suspension of contract—Payment after outbreak of war for goods delivered before—Licence to make payments—Adjustment of price after outbreak of war—Prohibition of sale to others—Arbitration—Alteration of basis of contract—Trading with the Enemy Acts 1914 (*Nos.* 9 *and* 17 *of* 1914), *secs.* 2, 3—*Enemy Contracts Annulment Act* 1915 (*No.* 11 *of* 1915), *sec.* 3 (5)—*Enemy Contracts Cancellation Act* 1915 (*Vict.*) (*No.* 2603), *sec.* 3 (5)—*Arbitration Act* 1915 (*Vict.*) (*No.* 2614), *sec.* 5—*Trading with the Enemy Act* 1914 (*Imperial*) (4 & 5 *Geo. V. c.* 87), *sec.* 1—*Imperial Proclamation of 9th September* 1914, *clause* 7.

By a contract made in 1908, as varied 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 and who had a representative in Australia, agreed to purchase during each of the ten years 1910 to 1919 the whole of the plaintiffs' production of zinc concentrates at their mines in Australia, where the concentrates were to be delivered. The production was not to be less than 85,000 tons or more than 95,000 in each year, and the plaintiffs were not, during the continuance of the agreement, to sell any zinc concentrates to anyone else. For each parcel of concentrates delivered payment was to be made in Melbourne, within seven days after delivery of a *pro formâ* invoice for the parcel, of 90 per cent. of the amount of such invoice and the prices were to be adjusted, as to 50,000 tons of each year's deliveries, on the average market prices of spelter and silver for the year of delivery, and, as to the surplus beyond

50,000 tons on the average market prices for the six months following the year of delivery or if the average price for any such period of six months exceeded £23 per ton then at the defendants' option on the average market prices of the whole of the year following the year of delivery. For the purposes of adjustment the market value of spelter and silver was to be "the exact average market price for spelter as per London Public Ledger quotations and silver as per Messrs. Sharp & Wilkins's Prices Current." The adjustment was to be made as soon as possible after receipt of mail advices as to prices. It was provided that in the event of (*inter alia*) any cause beyond the control of either the plaintiffs or the defendants preventing the carrying out of the agreement, the agreement "shall be suspended during the continuance of any and every such disability." It was also provided that any difference or dispute arising in respect of any matter under or arising out of the agreement should be referred to arbitration, that the contract should be deemed to be a contract to be performed in the State of Victoria, and that the parties submitted to the jurisdiction of the Victorian Court.

Held, that on the outbreak of the War the contract, so far as concerned payment for concentrates which had been delivered before that event, was neither dissolved nor suspended; that such payment might lawfully be made and received after the outbreak of the War; and that neither the provision for adjustment, nor the option given to the defendants as to the basis of adjustment, nor the provision for arbitration, nor the effect of the War upon the market price of spelter, was a bar to the plaintiffs' right to recover the difference between the 90 per cent. of the amount stated in the *pro formâ* invoice, which had been paid, and the adjusted price.

Zinc Corporation Ltd. v. *Hirsch*, (1916) 1 K.B., 541, distinguished.

Held, by *Barton*, *Higgins* and *Powers* JJ., that sec. 3 of the *Trading with the Enemy Acts* 1914 does not prohibit the receipt of payments by or on account of enemies arising out of transactions entered into before the outbreak of the War or the enforcement of such payments, clause 7 of the Imperial Proclamation of 9th September 1914 operating as a licence for such payments.

Decision of the Supreme Court of Victoria (*Hood* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

Two actions were brought in the Supreme Court by the Zinc Corporation Ltd. against Aron Hirsch, Abraham Hirsch, Emil Hirsch and Siegfried Hirsch. In one, the writ in which was issued on 7th September 1915, the plaintiffs claimed £41,920 16s. 2d. alleged to be due by the defendants to the plaintiffs under certain contracts in respect of 50,000 tons of zinc concentrates delivered by the plaintiffs to the defendants during the year 1914, or alternatively as being the balance of the price of 50,000 tons of zinc concentrates sold and delivered to the defendants. In the other, the writ in which

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was issued on 12th April 1916, the plaintiffs claimed £42,913 14s. 7d. alleged to be due by the defendants to the plaintiffs under the same contracts in respect of 4,500 tons of zinc concentrates delivered by the plaintiffs to the defendants from 20th July to 5th August 1914, or alternatively as being the balance of the price of 4,500 tons of zinc concentrates sold and delivered to the defendants.

The plaintiffs were a company incorporated in England having their head office in London. Their main business was the production of zinc concentrates at Broken Hill in New South Wales. The defendants were metal merchants resident and carrying on business at Halberstadt in Germany under the name of Aron Hirsch & Sohn, and were therefore, after the declaration of war between Great Britain and Germany on 4th August 1914, alien enemies. On 14th December 1908 a contract was entered into between the Zinc Corporation Ltd. (a company incorporated in Victoria), predecessors of the plaintiffs, and the defendants whereby the Company agreed to sell to the defendants 355,000 to 385,000 tons of zinc concentrates to be produced at Broken Hill; deliveries of the concentrates were to be taken at Broken Hill in about equal monthly deliveries as far as the plaintiffs' production would allow. The contract included (*inter alia*) the following provisions:—

"7. For each parcel of concentrates delivered payment to be made at the registered office of the sellers in Melbourne within seven days after the delivery by the sellers to the buyers of a *pro formâ* invoice for such parcel and to the extent of 90 per cent. of the amount of such invoice, the balance of 10 per cent. to remain unpaid pending the final adjustment of the account as provided in clause 8."

"8. The market value of spelter (ordinary brands) and standard silver (spot price) for adjustment and final invoice purposes shall be the exact average market price for spelter as per London Public Ledger quotations and silver as per Messrs. Sharp & Wilkins's Prices Current."

"17. In the event of any strike, lock-out, combination of workmen, interference of trade unions, suspension of labour whether partial, local or general, and from whatever cause arising, floods, storms, fire, stoppage of water supply, washaways of railways,

accidents, acts of God, force majeure or perils of the sea, breakdown of machinery or inability of the Silverton Tramway Co. to provide the necessary trucks for taking away the concentrates, or 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."

"21. Any difference or dispute arising concerning the construction of this agreement, or in respect of any matter or thing thereunder or arising thereout shall be referred to the arbitration of one person mutually selected or to arbitration and an umpire appointed in accordance with the provisions of the Victorian *Supreme Court Act* 1890 or any statutory modification thereof, and the decision given in each and every case so referred shall be final and binding on both parties and any submission may be made a rule of the Supreme Court of the State of Victoria . . . by either party.

"22. Any notice in writing hereunder may be deemed duly given by the sellers to the buyers if signed by or on behalf of the sellers and sent by registered letter to the buyers' agent, Francis Hugh Snow, 89 King William Street, Adelaide."

"23. This contract is to be deemed a contract to be performed in the State of Victoria, and the parties hereto submit to the jurisdiction of the Court of that State."

By a contract of 20th June 1910 varying and extending the provisions of the previous contract and confirming it as modified, the Company agreed to sell to the defendants in and during each of the ten years 1910 to 1919, both inclusive, the Company's production of zinc concentrates, such production not to be less than 85,000 tons or more than 95,000 tons in each year. The contract included the following provisions (*inter alia*) :—

"3. The sellers shall not so long as this agreement shall be in force sell any zinc concentrates to any person or persons firm or firms or corporation or corporations other than the buyers."

"6. The prices of the first 50,000 tons of each year's deliveries shall be adjusted on the average market prices of the year of delivery and of the residue on the average market prices of the six calendar months following the year in which delivery was made and taken.

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Should the average price of spelter for any such period of six calendar months be over £23 the buyers are to have the option to demand adjustment of the price to be paid on the basis of the average prices of the whole of the year following the year in which delivery has taken place, such option to be declared on or before 5th July of the year following the year in which delivery has taken place.

"7. The adjustment of all accounts shall be made as soon as possible after the receipt of the mail advices as to the prices of spelter and silver as mentioned by the principal agreement."

On 4th April 1912 an agreement was made between the Victorian Company, the liquidator thereof, the plaintiffs and the defendants whereby the plaintiffs undertook to perform the contract of 14th December 1908 as varied and extended by the contract of 20th June 1910 as if the plaintiffs were parties to it in lieu of the Victorian Company, and the defendants accepted the liability of the plaintiffs in lieu of that of the Victorian Company.

In the year 1914 the concentrates which were the subject matter of the actions were delivered and 90 per cent. of the *pro formâ* invoices was paid in respect of them, the amounts sued for being the balances alleged to be due on final adjustment in accordance with the contract.

By their defence to the first action the defendants said (*inter alia*):—

"8. The quotation (if any) for spelter in the London Public Ledger and for silver in Sharp & Wilkins's Prices Current after the commencement of the present war were not or some of the said prices were not market prices at all. No quotations for spelter were published in the London Public Ledger during the months of August, September and October 1914.

"8*a*. Alternatively the foundation and basis of the said contracts of 14th December 1908 and 20th June 1910 was that London and/or London Public Ledger quotations represented the value of spelter in the world's market and/or in the European market and not in England alone and that the profit resulting from the sale of spelter should be equitably divided between the miner and the smelter.

"8*b*. It was an implied term of the said contracts that the conditions regulating the London quotations and/or London Public Ledger quotations for spelter which existed at the date of the said

contracts should continue to exist and that the profit resulting from the sale of spelter should be equitably divided between the miner and the smelter and that the quotation in the London Public Ledger should represent the price of spelter in the world's market and/or in the European market and not in England alone.

"8*c*. By reason of the outbreak of the War (1) the chief sources from which spelter had previously come to England viz. Belgium France and Germany were closed to England and the smelting plants in England were at all times entirely inadequate to deal with any supplies of concentrates which could be brought there and therefore the prices of spelter quoted in London and/or the London Public Ledger ceased to bear any relation to the price obtainable for zinc ore; (2) the prices quoted for spelter in London and/or the London Public Ledger were not and could not be obtained by the defendants or at all; (3) the quotations for spelter in London and/or the London Public Ledger have not at any time since 4th August 1914 represented the price of spelter in the world's market and/or in the European market."

Those defences were also taken in the second action in pars. 8, 14, 14*a* and 14*b* respectively.

The defendants also contended in their defence to each action that the contracts of 14th December 1908 and 20th June 1910 were dissolved by the outbreak of the War and that the rights of the plaintiffs under the contracts were thereby also dissolved or in abeyance during the continuance of the War, and further that clause 17 of the contract of 14th December 1908 operated as a suspension of the contracts and of the rights of the plaintiffs thereunder during the continuance of the War.

The actions were heard together by *Hood* J., who gave judgment for the plaintiffs for £84,129 6s. 6d., being £41,897 10s. 9d. in respect of the first action and £42,231 15s. 9d. in respect of the second, with costs.

From that decision the defendants now appealed to the High Court.

McArthur K.C. and *Starke*, for the appellants. The contract between the plaintiffs and the defendants was altogether dissolved

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on the declaration of war (*Zinc Corporation Ltd.* v. *Hirsch* (1)), and the defendants were discharged from any further obligations under it. There was no obligation upon the defendants to pay anything at the time of the outbreak of war, and none could arise afterwards because the contract was dissolved. If a debt had then existed payment could have been enforced, for under clause 7 of the Proclamation of 9th September 1914 payment was permitted by royal licence and would not be trading with the enemy under sec. 2 (2) of the *Trading with the Enemy Acts* 1914 (*Janson* v. *Driefontein Consolidated Mines Ltd.* (2) ; *Halsey* v. *Lowenfeld* (3)).

[ISAACS J. referred to the *Trading with the Enemy Amendment Act* 1914 (Imperial) (5 Geo. V. c. 12), sec. 14.]

