contracts necessarily fall to the ground and must be disallowed. The other is that the property in all the goods is deemed to have continued as it was at the time of shipment up to the time of seizure, namely, in the enemy shippers. In other words, the enemy shippers were at the date of seizure the owners of the goods according to the doctrines of the Prize Court.

Apart therefore from all questions as to the destination of the goods they are subject to condemnation because their owners also had goods on board the same vessel belonging to them which were contraband and subject to condemnation as such.

Upon the question of infection the claimants have not, in strictness, any right to be heard, or, at any rate, any right to complain, because the decision of the Court is that they have not established any ownership in the goods and infection only affects the real owners.

I may add that even if the doctrines of the common law as to the passing of property in times of peace were to be applied in the circumstances of these cases, I should hold that the property in the goods had not vested in any of the claimants at the time of seizure.

The judgment of the Court is that all the goods claimed are condemned as good and lawful prize.

The Court condemned the goods.

Counsel for the Procurator-General—Sir F. E. Smith, K.C. (A.-G.)—Bevan—Hull. Agent—Treasury Solicitor.

Counsel for the Import Aktiebolaget Engwall, Hellberg, & Company, Berg and Halgren, and Levin Levander—Sir E. Richards, K.C.—Balloch. Agents—Botterell & Roche, Solicitors.

Counsel for the Aktiebolaget Koffee Import Rostereit "Orienten"—Balloch. Agents—Travers, Smith, Braithwaite, & Company, Solicitors.

Counsel for Rudolf Ofverstrom—Darby. Agents—Thomas Cooper & Company, Solicitors.

HOUSE OF LORDS.

Friday, March 16, 1917.

(Before the Lord Chancellor (Lord Finlay), Earl Loreburn, Lords Dunedin, Parker, and Sumner.)

WATTS, WATTS, & COMPANY, LIMITED *v.* MITSUI & COMPANY, LIMITED.

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

War—Ship—Charter-Party—Breach by Ship—Measure of Damages—Exception of Restraints of Princes.

The respondents chartered a ship from the appellants to proceed to M. before a certain date and to load and carry to Japan a cargo which the respondents had bought. The charter-party excepted "restraints of princes." The appellants failed to provide a ship, pleading as excuse a reasonable apprehension that the ship might be seized by the King's enemies. The respondents were unable to obtain another ship and had to repudiate their contract with the sellers of the cargo, paying them (after arbitration proceeding) £4500. The respondents claimed as damages £4500 together with such a sum as represented their loss of profit on the venture.

Held (*a*) that restraint of princes must be actual not prospective, (*b*) that the measure of damages was the difference between the contract price of the cargo at M. and that which it would have fetched in Japan had the voyage been prosecuted, subject to deduction of the amount of the insurance premium the respondents would have required to pay.

Appeal by the defendants from an order of the Court of Appeal, 1916, 2 K.B. 826.

The *facts* and cases cited appear from the considered judgment of their Lordships.

Lord Chancellor (Finlay)—The appellants in this case are shipowners who had entered into a charter-party dated the 5th June 1914 with the respondents, the charterers, by which it was provided that a steamer, the name of which was to be declared, should proceed to Mariopol on the Sea of Azov, and having there taken on board a cargo of sulphate of ammonia should carry it to Japan for delivery there. By the seventh clause the charterers had the option of cancelling the charter if the vessel was not ready to load by the 20th September 1914. By the twelfth clause there was an exception for the arrests and restraints of princes. The thirteenth clause was as follows:—"Penalty for non-performance of this agreement proved damages not exceeding the estimated amount of freight."

The respondents had in April 1914 purchased from the Coppee Company in Russia 3500 tons of sulphate of ammonia, and if the steamship had arrived the goods so purchased would have been shipped by it for Japan.

At the beginning of August war broke out between Germany and Great Britain, Russia, and France. Turkey did not enter into the war until November 1914. On the 1st September the respondents through their brokers requested that the name of the steamer should be declared. On the same day the appellants replied that the charter-party must be considered cancelled. The reason given was that the British Government had prohibited steamers from going into the Black Sea to load, but in fact there had been no such prohibition.

The Dardanelles were closed to navigation after sunset on the 26th September.

The action was brought by the charterers for not providing a steamer according to the charter-party. The defence was that on the reasonable apprehension of Turkey becoming involved in the European War, and of the Dardanelles being thereupon

closed, the shipowners were justified by reason of the exception of arrests and restraints of princes in not sending a vessel to load.

