arrived at, but the learned judge in the court below did not act upon that evidence, and their Lordships do not see their way to any finding of fact at which he did not arrive. They therefore think that he rightly refused to confiscate the vessel.

As to the other point, that the matter was already decided by the decree dated the 22nd November 1914, their Lordships think that it is unnecessary to express any opinion, since, whatever the intention of that decree may have been, the result would only be to arrive at the same conclusion, namely, that the appeal fails.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed, with costs.

Appeal dismissed, with expenses.

Counsel for the Appellant—Sir E. Pollock, (Sol.-Gen.)—Dr Pearce Higgins. Agent—Treasury Solicitor.

Counsel for the Respondents — Sir E. Richards, K.C.—W. Van Breda. Agents —William A. Crump & Son, Solicitors.

HOUSE OF LORDS.

Friday, January 31, 1919.

(Before the Lord Chancellor (Smith), Lords Buckmaster, Finlay, Dunedin, Atkinson, and Shaw.)

FRIED KRUPP AKTIENGESSELLSCHAFT *v.* ORCONERA IRON ORE COMPANY, LIMITED.

(On Appeal from the Court of Appeal in England.)

Contract—Validity—Alien Enemy—Executory Contract with an Alien Enemy—Suspension or Dissolution.

The respondent company was incorporated in England in 1873, the entire share capital being contributed by four ironmasters, one of them now represented by the appellant company. As part of the arrangement made at that time, contracts were entered into by the respondent to supply for a term of ninety-nine years specified amounts of ore at a specified rate to the promoters. The contract provided for its suspension during any period "in which an unavoidable cause shall exist preventing the company from delivering." The appellant claimed that by this clause the contract though suspended was preserved. *Held* that on the outbreak of war the contract was dissolved, not suspended.

Eitel, Bieber, & Company v. *Rio Tinto Company*, [1918] A.C. 260, 50 S.L.R. 784, *applied.*

Decision of the Court of Appeal, 118 L.T.R. 237, *affirmed.*

Appeal from an order of the Court of Appeal (Swinfen Eady and Bankes, L.JJ., and Eve, J.).

The respondents were the plaintiffs in the action, and the appellants and the Public Trustee were the defendants.

The plaintiffs claimed a declaration that an agreement dated the 15th August 1873, made between the plaintiff company and one Alfred Krupp, the predecessor in business of the defendant company, steel and munition manufacturers of Essen, was dissolved by the outbreak of war between Great Britain and Germany on the 4th August 1914, except in respect of the liability of the defendant company to pay for goods already delivered under the agreement.

By the *agreement* it was provided, *inter alia*, as follows:—Clause 15—"If by reason of war or civil disturbance the company shall be obstructed or hindered in the raising, getting, or leading away or transport of ore, or the export of ore or its carriage by sea shall be obstructed or hindered so that the company shall be unable in any year calculated until the completion of the railway, from the vesting of the mines and the railway in the company, and calculated after the completion of the railway therefrom, to deliver to Fried Krupp his full and proper quantity of ore according to the arrangement then in force, then (subject to the provisions of art. 6 of these presents) Fried Krupp shall be entitled to receive, and the company shall deliver to him at the full price per ton payable at the time of delivery during the five years next succeeding the cessation of such war or civil disturbance, the amount of ore by which the quantity of ore actually delivered fell short of the full and proper quantity, subject nevertheless to the proviso respecting the making good short deliveries contained in art. 11." Clause 18—"These presents and everything herein contained (except this present article and art. 23), and all provisions necessary for the settlement of accounts between and the payment and receipt of moneys due to or by the company by or to Fried Krupp, shall cease to have any force during any period of time in which an unavoidable cause shall exist preventing the company from delivering or Fried Krupp from receiving ore, but shall revive and be in full force on the cessation or removal of such cause."

