ORIGINAL CIVIL.

Before Mr. Justice Heaton and Mr. Justice Marten.

WOLF AND SONS IN LIQUIDATION BY P. S. MELLOR, LIQUIDATOR OF HOSTILE FIRMS, BOMBAY (APPELLANTS AND PLAINTIFFS) *v.* DADYBA, KHIMJI AND COMPANY (RESPONDENTS AND DEFENDANTS)*

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Contract with Enemy—Forward cotton contracts—Manager of an Indian branch of enemy firm entering into contracts prior to war—Pledge of goods as security by manager before and after war—Settlement by manager of pre-war contracts by cross-contracts—Agreement by Liquidator of an Indian branch of enemy firm, valid—Liquidator acting under instructions of Controller of Hostile Trading Concerns—Effect of war—Contract of agency, whether terminated by war—Payment made by Liquidator in settlement of a claim cannot be recovered—Mistake of law—Pleadings—The Indian Contract Act (IX of 1872), sections 21, 65 and 72—The Royal Proclamations of August 1914, nos. 1 and 2—Treasury Announcements—Hostile Foreigner's (Trading) Order of November 1914—The Enemy Trading Act (X of 1916), sections 4, 5 and 13—Controller can exercise all powers conferred on Official Liquidators by section 179 of the Indian Companies Act (VI of 1882), without sanction of Government—Counterclaim.

The plaintiffs, W. and Sons were a German firm with its head office in Germany and a branch office at Bombay managed by a German named Zoller. Prior to the outbreak of war between Great Britain and Germany on 4th August 1914, the plaintiffs had employed the defendants, an Indian firm in Bombay, as their guaranteed brokers and muccadums on the latter depositing with them Rs. 50,000 by way of guarantee. In July 1914, certain cotton contracts were entered into between the plaintiffs and the defendants for January to March 1915 delivery. On 3rd August 1914, the plaintiffs returned to the defendants Rs. 40,000 out of their deposit amount. On the 5th August 1914, the plaintiffs and the defendants entered into a written agreement (in pursuance of an arrangement arrived at between them the previous day) by which the plaintiffs pledged 799 bales of blankets belonging to them to defendants as security for the balance of the deposit amount and the differences on the forward contracts. On the 27 August 1914, Zoller further pledged certain cotton bales to the defendants by way of additional security. On 3rd September 1914, the forward contracts were closed by Zoller by cross-contracts with the defendants at the prevailing market rates. On 5th September 1914, Zoller was interned and one Tombroff was appointed Liquidator by Government, who in the course of his duties took directions from the Controller of Hostile Trading Concerns.

O. C. J. Appeal No. 14 of 1919; Suit No. 827 of 1917.

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In July 1915, the Liquidator with the assent of the Controller agreed with the defendants that they should sell the blankets and apply the sale proceeds towards the payment of their debt for the cotton differences. In or about September 1915, the Liquidator after communicating with the Controller entered into a further agreement with the defendants which in effect was that the Liquidator was to sell the cotton and the defendants were to give delivery to the purchasers and to allow the Liquidator to receive the purchase money on the express condition that the balance of the defendants' claim remaining after the realisation of the blankets was to be paid out of the proceeds of the cotton. The sales of the blankets and the cotton were duly effected. The sale proceeds of the blankets sold by the defendants being insufficient to pay off the whole amount of the debt due to them, the defendants sent to the Liquidator on 10th March 1916 a final statement of account showing a balance of Rs. 47,194 due to them and asked to be paid out of the sale proceeds of cotton in the hands of the Liquidator. On 12th April 1916, the Liquidator repudiated his liability to pay that amount or any, alleging that the original pledge of the blankets on the 5th August 1914 was illegal and void, and that he, on the other hand, was entitled to the sale proceeds in the hands of the defendants as pledgee after deducting therefrom Rs. 10,000 being the balance of the deposit due to them and certain expenses incurred by them. On 6th August 1917, the plaintiffs by their Liquidator sued the defendants for the amount of the sale proceeds of the blankets *contending, inter alia*, that the pre-war contracts of July 1914 and the pre-war pledge (if any) of the 4th August 1914 became *ipso facto* void on the outbreak of war, that the further pledges given on the 5th August and the 27th August 1914 were similarly void; that the cross-contracts of the 3rd September 1914 being tainted with the illegality of the pre-war contracts were also void or amounted to the settlement of a nullity; that Zoller's agency terminated *ipso facto* on the outbreak of war and that therefore he had no power to enter into any of the subsequent transactions; and that under section 65 or section 72 of the Indian Contract Act they were entitled to recover payments made towards the satisfaction of the defendants' debt, the illegality of the transactions not being discovered by them till November 1915. The defendants resisted the plaintiffs' claim for refunding the money paid and counterclaimed a large amount due at the foot of the account between the parties. On the figures agreed at the trial the plaintiffs' claim was for Rs. 69,467-9-0 and the defendants counterclaim for Rs. 58,440-9-0 (the plaintiff admitting their liability for Rs. 10,000, being the balance of the guarantee amount deposited by the defendants). The trial Judge, Macleod J, dismissed the plaintiffs' suit and decreed the defendants' counterclaim holding (*i*) that although the pre-war contracts and the two pledges became void on the outbreak of war the settlement of the contracts by cross-contracts was a legitimate transaction as merely fixing the damages

for the breach of contracts of purchase which both parties mistakenly believed could still be legally enforced, (*ii*) that Zoller's agency did not terminate on the outbreak of war and (*iii*) that the Liquidator having agreed that the amount realised by the sale of the blankets and the cotton bales be set off against the satisfaction of the debt due to the defendants, that amounted to a payment which the plaintiffs were not entitled to recover either under section 65 or section 72 of the Indian Contract Act, the latter section not applying to a mistake of law. The plaintiffs appealed :—

Held, confirming the decision of the trial Judge,

(1) that assuming but without deciding that the plaintiffs' contentions as to the effect of the war on the transactions in question were correct, the legal position of the Indian branch of an enemy firm up to November 1915 was in view of the Proclamations and Orders then in force sufficiently doubtful as to afford some justification for the view that the transactions were valid ;

(2) that the Liquidator in the course of the winding-up was entitled to enter into binding agreements with the defendants for the sale of the blankets and cotton and the application of the sale proceeds in discharge of the defendants' debt irrespective of any disability attaching to Zoller ;

(3) that the acts of the Liquidator done with the approval of the Controller were validated under section 13 of the Enemy Trading Act, X of 1916 ;

(4) that assuming that there was a mistake of law which was neither pleaded nor proved, the agreements entered into by the Liquidator with the defendants were "contracts" within the meaning of the Indian Contract Act and could not be avoided under section 21 of the Act as being made under any mistake of law, and that accordingly the payments made to the defendants were made under the binding contract and could not be recovered under section 72 of the Act ;

(5) that section 65 of the Indian Contract Act did not apply as the payments were made under valid agreements, but assuming that the payments were made under the pre-war contracts and pledges ending 3rd September 1914, the word "agreement" as used in the section did not apply to the pre-war contracts for they were "contracts" and not "agreements," and that the words "discovered to be void" were not applicable to the subsequent agreements as the parties knew all the material facts ;

(6) that no "advantage" within the meaning of section 65 was received by the defendants under the pre-war contracts when *ex hypothesi* they became void on the outbreak of war and payments were made to the defendants in 1915 under subsequent agreements with the Liquidator ;

(7) that the defendants were entitled to succeed on their counterclaim inasmuch as they changed their position with regard to the cotton in their possession on the faith of a promise made to them by the Liquidator, and that promise was binding in law.

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W. L. Ingle, Limited v. *Mannheim Insuance Company*(1), *Halsey* v. *Lowenfeld* (2), *Schaffenius* v. *Goldberg*(3), and *Holsworthy Urban Council* v. *Holsworthy Rural Council*(4), referred to.

APPEAL from the decision of Macleod J. dismissing the plaintiffs' suit for recovery of money paid and decreeing the defendants' counterclaim.

The plaintiffs, Wolf and Sons, were a German firm, having their principal place of business in Germany and having a branch office in Bombay. At the date of the suit, the plaintiffs, being a branch of an enemy firm, were in compulsory liquidation and they sued by their Liquidator, P. S. Mellor acting under the directions of the Controller of Hostile Trading Concerns, Bombay.

The Bombay Office of the plaintiffs carried on an extensive business in cotton, cotton waste and cotton blankets and was managed by one F. Zoller. The said Bombay Office had, in the course of its business, employed the defendants, an Indian firm of Bombay, as their guarantee brokers and muccadums and the defendants had deposited with that office the sum of Rs. 50,000 by way of guarantee.