There was not only no debt existing at the outbreak of war, but there might never have been any debt owing by the defendants to the plaintiffs, for on adjustment it might have been found that nothing was owing beyond what had been paid or even that the plaintiffs had been overpaid. There is no debt until adjustment in the mode provided by the contract, and in order to have that adjustment there would have to be intercourse between the plaintiffs and the defendants, that is, intercourse with the enemy. For that reason, if the whole contract was not dissolved, the right to payment was suspended until the end of the war. (See *Zinc Corporation Ltd.* v. *Hirsch* (4).) Under clause 17 of the contract of 14th December 1908 also, the right to payment was suspended during the continuance of the War. The alternative claim for goods sold and delivered is based on a promise to be implied from the circumstances, and could only arise in the event of the contract having been dissolved by the War. But the implied promise would then be one which was made after the outbreak of war and the law will not imply a promise which, if in fact made, would have been illegal. The claim must therefore rest on the contract alone. One of the arguments which prevailed with *Hood* J., namely, that the payment could be enforced because it was for the benefit of the British Empire, is contrary to the decision of this Court in *R.* v. *Snow* (5). As to the other

(1) (1916) 1 K.B., 541.
(2) (1902) A.C., 484, at p. 509.
(3) (1916) 2 K.B., 707.
(4) (1916) 1 K.B., at p. 556.
(5) 23 C.L.R., 256.

argument which influenced him, namely, that Snow had authority to adjust the accounts: if he had that right he must also have had the right to correspond with his principals, the defendants, and that would be unlawful as coming within the definition of trading with the enemy. But the agency was abrogated by the outbreak of war. Whatever the meaning of clause 17 of the first contract may be, it does not affect clause 17 of the second contract, but clause 3 was intended to operate in the event of a suspension under clause 17. If clause 3 stands, it is avoided by the *Enemy Contracts Annulment Act* 1915. That Act and the judgment of the Court of Appeal in *Zinc Corporation Ltd.* v. *Hirsch* (1) leave the obligations with respect to past deliveries to be dealt with according to the principles of the common law. One of those principles is that where a contract is abrogated or dissolved by the outbreak of war the whole of the obligations under the contract which have not already accrued are destroyed. The obligations which involve intercourse with the enemy cannot be severed from those which do not involve such intercourse. Here a new act is to be done in order to entitle the plaintiffs to payment. A balance has to be found to be due, and that must be found by the parties who are adjusting the accounts. The option given by clause 6 of the second contract is a right given to the defendants. That right cannot be exercised by them by reason of the War. If one of two alternatives is abrogated by the War, the other goes also. The contracts show that the basis of the agreement was that there should be an ordinary London market for spelter. The parties contracted on the footing that a certain state of things should continue to exist, and that state of things came to an end on the outbreak of war. The payment therefore cannot be enforced (*F. A. Tamplin Steamship Co. Ltd.* v. *Anglo-Mexican Petroleum Products Co. Ltd.* (2)).

[ISAACS J. referred to *Gelling* v. *Crespin* (3).]

[Counsel also referred to *Jones* v. *Thompson* (4); *Trotter's Law of Contract during War* (Supplement), p. 39.]

Mitchell K.C. (with him *Mann*), for the respondents. (Counsel was

(1) (1916) 1 K.B., 541.
(2) (1916) 2 A.C., 397, at p. 403.
(3) 23 C.L.R., 443.
(4) E. B. & E., 63.

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heard only as to the option given to the defendants by clause 6 of the second contract, and as to the adjustment of the account.) The contract was to be performed wholly in Australia, and could not be performed unless the defendants had an agent here. War does not terminate every kind of agency. The exceptions are based on the necessities of the case. Here the agent was held out as authorized to do everything which the defendants could have done under the contract. The necessity here was the exercise of the option which the principal himself could not exercise by reason of the War. (See *South Australia* v. *Victoria* (1); *Australasian Steam Navigation Co.* v. *Morse* (2); *Tingley* v. *Müller* (3).)

[ISAACS J. referred to *Gwilliam* v. *Twist* (4).]

For the purpose of adjustment the plaintiffs have taken the period which would entitle them to the least price. If the option had been exercised, the price would have been much higher. The option is in respect of goods which have been in part paid for. The most that can be said for the defendants is that circumstances have happened which rendered it impossible for them to exercise their option. The defendants must contend that there is an implied condition that if they cannot exercise their option they are not to pay at all. [He referred to *Leake on Contracts*, 6th ed., p. 512; *Barkworth* v. *Young* (5); *Brown* v. *Royal Insurance Co.* (6).] It was not illegal for the defendants to exercise their option. The receiving of a communication from the defendants exercising their option is not trading with the enemy, nor is the acting upon that communication.

[HIGGINS J. referred to *In re Abbott*; *Peacock* v. *Frigout* (7).]

A communication from the defendants as to the option would be lawful as being relevant to the payment, for a licence to receive payment from an enemy must cover that which is incidental to the payment or without which the payment cannot be made. Such a licence should be liberally construed (*Flindt* v. *Scott* (8)). Adjustment in the contract means only calculation and computation, and does not require anything to be done by the defendants. On the

(1) 12 C.L.R., 667, at p. 700.
(2) L.R. 4 P.C., 222.
(3) W.N. 1917, p. 180.
(4) (1895) 2 Q.B., 84, at p. 87.
(5) 4 Drew., 1, at p. 24.
(6) 1 El. & El., 853.
(7) (1893) 1 Ch., 54.
(8) 5 Taunt., 674.

claim for a *quantum meruit* the plaintiffs are entitled to the least price that could be determined under the terms of the contract (*James* v. *Cotton* (1)). [He also referred to *Seligman* v. *Eagle Insurance Co.* (2).]

[ISAACS J. referred to *Leake on Contracts*, 6th ed., pp. 40, 576 ; *Patmore* v. *Colburn* (3).]

McArthur K.C., in reply, referred to *Sinclair* v. *Brougham* (4) ; *W. L. Ingle Ltd.* v. *Mannheim Insurance Co.* (5).

Cur. adv. vult.

Oct. 12.

The following judgments were read :—

BARTON J. Under two contracts of very special terms for the sale by the plaintiffs to the defendants of zinc concentrates, which were the product of mines of the plaintiffs at Broken Hill, which concentrates contained a proportion of silver, deliveries were made at the mines during several successive years to the named agent of the defendants in Australia, and were paid for by him in due course up to the end of 1913. But in 1914 deliveries were made from 1st January to 20th July (the subject of the first action), and from 20th July to about the time of the outbreak of the War in August (the subject of the second action). On these the agreed proportion, 90 per cent., was paid to the plaintiffs by the agent of the defendants, termed in the contract "the buyers' Australian representative." The balance was not fully ascertained at the outbreak of the War, and is still unpaid ; and these actions, which were heard together, were brought at a time when, as the plaintiffs contend, the liability of the defendants had been duly ascertained. The main question is whether the balance can be recovered from the defendants, who are alien enemies resident in Germany, at all, that is, whether the contracts, having been dissolved by the fact of war so far as they were executory, are dissolved also in respect of any obligation of the defendants to pay for the concentrates which they have received ; and whether, if not dissolved in that respect, the obligation of the

(1) 7 Bing., 266.
(2) (1917) 1 Ch., 519, at p. 525.
(3) 1 C. M. & R., 65.
(4) (1914) A.C., 398.
(5) (1915) 1 K.B., 227.

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defendants is not suspended or in abeyance until the end of the War. A further question is whether the obligation of the defendants is not at an end by reason that the quotations published in the London Public Ledger, which were to represent the value of spelter in the world's market, ceased after the outbreak of war to represent that value, it being an implied term of the contracts that the conditions regulating the London Public Ledger quotations, which conditions existed at the date of the contracts, should continue to exist, as it is asserted they ceased to do, and that the Ledger quotations should continue to represent the price of spelter in the world's market, which it is said they ceased to represent. It was contended that these quotations no longer bore any relation to the price obtainable for zinc ore. The defendants said that, the basis for ascertainment of the price being gone, it was unascertainable, and therefore the defendants were not to be subject to judgment for any sum. *Hood* J., in the Supreme Court of Victoria, gave judgment for the plaintiffs, and the defendants now appeal.

I shall consider first the questions whether the outbreak of war dissolved the contracts not only as to things executory but as to payment for deliveries made before war, and whether the plaintiffs' right to payment, if not determined, was suspended during the War. I reserve for the present important questions arising on the contracts as to the exercise of an option by the defendants and as to the adjustment of prices, as those questions bear upon the ascertainment of the sum (if any) payable.

The defendants relied strongly on the case of *Zinc Corporation Ltd.* v. *Hirsch* (1). No doubt the judgments delivered in the Court of Appeal in that case bear the interpretation that the agreements were dissolved *in toto* by reason of clause 3 of the agreement of 1910, which forbade the sellers while the agreement was in force to sell any zinc concentrates to any buyers other than the defendants. It was held that this agreement had the effect of preventing the plaintiffs from using their resources for the benefit of the Empire, and therefore that the further performance of the contract after the outbreak of war became illegal as being detrimental to the interests of the Empire and of assistance to the King's enemies. It was held also

(1) (1916) 1 K.B., 541.

by two of the Lords Justices that continued performance would involve commercial intercourse with the enemy, and that the agreement had become illegal on that ground also and was dissolved. Neither of these grounds appears to me to affect or to have been intended to affect the question whether the legal liability of the defendants, if it otherwise exists, is susceptible of enforcement. I think the true reading of the judgments, while no doubt they held the agreement to be dissolved, is that the Court did not intend to say that the dissolution released or absolved the alien enemy from liability in respect of a right, accrued during peace, to be paid for deliveries made during peace, and for which part of the price had been paid during peace, the exact amount of an unpaid balance known to exist having merely to be adjusted (by the creditors, as I think I shall show) after the declaration of war. *Swinfen Eady* L.J., after dealing with various provisions the execution of which (if the contract subsisted in all respects except the deliveries suspended under clause 17) would involve commercial intercourse with the enemy, said (1) :—" The result is that the outbreak of war has dissolved the contract between the parties so far as regards the future performance after 4th August 1914. The remedy of either side for what had previously been carried out remains in abeyance until the termination of the War." He cited *Esposito* v. *Bowden* (2) and *Janson* v. *Driefontein Consolidated Mines Ltd.* (3), per Lord *Lindley*. The first of these passages, as pointed out by *Hood* J., refers only to the carrying out of an executory contract. The passage from the judgment of Lord *Lindley* in *Janson's Case*, as *Hood* J. also pointed out, is preceded by a quotation from *Arnould on Insurance*, which refers to the suspension of the right of an alien enemy to sue on a policy.

A close perusal of the judgments of the learned Lords Justices who sat with *Swinfen Eady* L.J. seems to show that in declaring the contract dissolved they were not in any way disputing the just right of the plaintiffs to be paid for that which they had already delivered in their past performance of the contract, or rather the duty of the defendants to pay for that which they had already received under it while it remained lawful. In fact the decision,

(1) (1916) 1 K.B., at p. 556. (2) 7 E. & B., 763, at pp. 779, 783.
(3) (1902) A.C., at p. 509.

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so far as it rested on clause 3 of the second contract, depended on a stated principle which cannot be invoked as a bar to payment for goods already received by the alien enemy before the War.

Two other circumstances are cogent in this connection. The first is that all of the Lords Justices who sat in the case of *Zinc Corporation Ltd.* v. *Hirsch* (1) had been members of the Full Court of Appeal who decided the case of *Porter* v. *Freudenberg* (2) in the previous January, and who affirmed finally the proposition that an alien enemy may be sued in the King's Courts, and affirmed it without reservation in a case in which the cause of action arose after the outbreak of war. The other circumstance is found in the formal judgment which was affirmed in *Zinc Corporation Ltd.* v. *Hirsch*, and which is quoted in a note at p. 551 of the report. That judgment adjudged and declared that the contract—the subject both of that case and of the present—" be and the same was hereby dissolved as from . . . 4th August 1914 by the existence of a state of war between Great Britain and Germany, and that the plaintiffs " (the Zinc Corporation) " as from the said time were and are released and absolved from any obligation at any time to supply to the defendants or their assigns any zinc concentrates ; " but the note shows that the declaration was " without prejudice to the rights of either party in respect of concentrates supplied or which ought to have been supplied prior to the said time or to moneys paid to the special trust account . . . or to any cause of action which had arisen prior to 4th August 1914." The rights of the plaintiffs, therefore, in respect of concentrates supplied before the outbreak of war were saved by the declaration.