Lord Chancellor (Birkenhead)—The facts in this case have been clearly and elaborately set out in the judgments of Younger, J., and of the Master of the Rolls in the Courts below. The facts are contained in somewhat lengthy documents. They are not in controversy, and a repetition of what is already on record would not, I think, assist your Lordships in dealing with the only points which have been persisted in in argument before your Lordships.

As it has been presented this is in my judgment a clear case. Four groups of persons interested in iron, of whom the appellants' predecessors in title, a German firm, were one, promoted a company which was incorporated in England in 1873. The objects of the company were, *inter alia*, to acquire the benefits of two contracts, conveniently known in this litigation as the mines contract and the railway contract. The first of these contracts is concerned with the property in certain mines near Bilbao in Spain; the second with a conces-

sion from the Spanish Government to construct and work a railway connected with the mines. It was a necessary part of the scheme that a contract should be entered into between the company and each of the groups which had combined to promote it. The predecessors of the appellant company, whom hereafter I speak of as the appellants, entered into such a contract on the 15th August 1873 with the respondents as the other contracting parties. The outbreak of war produced the result that the contract, one of the parties to which as I have said was a German, could not be carried out without such a degree of contact and trading with the enemy as would be plainly illegal. So much is common ground.

The sole question which has been argued before your Lordships is whether the effect of the outbreak of war was to dissolve this contract of the 15th August 1873 or merely to suspend its operation. The question was fairly open to argument until the decision of your Lordships in *Eitel, Bieber, & Company* v. *Rio Tinto Company* (1918 A.C. 260, 50 S.L.R. 784). Even then, however, it was a noteworthy circumstance that in the books there is no trace of the doctrine that contracts with alien persons who subsequently became enemy are merely suspended and not disrupted by the outbreak of war, and in view of that decision, and of the limited nature of the submissions made to-day, only a single question, in my judgment, remains —Are the appellants able to distinguish the present case on the admitted facts from the ambit of the decision in *Eitel, Bieber, & Company* v. *Rio Tinto Company*.

Much of the argument with which the Court of Appeal was troubled has been abandoned before your Lordships, and I may be allowed to point out that had the abandonment been somewhat earlier in date some considerable economy might have been effected in the preparation of the record in this case.

Only a single contention is now before your Lordships. It is said by counsel for the appellants that the conjoint effect of the contract in question and of the memorandum and articles of association, particularly of art. 93, is that the appellants became entitled not merely to a money dividend, but to a dividend in kind—that is, in the language of Mr Compston, to an aliquot portion of the output of the mine. Mr Pollock varies the submission by adopting the metaphor of a partnership; and so it is argued that the contract, in my Lord Dunedin's phrase in the *Bieber* case, is a concomitant of the rights of property, and as such is not abrogated. I confess that I am wholly unimpressed by this argument. Nothing is gained by calling that a lease which is not a lease, or a partnership that which is not a partnership, and then reasoning from your metaphor as if it were an axiom; and even if this contract could be properly described as "a concomitant of property"—and in my view it cannot be so described—I do not read my Lord Dunedin's language in the *Bieber* case as I gather that counsel for the appellants desire to read it. Lord Dunedin in his judgment uses the following language—"Further, there are certain contracts, particularly those which are really the concomitants of rights of property, which even so far as executory are not abrogated." In other words, my Lord points out that when you are dealing with contracts which are really the concomitants of rights of property, these even in so far as their operation lies in the future are not abrogated, but my Lord continues—"In other words, the executory contract which is abrogated must either involve intercourse, or its continued existence must be in some other way against public policy as that has been laid down in decided cases." My Lord's language there is quite general, and it is used after examining in detail the cases of those contracts which my Lord has pronounced to be "the concomitants of rights of property."