In the early part of 1914, the defendants wrote to the plaintiffs' Bombay Office complaining that the latter had, in breach of the terms of the defendants' employment, been dealing with another broker, and demanding the return of the said deposit.

The plaintiffs returned to the defendants Rs. 40,000 out of the said deposit on the 3rd August 1914, but by their letter of the 4th August 1914 stated that they could not return the balance of Rs. 10,000 as it was impossible for them to withdraw money from Germany. On the 4th August 1914, war was declared between Great Britain and Germany.

(1) [1915] 1 K. B. 227.
(2) [1916] 2 K. B. 707.
(3) [1916] 1 K. B. 284
(4) [1907] 2 Ch. 62

Prior to the outbreak of war and between 16th and 23rd July 1914, the plaintiffs had entered into contracts with the defendants for forward delivery of cotton (January to March 1915 delivery). The said contracts were pending at the date of the outbreak of war, but nothing was payable under them at that date.

On the 5th August 1914, at 9 a. m. the following agreement by way of pledge was entered into between the plaintiffs and the defendants in Bombay :—

Agreement made this day between Messrs. W. Wolf and Sons of Bombay on the one side and Messrs. Dadyba, Khimji and Co., on the other side.

It has been agreed as follows :—

Messrs. W. Wolf and Sons in consideration of a large amount of money due to Messrs. Dadyba, Khimji and Co., for deposit and difference on cotton purchased from the latter for forward delivery undertake to pledge and hand over to Messrs. Dadyba, Khimji and Co., 797 bales of cotton blankets originally indented for by the late Rattonsee Hirjee.

These bales are to be stored by Messrs. Dadyba, Khimji and Co., in their godowns as security, godown rent, removal charges, &c., to be paid by Messrs. W. Wolf and Sons at the time of receiving final account. Messrs. W. Wolf and Sons undertake to have the insurance taken out on these blankets transferred to Messrs. Dadyba, Khimji and Co's. name. These blankets to be sold by Messrs. Dadyba, Khimji and Co., in consultation with Messrs. W. Wolf and Sons at the best possible market rate against spot-cash in Bombay. Messrs. Dadyba, Khimji and Co. to receive a sales-commission of 2½ per cent. and from the proceeds of these blankets Messrs. Dadyba, Khimji and Co. are to receive the full amount found due to them with interest at the rate of 6 per cent. per annum until final settlement of account, the balance to be handed over to Messrs. W. Wolf and Sons.

Messrs. Dadyba, Khimji and Co. are to produce original vouchers and to render final account no sooner the last bales are disposed of.

Bombay, 5th August 1914.

Per Pro. W. Wolf & Sons.
(Sd.) Fr. Zoller.
(Sd.) Dadyba Hormasji Billimoria.
(Sd.) Khimji Poonja.
(Sd.) Dadyba, Khimji & Co

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This agreement was executed in pursuance of an arrangement arrived at between the parties the previous day, when the key of the godown was handed over to the defendants.

On the 10th August 1914, the Royal Proclamation of the 5th August 1914 setting forth the Law and Policy with regarding to Trading with the enemy was published in the *Bombay Government Gazette*.

Briefly, that was a warning to all persons resident carrying on business or being in the British Dominions not to have any commercial intercourse with any person resident carrying on business or being in the German Empire, otherwise they would be liable to such penalties as the law provided. Any transactions with or for the benefit of any person resident carrying on business or being in the German Empire which were not treasonable and were not for the time being expressly prohibited and which, but for the existence of the state of war, would be lawful, were permitted.

But it was provided, that the Proclamation should not apply to the trading or commercial intercourse carried on by any person who had an interest in houses or branches of business in some other country as well as in the Dominions, solely from or by such houses or branches of business in such other country.

An official explanatory Announcement was issued on the 22nd August 1914. It was pointed out therein that it was important to consider where the foreign trader resided and carried on business, and not his nationality. Paragraph 4 provided :—

"Where, however, nothing remains to be done save to pay for goods already delivered or for services already rendered, there is no objection to making the payment."

On the 28th August 1914, the Government of Bombay issued a Press Note giving effect to this announcement.

On the 17th August 1914, Zoller wrote to the defendants as king them to insure the blankets in their own name.

On the 25th August 1914, the defendants wrote asking for further security owing to the further fall in the price of cotton and suggested that certain cotton bales belonging to the plaintiffs should be handed over to them, blankets to be sold first.

On the 27th August 1914, Zoller replied as follows:—

"We duly received your favour of the 25th instant and are prepared to let you have bales of cotton lying at Colaba as a security. We have handed you the key of our godown already.

Fr. Zoller."

On the 3rd September 1914, the contracts of July were closed by cross-contracts being entered into for re-sale of the cotton to the defendants at the rates then prevailing. On the 5th September 1914, Zoller was interned and one Tombroff was put in charge of the affairs of the Bombay branch of the plaintiffs' business as Liquidator.

Previous to his internment Zoller had requested the defendants to open a shop for the sale of the blankets in small quantities, and they did so, but very few were sold.

On the 9th September 1914 was issued a further Royal Proclamation relating to Trading with the enemy.

It was stated in the preamble that it was desirable to restate and extend the prohibition in the Proclamation of 5th August 1914 and for that purpose to revoke that Proclamation.

Clause 6 of this Proclamation provided that where an enemy had a branch locally situated in British,

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allied or neutral territory in Europe, transactions by or with such branch should not be treated as transactions by or with an enemy.

Clause 7 provided that nothing in the Proclamation should be deemed to prohibit payments by or on account of enemies to persons resident carrying on business or being in the British Dominions, if such payments arose out of transactions entered into before the outbreak of war or otherwise permitted.

On the 5th June 1915, Tombroff wrote to the Controller of Hostile Trading Concerns that he would arrange with the defendants for the sale of the blankets, the proceeds to be retained by them against their claim and enclosed a letter from his solicitors, Messrs. Payne and Company in which they had advised him that he was not entitled to claim delivery of the blankets without paying the moneys due to the defendants. The Controller acknowledged the receipt of this letter and agreed to the proposal by a letter of 11th June 1915.

In or about September 1915, an agreement was arrived at for the disposal of cotton pledged to the defendants to the following effect: The defendants were to give delivery of cotton to purchasers from Tombroff while the sale proceeds were to be credited to a separate account and if anything remained due to the defendants after the sale of the blankets, that would be paid from the sale-proceeds of the cotton. This action was taken by Tombroff after obtaining legal advice and consulting the Controller.

By the end of the year 1915, the blankets had been sold some by auction and some to the defendants under an arrangement with the Controller made in September 1915. On the 13th November 1915, Tombroff wrote to the Controller that owing to the decision of the High

Court in the case of the *Textile Manufacturing Co., Ltd.* v. *Salomon Brothers*[1] he would have to claim from the defendants whatever stock of blankets might be left unsold in their hands. The Controller however took no action on that letter nor made any communication to the defendants.

On the 12th February 1916, the defendants sent to Messrs. Fergusson & Co. who had been appointed Liquidators in place of Tombroff a statement of accounts of blankets, scales and tarpaulines showing the sale-proceeds to be Rs. 79,467-9-4.

On the 10th March 1916, the defendants sent a final statement of account showing Rs. 47,194-6-8 to their credit and asked for a cheque in settlement.

On the 12th April 1916, the Liquidators' then attorneys, Messrs. Soonderdas & Co., wrote as follows :—

"Our clients Messrs. A. F. Fergusson and Company, Liquidators of Messrs. W. Wolf & Sons, have placed in our hands your letter to them of the 10th ultimo with instructions to say that the pledge of cotton blankets made on the 5th August 1914 by Mr. Zoller on behalf of Messrs. W. Wolf & Sons was clearly a transaction for the benefit of an enemy and was prohibited by common law and fell within the Royal Proclamation of 5th August 1914 as to trading with the enemy. The contract of pledge therefore was absolutely void and our clients are therefore entitled to the sale-proceeds in your hands as pledgees. Our clients will give you credit for Rs. 10,000 being the balance of the deposit due to you by Messrs. Wolf & Sons. As to the accounts furnished to our clients our clients deny that you are entitled to shop rent and servants' wages incurred before the appointment of our clients as Liquidators. Without prejudice to our clients' contentions as to the correctness of the accounts we are instructed to demand from you the amount of sale-proceeds of 797 bales of blankets in your hands and to give you notice which we hereby do that if you fail to pay the same within 24 hours from the receipt hereof by you our clients will without further intimation or delay file a suit against you to recover the sale-proceeds of the said bales holding you responsible for all costs, charges and expenses of and incidental to the same."