This declaration, however, was consistent with the abeyance until the termination of the War of the remedy of either side for what had been previously carried out. The right of action of the plaintiffs in that respect was not in question in the case.

So far as the right of payment is concerned, the King's Proclamation of 9th September 1914 must now be referred to. After setting out a number of prohibitions of acts constituting trading with the enemy, which need not be quoted at length, but which included, see clause 5, (1) the paying any sum of money to or for the benefit

(1) (1916) 1 K.B., 541. (2) (1915) 1 K.B., 857.

of an enemy, and (9) the entering into any commercial, financial, or other contract or obligation with or for the benefit of an enemy, clause 7 provides as follows: "Nothing in this Proclamation shall be deemed to prohibit payments by or on account of enemies to persons resident, carrying on business or being in Our Dominions, if such payments arise out of transactions entered into before the outbreak of war or otherwise permitted."

It would be absurd to contend that a forbearance to prohibit payments of this kind by or on account of enemies to persons in the King's Dominions could be consistent with a prohibition to those persons to receive them. The operation of the paragraph is to license such payments so far as they might without such licence constitute trading with the enemy; and acts constituting trading with the enemy are legal when licensed by the Crown. It was therefore legal for the plaintiffs to receive such payments, and it is clearly not open to the defendants to say that any such payment would amount to trading with the enemy on the part of the plaintiffs. If therefore a sum of money became due to the plaintiffs from the defendants in respect of these deliveries after the outbreak of war I see no obstacle to its recovery, having regard to the decisions in *Porter* v. *Freudenberg* (1), *Robinson & Co.* v. *Continental Insurance Co. of Mannheim* (2), and *Halsey* v. *Lowenfeld* (3). In the last case *Warrington* L.J. said (4):—"Did the performance of this obligation" (there an obligation to pay rent) "by the defendant require the concurrence of the plaintiffs, and, if so, would such concurrence be unlawful? It did require the plaintiffs' concurrence, inasmuch as payment by one party involved receipt by the other. It does not follow, however, that such receipt was unlawful, and I think the Proclamation of 9th September 1914 establishes that it was not, but was an act permitted by the executive authority." And His Lordship then quoted clause 7. He went on to say:—"In terms the clause purports to allow payments by or on account of the enemy and says nothing about receipts; but I think it must be construed to authorize—if such authority be necessary—the receipt by a British subject of a payment so made. If this is so, the performance by the defendant of his obligation did

(1) (1915) 1 K.B., 857.
(2) (1915) 1 K.B., 155.
(3) (1916) 2 K.B., 707.
(4) (1916) 2 K.B., at p. 717.

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not involve any unlawful act on the plaintiffs' part, and I see no reason why the defendant should be treated as released."

For these reasons I am of opinion that if the balance of the price of concentrates delivered before the War, the payment of which became in the true sense an obligation upon such delivery, was duly ascertained after the beginning of the War, that which was *debitum* became then *solvendum in præsenti*, and upon authority the defendants were liable to pay and might be sued. Taking in conjunction the ascertainment, if it took place, of the exact amount and the effect of clause 7 of the Proclamation, there was then a liability on the part of the defendants which might lawfully be discharged by payment and receipt, and I cannot see why in such a case an action should not lie against an alien enemy.

What, then, was to hinder the ascertainment of the true extent of the obligation? Two things, the defendants say: The first, shortly termed "the adjustment"; and the second, shortly termed "the option." It may be premised that by clause 23 of the first agreement the contract is to be deemed a contract to be performed in the State of Victoria and the parties submit to the jurisdiction of the Court of that State.

The adjustment is provided for in clauses 7 and 8 of the first agreement, so far as its discussion is at present material. 90 per cent. of the amount stated in a "*pro formâ*" invoice for each parcel of concentrates delivered was to be paid in Melbourne by the buyers within seven days after the *pro formâ* invoice. The balance of 10 per cent. was to remain unpaid pending final adjustment as provided in clause 8. The "*pro formâ*" invoice might be rendered by the sellers as soon as weight and assays had been agreed on (which it is not disputed has been done) and the amount therein stated was to be computed as to the value of the zinc and silver contents of such parcel upon the basis of the market price in London according to the Broken Hill Company's cable quotations of the nearest prior date. But these interim payments were to be subject to adjustment as to values upon receipt of mail advices of the average prices as specified in clause 8. By clause 8 the market values for adjustment and final invoice purposes were to be the exact average market price for spelter as per Public Ledger quotations and that for silver

as per Sharp & Wilkins's Prices Current. Then followed a number of provisions, varied in the second contract, for the ascertainment of prices, weights, &c. It is sufficient to say of these that there are not any of them which on my reading of the contracts cannot be performed by the sellers. In other words, so far as any adjustment had to be made after war began, communication and consequent agreement between buyers and sellers were not essential, and the contracts did not therefore involve communication with an enemy.

As to the "option" it was said that its exercise involved unlawful intercourse. Clause 6 of the second agreement, after providing that the prices of the first 50,000 tons of each year's deliveries should be adjusted (again I say it was not provided that the defendants should take part in the adjustment) on the average market price of the year of delivery, and the prices of the residue (which is the subject of the second action) on the average market prices of the six calendar months following the year in which delivery was made and taken, went on to provide as follows: "Should the average price of spelter for any such period of six calendar months be over £23 the buyers are to have the option to demand adjustment of the price to be paid on the basis of the average prices of the whole of the year following the year in which delivery has taken place, such option to be declared on or before 5th July of the year following the year in which delivery has taken place."

This clause, it will be seen, does not apply to the prices of the first 50,000 tons of each year's deliveries, which are to be adjusted on the average market price of the year of delivery, and the first action is brought as to the prices of the first 50,000 tons of the 1914 deliveries. As a matter of fact neither action was brought until after the expiration of the first six months following the year of delivery, and the second action was not brought until after the whole twelve months had elapsed, namely, in April 1916. No option was exercised before 5th July or at any time. If the buyers had demanded adjustment on the basis of the prices of the whole year following 1914, they would not have benefited themselves. According to the evidence, each month of the first six of 1915 showed a sharp rise in average price over its predecessor, and the conditions which have produced this

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progressive increase are, as we know, continuous. Nothing, therefore, could be more unlikely than that the buyers would exercise their option to take the basis of the whole of that year, declaring it as required before 5th July. But in any case it is only an option which the buyers would exercise to secure the lowest price, and it could not have been exercised to that end in view of the sales up to the time specified for declaration of the option. The prices demanded in the action are based on the lower of the two prices possible, that is, possible if the buyers had actually exercised a choice of the prices most favourable to themselves. In my opinion it is not enough to say that the exercise of the option would have involved the plaintiffs in the receipt of a communication from the enemy. Anything that it might involve to the defendants is neither here nor there. When the King licensed the discharge and receipt of payments by clause 7, it seems to me that he must have licensed, along with that communication with the enemy, such communication as was necessary to enable the alien enemy to indicate that way of payment which he thought would be most favourable to himself. By so much as the defendants contend that the opportunity to exercise the option was necessary for the arrival at payment, they are in that degree contending, though not willingly, in favour of the application of the maxim *Quando aliquid conceditur, &c.* I come to the conclusion that the mere existence of the option provisions in the contract is, in the circumstances of the case, no bar to the demand or receipt by the plaintiffs of the lowest possible price which the conditions of the contract allowed them. There were two ways of payment: the one primarily provided for was to be on the normal basis stipulated in the first part of clause 6 of the second contract; the second method was on the basis of the option under the second part of that clause if the option were ever resorted to. If the latter became impossible I do not think the defendants are released from compliance with the normal requirement. See *Barkworth* v. *Young* (1), per *Kindersley* V.C., and *Brown* v. *Royal Insurance Co.* (2). Neither the obstacle set up with regard to adjustment nor that with regard to option lays, or in my opinion has laid, the ascertainment of the price open to the ban of illegal intercourse with the enemy.

(1) 4 Drew., at pp. 24, 25.

(2) 1 El. & El., 853.

The *Trading with the Enemy Acts* 1914 may be regarded as substantially identical for the purposes of this case with the English Act of the same year. The sections for comparison are sec. 2 (2) of the Australian Act and sec. 1 (2) of the English Act. The proviso to sec. 1 (2) of the latter may be regarded, I think, as implied in the Australian Act, again for the purposes of this case. Some argument might, no doubt, be raised on the difference between the last words of the Australian sec. 2 (2), *i.e.*, par. (*c*), and the words preceding the proviso to the English sec. 1 (2), namely, in the one case "trading with the enemy" and in the other case "the offence of trading with the enemy." But Mr. *McArthur*, for the defendants, appears to have considered the matter, and to have refrained from making any point of it. It may be that the expression in the Australian Act means the same thing, namely, illegal trading with the enemy, so that it was not the intention of Parliament to make illegal anything licensed by the King, and I think that is very probable. I think, therefore, that we cannot in this case take it that the Australian Act intended to touch anything permitted by the King's Proclamation.

The Enemy Contracts Annulment Acts of the Commonwealth and of the State of Victoria may be looked at with reference to sec. 3 (5) in each Act. That provision does no more as to the executory part of such a contract as the present, than is done by the effect of the decision in *Zinc Corporation Ltd.* v. *Hirsch* (1), although these Statutes may have effect in cases which lack the particular provision on which the Court of Appeal acted. But it may be that the exception to the section places the rights and obligations relating to goods already delivered before the War definitely subject merely to be dealt with irrespective of the War. But in the view which I take of this case it is not necessary to rely on either of these Acts. At any rate they cannot impair the rights which the plaintiffs have, and which I think they are entitled to assert in this action.

There was an objection founded on the arbitration provision in clause 21, but it does not seem to have been seriously sustained. Whether so or not, I think it is met by the reasons I have given in respect of other terms of the contracts.

(1) (1916) 1 K.B., 541.

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I come now to the final defence, which rests on pars. 8, 8*a*, 8*b* and 8*c* of the defence to the first action, and pars. 14, 14*a* and 14*b* of the defence to the second action. A number of authorities were cited on this point of the *Taylor* v. *Caldwell* (1), *Krell* v. *Henry* (2), *Chandler* v. *Webster* (3) and *Horlock* v. *Beal* (4) class. The rule in such cases was stated last year in the case of *F. A. Tamplin Steamship Co. Ltd.* v. *Anglo-Mexican Petroleum Products Co. Ltd.* (5), by Lord *Loreburn*, thus :—"When a lawful contract has been made and there is no default, a Court of law has no power to discharge either party from the performance of it unless either the rights of someone else or some Act of Parliament give the necessary jurisdiction. But a Court can 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 or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract. In applying this 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. Some delay or some change is very common in all human affairs, and it cannot be supposed that any bargain has been made on the tacit condition that such a thing will not happen in any degree."