But it is not necessary to found my view upon this construction, right or wrong, of my Lord Dunedin's judgment, for the reason that in my view this contract is not a concomitant of the rights of property. In unscientific language any contract may be so described, but not in relation to terms which have acquired some degree of technical significance. If, contrary to my view, there were the slightest ambiguity in Lord Dunedin's language the illustration of *Halsey* v. *Lowenfeld* (1916, 2 K.B. 707) which my Lord adopted, made his meaning indisputably clear. The real truth is, as counsel was driven to admit, that no distinction can be drawn between this contract and any other contract in which the alien enemy before he became an enemy purchased, as naturally happens in business matters, rights for valuable consideration. This conclusion, in my judgment, becomes inevitable as soon as it is conceded that the appellants could have assigned their contractual rights, and that their assignees for consideration would have been able to maintain their contention before your Lordships.

Under these circumstances I confess that I myself should have felt a little doubt in relation to this matter if we approached it as a *tabula rasa*. But in view of the decision in *Eitel, Bieber, & Company* v. *Rio Tinto Company* the matter, in my judgment, as it has been argued before us does not admit of the slightest doubt. The appellants had a valuable contract; they had nothing more. We are not concerned with a precise appraisement of its value. The particular commercial shape which their financial arrangement adopted is in my view an irrelevant circumstance. Nor am I pressed by the contract between the probable duration of the war and the contemplated duration, had there been no war, of the contract. The law as I understand it says that in the facts that have arisen, and for the reasons amongst others given in Lord Dunedin's judgment in *Bieber's* case, this contract must be dissolved. I will remind your Lordships of the language used by Lord Dunedin in his judgment—language which to some extent was repeated or varied in the judgment of my Lord Sumner. Lord Dunedin says—"Let me now apply this rule to clause 15 on the hypothesis that it does suspend delivery during

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

I must add that the answer which was made by Mr Compston to a question put to him by Lord Shaw illustrated very clearly the relevance of the passage which I have just read to the facts of the present case. Lord Shaw asked Mr Compston whether, supposing that the other non-alien parties to this scheme after the outbreak of war had had an opportunity by forward sales of disposing of the whole of the produce of this mine for twenty-five years, accepting the hypothesis of the suspension merely of the contract, their commitments to the appellants would have prevented them from entering into such a contract, and Mr Compston was driven to admit that if this contract was not disrupted but was merely suspended the consequence indicated to him by my Lord would arise. That answer in my judgment made it plain that the submissions of the appellants here must fail. I cannot conceive of an answer which made it more clear that in the language used by Lord Dunedin in the passage which I have just cited the trade of the British subject, and through him the resources of the kingdom, were being hampered and they would be hampered in time of war.

If the law, rightly construed, required the conclusion which I have indicated on grounds which naturally have little relation to the interests of the enemy alien, the duration and value of the contract to the alien enemy become an irrelevant consideration. In this connection, and without thinking it necessary to read them, I refer to the informing judgments of Lord Atkinson and Lord Sumner.

I need only add one further observation in relation to the case of *Andrew Millar & Company, Limited* v. *Taylor & Company, Limited* (1916, 1 K.B. 402), which was much relied upon by Mr Compston.

It is a familiar principle of English law that the outbreak of war effects no confiscation or forfeiture of enemy property, and it naturally follows from that conclusion that if the property of an enemy be retained and used by a British subject after the outbreak of war, although indeed the reckoning is postponed, the profits which arise from the use of the property of the alien enemy, whatever be the nature of that property, are retained for his benefit although the period at which the benefit can be made effective for him is naturally postponed until the conclusion of peace.

I have carefully read *Millar's* case, and I can draw little from it which goes further than the doctrine which in general terms I have indicated, and I doubt whether your Lordships will derive much guidance from that case on the present facts.

For these reasons I am of opinion that this appeal should be dismissed, with costs.