Further correspondence followed which closed on the 14th June 1916.

(1) (1915) 40 Bom. 570.

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Thereafter P. S. Mellor was appointed Liquidator. On 6th August 1917, the present suit was filed. In the plaint as originally drawn no reference was made to the contracts of July 1914 nor to the cross-contracts of the 3rd September 1914 though it was stated that the consideration for the pledge of the 5th August 1914 was the amount due to the defendants for deposit and differences in cotton purchased. The plaint was subsequently amended and both sets of contracts were referred to.

The plaintiffs suing by their Liquidator P. S. Mellor contended, *inter alia*, (1) that the transaction of pledge was a transaction for the benefit of the enemy and was trading with the enemy and void under the Proclamation of the 5th August 1914 and the common law, the said transaction not being discovered to be void until after the sale of the blankets, (2) that upon the outbreak of war, the contracts for purchase of cotton became void and consequently the subsequent pledge and settling of the forward contracts by way of cross-contracts were without consideration and of no legal effect, (3) that Zoller's agency terminated on the outbreak of war and (4) that having regard to the legal position of parties they were entitled to recover all payments made as the illegality of the transactions was not discovered till November 1915. The plaintiffs expressed willingness to give credit to the defendants against the sale-proceeds for the sum of Rs. 10,000 and for shop rent and wages incurred subsequent to the appointment of Messrs. Furgusson & Co. as Liquidators.

The defendants in their written statement filed on the 7th November 1917 pleaded that the news of the declaration of war between Great Britain and Germany became known in Bombay on the 5th August 1914; that the actual pledge of the blankets was effected by

Zoller on the 4th August 1914 by handing over the keys of the godown to the defendants; that as a matter of fact the writing of 5th August 1914 was signed by the parties at 9 a.m. before they knew that war was declared between Great Britain and Germany; that the transaction of pledge was not a transaction for the benefit of the enemy or a trading with the enemy; that even if the transaction took place on the 5th August 1914 it was not unlawful or void under the Proclamation of 5th August 1914, nor did it in any manner contravene any Act, Ordinance, Statute or Proclamation in that behalf; and that such of the goods pledged as were taken over by the defendants were purchased by them under an arrangement with the Liquidator which was either known or sanctioned by the Controller of Hostile Concerns. With regard to the contracts of July 1914 the defendants submitted that they were settled by Zoller by cross-contracts of 3rd September 1914, and that the agreement arrived at with the defendants by Liquidator after obtaining the sanction of the Controller being an act done in the course of the winding up of the business was binding on the plaintiffs. The defendants therefore counterclaimed Rs. 47,194-6-8 as being the sum due to them at the foot of the account between the parties.

The defendants put in a supplemental written statement, dated 12th October 1918 para. 4 of which ran as follows:—

"4. The defendants say that upon the assumption that the contracts for the purchase of cotton made by the plaintiffs with the defendants became void at the outbreak of war, the parties were under the belief that the same continued to be effectual and that their mistake, if indeed they were mistaken, was a mistake as to the law in force in British India. The defendants accordingly submit that in any view of the matter the settlement of the said contracts by cross-contracts was a valid settlement and gave rise to a legal liability on the part of the plaintiffs to pay the respective differences at the respective due dates to the defendants."

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The suit came on for hearing before his Lordship Macleod J. when the following issues were raised :—

(1) Whether the pledge of the cotton blankets was unlawful or void or was discovered to be void ?

(2) Whether the contracts by the plaintiffs for purchase of cotton from the defendants became void on the outbreak of war ?

(3) Whether in any event the settlement of the said contracts by cross-contracts was (*a*) without legal consideration, (*b*) of no legal effect ?

(4) Whether the settlement of such cross-contracts did not give rise to a legal liability on the part of the plaintiffs to pay the respective differences at the respective due dates to the defendants ?

(5) Whether at the time of such settlement the parties were not under the belief that the said contracts continued to be effectual ?

(5) (*a*) Whether if the parties were under such belief their mistake was one as to the law in force in British India ?

(6) Whether the cotton blankets were not in the result validly pledged to defendants *inter alia* for the amount of such differences ?

(7) Whether the plaintiffs are entitled to the sale-proceeds of the blankets or any part thereof in any event ?

(8) Whether the plaintiffs did not pledge certain cotton bales with the defendants as alleged in para. 11 of the written statement ?

(9) Whether the defendants did not agree with Tombroff, the then Liquidator of the plaintiff company, that the said cotton bales should be sold by Tombroff, upon the terms that the defendants should have a first charge on the sale-proceeds ?

(10) Whether the said Tombroff did not sell the said cotton bales subject to the said agreement, and whether the defendants are not entitled to a first charge on the sale-proceeds for the money counterclaimed for by them ?

(11) Whether if the defendants have not first charge on the said sale-proceeds they are entitled to rank as ordinary creditors for the amount of their counterclaim ?

At the instance of the plaintiffs' counsel the following two issues were raised :—

(12) Whether the said pledge of cotton blankets was not illegal as involving commercial intercourse and trading with the enemy ?

(13) Whether the said cross-contracts were not illegal
reasons ?

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The learned Judge dismissed the plaintiffs' suit and decreed the defendants' counterclaim.

MACLEOD, J. :—[His Lordship after discussing the facts set forth above proceeded :—].....On the 4th August the position was as follows :—Plaintiffs had contracted to purchase 2,500 bales of cotton from the defendants January and March delivery. In addition they owed the defendants Rs. 10,000. Owing to the fall in the price of cotton defendants had demanded security for the due fulfilment of the forward contracts and the payment of the Rs. 10,000 and they were in possession as pledgees of 797 bales of blankets belonging to the plaintiffs.

It cannot now be contended after the decision of the House of Lords in *Ertel Bieber & Co.* v. *Rio Tinto Company*[1] that the July contracts were not avoided by the outbreak of war.

Lord Dunedin said :—

"There is indeed no such general proposition as that a state of war avoids all contracts between subjects and enemies. Accrued rights are not affected though the right of suing in respect thereof is suspended. Further, there are certain contracts, particularly those which are really the concomitants of rights of property, which even so far as executory are not abrogated.....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".

Therefore if nothing further had been done the defendants were after the outbreak of war bound to restore the advantage they had received, and the blankets would only remain as security for the repayment of the balance of the deposit.

The renewal of the agreement for security on the 5th August stands however on a different footing. It was made under a mistaken belief that the contracts were

[1] [1918] A. C. 260 at p. 269.

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still legally binding and that was a mistake of law. The contract was not therefore voidable under section 21 of the Indian Contract Act. Was it then illegal and therefore void at common law as being a new contract with an enemy, which came within the prohibition in the Proclamation of the 5th August? So far as Zoller was acting by procuration for his German principals it was a contract with the enemy, but it was also an act of trading with the Bombay Branch which according to the official explanation was permissible, provided it was *bona fide* and no transaction with the Head Office was involved.

I do not think, therefore, it can be said that the agreement by itself was illegal at common law. But the giving of security for money purporting to be payable under an agreement whose purpose was unlawful is itself an unlawful object even though it was not stipulated for by the original agreement: *Fisher* v. *Bridges*[1] and *Geere* v. *Mare*[2].

The defendants were taking security for the performance of a contract which had become unlawful and therefore the agreement was unlawful.

It has also been argued by Mr. Campbell that on the outbreak of war the contract of agency between the plaintiffs and Zoller was dissolved and therefore Zoller had no longer any authority to give his principals, goods as security, so that now they can repudiate his action. That contract was made in Germany and I should therefore have to consider whether according to German law it would be dissolved on the outbreak of war. There is no evidence as to what is the German law on the point but no authority has been cited for the analogous proposition that a contract of agency between an English firm with the English Manager of

(1) (1854) 3 E. & B. 642. (2) (1853) 2 H. & C., 339.

a branch established in Germany would be dissolved on the outbreak of war. No doubt that Manager would come within the definition of "enemy" and any intercourse with him would be prohibited, but it seems to me going too far to say that the contract of agency would be terminated so that the principals could repudiate any transactions entered into by their agent in the ordinary course of his agency which were not prohibited by the *lex loci*. But apart from that, since trading with a branch of a hostile firm was permissible, it would never have been considered that all contracts of agency between enemy principals and the Managers of their branch firms in allied territories became abrogated on the outbreak of war.