I do not think the defendants have brought themselves within this principle of law. Their contention in effect is that the method to which they assented of ascertaining quotations was one to which they could not now be held because of the disturbance of the English spelter market by the fact of war. And they said that as the specified means of ascertaining the average prices had become no means at all, they could not be found liable for any specific sum. As Germany, and the territories which she speedily occupied in Belgium and France, were the chief sources from which spelter had previously come to England and had become closed to England, and the smelting

(1) 3 B. & S., 826.
(2) (1903) 2 K.B., 740.
(3) (1904) 1 K.B., 493.
(4) (1916) 1 A.C., 486.
(5) (1916) 2 A.C., at p. 403.

plants of England were said to be insufficient to deal fully with the concentrates which could be brought there, it was argued that there was a dislocation of the market which destroyed the basis of the contract. The dislocation of the market is evident enough, but why should that destroy the basis of the contract? The parties elected a certain method of ascertaining average prices. They might have chosen any other method, and would, I should think, have had to abide by it. In considering this branch of the case it is necessary to put aside the character of the defendants as alien enemies. Considering the contract, then, as if it were one between two sets of British subjects, it is manifest that the adoption as a *ratio decidendi* of such a rule for determining whether goods delivered were to be paid for or not, the latter being the result unless normal conditions were in the main sustained, would have the most widespread disastrous effects upon the business transactions of the whole British Empire. The principle, if it became one, would not be confined to contracts which imported Public Ledger quotations. It would extend to almost anything in which the outbreak of war seriously altered the position of persons under contractual obligations to pay for goods received. For really it means that contracts for goods the prices of which are to be ascertained by methods which leave prices fairly steady in peace, but subject them to much enhancement or diminution or fluctuation as a result of war, are not in that result to be regarded as binding upon those who have undertaken to pay. In other words: "I have made my outlook relying on peace; war has entirely upset that outlook. Therefore the other party is to suffer, not I. I therefore do not owe him for his goods." And then the speaker, laughing in his sleeve, might say: "Yes, and how nice it is to keep the goods." That seems to me to point to a very preposterous contention. Every contract made in peace may, in a sense, be said to have been made on the assumption that peace is likely to last. But the contention has only to be stretched a very little and it will amount to an argument that, because war seriously upsets prices, sellers must suffer but buyers may escape. If for the sake of argument the contention were allowed to rest on the question of a world's market, then was there no world's market on the outbreak of war, or did Germany as embracing by possession the

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largest producing territories become the world's market? If that were seriously alleged, it would be instantly met by the fact that Germany had by blockade been prevented almost totally from receiving imports or despatching exports. What sort of a market would this be? On the other hand, the London market was only partially affected, for the Empire retained that ability to import and export which is essential to a market for products which require treatment in order to become so far finished as to be usable in the manufactures into which they enter.

I think this defence also fails.

In the result I think that *Hood* J. decided rightly in giving judgment against the defendants on the contracts, and that the appeal must be dismissed with costs.

ISAACS J. The appellants' starting point is the abrogation of the contract *in toto*. They contend that this happened for two reasons, both attributable to the War. The first reason, and the one chiefly pressed, is that the contract was, upon the grounds stated by the Court of Appeal in the case between the same parties (*Zinc Corporation Ltd.* v. *Hirsch* (1)), dissolved on the outbreak of war as to all future performance. It is urged that though the English Court of Appeal limited the judgment to future operations, because that was all then directly in issue, yet the necessary consequence at common law of the dissolution of the contract to that extent, is its total extinction as an existing operative contract, including all its provisions necessary to ascertain after the outbreak of war the amount payable to the sellers for goods delivered prior to the War, even though those provisions, if standing alone, would be quite lawful to carry out. The second reason is that, in addition to the abrogation of obligations for future performance, the provisions for ascertaining the debt are also independently invalidated for the same reason as the others, namely, the necessity of commercial intercourse with the enemy. That being so, say the appellants, the fact that goods were delivered but not fully paid for before the outbreak of war is a fact which carries with it no liability now to pay.

(1) (1916) 1 K.B., 541.

There is Australian legislation which should first be referred to. It consists of the Commonwealth Act No. 11 of 1915 (*Enemy Contracts Annulment Act*) and the Victorian Act No. 2603 (*Enemy Contracts Cancellation Act*). By these Acts, this contract is declared to be null and void, as from the commencement of the War, as regards all rights and obligations thereunder, except what I may shortly describe as rights and obligations as to past acts. Except as to such rights and obligations the contract is annulled, even if under the contract otherwise it would not be so, And if we were dealing with the question presented to the English Court (1), that is, as to future performance, our answer would at once be that we have not to inquire whether on ordinary principles the contract is operative during the War, or is suspended, or is dissolved, because Parliament has said "null and void," that is, "dissolved." But there are no words declaring that rights and obligations as to past acts are to be good or bad; nothing to say that they are to be good and operative, even if otherwise they would not be so apart from the enactment. They are simply excluded from the statutory declaration of annulment as to future rights and obligations; in other words, they are neither the better nor the worse for that partial annulment of the contract. Consequently the past deliveries are to be dealt with according to the effect which the contractual provisions relating to them would have if the legislation had not been passed. In any event, as the *Enemy Contracts Annulment Act* only annuls "rights and obligations" existing at the date it was passed (24th May 1915), and as at that date there were no existing rights and obligations under this contract as to future performance, and there had not been any since the commencement of the War, it is hard to see how the Act has affected this contract in any way whatever. If the obligations as to future performance had been then suspended merely, it would have annulled them, and that is really the class of contract the Act was intended to affect. But, as it is, this contract is untouched by the Act. In any case the statutory annulment of the one set of rights and obligations is by force of *the exception* to be disregarded when considering the other set of rights and obligations which are to be operative or suspended or dissolved

(1) (1916) 1 K.B., 541.

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as if no such Act had been passed, and so, whatever be the nature of the contract, we are called upon to deal with the matter before us without any regard to this legislation. The provisions of sec. 3 (5) greatly strengthen this view.

The contrary view leads to the result that, as the Act declares the continued force of the contractual obligations as to the past part-execution of the contract, notwithstanding that the effect of the War on the contract was to nullify any provision for illegality—as arbitration or otherwise—yet no question of illegality can arise, but all must proceed as if there were no war, and so the respondents must succeed simply by force of the Act. I fail to find this in the Statute. The appellants did not contest the position as I have stated it. They did not deny that if a debt actionable at the outbreak of war existed, they would be liable in this action. Their argument for non-liability in present circumstances rested on considerations apart from those two Statutes, namely, those already stated. The exact point now raised has not, so far, been decided, and expressions used in judgments sufficient for the cases in which they were used, now have to be more closely scanned, and the law stated with precision. Those expressions as they stand are to the effect that war dissolves or suspends contracts that involve intercourse during the war, dissolving them where a substantially new contract would ensue, if not, then merely suspending them meanwhile; expressions that certainly justify the appellants in raising the contention they have presented. And therefore the matter demands close examination.

I may begin by saying that Sir *Frederick Pollock* (*Contracts*, 8th ed., p. 335) phrases the matter thus: "If the contract cannot at once be lawfully performed, then it is suspended during hostilities unless the nature or objects of the contract be inconsistent with a suspension, in which case 'the effect is to dissolve the contract and to absolve both parties from further performance of it.'" But that leaves open the principle upon which suspension takes place in the one event, and dissolution in the other. It also leaves open the direct question we have to consider here. If the starting point be established that the War, for either of the reasons stated, *ipso facto* worked an abrogation of the whole contract, it appears to me

the reasoning which the appellants led from that point is extremely difficult to rebut. They urge that no implied contract could arise so long as the expressed contract stood, and that when the express contract disappeared (as assumed), no contract could then be implied, for the law does not imply a contract where an express contract would be unlawful. This I think is sound (*Sinclair* v. *Brougham* (1); *Jones* v. *Orchard* (2)). Even in times of peace, they say, a party having made an actual contract, and being willing to perform it but prevented by law, cannot be supposed to have made another contract and incurred liability on other terms. This is supported by *The Teutonia* (3). Impossibility of performance of the bargain made does not give rise to a different bargain—otherwise some of the Coronation Cases would have been differently decided (see, for instance, *Civil Service Co-operative Society Ltd.* v. *General Steam Navigation Co.* (4)). There is force also in the appellants' view that destruction by law of a contract *in toto*, leaves the parties where they stand, and they rely on the principle stated by *Rowlatt* J., in *Distington Hematite Iron Co.* v. *Possehl & Co.* (5), that "War does not create any contract." The cases on rescission by mutual agreement do not help the respondents (*e.g.*, *Patmore* v. *Colburn* (6); *Lamburn* v. *Cruden* (7)). Rescission by one party on repudiation by the other gives rise not to debt, but to damages (*Dominion Coal Co.* v. *Dominion Steel and Iron Co.* (8)).

The answer to the appellants' contention—if there be a valid answer—is not, in my opinion, to be found in any doctrine which, while admitting the extinction of the consensual tie, defies the ordinary law of contract, and substitutes some arbitrary standard which the Court, according to the personal equation of the Judge, thinks appropriate to meet the justice of the particular case. For instance, I do not think it at all sufficient to say broadly: "The defendants have had the goods; they ought to pay for them." The immediate answer which the law gives to such a statement is: "They ought to pay only if they have expressly or impliedly agreed,

(1) (1914) A.C., 398.
(2) 16 C.B., 614, at p. 625.
(3) L.R. 4 P.C., 171, at p. 182.
(4) (1903) 2 K.B., 756.
(5) (1916) 1 K.B., 811, at p. 814.
(6) 1 C. M. & R., 65.
(7) 2 Man. & G., 253.
(8) (1909) A.C., 293, at p. 311.

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in the circumstances that have happened, to pay, and then only such price as they have agreed to." The questions on which in the case of *The Teutonia* (1) the Privy Council gave no opinion have been raised here as an alternative ground, and the parties are entitled to know my opinion. It is, that before I can hold the appellants liable I must not create an agreement, but by well recognized rules find one which the law will recognize and enforce, and which lasted long enough, and was sufficiently complied with, to entitle the respondents to demand the money sued for.

The problem here is how far those conditions are satisfied by the events which have happened. The initial fact is, of course, the written agreement of 4th April 1912, by which the present parties were brought into contractual relations upon the combined terms of the documents therein referred to.

One important question which may, at first sight, appear an unnecessary investigation is this: "Was that agreement a lawful one when made?" It has been assumed to have been legal up to the commencement of the War. But the importance of that question in the present instance turns out to be great, by reason of its connotation and its consequences. If that contract was legal when made, it solves the difficulty of the construction of clause 17, and incidentally constitutes a long step towards the determination of the case. It is a fundamental principle of the law of contract that, whatever the parties may in fact agree to, the law attaches no sanction to their agreement if it be designed to contravene the law (see *Smith* v. *Becker, Gray & Co.* (2)). And it would be an unpardonable attempt to contravene the law if an agreement to be performed in His Majesty's Dominions were made by which the parties undertook to continue uninterruptedly the performance or observance of any contractual relations inconsistent with the War, notwithstanding the fact that during the contemplated term of the contract one of them became an "alien enemy," as that term is understood with respect to "trading with the enemy." I have used the expression "contractual relations inconsistent with the War," because, with regard to some contracts validly made before war, the relations created may lawfully subsist

(1) L.R. 4 P.C., at p. 183.

(2) 31 T.L.R., 59; 151.

and be performed notwithstanding the War. *Halsey* v. *Lowenfeld* (1) is an instance. In that case no intercourse was necessary, nor was there any necessary feature which could possibly prejudice this country or advantage the enemy. If this agreement contains a stipulation such as I have indicated, inconsistent with the duty of a British subject during a possible war, it was invalid *ab initio*. The general principle is stated by Lord *Eldon* L.C. in *Evans* v. *Richardson* (2), though that was a case where the bargain was made during war. In the case between these parties reported in (1916) 1 K.B., 541, *Phillimore* L.J. deals with this aspect of the question in these words (3):—"If, therefore, one of the causes of suspension under clause 17 is war between Great Britain and Germany, the agreement would be an unlawful one. If, however, as seems reasonable, we are to construe the agreement *ut res magis valeat quam pereat*, we shall not admit this as one of the causes of suspension; and in that case the parties have not provided for the contingency of this war, and the ordinary rule prevails." His Lordship goes on to say: "The agreement has become incapable of performance by reason of the outbreak of war and has been dissolved." The mind of the learned Lord Justice was manifestly directed to the future performance, and not to the past. The unlawfulness of the contract, upon the construction including war as a cause of suspension under clause 17, rests on the doctrine that "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," stated by Lord *Alvanley* C.J. in *Furtado* v. *Rogers* (4), and quoted by *Swinfen Eady* L.J. in *Hirsch's Case* (5).