LORD BUCKMASTER — The appellants in this case enjoy the benefit of a contract executory in form for the acquisition of iron ore from mines near Bilbao, of which the respondent company hold a ninety-nine years' lease. The term of the contract is for the full period of ninety-nine years with power to determine vested in the appellant, and certain other powers of determination which may or may not arise vested in the respondent company. In order to acquire the benefit of that contract the appellant associated himself with three other groups of people, and provided the necessary money both for the acquisition of the leasehold interest in the iron mine and of a railway concession to be used in connection therewith. The means by which this enterprise was carried out was through the instrumentality of the Joint Stock Companies Acts, and a company was formed with a share capital of £200,000 provided in equal quarters by each of the four associated groups. Although the memorandum of association of the company nowhere refers to the granting of these contracts as one of the essential purposes for which the company had been incorporated, it may, I think, upon the documents be accepted that that was the governing idea in the minds of the parties when they promoted the incorporation of the company. At anyrate contracts were executed, as I understand, in the same form as the one that is now in dispute in favour of each of the four groups of people who had in the manner that I have mentioned acquired the mines.

The question that arises is whether or no, if this contract be executory in fact as it is in form, it is exempted from the operation of the law as declared in the case of *Eitel, Bieber, & Company* v. *Rio Tinto Company* (1918 A.C. 260, 50 S.L.R. 784) by reason of the circumstances to which I have made reference.

I find it impossible to understand how those circumstances can affect the principles which lie at the root of that decision. It is perfectly true that in this case money has been spent; it is perfectly true that the declaration of the invalidity of this contract may cause money to be wasted. I think there can be no doubt that whatever happens loss must fall upon the appellants in this case if this contract be declared invalid, which will not be shared by the other three participators in the original adventure. But

I fail to understand how that can affect the reasoning which led to the declaration of the law to which I have referred.

My Lord Dunedin in expressing the opinion of the House in the case of *Eitel, Bieber, & Company* v. *Rio Tinto Company* said this — ". . . That a state of war between this kingdom and another country abrogates and puts an end to all executory contracts which for their further performance require, as it is often phrased, commercial intercourse between the one contracting party subject of the King and the other contracting party, an alien enemy. . . ." Lord Atkinson says that the illegality of any transaction as amounting to trading with the enemy does not at all depend upon whether it is profitable or not; and Lord Sumner says that the discharge operates by reason of the common characteristics of international intercourse.

If those are the principles which underlie the opinions in that case — and I hardly think that it was suggested on behalf of the appellants that they are not—then it only remains to be considered whether there is in this contract anything that will require, provided it were unaffected, the continuance of commercial intercourse, and whether there be any foundation in the argument that the contract and all the other documents taken together would effect the equivalent of a partnership and not an ordinary trading bargain.

As to the first point, there can, I think, be no doubt whatever that if the contract be left unaffected commercial intercourse is expressly contemplated, because among other clauses I find by clause 19 that there is provision for the company to keep the usual books of account for the ascertainment of the price of the ore. They are to produce them when called upon; they are to permit any person nominated by Fried Krupp to take extracts and copies; give any explanation which may be required in relation thereto; and in all other respects give every or any other reasonable facility to Fried Krupp and to any person or persons whom he may appoint to ascertain all necessary particulars respecting the ore and the price per ton to be paid by him; and that of course would affect both the ore delivered before the war as any other subsequent deliveries which he might be able to obtain.

It was argued, though indeed I think faintly, on behalf of the appellants that the fact that this mine was in Spain might make some difference. If it made any difference, it would, I think, make a difference adverse to the appellants. It is quite plain that if commercial intercourse is to be carried on, and the focus of the business is to be the centre where the intercourse will take place, it might be much more readily effected when that centre of business was in a neutral country than if it happened to be in one of the countries that were engaged in war.

The other question as to whether or no this contract and all these transactions can be taken to result in there being a partnership in the mine, so that there is some interest in property apart from the interest which the contract itself confers, is a matter the argument on which I confess I find it very difficult indeed to appreciate.

It might have been that these parties had they chosen could have so associated themselves with this mine that the interest which each person derived from his expenditure would have resulted in the acquisition of property which this country would certainly not confiscate by reason of war, but they have deliberately selected a form of procedure which has put the ownership of the mines into one separate and distinct legal entity, and has conferred on each of the people who joined together to promote the company nothing except a share interest in the company, which subject to the discretion of the directors in refusing transfers they are at liberty to deal with, and the interest in the contract, which subject to difficulties in assigning a contract of this character they are at liberty to assign.