Some light on the question was thrown by the decision of the House of Lords in *Daimler Company, Limited* v. *Continental Tyre and Rubber Company (Great Britain), Limited*[1]. The Company was registered in England, but all the shareholders except one, the Secretary, were Germans and the Directors were in Germany. A writ was issued in the name of the Company by the Secretary and it was contended that he had no authority from the Directors to file suits. It was sought to be established that the Directors by resolution had given him such authority but no trace of any such resolution could be found in the minute book. Their Lordships were unanimous in the opinion that for want of authority on the part of the agent the suit could not proceed. But it was further contended that the company was an enemy company, and Lord Parker while expressing the opinion of the majority of their Lordships said:

"A company incorporated in the United Kingdom is a legal entity, a creation of law with the status and capacity which the law confers...Such a company may...assume an enemy character. This will be the case if its agents or the

(1) [1916] 2 A. C. 307, 336, 344.

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persons in *de facto* control of its affairs, whether authorised or not, are resident in an enemy country...A person knowingly dealing with the company in such a case is trading with the enemy...[The Directors resident in Germany] were incapable...of authorizing the institution of this action. The contention that the Secretary of the Company could authorize such institution is untenable. The resolution by which he was appointed Secretary would confer on him such powers only as were incident to the performance of his secretarial duties. It is true that the Directors of the Company might by a proper resolution in that behalf have conferred on him a power to authorize the institution of proceedings in the Company's name, but they did not do so".

I think it may be inferred from this judgment that the Secretary's contract of agency was not terminated by the outbreak of war and that if he had been duly authorized to file suits on behalf of the company the only question to be decided would have been whether a company whose affairs were being managed by Directors in Germany was entitled to sue in the Courts in England.

I do not think, therefore, that the plaintiffs could have repudiated the acts of Zoller in giving a pledge of the blankets and the cotton to the defendants on the ground that the agency had terminated.

Then as to the transactions of the 3rd September. On the face of them they constituted a purchase by the defendants of cotton from the plaintiffs' firm. Whether such a transaction would have been legal it is not necessary to consider, for in reality the transactions of the 3rd September amounted to this. Defendants agreed with plaintiffs' Branch Manager, Zoller, to treat the contracts of July as broken on condition that Zoller agreed to pay the differences calculated at the then rates of the day on the various due dates.

That, as far as I can see, was a perfectly legitimate transaction, not only according to the Proclamation of the 5th August but also that of the 9th September. It did nothing more than fix the damages for breach of

certain contracts which both parties were under the mistaken belief could be legally enforced at the due dates. The legality or illegality of the contract to give security was in no way affected.

I think that when Tombroff took charge of the assets of the Bombay Branch of the plaintiff firm he could still have recovered the security after allowing for repayment of the Rs. 10,000.

But when Tombroff with the approval of the Controller allowed the defendants to sell the blankets and set off the amount realised against the amount due on the cotton contracts as well as the Rs. 10,000, that amounted to a payment and the question whether the plaintiffs can now recover it depends on an entirely different set of circumstances to those which govern the question whether the agreement to give security was a lawful contract.

The plaintiffs cannot seek to recover it by the aid of section 65 of the Contract Act as an advantage received by the defendants under contracts which became void, as the advantage must be received before the contract becomes void. Nor do I think it can be said in this case that the plaintiffs can recover the money as paid under contracts which have been discovered to be void as those words cannot be applied to these contracts. If the money had been paid in part payment for the cotton it might have been recovered on the general principle that money paid in consideration of an executory contract which is illegal may be recovered back upon repudiation of the transaction as upon failure of consideration. But that again is not the case here. The money was paid as damages for breach of contract which as a matter of fact had become void and the performance of which had become unlawful, at a time when both parties thought the contracts were lawful, and legally enforceable.

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In my opinion, therefore, the plaintiffs can only recover by the aid of section 72 of the Indian Contract Act.

It has been argued that money paid under mistake can be recovered whether the mistake be one of law or of fact. It is unfortunate that the wording of section 72 is sufficiently ambiguous to lead to a difficulty in construing it. On the face of it "mistake" include take of law.

But it is said that under section 21 a contract is not voidable on the ground that the parties contracted under a mistaken belief of the law existing in British India, and the effect of that section would be neutralised if a party to such a contract could recover what he had paid by means of section 72 though under section 21 the contract remained legally enforceable.

This seems to be the argument of Messrs. Pollock and Mulla at page 308 and as far as I can see it is sound.

In my opinion, therefore, the plaintiffs cannot recover from the defendants what they realised by the sale of the blankets. In any event it is admitted that the defendants could retain sufficient to recoup themselves the balance of their deposit.

The next question is whether the defendants can succeed on their counter-claim. That depends on the question whether in the events which have happened it can be said that though the sale-proceeds of the cotton are in the hands of the Liquidator, they must be treated on equitable principles as if they had been actually received by the defendants.

If the cotton had been still in possession of the defendants I think the Liquidator could have recovered on the ground as I have already stated that the agreement to give security on the 26th or 27th August was

bad. But the defendants gave possession of the cotton to Tombroff's purchasers on the understanding that if the blankets did not realise sufficient to satisfy their claim for damages the balance would be paid out of the sale-proceeds of the cotton. That arrangement was for the benefit of the Liquidator who was anxious to realise the cotton in order to save expenses as the cotton could be sold at once while there was considerable difficulty in selling the blankets. As long as no steps were taken to set aside the agreement of pledge or even to dispute its validity the defendants could have sold the cotton after due notice had been given to the Liquidator. It is difficult to see how the defendants can be put in a worse position than they would have been if they had themselves sold sufficient cotton to satisfy their claim. It is not as if there had been a mere promise by the Liquidator to pay the defendants' claim out of the general cash balance in his hands.

This then is the case of a Liquidator of a hostile firm who has admitted the liability of the firm to the defendants, who has actually paid them a portion of their claim and for the balance holds a sum of money under an arrangement which amounted to an admission that he held it on behalf of the defendants. The state of pledge no longer existed, the money was earmarked for the defendants.

No doubt, if the parties had been aware of the true legal position when war broke out, the defendants would only have been able to retain their security for the balance of their deposit, but it is impossible now, in the view I take of the law, that the present Liquidator can repudiate the action of his predecessor.

I find on the issues :—

(1) (*a*) The pledge of the blankets on the 4th was an advantage which the defendants would have been

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bound to restore under section 65 of the Contract Act on the outbreak of war except to the extent of Rs. 10,000.

(*b*) The pledge of the 5th August was void except to the extent of Rs. 10,000.

(2) The contracts by the plaintiffs for the purchase of cotton from the defendants became void on the outbreak of war.

(3) The settlement of the contracts of purchase by cross-contracts of sale was a legitimate transaction as merely fixing the damages for the breach of the contracts of purchase which both parties mistakenly believed could still be legally enforced.

(4) Unnecessary. (5) and 5 (*a*) affirmative. (6) and (7) Negative. (8) Affirmative.

(9) Tombroff agreed to pay out of the sale-proceeds of the cotton the balance of the defendants' claim which remained due after the blankets had been sold.

(10) The defendants are entitled to be paid the balance of their claim out of the sale-proceeds of the cotton.

(11), (12) and (13) Unnecessary.

The plaintiffs appealed.

Campbell with *Coltman*, for the appellants.

Kanga and *Desai*, for the respondents.

MARTEN, J.:—This is an appeal from the judgment of Mr. Justice Macleod of the 12th December 1918 dismissing the plaintiffs' claim in this suit and allowing the defendants' counterclaim. On the figures since agreed, the amount of the claim is Rs. 69,467-9-0 representing the nett proceeds of sale of certain cotton blankets. The amount of the counterclaim is

Rs. 58,440-9-0 representing part of the nett proceeds of sale of certain cotton bales. The aggregate amount in dispute is therefore Rs. 1,27,908. This sum represents the amount alleged to have been owing to the defendants on the security of the blankets and bales, which were pledged to them for differences on certain cotton contracts. The plaintiffs say these pledges and contracts became or were illegal and void, having regard to the outbreak of war at 11 p.m. on 4th August 1914, and that they are entitled to recover the sale-proceeds of the blankets which were sold by the defendants in and prior to 1915, and to retain the sale-proceeds of the bales which were by arrangement sold by the then Liquidator of the plaintiffs in the same year. Counsel for the appellants stated that apart from the sums in dispute, the realised Indian assets of the plaintiffs are insufficient to meet their Indian liabilities, but there is no evidence before us to that effect.