The action was tried by Bailhache, J., in the Commercial Court. He decided—(1) That there was no justification for the breach. (2) That even if the steamship had arrived by the cancelling date (the 20th September) she could not have loaded and got to the Dardanelles before they were closed. (3) That if the steamship had been provided at Mariopol the charterers could have insured the goods for Japan, and that they had lost the chance of doing so, to the shipowners' default. (4) That no other charter-party being procurable the charterers were entitled to £3800, being the amount of profit which they would have insured on the voyage to Japan. The learned Judge arrived at this amount by taking the difference between the price at which the charterers had purchased the goods under the contract of April 1914 and the market price in Japan in November 1914, the date at which the goods might have been expected to arrive, but by a lapse no allowance was made for the premium which the respondents would have had to pay on the insurance.

A claim for £4500 which the charterers had paid to their sellers (the Coppee Company) to have their contract of purchase cancelled was disallowed as being too remote.

Both sides appealed to the Court of Appeal, the shipowners on the ground that they ought to have been held not liable, and the charterers on the ground that they ought to have been allowed the sum of £4500 which they had paid to their sellers. The Court of Appeal disallowed the claim for £4500, agreeing in this with Bailhache, J.; and while holding the shipowners liable in damages, varied the order of Bailhache, J., by directing a reference to ascertain the amount of the damages, and declaring that the measure of damages was the difference between the price which the goods would have realised if they had been sold in Japan at the end of November 1914, and the cost price of the goods at the port of loading at the current price at the nearest available date to the 10th September 1914, in addition to freight, insurance premiums for war risks, and brokerage.

The effect of the decision of the Court of Appeal was that while the damages would be reduced by the allowance for the amount of the premium, they might have been largely increased if it proved to be the case that the cost price at Mariopol at the time of the breach was less than the price under the contract of April 1914.

The shipowners appealed to this House; there was no cross appeal in respect of the £4500 disallowed by both Courts below.

In my opinion the contention of the appellants that they could justify the failure to provide a steamship on the ground of the exception for restraint of princes was not made good. There was not, in fact, any restraint of princes to prevent the passage of the steamship through the Dardanelles and to Mariopol until the closing of the Dardanelles on the evening of the 26th September. There was a reasonable apprehension that the Dardanelles might be closed, but such an apprehension does not constitute a restraint of princes. To bring the case within the exception there must be an actual restraint in existence, and in the present case there was nothing to prevent the steamship from passing the Dardanelles and arriving at the port of loading by the cancelling date (20th September).

It is quite true that her going there, so far as the actual voyage to Japan was concerned, would have been useless, as the Dardanelles were closed before she could have got out, but if the vessel had arrived at Mariopol the charterers might have insured against war risks. I confess I have some doubt whether the respondents might not have abandoned the adventure instead of having to insure at a heavy premium, but having regard to what passed at the trial, as stated to us by counsel on both sides, I think we must deal with the case on the footing that the insurance against war risks would have been effected. The only controversy between the parties on this point appears to have been as to whether such an insurance was practicable. It was proved by the one witness called that the insurance could have been effected. There was no contradiction, and I think that the Courts below were right in holding that the loss of insurance may be recovered. I do not think that the opportunity of effecting an insurance can be regarded as too remote to constitute an element of damage.

As regards the amount of the damages, the basis adopted by Bailhache, J.—correcting of course the mistake as to the non-allowance of the premium—was in my opinion correct. It was strenuously argued for the respondents that as the £4500 paid by the respondents to their sellers as too remote, the contract of April must be disregarded for all purposes, and the loss ascertained on the difference between the market price at the port of loading at the date of the breach and what would have been the market price in Japan on arrival. It would follow, on the assumption that the cost price at Mariopol had fallen by the time of the breach to a point below the price under the contract of April, that the damages recoverable would be correspondingly increased. In my opinion the respondents' contention on this point fails. It is quite clear, and indeed was not disputed, that if the steamship had arrived at Mariopol the sulphate of ammonia which the respondents had contracted to purchase under the contract of April would have been the goods shipped, and this of course involved taking delivery of these goods, and paying for them to the seller. If the respondents having so shipped the goods had started the steamship upon a voyage to Japan, insuring against war risks, the adventure would have been frustrated by the closing of the Dardanelles, and this should have constituted a constructive total loss. The respondents would have recovered on the insurance the value of the goods as at the time of their expected arrival at Japan, but they would

ex hypothesi have had to pay the price for the goods under the contract of April, and the difference between these two amounts would have represented their profit after deduction of premium, &c. This seems to me to exclude any inquiry as to a possible lower market value at Mariopol at the time of the breach.