For these reasons I think this contract is indistinguishable from the contract that arose for consideration in the case of *Eitel, Bieber, & Company* v. *Rio Tinto Company*.

I feel that in this decision there may be involved the sacrifice of great pecuniary interests in the case of the appellants. That certainly is not the purpose or intent of any such decision as has been given in these cases, and it has been said again and again that this country does not confiscate enemy property in this country owing to a state of war, but that all the courts engage to the best of their power in administering justice, equal and even handed, both as between subject and subject and as between subject and foe.

LORD FINLAY—It is, I think, undisputed that the carrying out of this contract would have involved constant intercourse with the enemy during the war, the person with whom the contract was entered into being an enemy subject. Under these circumstances it is perfectly clear that this contract could not during the continuance of the war be performed. I do not think that any argument has been addressed to your Lordships against that position.

The question that might have remained for consideration was whether, having regard to the nature of this very special contract which has a duration for ninety-nine years, the fact that its performance could not take place so long as the war lasted put an end to the contract altogether. Now I should, I confess, have desired to hear that question argued, but the learned counsel for the appellant took the view that the point was not open to him, having been decided against him by *Eitel, Bieber, & Company* v. *Rio Tinto Company*, 1918 A.C. 260, 50 S.L.R. 784. I do not think that that case either decided or could have decided anything of the kind. *In Bieber's* case all the contracts were short commercial contracts, and it is perfectly obvious that to prevent performance of such a contract during the existence of the war would have totally altered its nature. Where there is a contract for three or five years, as I think were the periods in *Bieber's* case, it is perfectly obvious that if war breaks out and you say, and say as you must say, that

the contract cannot be performed during the continuance of war, if it is allowed to be carried on after the war ceases it becomes a totally different contract. There are expressions occurring in the judgments in *Bieber's* case to the effect that war *ipso facto* puts an end to executory contracts. It puts an end to their fulfilment certainly during the war. The point on which I confess I should have liked some assistance in the way of argument if it had been considered open was how far that applies where the interruption during the period of the war is insignificant, having regard to the special nature and very prolonged term of the contract under consideration. The question really never has arisen. In every case the terms of the contract under consideration have been so very different from the special contract with which we have here to deal, particularly in the matter of duration, that no such point could arise, and I confess that I regard the point as not covered by *Bieber's* case at all. It has not, however, been argued, and I desire to say nothing more about it than that my own mind is perfectly open on the question.

LORD DUNEDIN—I concur, and I should not have thought it necessary to trouble your Lordships with anything further had it not been for the observations which have just fallen from the noble Lord beside me. I confess that in my view the concession made by counsel was right, and I cannot agree with the noble Lord who has preceded me in thinking that the question has never arisen. It seems to me that it always must arise when any executory contract is sought to be set aside at the beginning of a war, because you never know whether the war may either be so long that it will go far beyond the term of the contract, or so short that there may be still a great deal of time during which the contract might be performed. I can only say that my judgment in *Eitel, Bieber, & Company* v. *Rio Tinto Company* was I hope founded on older authorities, and that in the older authorities I think there is this proposition clearly laid down, that an executory contract is abrogated, and there is not a trace of any doctrine that the effect of war on an executory contract, from motives of public policy alone, is merely to suspend and not to abrogate.

The only other matter I should like to add is that the comments of the Master of the Rolls on the meaning of certain expressions used by me in my speech in *Bieber's* case are entirely in accordance with what I intended to convey.