The Court construes every contract so as to preserve its validity where possible. Lord *Ellenborough* C.J., in *Brandon* v. *Curling* (6), said of a contract of insurance in general terms: "The insurance must be construed in such a manner as to exclude the particular event or peril which could not, for the reason above mentioned"

(1) (1916) 2 K.B., 707.
(2) 3 Mer., 469, at p. 470.
(3) (1916) 1 K.B., at p. 562.
(4) 3 B. & P., 191, at p. 198.
(5) (1916) 1 K.B., at p. 558.
(6) 4 East, 410, at p. 417.

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(*i.e.*, contravention of public interest), "be so made the subject of a legal insurance in direct terms by a British underwriter." And the learned Chief Justice put into actual words the implied proviso which he said should be taken as engrafted in the insurance; and observed, what is very material here, that more instances might be put of similar implied exceptions arising out of the general terms of the contract. Loyalty should be presumed; in other words crime should not be imputed where it is reasonably possible to avoid it: and, therefore, in assuming the innocence of the parties and the consequent validity of agreement, the first position is reached that the 17th clause did not include war as a suspensory circumstance, during the continuance of which clause 3 of the contract of 1910 required the sellers to abstain from selling the concentrates, and to retain them for the benefit of the purchasers, though alien enemies. It is, however, a well established rule that into every contract is read the implied condition that it is subject to the paramount and lawful requirements of the State. For instance, it is subject to any paramount requisition for public purposes (*In re Shipton, Anderson & Co. and Harrison Brothers & Co.* (1)). In other words, it is read as containing a necessarily implied condition to that effect. It is also necessarily subject to the operation of a declaration of war. War is a "lawful state," as Lord *Wrenbury* says in *British and Foreign Marine Insurance Co.* v. *Samuel Sanday & Co.* (2); that is, it is a state established by law, and consequently all contracts must conform tc it. Lord *Wrenbury* says:—"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." A stipulation reserving to the subject perfect freedom to render obedience to this paramount obligation must be read into every British contract as *verba subaudita*. Another observation of Lord *Wrenbury* (3) is illuminative, and goes to the root of the matter. His Lordship says:—"The common law was not a new actor which came into

(1) (1915) 3 K.B., 676. (2) (1916) 1 A.C., 650, at p. 671.
(3) (1916) 1 A.C., at p. 672.

action when war was declared. The law was always one and the same, namely, that in one state of circumstances (namely, peace) the adventure was and in another state of circumstances (namely, war) the adventure was not legal." The only novelty then was a new state of facts. And the real question is how do the parties stand contractually in the presence of the new state of facts. From the legal considerations already stated, it is right to say that every contract is presumed to contain an implied condition that on the outbreak of war it shall not be performed so as to trade with the enemy. As I view the matter, it is the proper statement and recognition of the rule of law which introduces such a condition into a contract, that forms the key to the present problem. Every document, whether a Statute, or a will, or a contract, or a letter, contains not merely what its words actually express, but also what they necessarily imply. Necessary implication is as much part of the contents of a document as its express statements. It is only on that basis that all the admittedly implied conditions above mentioned arise, and in the result it is by ascertaining and applying the necessarily implied conditions of this particular contract that the rights of the parties here are to be determined. Lord *Loreburn* and Lord *Parker*, in their judgments in *F. A. Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (1), have written out in the clearest characters the relevant principle. Indeed, all the learned Lords in that case agreed on the principle which was enunciated in the earlier case of *Horlock* v. *Beal* (2), although the differences of opinion in the later case exemplify the difficulty of applying the admitted principle to given circumstances. But the principle itself is undeniable. Lord *Loreburn* (3) besides stating the principle observes that "No Court has an absolving power," of course, at common law. So that while on the one hand no new contract is created, so on the other the Court cannot relieve from the obligations of a contract if they in fact exist. Lord *Haldane's* observations at p. 406 are relevant to this phase, and at p. 407 are important as to the effect of an indefinite interruption of performance. Lord *Parker* (4) states the principle applicable in these terms:—

(1) (1916) 2 A.C., 397.
(2) (1916) 1 A.C., 486.
(3) (1916) 2 A.C., at pp. 403-404.
(4) (1916) 2 A.C., at pp. 422 *et seqq.*

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"This principle is one of contract law, depending on some term or condition to be implied in the contract itself, and not on something entirely *dehors* the contract which brings the contract to an end. It is, of course, impossible to imply in a contract any term or condition inconsistent with its express provisions, or with the intention of the parties as gathered from those provisions." Then His Lordship refers to "The nature of the contract" as material for this purpose, also the stage to which a contract has advanced—that is, before execution, or after it has been partly performed. And other matters irrelevant, however, to this case are mentioned. But the principle is that the search is not for some extraneous circumstance as such, but for some implied stipulation which, if found, the Court regards as part of the contract, and then the contract is construed accordingly. That principle this Court, in the recent case of *Gelling* v. *Crespin* (1), applied on the authority of *Horlock* v. *Beal* (2), the later case of the *Tamplin Steamship Co.* (3) not being cited. It has been applied by the Court of Appeal in the late case of *Scottish Navigation Co.* v. *W. A. Souter & Co.* (4), and again in the still later case of *Metropolitan Water Board* v. *Dick, Kerr & Co.* (5). Now, that is simply taking, as in any ordinary case, the actual words of the contract, applying them to the subject matter, reading them by the light which parties had (*McLeod* v. *McNab* (6); *Carter* v. *McLaren & Co.* (7)) — and including in that their presumed knowledge of what the law requires in time of war—in other words, by the aid of the surrounding circumstances (*Inglis* v. *Buttery* (8) and *Yorkshire Insurance Co.* v. *Campbell* (9)), and thereby ascertaining the necessary implication which the parties are to be taken to have introduced into their compact. And by a "necessary implication" is meant what *Bowen* L.J. described in *The Moorcock* (10), where he said: "The law" raises "an implication from the presumed intention of the parties with the object of giving to the transaction *such efficacy as both parties must have intended that at all events it should have.*" *Mellish* L.J., in *The Teutonia* (11), after saying

(1) 23 C.L.R., 443.
(2) (1916) 1 A.C., 486.
(3) (1916) 2 A.C., 397.
(4) (1917) 1 K.B., 222.
(5) (1917) 2 K.B., 1.
(6) (1891) A.C., 471, at p. 474.
(7) L.R. 2 H.L., Sc., 120, at p. 126.
(8) 3 App. Cas., 552.
(9) (1917) A.C., 218, at p. 225; 22 C.L.R., 315, at p. 320.
(10) 14 P.D., 64, at p. 68.
(11) L.R. 4 P.C., at p. 182.

that the Court ought not to make a contract for the parties which they have not made themselves, adds: "Yet a mercantile contract . . . ought to be construed fairly and liberally for the purpose of carrying out the object of the parties"—which I take to mean very much what *Bowen* L.J. meant in the passage quoted. With that principle and those aids, the Court has to conclude whether or not in a given case a suggested implication is to be found in the contract.

Let us apply that principle to the contract in hand. We have got so far as to admit that, though in fact the parties may not actually have given a thought to a possible war, any more than the parties to the Coronation Cases gave a thought to a possible illness of the King, or the parties to any contract in fact give a thought to the possible destruction of a specific thing, yet they are presumed to have contemplated the possibility of the event. And the law asks: "What must they have impliedly agreed with reference to it?" What is the necessary implication as to that in the present contract? Certainly no continued performance during the War, if intercourse or continued obligation inconsistent with a state of war were involved. But what, then, follows? The appellants have asked the one question: "Is the contract to be at an end, or is it to be suspended only?" Finding the decision of the Court of Appeal that the contract is at an end as regards future deliveries, they assume the same fate must attend the rest of its provisions by force of the law of contract.

The radical error in the appellants' main position is this: They assume—to borrow the phraseology of Lord *Parker* in the passage quoted—that it is "something entirely *dehors* the contract which brings the contract to an end." Their assumption really is that the outbreak of war, which is, as Lord *Wrenbury* says, the new fact, is the event having *proprio vigore* that effect. In truth, that event is simply something *dehors* the contract which brings into operation the implied stipulation of the parties, whatever that may be, as to how the contract shall be affected when the event happens. And the true question for the Court to determine is what that implied stipulation is, and how far it extends, whether it is the one short stipulation of dissolution or of suspension of the contract as a

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whole, or whether it is a stipulation which applies variously to the different parts of the contract, or to different stages of the contract, according as at the moment the War occurs it is executory, or completely executed on one side, or part-executed, and if part-executed then according to the extent of part-execution. The answer I give is as follows. Assume the parties when making the contract contemplated the possibility of this war, what must they as business men, and as honest and fair-minded business men, have implicitly agreed to, on the facts before us, in order to meet the exigencies of such an event? To my mind, the necessary implication guarding the best interests of both was substantially in this form: "The instant the War occurs, the law shall be observed, and all obligations as to future performance shall be extinguished unless permitted to proceed substantially as provided; but as to past deliveries, as they are from the terms of the contract quite separate from the rest of the contract, they are to be separately considered, and shall be paid for according to the terms of the contract applicable to past deliveries, provided always those terms can be observed without breach of law, but without regard to whether the future obligations continue or not." In other words, there was no implied understanding that the whole contract if part-executed must stand or fall together. That is to say, the implication of the contract as to extinction regarding future deliveries which must involve either continued intercourse or continued unlawful contractual obligation, or such limited permissible intercourse as substantially alters the consensual provisions, is not necessarily attached to past deliveries which may not.

The basic assumption of the appellants that the contract is dissolved *in toto* is therefore erroneous. Substitute for that assumption the proposition that the contract, in accordance with its own contemplation, is dissolved only so far as its uninterrupted performance is inconsistent with a state of war, *and the subsequent resumption of performance is inconsistent with the substance of its terms properly construed.* Tested in that way, the provisions of the present contract as regards the deliveries sued for are separated from the provisions as to future deliveries, and must be dealt with on their own merits.

They were dissolved or suspended only so far as they led to unlawfulness, and, if the interruption due to unlawfulness altered the rights of the parties as to the price to be paid for the past deliveries, then the necessary implication was that these provisions also were dissolved.