The case of *Rodocanachi* v. *Milburn*, 18 Q.B.D. 67, has in my opinion no application. That was a case in which the goods had been lost on the voyage by the fault of the ship, and it was held that the damages could not be reduced by reference to a contract for sale at a price below the market price at the date when they ought to have been delivered.

The claim of the respondents to enhance the damages by reference to a supposed fall in the market at Mariopol at the time of the breach appears to me also to fall upon another ground. There was no evidence that there was any market at Mariopol for such goods, or that they could be obtained from any person other than the Coppee Company (the respondents' vendors), and there is no evidence of any fall in the cost price of such goods at the time of the breach. It is indeed probable that the price may have fallen after exit from the Black Sea had been barred by the closing of the Dardanelles on the 26th September. The Court of Appeal ought not in my opinion to have directed an inquiry as to damages on a basis for which no foundation had been laid by the evidence at the trial.

I agree with the construction put in the Courts below on clause 13—the penalty clause. If this clause had appeared for the first time I think it might have been construed as imposing a limitation on the damages to be recovered, but the penalty clause is an old one with a settled meaning, and the intention, if it existed, to make so fundamental a change in its effect as is suggested ought to have been much more clearly shown in order to bind the other party to the contract.

In my opinion the judgments of Bailhache, J., in the present and in the earlier case before him on this point were right.

In my opinion the respondents are entitled to £3800, less the cost of insurance, &c.

Bailhache, J., took the premium to be 6 per cent., and on this basis the amount will be £800.

I think that the respondents should have costs in the Commercial Court and in the Court of Appeal, but that there should be no costs of the appeal to this House.

I am authorised to say that Lord Parker concurs in the opinion I have just read.

EARL LOREBURN—I need not recapitulate the facts of this case. In my opinion there was no restraint of princes on the 1st September, when the shipowners declared their intention of not carrying out their contract. There was an available force at hand in the Dardanelles, and if the situation had been so menacing that a man of sound judgment would think it foolhardiness to proceed with the voyage I should have regarded that as in fact a restraint of princes. It is true that mere apprehension will not suffice, but on the other hand it has never been held that a ship must continue her voyage till physical force is actually exercised. I agree, however, with Lord Dunedin's expression that "it would be useless to try and fix by definition the precise imminence of peril which would make the restraint a present fact as contrasted with a future fear." No form of words is likely to cover automatically all contingencies. In the present case the list of ships that went through the Dardanelles to and fro during the material days, which were furnished to us during the argument though not printed in the book, show that there was no restraint of princes when the voyage was abandoned. I cannot agree with the learned counsel for the appellants that we are to judge merely by the event. The decision must be made at the time by those concerned.

If this be so, the sole remaining question relates to the measure of damages. What the plaintiffs claim was the sum they had to pay as compensation to the sellers of the cargo which they had bought in order to load it on the ship, but were disabled from loading because the defendants failed to provide the ship. Now this would not be the measure of damage in the absence of any notice to the shipowner. It is unnecessary to quote authority for this familiar rule. After the case had been heard on this footing the learned Judge allowed an adjournment to hear evidence on another footing altogether. The plaintiffs then argued that if this ship had entered the Black Sea and reached the port of loading on the 20th September (the last day allowable under the contract and the earliest day on which she could have arrived) they could have loaded her with the cargo intended. They also said that they could and would have insured the cargo against war risks, and that though she would have been captured by the Turks on her way down through the Dardanelles they would have recovered from the underwriters. The evidence on this case was very meagre, and indeed unsatisfactory, but it was uncontradicted. We are therefore bound to take it that this cargo could and would have been insured against war risks at a premium of 6 per cent. They would have done so, we must assume, because a sensible man of business would so act, and they were deprived of their opportunity of so doing.

In these circumstances I think it is legitimate to recognise this as an element in damages. A man of business in such a position would naturally load the cargo and insure against war risks if he could, even if the premium swallowed up nearly all the profits of his voyage, because he would thereby be free from any liability which might fall upon him for not himself taking delivery from his sellers, or if he himself had already taken delivery he would not be left with the goods on his hands in a port to which access might soon be made impossible by war. In short, I think the plaintiffs are entitled to say to the defendants—"You broke your contract in not sending your

ship to the port of loading. If you had sent her we could have loaded her with a cargo which we had ready. True, it would never have reached its destination by reason of the war, but we should have insured against war risks, as any practical man would do, and we could have done so at 6 per cent. premium. Pay us what we have lost by your default. It is the avowed value at port of destination, less the actual price we paid at port of loading and the expenses, and less also the premium we had to pay for insuring against war risks." That sum leaves £800 as the damages.