LORD ATKINSON—The contract impeached in this case, if it stood alone and unconnected with Messrs Krupp's interest in this company, must be held to be illegal because it has two vices—first, it is an executory contract of course, but an executory contract is only condemned because, if performed, it would either amount to trading with the enemy or amount to affording opportunity for communication with the enemy. Where I am inclined to differ from my noble friend Lord Finlay is this, that whether it involves trading with the enemy for a year, or ten years, or fifty years, or communicating information for one year, or ten years, or fifty years, it is the trading with the enemy, even though it may be only for a short time, and the opportunity for communication, though it may be only for a short time, which vitiates the contract because it is injurious to the interests of the State, and on grounds of public policy is to be condemned and declared void.

Now I think that this case is covered by *Bieber's* case. I had the honour of being a party to that decision, and dealt with some of the matters in the judgment which I delivered. I deny altogether that my noble friend Lord Dunedin ever said that every executory contract should be declared void; on the contrary, he went on to point out that some executory contracts are not to be declared void at all for the very good reason that they may neither involve communication with the enemy nor trading with the enemy.

But it is sought to defend this contract by bringing it within the principle of *Hugh Stevenson & Sons* v. *Aktiengesellschaft für Cartonnagen-Industrie* (1918 A.C. 239), where it was decided that if an alien has property in this country, that property and the fruits which may arise from it are not to be confiscated but preserved for him until the end of the war, and it is said that the interest and status which the Messrs Krupp have acquired in this company, and the interest of the shareholders, is property of an analogous kind, and that the fruit of that property is these contracts, and therefore the property and that fruit must be preserved for them till after the war. I do not think that these contracts that he is enabled to make and has the right to make by reason of his interest in the corporation and his status in it can be at all considered to be the fruits of property within the meaning of *Stevenson's* case and of the other cases dealt with; but I go further and say that in my humble judgment if they are the fruits of his property, inasmuch as they are executory contracts to be carried out by sending goods to a firm which has become an enemy alien, fruit of that kind is vicious fruit which cannot be preserved till the end of the war for any enemy alien. That is my humble opinion. I therefore think the judgment in this case was perfectly right and should be upheld.

LORD SHAW—What is asked in this case is a declaration that a certain agreement of the 15th August 1873 "was dissolved, abrogated, and avoided by the existence of a state of war" between this country and Germany. It was not disputed that, so far as the period of war extended, that abrogation in point of fact must exist, but it was argued, although not expressly in that form, still in substance, that this abrogation was merely a temporary abrogation, and that, in short, suspension and nothing else was the result of the outbreak of war.

I am of opinion that the whole of this question of suspension has been already sufficiently dealt with in this House in

various cases, including *Horlock* v. *Beal* (1916 A.C. 486), in which the principle laid down by Lush, J., in *Geipel* v. *Smith* (1 Asp. Mar. L. C. 288) is affirmed—namely, that when a rupture of contractual relations takes place owing to the outbreak of war, that rupture is *ex necessitate* for a period which is indefinite, and so the rupture is complete in the eye of the law, and for ever. But there was a question in this case which might have been argued to your Lordships; it is the question which is referred to by Younger, J. Referring to certain decided cases, that learned Judge in his judgment stated—"The attention of the Lords Justices was not in either of these cases, I think, directed to a contract so special in its terms or so prolonged in duration as this." I therefore thought at the opening of the argument that the speciality of this case being a contract extending to the long period of ninety-nine years was to be founded upon as something which distinguished this case from the others which have preceded it, including the case of *Eitel, Bieber, & Company* v. *Rio Tinto Company*. I discovered that that was not so; the length of the contract in this case was not put by the learned counsel as a ground for distinguishing the present from *Bieber's* case at all, and, in short, the principle of *Bieber's* case was not challenged. I confess to a little surprise at that course in one view—namely, that there are expressions towards the close of Lord Parker's judgment in *Bieber's* case which might have, at least for a time, grounded an argument that the principle of that case did not extend in anything like a general direction; but, as I say, your Lordships are in the position that the principle *quoad* length of time of *Bieber's* case was not challenged as being applicable to the present case.