That brings me to the next question: What was unlawful in perfecting the plaintiffs' right to the price of the goods? The position at the outbreak of war as to the ore sued for was this. It had all been delivered. It all had to be paid for. A debt, the exact amount of which had yet to be ascertained, was owing by the appellants to the respondents. That is the dominant fact on this branch of the case. It was assumed during the argument that at the outbreak of war there was no debt, because it was not then established whether the 90 per cent. of the *pro formâ* invoice was too much, or not enough, or exactly right. That is an error. The 90 per cent. does not affect the question we are at this point considering. The concentrates when delivered had, under the terms of the contract, to be paid for, and so the fact of a debt was fixed, though the amount of that debt payable to the sellers remained to be ascertained on the basis provided or (I add in appellants' favour) not at all. In the meantime a *pro formâ* invoice, that is, not *the* real invoice, was agreed for—purely provisionally; and 90 per cent. of the amount stated in that was to be paid—purely interim and provisionally, and not as final payment even *pro tanto*. It was really a delivery of so much money in return for goods, pending the ascertainment of the debt by the receipt of the mail advices showing "the exact average market price" and subject to adjustment between the amount of the debt when ascertained and the money provisionally paid. As to the first 50,000 tons, the ascertainment of the debt was to be arrived at by the sellers reckoning values when they received by mail the stipulated London Public Ledger relating to spelter, and Sharp & Wilkins's Prices Current relating to silver. They were then to find the average market value of the concentrates for the proper period, and to adjust the debt with the provisional payment accordingly, and send in the final invoice. The final invoice showing the actual amount of the debt might thereby, when compared with the *pro formâ* invoice,

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show (1) that the amount of the debt was exactly satisfied by the provisional payment, or (2) that the provisional payment was insufficient, or (3) that the provisional payment was in excess of the debt and that the purchasers were entitled to a refund. The invoice was to be sent to Snow under clause 22 of the agreement in Australia. All that could and would be done entirely in Australia without communication or intercourse between any person here with the enemy country, hither or thither. The appellants contended that "adjustment" meant negotiation and discussion with consequent personal intercourse, possibly complicated and prolonged. In my opinion, that is not accurate. The word "adjustment" may in a certain collocation mean that, but not always. See *In re Buckinghamshire and Hertfordshire County Councils* (1), per *Bruce* J. It may mean a unilateral act necessary or unnecessary as a step, but in either case not necessarily final or binding on the other side. An instance is found in *Wavertree Sailing Ship Co.* v. *Love* (2), where Lord *Herschell*, for the Privy Council, speaking of an adjustment under an average bond, said: "It is put forward by the shipowner as representing his view of the general average rights and obligations, but the statement or adjustment is open to question in every particular by any of the parties who may be called on to contribute." The adjustment here is precedent to the "final invoice," and cannot be regarded as excluding the purchasers from contesting its accuracy. The price they undertook to pay was, under clause 8, "the exact average market price" as per the periodicals mentioned. If sued for more, under an erroneous adjustment and invoice, they were at liberty to show it. That consideration and also the provision at the end of the clause, that the adjustment should be made as soon as possible after receipt of the mail advice, show that "adjustment" is an act, but the act of the seller, and, though a necessary act, is nevertheless not a final and conclusive act.

As to the first action, that is for the first 50,000 tons delivered, it appears to me the respondents' case is on this branch simple and complete. In that action, the plaintiffs are entitled to hold their judgment for £41,897 10s. 9d.

With regard to the second action, it is not so simple. The second

(1) 68 L.J.Q.B., 417, at p. 423. (2) (1897) A.C., 373, at p. 380.

action is brought for the price of the balance of concentrates delivered during the year and not paid for, namely, about 4,480 tons. As to this the price was agreed to be adjusted—not on the average market prices of the year of delivery, as in the case of the first 50,000 tons delivered during the year, but on the average market prices of the six calendar months following the year of delivery. So far there would be no difficulty. But clause 6 of the agreement of 1910 went on to say: "Should the average price of spelter for any such period of six calendar months be over £23 the buyers are to have the option to demand adjustment of the price to be paid on the basis of the average prices of the whole of the year following the year in which delivery has taken place, such option to be declared on or before 5th July of the year following the year in which delivery has taken place." It is plain that when the War began, the contract, even as to 4,480 tons of past deliveries, entitled the appellants, if so desirous and the law permitted, to declare between 30th June 1915 and 5th July 1915 their option to have the adjustment made on the average price for the whole of 1915 instead of the first half of it. They did not agree to pay anything beyond the 90 per cent. of the *pro formâ* invoice, any more than the sellers agreed to refund any portion of that 90 per cent. on any other basis. The provision as to time I regard as of the essence of the stipulation from both points of view; and further I consider whichever of the two parties happened to be claimant would have the burden of showing that the adjustment made as required by the contract entitled him to succeed.

The appellants contend that, as it would have been illegal for the respondents to have any intercourse with them after 4th August 1914, the law prevented them from exercising their right of option by 5th July 1915, and, therefore, as time was of the essence of this provision, it was destroyed, and they are entirely relieved of their agreed obligation to pay, and no other obligation to pay was created or could be implied. To begin with, I do not think that on 5th August 1914 the option clause, which was valid when made, could be regarded as illegal, because on 5th July 1915—when, for all one then knew, the War might have ended—the option would

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expire. In my opinion we have to come to 5th July 1915, and consider how matters stood then. I agree that the declaration of option was a matter requiring the personal determination of the respondents; that there is no evidence that Snow was ever authorized to exercise or abandon that option; that it was not a mere power which an agent not specifically or otherwise fully authorized in that behalf could, as a matter of course, exercise either ministerially or discretionally; that probably, if such agency had existed by general appointment, it was dissolved on the occurence of war, because from time to time it would have imported the duty of communication both ways, and that on the evidence before us communication from Germany either to Snow or to the respondents would, as the latter knew, have been requisite. The common law would forbid such intercourse, unless permitted by the Sovereign. Even payment, involving actual intercourse with the alien enemy, direct or indirect, would, in my opinion, be forbidden during war unless permitted by the Crown.

It was suggested by learned counsel for the respondents, and singularly enough was assented to by learned counsel for the appellants, that payment for a debt existing at the commencement of war is not contrary to the common law, although it involves direct intercourse between the alien enemy and the British subject here. I have no hesitation in pronouncing against that doctrine. In the first place, it runs directly counter to the clear-cut principle enunciated so emphatically by Sir *William Scott* in *The Hoop* (1). It is there said:—"No principle ought to be held more sacred than that this intercourse" (that is, commercial intercourse) "cannot subsist on any other footing than that of the direct permission of the State. 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*?" It is clear on principle that, as payment from an "alien enemy"—the term connoting a residence outside Australia—involves intercourse with him, it is illegal. And as the intercourse, if it takes place, is of a commercial nature, it is an act which constitutes

(1) 1 Rob. Adm., 196, at p. 200.

"trading with the enemy" (*R.* v. *Snow* (1)). Besides, there is high authority that receipt of payment from an alien enemy is trading with the enemy.

The fundamental and all-embracing principle laid down in *The Hoop* (2) in 1799 was formulated in accordance with a number of prior decisions. One of these was *The William* (3), decided by the Privy Council in 1795, on appeal from the Vice-Admiralty Court of St. Christopher. Lord *Mansfield* presided, and Sir *Richard Arden*, then Master of the Rolls, was also present. In that case the evidence showed the course of trade between Great Britain and the French Island of Guadaloupe was that the British merchants supplied slaves, and took payment in the following years in sugar for the debt. The claimants proved that they had taken sugar during the war in payment for a debt on account of slaves sold in the previous year. Thus all the "traffic" in the narrower sense had been concluded prior to the war, and nothing remained but the simple debt, and, as to that, nothing was done in the way of intercourse but receiving payment from the alien enemy. At pp. 215-216 of the report of *The Hoop* the arguments are set out, and it seems quite clear that receiving payment of a debt by unlicensed intercourse with an alien enemy was, in the opinion of the Privy Council, an unlawful trading with the enemy. *Kent* C. in *Griswold* v. *Waddington* (4) says:—"The law that forbids intercourse and trade must equally forbid remittances and payments. On any other supposition, those propositions would be inconsistent with each other." And he states a decision to that effect. In modern times I need not go beyond referring to the judgments of Lord *Reading* C.J. and *Warrington* L.J. in *Halsey* v. *Lowenfeld* (5). Observations made in some cases cited as to the legality at common law of payment by an alien enemy must be read with such qualifications and implications as are necessary to make them consistent with the rule thus definitely established. The mere question of payment apart from intercourse is not material here. A debtor under a Victorian contract, as the parties by clause 23 have declared this to be—so far as possible,—is bound to seek out his creditor and

(1) 23 C.L.R., 256.
(2) 1 Rob. Adm., 196.
(3) 1 Rob. Adm., at p. 214.
(4) 16 Johns., 438, at p. 483.
(5) (1916) 2 K.B., at pp. 712, 717.

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pay him. If the debt is not paid, an action lies. The only materiality of the question lies in the necessity of considering the option of extending the six months period to twelve months. If this is not covered by the 7th clause of the Proclamation of September 1914, permitting "payments" from an alien enemy, it would be illegal at common law and, in my opinion, would be a ground for saying the defendants were not bound to pay. They have never agreed to pay on any basis other than upon that of having the right between 30th January and 5th July to choose whether they would have the chance of the market for the whole year. It is not, in my opinion, a sound argument to say that the subsequent event has proved they would not have lost by being held to the half-year period. We have to consider how they stood on 5th July. Was the stipulation operative then or not; and, if not, was it deferrable; and, if not deferrable, were they then bound to pay on another basis? If they were so bound then, the action could have been brought at once, just as well as after the twelve months had expired. But that cannot, in my opinion, be admitted. The time was essential for both parties, and it would be a substantially different bargain if the defendants were held to the first half of it. Was, then, permission to receive such an option from the alien enemy covered by clause 7 of the Proclamation? If it was, then, upon the argument in this case, I think the appeal must fail as to the second action also. I say "upon the argument in this case" for this reason:— During the argument, attention was drawn to the stringent language of the Australian *Trading with the Enemy Act* No. 9 of 1914. Sub-sec. 2 of sec. 2 declares three separate and independent classes of "acts or transactions" which cause a person to be deemed to trade with the enemy. The first is any act or transaction prohibited by or under a proclamation of the King; the second is any act or transaction prohibited by or under a proclamation of the Governor-General; and the third is "any act or transaction which at common law or by Statute constitutes trading with the enemy." The unqualified words of the third enumeration were referred to. Learned counsel for the respondents, after careful consideration, announced that they had no argument to offer in support of their case, based on that Statute.

Therefore, unless the Court is bound to decide the matter for itself, it is relieved of any duty of deciding whether an act of "payment" accepted from an alien enemy, illegal at common law because an act of trading with the enemy, is within the thirdly enumerated class, notwithstanding it is not a breach of the firstly enumerated class—both being independently stated. The matter is serious, and to my mind not very clear. The English Act is very different. It includes the first class mentioned in our Act; it of course has no mention of our second class; and as to the third its language expressly avoids the very difficulty referred to. That language is "which at common law or by Statute constitutes *an offence* of trading with the enemy." At common law, trading with the enemy in any way whatever is not an offence, so far as it is permitted by the Sovereign. Consequently, the permission in the Proclamation is effective to cut out payment within its terms from the statutory offence referred to. And the English Act further adds a proviso in these terms: "Provided that any transaction or act permitted by or under any such proclamation shall not be deemed to be trading with the enemy." Powerful arguments might be used either way. On the one hand, it might be conjectured that Parliament did not intend to penalize anyone who followed the permission in the King's proclamations. It certainly would be extremely painful for a Court to hold anyone liable in such circumstances, and the Court would do its best to avoid such a construction if judicially possible. Conjecture as to what Parliament intended to say, of course, does not suffice. On the other hand, the Commonwealth Parliament deliberately altered the verbiage of the English Act. It cut out the word "offence," and it cut out the protecting proviso. If the third class does not cover anything included in the first, neither does the second, and that might limit the power of the Governor-General as to his proclamation. I do not express or suggest any opinion whatever as to the effect of the Act in this respect. I merely indicate the difficulty, and say that before I would declare, or indeed form, any opinion on the matter, I should desire to hear some argument upon it, and in the present instance I should desire to have some assistance from counsel on behalf of the Crown. The Act is certainly stringent, but is passed for the

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public safety and welfare. It may be the stringency of language was intentional and on a proper construction should be held so, leaving it to the operation of sub-clause 6 of sec. 3 to moderate it. It may be that it was accidental and, properly read, should not be taken literally. But if not compelled to determine the matter, I think it would be inexpedient if not dangerous to do so now. And I do not think there is any necessity to determine it. Learned counsel for the appellants, in taking the course they did, acted most properly. With the strongest temptation to urge every point possible in their clients' favour, they, finding themselves unable conscientiously to present any supporting argument based on the enactment, candidly and honourably said so. That, however, in the circumstances relieves this Court from deciding it, and for this reason :—No option was in fact exercised, that is, no communication in fact took place, and therefore no illegal act was committed (*Griswold* v. *Waddington* (1) ; see *Evans* v. *Richardson* (2)). The time for doing it has, however, passed for ever, and therefore the act of illegality, if such an act be illegal, can never be committed. The respondents do not rest their case upon the act or the necessity for the act. It is the appellants who rely upon its non-availability, but who expressly refrain from urging on their own behalf any argument based on the Statute. They do urge non-availability by reason of the common law, and that is met, if met at all, by the terms of clause 7 of the Proclamation. To that I now address myself.