LORD DUNEDIN—In terms of the contract contained in the charter-party of the 5th June 1914 the appellants were bound to send a steamer to Mariopol, on the Sea of Azov, not to arrive before the 1st and the contract cancellable if it arrived after the 20th September 1914, to receive a cargo of 3500 tons of sulphate of ammonia to be carried to Japan *via* the Suez Canal. On the 1st September 1914 the appellants informed the respondents that they considered the contract as cancelled. On the 2nd the respondents in a letter to the appellants refused to accept that proposition and called on them to proceed with the contract and give the name of the steamer which they proposed to send to Mariopol. The appellants persisted in their attitude, and no steamer was sent. The present action is to recover damages for this alleged breach of contract.

The first question that arises is whether there was a breach of contract. The nonfulfilment is admitted, but the appellants say that under the circumstances that is excused under one of the exceptions in the charter-party—namely, restraint of princes. On the 1st August 1914 Germany had declared war against Russia and had begun hostile action against France, and on the night of the 4th Great Britain declared war against Germany. There was, however, at this time no activity on Germany's part in the Black Sea or in the passage from the Black Sea to the Mediterranean, or in the Levant. Turkey was a neutral. Restraint of princes, to fall within the words of the exception, must be an existing fact and not a mere apprehension. This was held long ago by Lord Ellenborough in *Atkinson* v. *Ritchie*, 10 East, 530. The more recent cases cited by the appellants, such as *Giepel and Another* v. *Smith and Another*, L.R., 7 Q.B. 404, and *Nobel's Explosives Company* v. *Jenkins*, 1896, 2 Q.B. 326, do not in any way touch that proposition. They only show that it may be possible to invoke the exception when a reasonable man in face of an existing restraint may consider that the restraint, though it does not affect him at the moment, will do so if he continue the adventure. It would be useless to try to fix by definition the precise imminence of peril which would make the restraint a present fact as contrasted with a future fear. The circumstances in each particular case must be considered. In the present case, while there was natural and great apprehension on the 1st August, and while the decision of the British Government immediately after to exclude Black Sea voyages from the benefits of the Government Insurance Scheme, might well deter British subjects from sending their ships to the Black Sea, yet it is clearly proved by the production of lists of ships which after that date, and up to the 26th September, passed inwards and outwards through the Dardanelles, that there was no such restraint as would have actually prevented the appellants presenting a ship at Mariopol before or by the appointed date of the 20th September. I agree on this matter with the conclusion arrived at by the Courts below.

Breach of contract being ascertained, damages are due. What happened subsequently, so far as material, was as follows:—The respondents attempted, but without success, to secure another ship at Mariopol. On the 26th September the Dardanelles were finally closed and have never been open since. On the 5th November Great Britain declared war against Turkey. The respondents had by a contract, of date the 23rd April 1914, secured a cargo of sulphate of ammonia from a company, Coppee Company Limited, registered in England but trading in Russia at Mariopol. Under the contract the sulphate was to be accepted by the buyers not later than the end of October, but the respondents asked and obtained a prolongation of the period to the end of November. In November the respondents, who had been sounding the Coppee Company as to terms for cancelling the contract, finally intimated that they did not propose to accept delivery. A lengthened correspondence ensued as to what damages were to be paid, and the matter was finally settled in July 1915 upon the respondents paying the Coppee Company £4500 with certain costs of an inchoate arbitration.

The respondents in the case as raised set forth the breach of contract by the appellants and their own consequent inability to accept delivery of the sulphate, and claimed as damages the said sum of £4500 together with such a sum as would represent their loss of profit on the venture, said loss to be arrived at by taking the difference between what the sulphate would have fetched if sold in Japan in November, and the sum they would have had to pay for it at Mariopol under the contract. They went to trial, and the respondents contented themselves with proving the charter-party, the failure of the appellants to send a ship, and their own inability to procure another ship, the facts as to the contract and the payment they had made to the Coppee Company, and the facts as to the position at the Dardanelles and the Black Sea in August and September. The evidence of the appellants was directed to the sole point of showing that there was such danger as at the 1st September as justified them in refusing to send a ship.