Then what did the argument come to? Here is an executory contract. Under this executory contract the firm of Krupp obtains a certain right to a certain quantity of the product of a mine at Bilbao. The terms of that contract are that it shall, using only one of the arithmetical figures quoted, pay the costs of extraction of the ore, and the other incidental costs of management, and 1s. 9d. per ton over and above. Compared with the prices realisable since the war began, or presumably realisable in the ordinary commercial market, Messrs Krupp thus obtained an advantage of £45,000 a-year. I now ask with regard to this commercial contract, what did it come to in reference to the proposition that was put forward, that this advantage of Messrs Krupp was in some respects allied in nature to property? There are two meanings of the argument presented; there is a proper meaning and an improper meaning. The proper meaning of such an argument with regard to property is that alluded to by my noble and learned friend opposite, Lord Buckmaster; it is a meaning which repudiates as any part of the jurisprudence of this country the approbation of confiscation of property. That meaning may be expressed thus—that at the end of the war the property of a partner who happened to be an enemy alien, with the accrued profits on his share in a partnership, shall be restored to him if the conditions of peace between the enemy powers do not forbid that transaction and do not interfere by a specific and different arrangement with that result. That seems to be perfectly sound and I assent to it; but the other and dangerous, and as I think wrong, proposition is this—it may mean that at the end of the war, under this appeal to "property," the contractual arrangement between the parties as to, *inter alia*, the property, or yield of property, belonging to the adventure shall be resumed, and so in this way the enemy alien's post-war advantage shall, roughly, be the same as his pre-war advantage. Taken in the concrete, that would, accordingly, result after the war in the Messrs Krupp being put in this position, that notwithstanding high prices ruling in the markets of the world for this Spanish iron ore, they could found upon this executory contract which had been disrupted for a long and indefinite period by the war, and found upon it to their advantage as if it had been resumed afresh by the parties to the contract. In commerce that could not work. Your Lordship on the Woolsack has been good enough to allude to the illustration which was given. This business of selling iron ore to the advantage of all the partners, including Messrs Krupp, must be continued; it turns out from our experience within the covers of this record that long leases, and long advantages in point of time, may be given with regard to price; and I therefore assume a forward contract price, say for a period of twenty years. In such a case it is perfectly clear that during the currency of the war—and that is an important consideration—the hands of the remanent and British members of this firm would be tied by this embarrassing consideration producing a commercial impossibility, that by making a forward contract they would interrupt—so the argument would seem to be—the rights which would *de jure* arise at the conclusion of the war to Messrs Krupp, and so an impasse of a commercial character, difficult to describe, difficult to foreshadow, but making commerce almost impossible, would be produced. There is that consideration.

There is this further consideration, that if this valuable asset, capable of again springing into being, exist on the part of Messrs Krupp, it is not an inconceivable thing that the enemy alien would during the war receive the greatest advantage. Any banker in Amsterdam, upon an assignment of that prospective and eventual interest, might have advanced millions of money on this contract, and the advantage of Germany would thus have been that under the doctrine now contended for there would during the currency of the war itself have been produced financial advantage to the very enemies against whom the rule with regard to enemies is directed.

I have thought it right separately to make these observations because of one thing. I was not a party to the decision in *Bieber's* case, but the separate consideration, and that separate route which I have trod, seem

to lead me to confirm in the most ample degree the significance of the *Bieber* decision.

I express my concurrence with my noble friends Lord Dunedin, Lord Atkinson, and the other noble Lords, and I put in particular this consideration before the House, that now this case has been decided it shall not be open hereafter to challenge the expansive and general authority of the *Bieber* case, defended, as in my view it is, by those other considerations with which I have ventured to trouble the House.

Appeal dismissed with costs.

Counsel for the Appellants — Compston, K.C.—Dighton Pollock. Agents—Nicholson, Graham, & Jones, Solicitors.

Counsel for the Respondents — L. Scott, K.C.—H. G. Wright. Agents—Bircham & Company, Solicitors.