2. It is common ground that both the cotton blankets and the cotton bales were, prior to the war, the property of the plaintiffs, Wolf & Sons, a German firm with its head office in Germany and a branch office at Bombay, which was managed by a German named F. Zoller, who was interned on the 5th September 1914. Para. 2 of the plaint describes the plaintiff-firm as being "incorporated"; but there is no evidence of this, and they have been treated in these proceedings as an ordinary partnership firm. From the report in *Wolf & Sons* v. *Carr, Parker & Co.*[1], this appears to be their correct status. The plaintiff-firm now sues by Mr. P. S. Mellor, the present Controller of Hostile Trading Concerns, Bombay, who was appointed Liquidator of this hostile firm by the Bombay Government Order of the 20th September 1916, Exhibit A to the plaint. The defendants Dadiba Khimji & Co. are an Indian

[1] [1915] W. N. 195.

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firm carrying on business in Bombay, and were the guaranteed brokers and Muccadums of the plaintiffs prior to the war.

3. It is also common ground that between the 4th August and the 3rd September 1914 (inclusive) the blankets and bales were handed over to the defendants by Zoller on behalf of the plaintiffs as security for (*a*) the cotton differences, and (*b*) Rs. 10,000, the balance of a deposit of Rs. 50,000 by the defendants. No dispute arises about the Rs. 10,000. That is admitted to have been since repaid, and properly repaid, to the defendants out of the proceeds of sale of the blankets. But a dispute does arise about the cotton differences. These arose out of certain pre-war cotton contracts between the plaintiffs and the defendants for January to March 1915 delivery, which were closed or purported to be closed by Zoller on behalf of the plaintiffs on the 3rd September 1914, and showed a heavy balance payable to the defendants on the due dates. To secure the sum ultimately payable by the plaintiffs on these pre-war contracts, Zoller pledged the cotton blankets on the 4th or 5th August 1914, and by way of further security the cotton bales on or about the 26th or 27th August. There is no evidence of any further express pledge on the 3rd September.

4. What happened to the business after Zoller was interned was this. One Tombroff was appointed Liquidator by Government, and, in the course of his duties, he appears to have taken directions from time to time from Mr. G. S. Hardy, I.C.S., the then Controller of Hostile Trading Concerns. At the trial, the order appointing Tombroff was called for by the defendants. It was not produced, but counsel for the plaintiffs stated: "We do not dispute that he (Tombroff) had power to deal with the assets of Wolf & Co.". The trial accordingly proceeded on that footing.

5. In the course of managing or winding up the business in 1915, Tombroff had to deal with the cotton blankets and bales and also with the pledges which the defendants claimed thereon for the amount of the cotton differences. Having regard to the approaching monsoon, Tombroff thought it desirable, if not imperative, to sell these goods, and he accordingly approached the Controller and the defendants on the subject. As regards the blankets we have a correspondence which is very material. Writing to the Controller on the 5th June 1915, the Liquidator says :—

"I have the honour to inform you that there are now the following stocks left with me which I would propose selling by auction in small lots...799 bales of cotton blankets in the godown of Dadiba, Khimji & Co. The blankets are in possession of Dadiba, Khimji & Co. as security against differences due to them on cotton, but I trust there would be no objection on their part to have these goods sold. Their claims have been duly taken note of...As for the blankets it is imperative they should be sold now."

To this proposal for sale, the Controller agreed in a letter of the 11th June 1915.

6. Then the Liquidator after taking the advice of his solicitors wrote to the Controller on the 1st July as follows :—

"Re: 797 bales of cotton blankets.

I have the honour to acknowledge the receipt of your letter of 11th instant referring among other lots to the 797 bales mentioned above.

These bales were given in charge of Dadiba, Khimji & Co., Muccadums of this firm, under an agreement, dated 5th August 1914, and with the view of obtaining possession of the same I consulted Messrs. Payne & Co. for opinion and received their reply as per their letter enclosed. Under the circumstances, I shall arrange with Dadiba, Khimji & Co. for selling these goods by public auction and the proceeds realised to be retained by Dadiba, Khimji & Co. against their claim on this firm."

It will be noted that this letter to the Controller tells him that the agreement relied on by the defendants is dated the 5th August 1914 which is after the outbreak of war.

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7. The enclosed opinion of the solicitors Messrs. Payne & Co., which is dated 16th June 1915, was as follows :—

"Dadyba, Khimji & Co. and Wolf & Sons,

Referring to your letter of date Dadiba, Khimji & Co. have got the blankets in question as security for payment of the moneys due to them, and you are therefore not entitled to claim delivery of the blankets without paying the moneys due to them. You may therefore allow Dadiba, Khimji & Co. to sell the blankets after consultation with you as to the price which they are to be sold. We return the papers sent to us herewith."

The letter of instructions to the solicitors which they refer to is not in evidence: nor are we told what were the papers they returned.

8. On the 2nd July the Controller acknowledged the receipt of the Liquidator's letter of the 1st July and its enclosure. Thereupon the Liquidator appears to have carried out the arrangement contemplated, that is to say, he agreed with the defendants that they should sell the blankets and apply the sale proceeds in or towards payment of their debt for the cotton differences.

9. The defendants accordingly proceeded to sell the blankets by auction, but as appears from their letter of the 7th of October 1915 to the Liquidator, only 180 bales were sold. This letter is material and I may quote portions of it.

"Re: blankets account. W. Wolf & Sons.

We have to bring to your notice the following and shall thank you to let us know your decision after due consideration.

Out of 797 bales of blankets which are mortgaged to us by W. Wolf & Sons we have sold so far with your consent by auction the following quantities at the rates mentioned below :—

180 bales fetched Rs. 17,695.

Out of the amount we have paid Rs. 442-8-0 as to Messrs. Menessee & Co., auctioneers their commission at 2½ per cent.

We have to say that the way these blankets are sold by auction, they are not fetching their real value because people will not pay their prices in auction and as this is prejudicial both to W. Wolf and Sons' interest and to ours, we would propose to allot the balance of about 500 bales to us against our outstanding claim with W. Wolf & Sons, and we are prepared to pay Rs. 10 per bale more than the average price obtained in the three auction sales.....

The assuring is of course not possible for you to do because you have to sell quickly and close the liquidation. Please remember that the running expenses per month are about Rs. 750; we have to pay Rs. 450 in shape of godown rent and there is insurance and shop rent and wages, &c., which expenses will be saved to you, besides the auctioneers' commissiom at 2½ per cent. if the goods are sold by the auction."

10. The Liquidator consulted the Controller on this proposal and wrote to him on the 22nd October 1915 as follows :—

"With reference to the interview I had with you this afternoon in connection with the sale of blankets of this firm mortgaged to Dadiba, Khimji & Co., I have the honour to inform you that I have duly intimated to them that their offer is accepted at the prices realised in the auction sale held on the 18th instant. There are some bales absolutely damaged which I believe can be only sold by auction, and in the interest of the firm I would suggest this procedure."

It appears from a note on this letter that a verbal reply was given by the Controller on 23rd October 1915.

11. Then on 28th October Tombroff wrote to the defendants as follows :—

"With reference to my letter dated 8th instant I have referred to the Controller.....your offer for purchase of sound bales out of the lot of the blankets mortgaged to you by this firm."

Please note that the Controller has accepted your offer to buy at the prices realised in the auction sale of Messrs. Crawford & Co. held on the 18th instant. As there is very short time for the termination of the liquidation, I should ask you to submit to this office a complete statement of account of all bales so far sold including those purchased by you with amounts realised and your bills for godown rent and insurance charges, &c.".

The defendants acknowledged this letter on the 29th October and agreed to pay a certain sum for some scales

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and tarpaulins mentioned in the Liquidator's letter of 28th October.

12. On the 12th February 1916 the defendants sent to the then Liquidators, Fergusson & Co., their statement of account for the blankets, scales and tarpaulins, and on the 10th March 1916 their final account showing a balance of Rs. 47,194 still due to them and which according to them had been agreed by Tombroff to be paid out of the sale proceeds of the cotton bales in his hands.

13. Now as regards the cotton bales we have no correspondence as to the arrangement arrived at. There was, however, no cross-examination of the defendants' witnesses on the point: nor have the plaintiffs put in any defence to the defendants' counter-claim or denied in any pleading the agreement set up in para. 13 of the written statement, or called Tombroff or Mr. Hardy as witnesses. I am, accordingly, satisfied that the agreement was made between Tombroff and the defendants, and that in effect it was as follows:—

Tombroff was to sell the cotton and the defendants were to give delivery to Tombroff's purchasers and allow Tombroff to receive the purchase money, but on this express condition that the balance of the defendants' claim remaining after the realisation of the blankets was to be paid out of the proceeds of sale of the cotton. I think one may also infer that Tombroff acted here with the approval of the Controller, as he undoubtedly did as regards the blankets.