A permission by the Sovereign to engage in trade with the enemy is an act of high public policy, and intended for the public benefit. In *Flindt* v. *Scott* (3), in 1814, the Court of Exchequer Chamber, speaking by *Thomson* C.B., said that licences to trade are now construed favourably to trade, "in order to effectuate the benefits intended to result from them." Two prior cases, decisions of Lord *Ellenborough*, deserve notice. One is *Uspariche* v. *Noble* (4), in 1811, where the learned Chief Justice said :—"The Crown, in licensing the end, impliedly licenses all the ordinary legitimate means of attaining that end. . . . For the purpose of this licensed act of trading

(1) 16 Johns., 438.
(2) 3 Mer., 469.
(3) 5 Taunt., at p. 697.
(4) 13 East, 332, at p. 341.

(but to that extent only), the person licensed is to be regarded as virtually an adopted subject of the Crown of Great Britain; his trading, as far as the disabilities arising out of a state of war are concerned, is British trading." The same liberal view is expressed by the same Chief Justice in *Fenton* v. *Pearson* (1), in 1812. In 1816, after *Flindt* v. *Scott* (2), Lord *Ellenborough*, in *Rucker* v. *Ansley* (3), said: "This, however, I take to be now established, that these licences ought to be construed according to their intention." And so the Court looked at the whole circumstances to see the object of the licence. And lastly, in 1824, in *Lemcke* v. *Vaughan* (4) Lord *Gifford* C.J. held that as licences were intended to facilitate the commerce of the country, they had been construed and should be construed liberally.

On that principle, while excluding any such act or transaction as a notice, under the contract, fixing the number of tons to be taken in any year, I think the right of making a communication under clause 6 of the contract, electing to pay the debt on the second alternative, is one of the essential terms under which the British firm has the right of getting payment. The King, it must be presumed, considers it for the advantage of his Empire that payments should be received in respect of debts already existing; and a mere communication which admits the debt, and simply states a means of completing it, by choosing the method of its computation—a communication which is assumed by the argument to be essential to the receipt of the payment permitted—is, in my opinion, covered by the protection intended by the 7th clause of the Proclamation. If the option had to be declared *eo instanti* of the payment it would manifestly be allowable, and there is no real difference in declaring it six months before.

Another ground was urged for dissolving the contract, as to past delivery, the arbitration clause. The argument took this form: It is part of the contract that any dispute shall be referred to arbitration according to Victorian law, and as that is impossible an important right is lost by which the amount of liability might be affected. There are two answers to this contention. The first

(1) 15 East, 419, at p. 426.
(2) 5 Taunt., 674.
(3) 5 M. & S., 25, at p. 29.
(4) 1 Bing., 473, at p. 481.

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is that the clause does not make the arbitration a condition precedent to liability or the amount of liability, as, for instance, in *Spurrier* v. *La Cloche* (1) and other cases there cited. It could not, therefore, be pleaded as a defence (*Thompson* v. *Charnock* (2)). The judgment of Lord *Moulton* (then Lord Justice) in *Pena Copper Mines Ltd.* v. *Rio Tinto Co.* (3) shows that the contention would fail in any case. It must be borne in mind that I am considering the clause only so far as it affects the right to recover for goods already delivered; as to its effect upon the future, as, for instance, the right to get more ore, the position is wholly different. But, as to the future, the contract is gone. Further as to this claim, the defendant to an action may, where such a clause exists, apply under Victorian law (*Arbitration Act* 1915, sec. 5) to stay the Court proceedings. The appellants here could have made that application for the reasons fully set out by Lord *Reading* C.J. in *Porter* v. *Freudenberg* (4). As to personal attendance, see per *Bailhache* J. in *Robinson & Co.* v. *Continental Insurance Co. of Mannheim* (5). The application might or might not be granted, but it would be made, and so the right was not lost.

Lastly it was said that the disorganization of the London market was so great that the agreed basis of price had disappeared, and therefore, if anything is recoverable, it must be on a *quantum meruit*. The *quantum meruit* argument is disposed of by the appellants' own contention, and, as I think, successfully. But as to the London market, the basis had not disappeared. The parties took the risk of any event, whether war or invention or discovery or law, affecting the London market price as to give any unexpected advantage to either of them. The option of extending the computation period for another six months was the agreed method of meeting for the buyers' protection any abnormal fluctuations. But, so long as there was a market price, it governed the contract. Lord *Parker* points out in the *Tamplin Steamship Co.'s Case* (6) that it is always more difficult to defeat a contract by a condition subsequent after part performance. As to what would have

(1) (1902) A.C., 446.
(2) 8 T.R., 139.
(3) 105 L.T., 846, at pp. 851-852.
(4) (1915) 1 K.B., at pp. 880-883.
(5) (1915) 1 K.B., at p. 161.
(6) (1916) 2 A.C., at p. 422.

happened had all market price disappeared entirely, I say nothing.

For all these reasons, I hold that the respondents are entitled to retain their judgment in the second action also, and that the appeal should be wholly dismissed.

Since writing this judgment the last number of the *Times Law Reports* has come to hand, containing two cases on the subject of trading with the enemy. One—*Rio Tinto Co.* v. *Eitel, Bieber & Co.* (1), before the Court of Appeal — is noticeable for two reasons. The first is that *Scrutton* L.J. says that there does not seem to be in existence any very clear statement of the law as to the effect of war on executory contracts. The second is that the arbitration clause was a reason for annulling the contract, that is, so far as it was executory. I have drawn the distinction between the effect of that clause in the executed as distinct from the executory part. The second case is *Orconera Iron Ore Co.* v. *Fried-Krupp Aktiengesellschaft* (2), decided by *Younger* J., after considering the judgments in the *Rio Tinto Co.'s Case.* I observe that that learned Judge says: "Whether the contract was dissolved depended upon the terms of the contract express or possibly implied," and quotes Lord *Haldane* in the *Tamplin Steamship Co.'s Case* (3). He also made a declaration that though the contract was dissolved as to the future, the liability to pay for goods already delivered remained notwithstanding the arbitration clause.

HIGGINS J. The main question before us is as to the right of the Victorian Court to give judgment during the War against alien enemies for payment, in pursuance of agreements made before the War, for concentrates delivered before the War. It is admitted that, according to the contract, payment had to be made after each delivery.

The difficulties as to service of writs on the defendants have been surmounted; and, as I understand, there are assets here on which execution can be levied.

Apart from the Acts to which I shall refer, the effect of war is not to rescind or destroy agreements made with enemy subjects

(1) 33 T.L.R., 537. (2) 33 T.L.R., 570.
(3) (1916) 2 A.C., 397.

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(or more strictly, perhaps, persons resident within the enemy's country). The root principle is that every British subject becomes by the outbreak of war an enemy of each of the subjects of the enemy; and it follows that intercourse between them is forbidden. But as the King has the power of creating and removing the state of war, he has also the power of removing the state of war in part, by permitting such intercourse as he deems fit. Except so far as the King allows intercourse, the agreements can no longer legally be carried into effect—*e.g.*, by further deliveries, notices, &c. So far as performance of the agreements would involve intercourse with the enemy, the performance is forbidden (if not licensed by the King).

Now as to the Acts. For the purpose of this Australian Court, I look first at the Federal *Enemy Contracts Annulment Act* 1915, and its replica passed by the Victorian Legislature. The Federal Act, sec. 3 (5), makes the agreements "null and void," as from the commencement of the War, "as regards all rights and obligations thereunder *except* such rights and obligations as relate to goods which had already been delivered or acts which had already been performed at that time or such as arise out of or in consideration for such delivery or performance." If we had to consider this section only, the right of the Company to receive, and to enforce, payment for deliveries before the War, would be clear. But, although the draftsman may have thought that his words would declare the law on the subject exhaustively, they do not necessarily do so. That which he "excepts" from the "null and void" provision may be "null and void" or unenforceable by some other law — common law or statute. The words imply, however, that there may be *some* intercourse with the enemy which is not unlawful.

Next, I examine an Act passed in the previous year—the *Trading with the Enemy Act* 1914. This provides (sec. 3) that "any person who, during the continuance of the present state of war, trades or has before the commencement of this Act traded with the enemy shall be guilty of an offence." The Court cannot make an order which would involve the offence of trading with the enemy under this section; and I assume (this point has not been fully argued) that to receive money in payment for goods which have been sold and delivered,

whether from the alien enemy or from his agent in this country, is part of the transaction of trading as to those goods, and involves intercourse—is "trading." In the recent case of *Seligman* v. *Eagle Insurance Co.* (1) the learned Judge said: "Bringing an action certainly involves the concurrence of the promisee, and I think no less the receipt of money tendered involves intercourse with the other party." In *Halsey* v. *Lowenfeld* (2) *Warrington* L.J., speaking of the payment of rent after the War, said that it required the plaintiff's concurrence, "inasmuch as payment by one party involved receipt by the other." But if the receipt of money from the enemy or his agent is trading with the enemy, does sec. 3 make it an offence under all circumstances—even if the King give his licence to receive?

The definition section, sec. 2, sub-sec. 2, provides that a person shall be deemed to trade with the enemy if he performs or takes part in (*a*) "any act or transaction which is prohibited by or under any proclamation" of the King, (*b*) "any act or transaction which is prohibited by or under any proclamation" of the Governor-General, or (*c*) "any act or transaction which at common law or by Statute constitutes trading with the enemy."

Now, the phrasing of the British Act is different. The King's Proclamation of 9th September 1914, taken with the British Act 4 & 5 Geo. V. c. 87, makes it an offence to do anything in contravention of the Proclamation, or anything which by Statute or the common law constitutes *an offence* of trading with the enemy.

The draftsman of the Australian Act has, in the main, copied the British Act; but he has omitted the words "an offence"; so that, at first sight, it would seem that any trading with the enemy whether it be an offence or not at common law, becomes an offence by sec. 3 of the Australian Act. At common law, it was an offence to have such intercourse with the enemy *without the King's licence* (*Potts* v. *Bell* (3); *Janson* v. *Driefontein Consolidated Mines Ltd.* (4), per Lord *Lindley*; *Seligman* v. *Eagle Insurance Co.* (5)). The question is, does the Australian Act make it an offence to receive money from an enemy debtor, even with the licence of the King?

(1) (1917) 1 Ch., at p. 525.
(2) (1916) 2 K.B., at p. 717.
(3) 8 T.R., 548, at p. 561.
(4) (1902) A.C., at p. 509.
(5) (1917) 1 Ch., 519.

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This would be a startling result; and it is our duty to scan the words very closely.

In the first place, it is clear to my mind that so far as the British Act and the Proclamation of 9th September 1914 are concerned, there is no offence in receiving money from an enemy debtor (*Halsey* v. *Lowenfeld* (1)). The Proclamation purports to be declaratory of the existing law; and it provides (clause 7) that "nothing in this Proclamation shall be deemed to prohibit payments by or on account of enemies to parties resident," &c., "in Our Dominions, if such payments arise out of transactions entered into before the outbreak of war or otherwise permitted."

This clause is not in form a licence; but by the British Act, sec. 1, sub-sec. 2, it is "provided that any transaction or act permitted by or under any such proclamation shall not be deemed to be trading with the enemy." Counsel for the defendants admit that by these provisions there is a licence, or what is equivalent to a licence.