The evidence being closed and counsel having addressed the Court, the learned Judge seems to have expressed an opinion that the restraint of princes was not, in his view, made out in fact, and that in law

the liability of the respondents to the seller under the contract was as regards the appellants *res inter alios acta* and too remote to be taken as the measure of damages as against them. He also seems to have indicated that in his view, the Dardanelles having been finally shut on the 26th September, the voyage could not have been made at all, as the ship, even if sent by the due date, could not after loading have repassed the Dardanelles. At the same time he indicated that it might have been possible for the respondents, if the ship had been at Mariopol, to have insured the cargo for safe arrival, and in so doing to have valued the goods at arrival value in Japan. He accordingly, without amendment of the pleadings, allowed a continuation of the cause to a future day for further evidence on that point. This evidence was subsequently led, and thereafter the learned Judge gave his judgment. He found, first, as already stated, as to the restraint of princes; second, as a fact that the Dardanelles having been finally closed on the 26th September the ship even if sent could not have made out the voyage; and third, as a mixed question of fact and law, that the respondents, had the ship been duly sent to Mariopol, could and would as reasonable men have effected an insurance against loss, including war risks, on the arrived value of the goods in Japan. On this third finding he repeated his view as to the payment under the contract between the respondents and the Russian sellers not being the measure of damages as against the appellants; but he found due as damages the sum of £3800, being the difference between the proved value of the cargo as it would have sold in Japan, which he assumed covered by insurance, and the sum payable for the sulphate of ammonia if the respondents had shipped the intended cargo, which would have given them an insurable subject.

Both parties appealed to the Court of Appeal. The learned Judges there affirmed all the findings of the trial Judge in fact and law, but on the third finding they came to a different conclusion. While affirming the view that the damages paid under the contract could not be taken as the measure between the respondents and appellants, they decided that the proper way of arriving at the damage was to take the arrived value of the goods, which, like the trial Judge, they held could be covered by insurance, and then to find the loss which the respondents suffered by comparing that sum with the cost of buying a cargo at Mariopol on or about the 10th September 1914, plus freight, insurance premium for war risk, and brokerage, and they referred it to the official referee to determine this sum.

The general rules for assessment of damages for breach of contract have been often stated, but nowhere more succinctly than by Parke, B., in *Robinson* v. *Harman*, 1 Ex. 850—"Where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed." The matter was further elucidated in the case of *Hadley* v. *Baxendale*, 9 Ex. 341.

Now what would have been the position of the respondents if the ship had been duly sent to Mariopol? They would have been able to ship their cargo. But what then? Once it is found as a fact that the final closing of the Dardanelles on the 26th would have prevented the ship after loading from reaching the Mediterranean it is obvious that the intended voyage could not have been performed. The appellants argued that, that being so, damages should be merely nominal, the true cause of the failure of the adventure being not their breach of contract but the facts of war. I agree with the learned Judges in the Courts below that that does not conclude the matter, but that one must next inquire what would a reasonable man have done in the supposed position. As a matter of ordinary common sense he would have insured his cargo against sea and war risks, and the possibility of so doing was, I think, rightly affirmed by the trial Judge upon the evidence led. The result arrived at by him after this seems to me right, subject to correction of what is an obvious inadvertence—though it must be admitted an inadvertence which makes a great difference in the pecuniary result. I refer to the omission to deduct from the sum receivable under the insurance the amount of the insurance premium. This premium has been proved—not very satisfactorily, but I think sufficiently—to be calculable at 6 per cent.

This method of assessing the damage was, as already stated, altered by the Court of Appeal.

I am not satisfied that the view taken by the learned Judges of the Court of Appeal is correct. The respondents' counsel sought to support it by citing the case of *Rodocanachi* v. *Milburn*, 18 Q.B.D. 67—a case which, although not binding on your Lordships, was, I apprehend, rightly decided, and is indeed in consonance with the case in this House of *Ströms Bruks Aktie Bolag* v. *Hutchison*, 1905 A.C. 515. In that case the plaintiffs chartered a ship to bring cotton from Alexandria to the United Kingdom. The goods were lost by the fault of the shipowner. It was held that the damages due to the plaintiffs were the value of the goods at market price in the United Kingdom at the date at which the goods ought to have arrived, and that it made no difference that the plaintiffs had sold the goods "to arrive" at a figure less than that market price. It does not appear to me that the present case is in the same position. In that case the plaintiff, owing to the breach of contract, was actually left without his goods, and he was therefore entitled to be presented with the sum which it would have cost him to get other goods of the same quality and quantity. Whether, having the goods, he sold them to someone else at a profit or a loss was a matter with which the shipowner had no concern, and the fact of the sale being antecedent to the possession made no difference.

In this case the respondents were not without goods; they had no ship to put

them in owing to the breach of contract. But the failure of the venture was due not to the breach of the contract but to the war. In order to estimate the damage an ideal situation has to be created, namely, the idea that the respondents having got the ship would have insured the arrival of the goods in Japan against all risks, and the respondents are given credit for the arrived value of the cargo intended to be shipped. But then I think we must take the ideal situation as it would have existed in fact—that they would have shipped the cargo they intended to ship—that is to say, the sulphate of ammonia acquired under the contract; and that therefore their only real loss is the difference between the price they would actually have had to pay for the cargo and the arrived value of the cargo under deduction of the insurance premiums. Taking it the other way, and assuming there had been a fall in the market, then, inasmuch as the venture was in truth frustrated not by the breach of contract but by the war, you really come to throw on the back of the shipowner the loss in value of the goods which was truly due to the war.