14. The precise date of this agreement about the sale of the cotton bales does not appear, but I think it clear that the sales took place somewhere in 1915. The reason no doubt why the evidence is rather meagre is that at the trial there was really no dispute as to the facts. The only witness called by the plaintiffs was

Zoller, and he could not depose to the arrangement with the Liquidator, for he was interned at the time, and it does not appear that he was consulted in any way. Counsel tells us too that he could not be questioned much, owing to his strange manner in the witness box, and that he committed suicide the same evening.

15. It is common ground, however, that the arrangement in question was carried out so far as the defendants were concerned. They gave delivery to Tombroff's purchasers and allowed him to get possession of the sale proceeds. The plaintiffs, however, now repudiate the condition on which these bales were given up by the defendants, and the sale proceeds obtained by Tombroff, and claim that they are under no obligation to pay what was agreed to be paid to the defendants.

16. As I have already said, the defendants' final accounts were sent to the then Liquidators on the 12th February and 10th March 1916, and it was not till the 12th April 1916 that the defendants had any intimation that the plaintiffs repudiated the transaction. This letter of the 12th April 1916 which was written to the defendants by the attorneys of the then Liquidators alleged that the original pledge of the blankets on the 5th August 1914 was illegal and void: that the Liquidators were entitled to the sale proceeds in the hands of the defendants as pledgees: that the Liquidators would however give credit for the Rs. 10,000 deposit but demanded payment of the balance of the sale proceeds of the blankets within twenty-four hours, in default of which they would without further intimation or delay file a suit to recover the sale proceeds. The demand for payment within twenty-four hours was utterly unreasonable, if not silly, but it is almost a common form among Bombay solicitors and will probably take time to eradicate. It is quite in keeping with this sort

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of demand that no proceedings to enforce it were taken for over one year and one quarter, viz., till the present suit was instituted on the 6th August 1917 : and that after a further thirteen months the plaint was amended materially.

17. To complete the main facts, I should state that on the 13th November 1915 Tombroff wrote to the Controller drawing his attention to a decree of Macleod J. of the previous day in *Textile Manufacturing Co., Ltd.* v. *Salomon Brothers*[1] whereby according to Tombroff "all contracts entered into with alien firms are held as cancelled by virtue of the Royal Proclamation." The writer proceeded : "I have also to point out that this firm held a stock of blankets which the Manager had handed over to Dadiba, Khimji & Co. as security against their claim for differences on cotton contracts, and after consulting my solicitors I shall have to claim (since the question of contracts is settled as above) to obtain possession of whatever stock there may be still unsold in the hands of Dadiba, Khimji & Co. to be included in the liquidation." It does not however appear that the Controller took any steps on this letter or made any communication to the defendants. The first hostile communication to them was the solicitors' letter of the 12th April 1916. The appellants rely on this letter of the 13th November 1915 as establishing the date when they first discovered the pre-war contracts to be illegal and void.

18. The arguments presented to us on this appeal were centred round two main points, viz., (1) the effect of the war on the transactions in question and on the legal position of the Bombay branch of the enemy firm, and (2) the provisions of the Indian Contract Act with reference to the recovery of money.

[1] (1915) 40 Bom. 570.

19. On the first branch of the case, it was urged by the appellants that the pre-war contracts of 16th to 23rd July 1914 and the pre-war pledge (if any) of 4th August 1914 became *ipso facto* void on the outbreak of war: that the further pledges given on the 5th August and on the 26th or 27th August were similarly void: and that the cross contracts of the 3rd of September were so tainted with the illegality of the pre-war contracts as to be themselves void, or alternatively only amounted to the settlement of a nullity. It was further urged by the appellants that Zoller's agency terminated *ipso facto* on the outbreak of war, and that therefore, he had no power to enter into any of the subsequent transactions.

20. In the view I take of this case, it is not necessary for me to decide whether these propositions are well founded. I think that for the purposes of this case one may assume in favour of the appellants, but without deciding the point, that all their contentions on this head are correct. But while making this assumption, I am of opinion that at any rate up to November 1915 the legal position of the Indian branch of an enemy firm was sufficiently doubtful as to afford some justification for the view that the transactions in question were valid. For that purpose and that purpose only I will refer to certain Proclamations and Orders then in force in India.

21. The Royal Proclamation No. 1 of the 5th August 1914 (see English Manual of Emergency Legislation, 1914, p. 375) has a somewhat obscure clause at the end, which probably standing by itself would not validate trade with a branch like that we have to deal with. But the official announcement of the 22nd August 1914 issued by the Treasury in explanation of the Proclamation No. 1 (see English Manual, p. 377) stated in para. 3.

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"If a firm with headquarters in hostile territory has a branch in neutral or British territory, trade with the branch is (apart from prohibitions in special cases) permissible, as long as the trade is *bona fide* with the branch, and no transaction with the head office is involved."

And paragraph 4 stated :—

"Commercial contracts entered into before war broke out with firms established in hostile territory cannot be performed during the war, and payments under them ought not to be made to such firms during the war. Where, however, nothing remains to be done save to pay for goods already delivered, or for services already rendered, there is no objection to making the payment....."

22. This was followed by the Royal Proclamation No. 2 of the 9th September 1914 (see Indian Manual of Legislation and Orders relating to the War, 6th Ed., 1918, p. 77). This declared that as from the date thereof, Proclamation No. 1 together with any public announcement officially issued in explanation thereof was revoked and the present Proclamation substituted therefor. This obviously referred to the announcement of the 22nd of August, and to that extent recognised its former validity. Then in para. 3 it defined "enemy". This definition would clearly include the plaintiff's head office in Germany, but perhaps not Zoller himself, as he was neither "resident nor carrying on business" in Germany. Para. 6 dealt with branches as follows :—

"*Provided always* that where an enemy has a branch locally situated in British, allied, or neutral territory, not being neutral territory in Europe, transactions by or with such branch shall not be treated as transactions by or with an enemy."

Then in para. 7 :—

"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."

23. In addition to these Proclamations, there was in India on the 8th August 1914 a Notification (see

Indian Manual, p. 185) putting in force the Foreigners Act (III of 1864). By virtue of section 9 of that Act no foreigner was to travel in or pass through any part of British India without a license. This was followed on the 20th of August by a Foreigners Ordinance No. III of 1914 (see Indian Manual, p. 47) giving powers to the Governor General in Council by order to restrict the egress of foreigners and to prohibit or restrict their trade or business. Then on the 22nd August there was a Notification (see Indian Manual, p. 368) prohibiting foreigners from leaving the country. On the 28th August two Press Notes were issued in Bombay by the Political Department, the one on the lines of the Treasury Explanation of 22nd August, and the other stating certain arrangements permitting the clearance and disposal by German subjects of imported and other goods, and permitting the delivery to British subjects of goods from German firms, and to "have commerial dealings with them in respect of existing stocks only". These Press Notes are referred to in *Textile Manufacturing Co., Ltd.* v. *Salomon Brothers*[1] and are set out in full in Campbell's "Trading with the Enemy" at pp. 408-409. On the 14th November 1914 the Hostile Foreigners (Trading) Order (see Indian Manual, p. 373) was passed rendering it necessary for all hostile firms to obtain within one month licenses to trade. This provided in para. 5 (2) that "An application on behalf of a hostile foreigner or hostile firm not resident or located in British India shall be signed by a manager or other agent resident in British India."

24. As regards the plaintiffs themselves, it appears that by a Notification of the 6th March 1915 (see Indian Manual, p. 379) their licenses to trade were to "remain in force" until the 14th of August 1915; and it appears that by a subsequent Notification this period was

[1] (1915) 40 Bom. 570.

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extended to 14th November 1915 [see Foot-note (2) on page 380 of the Indian Manual]. As the Notification of the 4th March says that the licenses are "to remain in force", I should infer that Wolf & Sons had previously obtained the necessary license to trade.