It follows, therefore, that to receive or enforce payment is not an act or transaction which is prohibited by or under any proclamation of the King, within the meaning of sec. 2, sub-sec. 2, of the Australian *Trading with the Enemy Act*; and the only question that remains is, is such receipt or enforcement an offence within (*c*), as being "an act or transaction which at common law . . . constitutes trading with the enemy"? As I have said, this would be a startling result; but if the words are clear, we must accept the result. We shall have to treat the Australian Parliament as having interfered with the King's prerogative in the case of war, so far as regards his right to allow such trading as is for the benefit of his Dominions. As Sir *William Scott* put it, in the case of *The Hoop* (2), the King alone has the power of declaring war and peace; and as he has the power of entirely removing the state of war, he has the power of removing it in part by permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war. As Lord *Parker* said, in *Daimler Co. Ltd.* v. *Continental Tyre and Rubber Co.* (*Great Britain*) *Ltd.* (3), through the royal licence, intercourse and trade are brought under necessary control. "Without such control they are forbidden."

(1) (1916) 2 K.B., at p. 717.
(2) 1 Rob. Adm., at p. 199.
(3) (1916) 2 A.C., 307, at p. 344.

More than that—the result would be to create retrospectively an offence under circumstances of extreme injustice. For, under sec. 3 of the Australian *Trading with the Enemy Act*, any one who has before the commencement of the Act traded with the enemy becomes guilty of an offence ; and if an Australian vendor, after the outbreak of war, but before the Act, following loyally the words of the King's Proclamation, accepted from an alien enemy money due for goods, he would be liable to conviction. He would be liable to conviction even if he accepted the money with the special, express licence of the King.

But the *Enemy Contracts Annulment Act* throws much light on the real intention of the Australian Parliament. It was passed after the *Trading with the Enemy Act*. From the words of sec. 3, sub-sec. 5, already stated, Parliament shows that although existing contracts were to be null and void as to future deliveries, &c., the rights and obligations as to the goods already delivered before the War might remain. That is to say, Parliament treats the collection of debts in respect of ante-war transactions as being lawful ; and as this new Act does not in any way purport to amend the *Trading with the Enemy Act*, I am driven to the conclusion that in sec. 2, sub-sec. 2 (*c*), of the *Trading with the Enemy Act*, Parliament meant, by the words " trading with the enemy " at common law, *unlawful* trading with the enemy ; just as under the preceding heads (*a*) and (*b*), trading with the enemy means unlawful trading, in defiance of the King's proclamation, or the Governor-General's proclamation.

I am of opinion, therefore, that the action lies—if there was an obligation to pay existing at the outbreak of the War. There are many cases which show that enemy aliens can be sued during the War, although they are disabled from suing in our tribunals (see *Esposito* v. *Bowden* (1) ; *Robinson & Co.* v. *Continental Insurance Co. of Mannheim* (2) ; *W. L. Ingle Ltd.* v. *Mannheim Insurance Co.* (3) ; *Porter* v. *Freudenberg* (4) ; *Halsey* v. *Lowenfeld* (5)). In some of the cases, payments were enforced even though they accrued due after the outbreak of war. In the present case, the liability of the

(1) 7 E. & B., 763.
(2) (1915) 1 K.B., 155.
(3) (1915) 1 K.B., 227.
(4) (1915) 1 K.B., 857.
(5) (1916) 2 K.B., 707.

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defendants was complete at the outbreak, except as to the ascertainment of the amount due, which amount depended on future facts, on matters of evidence.

The fact that the price to be paid had not been ascertained before the outbreak of war, and the fact that the price depended on the prices prevailing in London during a period subsequent to the outbreak, do not, in my opinion, afford any defence to this action. Nor can I find that the agreements render necessary any concurrence of plaintiffs and defendants in the ascertainment of the balance due, or that any intercourse between the plaintiffs and the defendants was necessary during the War. No meeting of the parties or their agents was necessary. I take it that the word "adjustment" is used in the same kind of sense as in the phrase "average adjustment" when cargo is lost. It means here the finding of the balance due from either party to the other on the basis stated in the agreement. The plaintiffs have to prove what the London Public Ledger quotations were, and what was the average market price as appearing thereby; and it is the duty of the Court, before giving judgment, to see to it that all debits and credits are properly adjusted on that basis.

As for clauses 20 and 21 of the 1908 agreement, I do not think that they necessarily involve intercourse with the enemy during the War. Clause 21—the clause for arbitration—does not oust the jurisdiction of the Court. The plaintiffs' right of action is complete; and the fact that the defendants might but for the War, and at the discretion of the Victorian Supreme Court, have the proceedings stayed with a view to arbitration instead of trial, does not prevent the plaintiffs from recovering judgment.

As for clause 6 of the agreement of 1910, much debate has arisen as to the option therein mentioned. As soon as 50,000 tons per annum have been exceeded (as happened with regard to concentrates —the subject of the claim in the second action) the price of the surplus has to be ascertained on the average market prices for the first six months of 1915; but if the average price should be over £23 per ton (as actually happened) the defendants had an option to demand adjustment on the basis of the whole year 1915; and the option had to be declared on or before 5th July 1915. How, it is asked,

could the defendants notify the exercise of this option after the War, without unlawful intercourse? The inference is that the amount payable under the contract (as distinguished from the common count for goods sold and delivered) cannot be ascertained, or adjudged.

If we have to state the strict legal position, it is this. There is an obligation to pay on "A" basis, with power for the purchaser to substitute "B" basis; and if the power cannot be exercised (as has been assumed)—because of war or anything else—the obligation to pay on the "A" basis remains. It is like a limitation coupled with a power of defeasance which has failed (*cf. Right dem. Fisher* v. *Cuthell* (1); *Keates* v. *Burton* (2)). It so happens that the average prices for the first six months of 1915 were lower than the average prices for 1915 as a whole; so that the exercise of the option would have involved judgment for a higher amount. Judgment has been entered for the minimum sum that was *payable in any event*, whether the power was exercised or not; and that judgment should stand.

I do not think that there was any such implied term in the agreement as is suggested in the defence—that the London price was not applicable unless it represented the price in a world market, unaffected by war conditions. The parties took the risk.

The defendants have accepted the concentrates under the contract, and should pay under the contract.

In my opinion, the appeal should be dismissed.

GAVAN DUFFY J. The defendants' leading argument may be stated thus: According to the principles of the common law the declaration of war between Great Britain and Germany did not affect what had already been done under the contract between the plaintiff Company and the defendants, but no further performance could be demanded by either party; no claim arising out of the contract, or at all events no claim which had not at the commencement of the War ripened into a complete cause of action, could thereafter be enforced. I do not desire to be taken as assenting to or dissenting from this statement of the law, but even if we assume it to be accurate the argument is vicious because it ignores the existence of the statute law operating within Australia. The Commonwealth

(1) 5 East, 491.

(2) 14 Ves., 434.

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Act of Parliament No. 11 of 1915, sec. 3 (5), and the Victorian Act of Parliament No. 2603, sec. 3 (5), apply to this contract, and enact that "Every enemy contract made before the commencement of the present war is hereby declared to be and to have been null and void as from the commencement of the present war as regards all rights and obligations thereunder except such rights and obligations as relate to goods which had already been delivered or acts which had already been performed at that time or such as arise out of or in consideration for such delivery or performance."

In my opinion the effect of these enactments is to destroy certain rights and obligations under the contract and to affirm the remaining rights and obligations thereunder. The enactment does not create rights and obligations with respect to goods delivered or acts done before the War, but affirms and protects them from invalidity when they accrue, and preserves the contract so that they may accrue by all lawful means as they would have done before the War. If they had accrued before the commencement of the War, they are not affected by it; if they had not then accrued, they may accrue thereafter, or they may never accrue because of the operation of the War or of any other cause which by the general law prevents them from maturing.

When the common law dissolves a contract owing to the outbreak of war, it does so because its performance necessitates trading with the enemy during the period of the war; the performance of an illegal contract is not permitted by the law, whatever may be the intention of the parties, and the suspension of performance would be inconsistent with the intention of the parties. The Court cannot make a new contract for the parties, but the Legislature can readjust, and in this case has readjusted, the reciprocal rights and obligations of the parties, and the terms of that readjustment are binding on this Court. We need not consider whether by the common law this contract would be dissolved or suspended, and what would be the effect of dissolution or suspension. We have merely to consider whether the plaintiff Company is endeavouring to enforce under its contract a right relating to goods which were delivered before the commencement of the War or arising out of or in consideration of such delivery. The defendants did not suggest that the mere

payment of the price involved any illegality if the right to payment were established—indeed, their counsel specifically admitted that such a payment would be protected by the King's licence,—and they declined to argue the point as to the construction of sec. 2 (2) (*c*) of the *Trading with the Enemy Act* which has been so fully discussed in the judgments of my learned brothers *Isaacs* and *Higgins*. I am disposed to think that the words "trading with the enemy" there mean trading with the enemy without the King's licence, but, as we have not had the benefit of argument, I reserve to myself the right of further consideration should the question again arise. I feel at liberty to do so because if nothing remained to be done under the contract as a condition precedent to payment the provisions of the Commonwealth and Victorian Acts would, in my opinion, authorize the acceptance of such payment.

But the defendants say that no rights to insist on payment had accrued to the plaintiff Company before the commencement of the War, or had accrued or could accrue to it since that date. With respect to the deliveries relied on in both actions their obligation was to pay the amount which should be found due after the accounts had been adjusted, and with respect to the deliveries in the second action their obligation to pay arose only after they had had an opportunity of exercising the option of adopting one or other of two standards for the purposes of assessing the price of a portion of the goods delivered. At the commencement of the War there had been no such adjustment and the time for exercising the option had not arrived, and after the commencement of the War it was impossible to make an adjustment or to exercise the option without a violation of the provisions of the *Trading with the Enemy Act*. In my opinion these contentions are not maintainable. I agree with the other members of the Court in thinking that the adjustment of accounts did not necessitate any intercourse between the plaintiff Company or its agents and an enemy subject or any other violation of the Act. The question of option presents more difficulty. I do not dissent from the reasons which induce my brother *Higgins* to overrule this objection, but I desire to rest my judgment on another ground. In my opinion a declaration by the defendants that they intended to exercise their option would not necessarily involve any act of

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trading or other intercourse with the enemy by a British subject, and nothing thereafter would remain to be done by the plaintiff Company except to receive payment calculated on the agreed basis. If in consequence of such declaration any act was necessary on the part of the plaintiff Company to ascertain or establish the price payable by the defendants, I think such act would be congeable as ancillary to the acceptance of payment.

Next, it is said that the plaintiff Company's right to payment did not arise until the defendants had had an opportunity of exercising their right to refer questions in dispute to arbitration. In my opinion their only right was that conferred by sec. 5 of the Victorian *Arbitration Act* 1915, and that right they retained notwithstanding the existence of the War.

Of the other objections urged in support of the contention that there was no complete cause of action I need say nothing, as they were sufficiently dealt with in the course of the argument.

In my opinion the appeal should be dismissed.

POWERS J. I concur in the judgment delivered by my brother *Barton*, and I do not see any necessity for adding anything to what he has said, except on the objection founded on clause 21—the arbitration clause in the contract in question.

As this clause did not necessarily involve intercourse with the enemy during the War, it does not oust the jurisdiction. It did not make arbitration a condition precedent to liability or the amount of liability. It could not be pleaded as a defence so far as it affects the right to recover for goods delivered.

I agree with my brother *Isaacs* where he points out that the defendants, as defendants to this action, might have applied under Victorian law to stay the proceedings in the Supreme Court in Victoria, although they could not as plaintiffs institute proceedings.

I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants, *Madden & Butler.*

Solicitors for the respondents, *Arthur Robinson & Co.*

B. L.