Besides this there is, in my view, something else which ought to prevent judgment passing in terms of the order of the Court of Appeal. The respondents here entered Court with a claim based entirely on their own payment to the Russian seller, and they made no other case. After the case was really concluded the learned Judge intimated that he could not accept their view; and, indicating the point as to insurance, he allowed an adjournment for further evidence. The respondents had then the opportunity of making out any case they could as to insurance. They did so by proving the possibility of insuring against war risks at a premium of 6 per cent. up to at least the middle of September, and by proving what would have been the selling value of sulphate of ammonia in Japan in November. They proved nothing as to the state of the market at Mariopol in mid-September, nor indicated in any way that the price would have been less than the price they had agreed to pay under the contract.

It is true that there are some references to the market for sulphate of ammonia having fallen, but they are of the most vague description. They are not the subject of direct testimony, but are all, such as they are, contained in the negotiations in correspondence between the respondents and the Coppee Company as to the amount of damages to be charged against the respondents for having broken the contract of sale —correspondence which, strictly speaking, is not evidence at all in regard to statements made in it as against the appellants.

The earliest and indeed the only reference which is at all direct is in a letter of the 17th September from the Coppee Company to the respondents, in which, with reference to a verbal communication made by the respondents that they were not ready to accept delivery of the sulphate and would like to know what would be the terms for cancellation, the Coppee Company point out that the sulphate is all lying ready to be delivered, and that if it is not taken at the stipulated time they will have to arrange either to build or to hire a store in order to prevent deterioration of the sulphate during the cold weather. They add—"In addition, the market price has diminished, and we should have to take into consideration the probability whether the price would further diminish during the period the sulphate is in store." That means, of course, till the spring. On the 6th November they write again—"We went into the question of the fall of price in sulphate, and so far as we are able to estimate any future loss in this respect, and for the storage," &c. Actual figures are not approached till January 1915, when the fall in price is quoted at £2, 3s. 9d. per ton. But by this time the war with Turkey was well established and the Black Sea was absolutely sealed for exit to the Mediterranean. It is obvious that the price at that time reflects no light on the price at mid-September 1914, at a time when both in fact and *ex hypothesi* of the present calculation the sea was still open and a voyage from Mariopol to Japan was insurable. This exhausts the references to be found in their correspondence. There is one piece of direct testimony given by the respondents' own manager which, so far as it goes, tends the other way. He says that in July 1915 it was rumoured that the price of sulphate in Russia was very high. He also says that there is no market price for sulphate of ammonia in Russia, except the prices advertised by Coppee and Company. There is not a shred of evidence that Coppee and Company would have supplied sulphate in mid-September at a reduced price. This being so, it seems to me that there is no justification for allowing a new and fresh inquiry to make a new case. I am aware that the Commercial Court is not bound by the stricter rules of pleading which obtain in the ordinary courts. But I cannot think it would be right at this time to start a new case as has been done by the Court of Appeal in the order complained of. The respondents have already had two cases adjudicated. It is not right, in my opinion, that they should now be allowed to embark on a third without having proved the fact which forms the foundation of it, basing the hope on the strength of casual references in a correspondence with other parties that something may turn up which will allow of a larger computation of the damages due.

I am therefore of opinion that the appeal should be allowed and that the respondent should be found entitled to the sum of £800, being the sum allowed by Bailhache, J., minus the premium calculated at 6 per cent. This view makes the discussion as to the limitation of liability under the penalty clause of no practical importance. But I wish to say that had it been necessary to decide the point I should have only wished to express my approval of the admirable judgment of Bailhache, J., in the case of *Wall* v. *Rederiaktiebolaget Luggude*, 1915, 3 K.B. 66.

LORD SUMNER—Restraint of princes is, I think, no excuse for the appellants' breach of charter-party in not sending a steamer to

load at Mariopol. No such restraint even existed, still less operated to restrain them, when they intimated their intention of not sending any steamer, or at any time thereafter till the Dardanelles were closed on the 26th September 1914. They do not so contend, nor that the ambiguous and arbitrary conduct of the Porte before that date amounted to restraint.