25. Now if one looks at the Proclamations and in particular at paras. 6 and 7 of the Proclamation No. 2, I think a business man—or for the matter of that a lawyer—might not unnaturally infer that you could deal with what I will call an enemy branch in India provided such dealing involved no intercourse with the head office in Germany (see *W. L. Ingle, Limited* v. *Mannheim Insurance Company*[1]). And further that where, as here, the transaction merely involved payment by the enemy branch, namely, in respect of the cotton differences, one might fairly urge that it was an authorised payment within para. 7 as being a payment to a British subject arising out of a transaction entered into before the outbreak of war (see same case, p. 232 and *Halsey* v. *Lowenfeld*[2]). And that if such a payment was authorised, it was also legitimate to do something short of payment, viz., to give security to a British subject for such payment.

26. Or, again, if one looked at Hall's International Law, 6th Edn., p. 388, which was cited with approval by Mr. Justice Sargant in *Princess Thurn and Taxis* v. *Moffitt*[3], it might be said that at any rate until his internment Zoller was not disabled by the war from entering into the transactions in question. The passage I refer to is as follows :—

"When persons are allowed to remain, either for a specified time after the commencement of war, or during good behaviour, they are exonerated from the disabilities of enemies for such time as they in fact stay, and they

(1) [1915] 1 K. B. 227, at p. 231. (2) [1916] 2 K. B. 707, at pp. 712, 717.
(3) [1915] 1 Ch. 58, at p. 61.

are placed in the same position as other foreigners, except that they cannot carry on a direct trade in their own or other enemy vessels with the enemy country."

Now, here, Zoller was prohibited by the Notification of the 8th, or, at any rate, of the 22nd August from leaving the country—a fact which was relied on by Mr. Justice Sargant. The actual decision in that case, viz., that the Princess, though of enemy nationality, was entitled to sue in the English Courts for an injunction to restrain the publication of libels on her, was approved by the Court of Appeal in *Porter* v. *Freudenberg*[1] and in *Schaffenius* v. *Goldberg*[2], the latter of which cases decides that the right to sue is not lost by internment.

27. Further, if it be urged that the transactions in question must be judged in the light of the Proclamations actually in force at the date of the transactions and that the official explanation of the 22nd August and the two Press Notes of 28th August had no legal authority, it may be urged in answer that this is taking a somewhat narrow view of the subject, and that it would not be unreasonable for the Controller or the Liquidator acting under his directions to abide by the spirit of the later Proclamation, viz., No. 2 of the 9th September 1914 and which remained in force during 1915.

28. As was said by Mr. Justice Macleod in *Textile Manufacturing Co., Ltd.* v. *Salomon Brothers*[3], speaking of affairs in Bombay during the latter half of 1914 :—

"It is not to be wondered at, that confronted with this bewildering array of Proclamations, Ordinances, Orders and Official communications, abounding in conflicting provisions, the members of the mercantile community in

(1) [1915] 1 K. B. 857, 874. (2) [1916] 1 K. B. 284, 299.
(3) (1915) 40 Bom. 570 at p. 587.

Bombay, whether British subjects, foreigners or enemies, remained paralysed—unable to form any opinion as to what they could do or what they could not do".

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29. In the present case however, we have to deal with the Controller, a Government Official, who presumably had special facilities for ascertaining the policy and intentions of Government, and if necessary of obtaining the highest legal advice.

Further, in the present case, Mr. Justice Macleod while holding that the pre-war contracts became invalid and that the pledges were invalid, thought that the September settlement by cross contracts was in itself valid, as was also the contract of 26th August (apart from the actual pledge) and that Zoller's agency was not terminated by the war. The learned Judge left open the question whether the defendants could in any event claim to rank as unsecured creditors.

30. I think, I have now stated enough to show, that in 1914-15, the true legal position was open to doubt, at any rate in some particulars. As I have already said, I need not and I do not decide what that position was. I merely assume for the purposes of this case that the appellants are correct on this first branch of the case.

31. I come accordingly to the second branch which appears to me to be the crux of the case, viz., on what legal grounds can the plaintiffs claim to recover the sale-proceeds of the blankets. One may clear the ground by saying that their claim is based solely on section 72, or alternatively, on section 65, of the Indian Contract Act. They admitted that no claim based on the English law apart from that Act could succeed. The relief given in *Gulabchand* v. *Fulbai*[1] (where the illegal purpose had not been carried out) was

[1] (1909) 33 Bom. 411.

therefore inapplicable. In view of such cases as *Kearley* v. *Thomson*[1], this admission was, I think, properly made, having regard to the appellants' contention that all the transactions were illegal. Nor need I consider whether if this Court was administering some fund, the mistake could be rectified (see *Robinson, In re. McLaren* v. *Public Trustee*[2], and *In re Ainsworth. Finch* v. *Smith*[3]), nor whether if the payment had been made to its own officer by a mistake of law, the payment would be refunded (see *Ex parte Simmonds. In re Carnac*[4]; *In re Opera, Limited*[5]).

32. Before us, section 72 was relied on first in argument. It was said that this was a case of "money paid by mistake" viz., a mistake of law, all parties thinking the contracts and pledges were valid and the debt due. When asked whether the appellants relied on any mistake of the then Liquidator, counsel at first said No, but at a later stage withdrew that answer and said Yes. I am not surprized at counsel's first answer. There is not a word in the pleadings about the Liquidator or Controller being under any mistake: no issue was raised about it: and neither of them went into the witness box to say he had made any mistake. The amended plaint is, I think, based on a different section altogether, viz., section 65, as will be seen from looking at paras. 9, 9A and 14 and in particular to the allegation in para. 9 as to the agreement being "discovered to be void."

We were referred by the appellants to para. 4 of the defendants' supplemental written statement of 12th October 1918, but this only dealt with the cross contracts of 3rd September 1914 and was in answer to the amended paras. 9 A and 10 of the plaint. So, too,

(1) (1890) 24 Q. B. D. 742.
(2) [1911] 1 Ch. 502.
(3) [1915] 2 Ch. 96.
(4) (1885) 16 Q. B. D. 308.
(5) [1891] 2 Ch. 154; 3 Ch. 260.

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issues Nos. 5 and 5 A refer to a mistake at the time of the settlement mentioned in issue No. 4, viz., the settlement by cross contracts on 3rd September 1914. It has nothing to do with any subsequent mistake by the Liquidator.

33. It seems to me, therefore, that on the pleadings, this point under section 72 is not open to the appellants and that in any event there is not sufficient evidence of any payment "by mistake." In the view I take, therefore, it is really unnecessary to consider whether section 72 applies to a mistake of law. But as the learned trial Judge did deal with this point, and as it may be urged that an implied amendment of the pleadings was thereby made, and the case argued on the assumption that there was some evidence of a mistake in law, I will deal with the matter on this footing.

34. The next difficulty in the way of applying section 72 is section 21 which says that "A contract is not voidable because it was caused by a mistake as to any law in force in British India." Consequently, if section 72 applies to mistakes of law, a man might recover payments under section 72, although he could not avoid the contract under section 21. I am thinking of course of a case where the same mistake is made at the inception of the contract as on the payment thereunder. Counsel for the appellants admitted that in such a case section 72 would not apply. The payment in such a case he said would be made under the contract (which *ex hypothesi* could not be rescinded under section 21), and consequently the payment would not be by mistake.

35. The appellants contended however that section 21 did not apply here because there was no "contract" as defined by section 2 (*h*), viz., "an agreement enforceable by law". There was at most an

"agreement not enforceble by law" and therefore void under section 2 (*g*). This contention is, I think, erroneous on the facts. In my judgment the Liquidator entered into binding agreements with the defendants for the sale of the blankets and bales and for the application of the proceeds in discharge of the defendants' debt. The disabilities attaching to Zoller did not apply to the Liquidator or the Controller. He, as counsel admitted at the trial, had power to deal with the assets.

36. Further, the Enemy Trading Act X of 1916 (Indian Manual, p. 15), which was not cited to us, provides in section 13 that—

"Any act done after the 3rd day of August, 1914, by or under the orders of, any officer of Government in respect of the property, moveable or immoveable, of any hostile foreigner or hostile firm which, if this Act had been in force, could have been validly done in the exercise of the powers conferred thereby, or which could have been conferred thereunder, is hereby validated."

Sections 4 and 5 give wide powers for winding up enemy businesses and dealing with their assets in accordance with rules to be made by the Governor General in Council. This provides in effect that such a winding-up order is to have the same effect as if made by the Court under the Indian Companies Act, 1913, subject to modifications to be specified.