Counsel for the Public Trustee — Austen-Cartmell. Agents — Coward & Hawksley, Sons, & Chance, Solicitors.

HOUSE OF LORDS.

Monday, March 24, 1919.

(Before the Lord Chancellor (Birkenhead), Lords Finlay, Atkinson, Shaw, and Parmoor.)

M'ELLISTRAM *v.* BALLYMACELTIGOTT CO-OPERATIVE AGRICULTURAL AND DAIRY SOCIETY, LIMITED.

(On Appeal from the Court of Appeal in Ireland.)

Contract—Illegality—Restraint of Trade—Industrial and Provident Society—Validity of Rules—Challenge by a Member—Arbitration Clause—Powers—Industrial and Provident Societies Act 1893 (56 *and* 57 *Vict. cap.* 9).

In 1916 the respondent society which the appellant had joined in 1903 altered its rules. By the new rules, to which the appellant objected as in unreasonable restraint of trade, members became bound under penalty to sell their whole output of milk to the respondents at their price, whilst they were prohibited from withdrawing from membership of the society except with the consent of a committee of the members. The rules referred all disputes between the society and its members to the decision of the Irish Agricultural Organisation Society.

Held that a dispute as to validity of the rules of the society was not a dispute between the society and its members in terms of section 49 of the Industrial and Provident Societies Act 1893. The action was therefore competent — *Heard* v. *Pickthorne*, 1913, 3 K.B. 299.

Held further (*dis.* Lord Parmoor on the ground that membership of a co-operative society is analogous to a partnership), that as the combined effect of the new rules was to impose restrictions more onerous than reasonably necessary for the protection of the respondents' business, they were *ultra vires* of the society.

Tipperary Creamery Society v. *Hanley*, 1912, 2 I.R. 586, *approved.*

Athlacca Co-operative Creamery, Limited v. *Lynch*, 1915, 49 I.L.T. 233, and *Coolmoyne and Fethard Co-operative Creamery* v. *Bulfin*, 1917, 2 I.R. 107, *overruled.*

The *facts* appear from their Lordships' considered judgment:—

Lord Chancellor (Birkenhead) — In this appeal the appellant seeks a declaration that a certain rule of the respondent Society is not binding on the members as being improperly adopted to his prejudice, illegal because in restraint of trade, and *ultra vires* the respondent Society, and he asks for an injunction to restrain the respondent Society from acting thereon.

At the trial judgment was entered for the plaintiff, but this was reversed by the Court of Appeal in Ireland, and from that reversal the present appeal is brought.

The respondent Society was registered on the 6th March 1903 under the Industrial and Provident Societies Act 1893, and was governed by special rules applying and modifying general rules.

By rule 3 of the special rules the Society was empowered to carry on the occupations, *inter alia*, of dairymen and manufacturers of dairy produce, but there was no limitation as to the area within which such occupations might be carried on. Rule 4 provided that the shares should be transferable only, except guarantee shares, which if issued were to be withdrawable. Rule 11 specified certain rules which were declared to be fundamental and alterable only at a special general meeting by a two-thirds majority, representing at least two-thirds of the nominal capital. Rule 20 provided that any member who should supply milk to any other creamery than that owned by the Society for three years from his admission to membership without the consent of the committee should forfeit his shares. The general rules provided for the constitution of the Society. Rule 45 enabled a member to transfer his shares with the approval of the committee. Rules 63–68 and rule 72 provided for the holding and conduct of special meetings, and rule 120 provided for the amendment of rules not declared to be fundamental.

Towards the end of 1915 the committee were considering a proposal to establish a new creamery at a place called Gortatlea, and on the 15th November 1915 the committee passed a resolution to call a special general meeting on the 7th December to consider the adoption of a complete amendment of the Society's rules. This meeting proved abortive, and another meeting was held on the 18th January 1916, at which a resolution to readopt the complete amendment of the Society's rules was declared to be carried by the requisite majority. These new rules superseded both the special and