The words "restraint of princes" do not, in my opinion, extend to the apprehension of restraint. Such is neither the meaning of the words nor the sense of the clause. No decided case has gone so far, and the language of Lord Ellenborough in *Atkinson* v. *Ritchie*, 10 East, 530, is authority to the contrary, though, as the ship there could have loaded a full cargo before any embargo was imposed, the case on the facts is distinguishable. The exceptions clause contemplates matters which cause a breach or prevent performance of the charter. The reasonable apprehension of a prudent man and the inutility of doing something, which cannot lead to any good result, are considerations material in deciding at what distance of time or over what area an existing restraint of princes may be deemed to be operative so as to restrain; but restraints in themselves they are not. The appellants admit that apprehension alone will not suffice, and say that the shipowner must take the risk of his fears being justified by the event. This argument converts a provision stipulating the effects of the operation of certain causes into a speculation upon the chances of their coming into operation. To some of the excepted matters—for example, fire, explosions, or collisions—such a contention is obviously unfitted. In any case its application would lead to the interpolation of a period of suspense during which neither party could be certain of his rights until the course of events determined the speculation in one way or the other. As Scrutton, L.J. (then Scrutton J.) well observes in *Embiricos* v. *Sidney Reid & Company*, 1914, 3 K.B., at p. 54—"Commercial men must not be asked to wait till the end of a long delay to find out from what in fact happens whether they are bound by a contract or not." Such a construction would unsettle the foundation of the contract as a matter of business, which is that the ship shall proceed upon a named voyage unless prevented by named causes. Here, as the facts stood, the shipowners, by refusing to send a ship to Mariopol, evinced such an intention not to perform their bargain as justified the charterers in treating it as an offer of repudiation and in accepting it as such.

I have no doubt that clause 13 is a penalty clause and immaterial in the present case. To read it otherwise is to ignore the first word "penalty." True the use of that word is not decisive, but it is not impossible to read the residue of the clause as defining a mode of calculating a mere penal sum, and to read it as a limitation of the right to recover proved damages seems to me to produce an absurd result in business. Whatever the value of the cargo or the extent of the injury to it, the shipowner's liability in respect of it would be limited to the estimated amount of the freight, however that estimate is to be made. If the cargo owner is uninsured, he stands to lose large sums for the ship's default. If he is insured he upsets the ordinary course of insurance business by depriving his underwriter of a valuable right of recourse and must suffer for this in one way or another. Nothing could be less like a "genuine covenanted pre-estimate of damage"—*Dunlop Pneumatic Tyre Company* v. *New Garage and Motor Company*, 1914 A.C., *per* Lord Dunedin at p. 86. The whole matter has been fully and, if I may say so, admirably discussed by Bailhache, J., in the recent case of *Wall* v. *Rederiaktiebolaget Luggude*, 1915, 3 K.B. 66. Your Lordships decided the point in *Ströms Bruks Aktie Bolag* v. *Hutchison*, 1905 A.C. 515, upon a somewhat similar clause, and I think that the present case cannot really be distinguished. My only difficulty is to understand why such a provision should be inserted at all.

I should be loath to hold that, if insurance of the war risk was feasible, proof that the charterers would have insured it was really needed. As is admitted, to insure the cargo against marine risks would be the ordinary thing to do, and it would have been obviously imprudent in a merchant to stand his own insurer of the war risk of such an adventure. I should have thought it would be within the legitimate inferences of fact to be drawn from the known circumstances of this case to find that a war-risk policy would be effected, but, as it is, the point need not be decided. What passed between the solicitors to the parties before the adjourned hearing in effect dispensed the plaintiffs from calling any witness on the point, almost formal as that witness would have been. The evidence called was very brief, but it sufficiently supports a finding that the whole line would have been covered. If so, no further inquiry on the point is needed. In effect, the breach of charter-party caused the plaintiffs to lose the chance of shipping and dispatching an insured cargo and of recovering on the policy when the cargo was lost, as it would have been actually and constructively, in consequence of the outbreak of war with Turkey. The legal presumption must be that the amount to be insured would be such as would indemnify the plaintiffs for their actual loss and pecuniary damage. This will accordingly eliminate the factor of war and bring the case within the ordinary rules as to damages for breach of contracts of carriage by sea,