37. Now one of the ordinary duties of a Liquidator confronted with a person claiming to be a secured creditor is to decide whether he will admit the claim or fight it, and if necessary he will obtain the directions the Court. And subject to the control of the Court he can pay creditors or make any compromise or arrangement with creditors or persons claiming to be creditors (see Indian Companies Act, section 234). But under section 3 of the Enemy Trading (Winding

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up) Order, 1916 (see Indian Manual, p. 284) Government takes the place of the "Court" in applying the Companies Act to this winding up; and as appears by the Notification, Exhibit A to plaint, the present Controller can exercise all the powers conferred on Official Liquidators by section 179 of the Indian Companies Act without the sanction or intervention of Government, and I think that the powers under section 234 could also have been conferred on him.

38. I am, therefore, of opinion that, apart from all other grounds, the acts of Tombroff and Mr. Hardy are validated by section 13 of the Enemy Trading Act, 1916, as being acts which could have been validly done in exercise of powers which could have been conferred under that Act. As I have already pointed out the law at the time was not clear, and I do not think that either of these gentlemen can be blamed for preferring a settlement to a law suit, particularly when they were told by their legal advisers that the defendants were right.

39. It is not suggested that the wide powers given by section 6 of the Enemy Trading Act, 1916, to the Governor General in Council of cancelling contracts injurious to the public interest or revesting property transferred under them have ever been or could be exercised in the present case.

40. I am, therefore, of opinion that the agreements entered into by the Liquidator with the defendants were "contracts" within the meaning of the Indian Contract Act and could not be avoided under section 21 as being made under any mistake of law. That being so, I am further of opinion that the payments made to the defendants were payments under this binding contract, and could not be recovered under section 72.

41. In this view of the case, I need not decide whether section 72 can ever apply to a mistake of law, but as at present advised, the passage referred to by the learned trial Judge in Pollock and Mulla (3rd Edn.) at p. 308 seems to me good sense: and good sense is generally good law. The passage in question runs:—

"The man who has chosen to judge his own cause upon all the facts, and has decided against himself, cannot appeal to the Court against his own judgment, whether it was well informed or not."

I may also refer to the judgment of the Court of Appeal in *Rogers* v. *Ingham*[1] as showing the evils which would result from allowing parties to re-open transactions on the ground of some mistake of law having been made by them or their legal advisers.

I may also refer to the *Holsworthy Urban Council* v. *Holsworthy Rural Council*[2] where Warrington J. held that a local authority was bound to continue payments under a compromise founded on an erroneous view of the law, notwithstanding that apart from such compromise the payments would be *ultra vires*. So too payments made under compulsion of legal process whether in a home or foreign Court of Law cannot be recovered (see *Clydesdale Bank, Limited* v. *Schroder & Co.*[3]). These four English cases illustrate the general principles adopted in England, and I only cite them by way of analogy.

42. I should perhaps have added that before us the appellants admitted that the arrangement with Tombroff as to the application of the sale proceeds of the blankets amounted to a payment. Under these circumstances, I think no real distinction arises between the few blankets sold before June 1915 and those sold afterwards.

(1) (1876) 3 Ch. D. 351, at pp. 356-57. (2) [1907] 2 Ch. 62.

(3) [1913] 2 K. B. 1.

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I may also add that the defendants, in the alternative contended that the Liquidator's agreements were a compromise and in any event valid, and they relied on *Callisher* v. *Bischoffsheim*[1] and *Miles* v. *New Zealand Alford Estate Co.*[2]. In the view I take however it is unnecessary to decide this point.

One other point may be noted, viz., that there is a clerical slip in the printed judgment on p. 91 as to the answer of the learned trial Judge to the important issue No. 7. This should clearly be in the negative and not in the affirmative as printed.

43. The alternative claim of the plaintiffs is based on section 65 which runs:—

"When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

Now I have already held that the agreements with the Liquidator were valid. Consequently, in my opinion, section 65 does not apply to the payments in question as they were made to the defendants under valid agreements and not under void ones.

44. But supposing for the sake of argument that the payments were made under the contracts and pledges ending 3rd September 1914, and that the Liquidator's agreements were mere machinery for carrying out these contracts and pledges, the appellants have still other difficulties to contend with. The first arises from the words "agreement discovered to be void". I agree with the learned trial Judge that the word "agreement" as used in that section does not apply to the pre-war contracts, for they were "contracts" within the meaning of the Indian Contract Act and not "agreements". As regards the subsequent agreements, the

(1) (1870) L. R. 5 Q. B. 449. (2) (1886) 32 Ch. D. 266, at p. 291.

parties knew all the material facts and I doubt whether the words "discovered to be void" are really applicable to those agreements (see *Gulabchand* v. *Fulbai*[1]). The decision in *Jijibhai* v. *Nagji*[2] can be supported as being based on the validity of a collateral agreement for a refund, quite apart from section 65 (see p. 698).

45. Next, if the other branch of the section is relied on no "advantage" under the pre-war contracts had been received by the defendants when *ex hypothesi* they became void on the outbreak of war. The plaintiff's case is that there was no pledge till the 5th August. It hardly, therefore, lies in their mouths to contend there was a pre-war pledge and therefore an antecedent advantage for which compensation must now be given. In any event the advantage which the plaintiffs are trying to recover is the payment made to the defendants in 1915, and not the pledge in 1914. The appellants argued that under section 65 the advantage need not be received before the contract becomes void or the agreement is discovered to be void. This is not, I think, the true construction of section 65. I think the line is drawn at the time the agreement is discovered to be void or when the contract becomes void.

46. In the result, therefore, I respectfully agree with the learned trial Judge that the payments in question cannot be recovered by the plaintiffs under either section 72 or 65 of the Indian Contract Act and that accordingly their claim fails.

47. As regards the counter-claim, the position at first sight seems somewhat different, for here it is the defendants who are claiming moneys in the hands of the Liquidator, viz., the part proceeds of the cotton

(1) (1909) 33 Bom. 411 at p. 417. (2) (1909) 11 Bom. L. R. 693 at p. 698.

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bales. This claim is based solely on the agreement with Tombroff. They say that by virtue of that agreement the Liquidator holds those moneys as earmarked or upon trust for them: that he can only discharge that obligation or trust by paying them the moneys: that they will then hold those moneys just as if the sale proceeds had been paid to them in the first instance: and that their ultimate right to retain them will depend on the decision of this Court on the claim.

48. On this point also I agree with the decision of the learned trial Judge. The defendants have changed their position on the faith of a promise which in my opinion was validly made to them by the former Liquidator, and I think that promise is binding on the present Liquidator.

49. It was next contended by the appellants that the promise only applied to the defendants' "claim" generally and did not admit any specific sum to be due, and that accordingly the whole claim could be repudiated. This, I think, is not the true view. The defendants' account might no doubt be vouched, and details such as godown rent challenged; but no repudiation of the mortgage itself was intended by the parties. That as the correspondence shows was regarded as valid at any rate with respect to the blankets. Nor in the view I take is this a case where the assistance of equity is asked towards carrying out an illegal agreement as in *Mohori Bibee* v. *Dhurmodas Ghose* [1].

In substance, therefore, it seems to me, that the defendants' case on the cotton bales stands or falls with their case on the cotton blankets. They have succeeded on the claim. I think they also succeed on the counterclaim.

[1] (1903) L. R. 30 I. A. 114; 30 Cal. 539.

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50. The appeal, therefore, of the plaintiffs should in my judgment be dismissed with costs. It will not however be necessary to proceed with the account directed by the decree, as the parties have since agreed on the figures. But this need not, I think, be mentioned in the order we make.

HEATON, J.:—I agree that the Liquidator entered into valid agreements with the defendants regarding the sale of the blankets and of the cotton bales and for the disposal of the proceeds. And I think so for the reasons stated by my learned brother. That being so, the plaintiffs' claim must fail, for neither section 72, nor section 65 of the Indian Contract Act can possibly apply to what in this case happened, in fulfilment of those valid agreements.

I, therefore, agree that the appeal must be dismissed with costs.

Solicitors for the appellants: Messrs. *Little & Co.*

Solicitors for the respondents: Messrs. *Craigie, Blunt & Caroe.*

Appeal dismissed.

G. G. N.

APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Crump.

NAGINDAS BHUKHANDAS (ORIGINAL OPPONENT), APPELLANT *v.* GHELABHAI GULABDAS (ORIGINAL APPLICANT), RESPONDENT.*

1919 December

Provincial Insolvency Act (III of 1907), section 43—Provident Funds Act (IX of 1897), section 4—Provident Fund—Railway employe drawing his Provident Fund after his adjudication as insolvent—Payment of the money to his wife—Fraudulent transfer.

*First Appeal No. 234 of 1918.