On the measure of damages a point of considerable nicety was discussed, but in my opinion it is not really raised by the evidence. The principle of measuring damages for breach of a contract for the sale of merchandise by a ruling market price at a given date is not always equally applicable to contracts of charter-party. Nor do I think that the canon expressed by Lord Davey in *Ströms Bruks Aktie Bolag* v. *Hutchison* is in point in the present case. There the charterers were themselves producers of the intended cargo, and could have loaded

the ship from their own factory if she had arrived to load. Their claim arose because the shipowner's breach of contract prevented them from delivering the cargo at the port of discharge as they had contracted to do. Naturally, in measuring their loss, the cost of replacing it there was a factor to be compared with the value of an equivalent quantity never shipped at all. In the present case there is no evidence that there was any market or even any market price for sulphate of ammonia at Mariopol about the 10th September 1914. There is no evidence that the charterers could have bought a cargo of it there or then, so as to load it on the arrival of the defendants' ship. Such evidence as there is shows that, if there was any sulphate of ammonia except the cargo in question, it all belonged to the firm from whom the charterers had contracted to buy it. If so the charterers would have held to their bargain if the price had risen, and the vendors if it had not. A good deal can be said for the argument that, if this bargain is to be disregarded as too remote (which is admitted) so far as the plaintiffs claimed to recover the damages paid for its non-fulfilment, then, too, it should be disregarded for all purposes connected with the present case, and that the position is truly an inversion of that in *Rodocanachi* v. *Milburn*, 18 Q.B.D. 67—"The value is to be taken independently of any circumstances peculiar to the plaintiff." This argument, however, is based on a supposition of fact as to the existence of a market price at Mariopol, which on the evidence fails.

I think that in the main the appeal succeeds, and I concur in the motion proposed by my noble and learned friend on the Woolsack.

Their Lordships sustained the appeal.

Counsel for the Appellants—Leck, K.C.—Raeburn. Agents—Holman, Fenwick, & Willan, Solicitors.

Counsel for the Respondents—Leslie Scott, K.C.—Wright. Agents—Waltons & Company, Solicitors.

PRIVY COUNCIL.

Tuesday, March 20, 1917.

(Present—The Right Hons. Lord Parker, Sumner, Parmoor, Wrenbury, and Sir Arthur Channell.)

THE "GERMANIA."

(On Appeal from Probate, Divorce, and Admiralty Division (in Prize), England.)

War—Ship—Enemy's Vessel—Confiscation—Private Yacht Seized in British Port at the Outbreak of War—Sixth Hague Convention 1907, *Article* 1.

A racing yacht which was described as "of no value or utility for any commercial, naval, or military purpose, nor adaptable for any such purpose," is not *un navire de commerce* under Article 1 of the Sixth Hague Convention 1907, and consequently has not the protection against confiscation conferred by that article.

The President of the Admiralty Division (in prize) directed that the sailing schooner racing yacht "Germania," the property of Herr Gustav Krupp von Bohlen, should be condemned as lawful prize and sold. Appeal was taken on behalf of the owner. The *facts* appear in the opinion (*infra*).

The considered opinion of their Lordships was delivered by

Lord Parmoor—The "Germania" is a sailing schooner racing yacht of 366 tons Y.M., 191 tons gross and 123 tons net register, built and registered at the port of Kiel. She was built in 1908 and belonged to Gustav Krupp von Bohlen. In the claim of Baron Friedrich von Bülow, on behalf of the owner, she is described as a racing sailing yacht of no value or utility for any commercial, naval, or military purpose, nor adaptable for any such purpose, and as being no part of the commercial, naval, or military resources of the enemy.

On the 27th July 1914 the "Germania" arrived at Southampton to take part in the Cowes Regatta, and was dry-docked for the purpose of repairs, cleaning, and painting. On the outbreak of war she was in the yard of Messrs Summers & Payne, at Southampton, and was seized and detained by the officer of Customs. A decree of detention until further order of the Court was made on the 24th September 1914. Subsequently on the 23rd September 1915 notice was sent to the appellant's solicitors that an application would be made to the Prize Court to condemn the "Germania." The application was made on the 28th October 1915, and on the same day a decree was made condemning the "Germania" as lawful prize. It is against this decree that the appeal, on behalf of the owner of the "Germania," is brought.

Two contentions were raised before their Lordships at the hearing of the appeal. In the first place it was said that a racing yacht such as the "Germania" should not be regarded as property liable to confiscation and condemnation as droits of Admiralty. No authority was adduced in support of this contention. In the opinion of their Lordships there is no principle in prize law which would place a racing yacht in a special category or exempt it from the ordinary rule that enemy property seized in port after the outbreak of war is liable to confiscation and condemnation as droits of Admiralty.

It was contended, secondly—and to this point the argument of the counsel for the appellant was mainly directed—that the "Germania" was *un navire de commerce* within the meaning of Article 1 of the Sixth Hague Convention, and as such was not liable to confiscation. If the "Germania" is not *un navire de commerce* it is not within the protection of Article 1, and it is unnecessary to consider the further conditions specified in the article. In order