was about to be searched, the other the destruction of the accounts relating to the stock and the consumption of signal lights. As to the first, the Attorney-General admits that the destruction of the code book to prevent it getting into enemy hands is at least excusable. It is, indeed, so obvious that that must at anyrate be done that complaint could not be made of it. But Captain Pfeiffer naively admitted that, when throwing overboard documents to avoid their getting into enemy hands, he acted on the principle of throwing overboard too many rather than too few, and adds that the Morse signal book contained absolutely innocent messages, which could be read by anyone. That probably was so, but it may also have contained some which were not so innocent, and it is pretty obvious that when he threw it overboard he either knew it did, or was not sure that it did not.

The Morse signal book could not have disclosed or given any key to the wireless signal code, so there could be no reason for destroying it except the consciousness that as something wrong had in fact taken place it might be disclosed by the book. As pointed out, a wireless signal log might have been kept in such a way as not to disclose the code or give any key to it. The destruction of the stock book of signal lights cannot be excused by any fear of disclosing a secret code. It is suggested that it was innocent because the guard on the ship was told it was being done, and that British officers had already examined it. British officers would not in the first instance examine minutely documents of that kind, but would assume that if wanted they could be looked over afterwards. Pfeiffer and the paymaster doubtless knew what the signal lights really were for, and hoped that the British, who up to that time had made no point about it, would not find it out, so they destroyed the book. Nothing that can be called a reason was given for doing so. Even if the books had become waste paper, why destroy them?

Their Lordships are of opinion that Captain Pfeiffer and the other witnesses have by their acts put themselves in such a position that their evidence cannot be relied on, that the evidence discloses facts of which no satisfactory explanations are or can be given, and that although on the Crown affidavit evidence some ambiguities have been pointed out which have not been cleared up by cross-examination, or re-examination, yet there are incriminatory matters in those affidavits to which no answer has been given. They are of opinion that the President was fully justified in finding that "the 'Ophelia' was not constructed or adapted or used for the special and sole purpose of affording aid and relief to the wounded, sick, and shipwrecked, and that she was adapted and used as a signalling ship for military purposes." Their Lordships agree in that finding, which of course justifies the condemnation of the vessel as lawful prize. They will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Counsel for the Appellant—Scott, K.C.—Leck, K.C.—Darby—Holmes. Agents—Hewitt, Woolacott, & Chown, Solicitors.

Counsel for the Respondent—Sir F. E. Smith (A.-G.)—Sir G. Cave (S.-G.)—Dunlop. Agents—Treasury Solicitor.

HOUSE OF LORDS.

Friday, June 30, 1916.

(Before the Earl of Halsbury, Viscount Mersey, and Lords Kinnear, Atkinson, Shaw, Parker, Sumner, and Parmoor.)

DAIMLER COMPANY, LIMITED *v.* CONTINENTAL TYRE AND RUBBER COMPANY (GREAT BRITAIN), LIMITED AND ANOTHER.

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

War—Company—Alien Enemy—Trading with the Enemy—Right of Company Registered in England, whose Shareholders and Directors are Alien Enemies, or its Secretary on its Behalf, to Sue for Debt.

By writ specially indorsed under Order XIV the solicitors of the respondent company on the authority of its secretary commenced an action in October 1914 to recover certain debts.

The respondent company was registered in London with a capital of £25,000 in £1 shares, only one of which was held by a naturalised British subject, the remainder by Germans. All the directors were Germans and resided in Germany.

The appellants contended (1) that it was illegal to trade with or pay money to or for the benefit of alien enemies during the war, and that in substance and in fact the respondent company was an alien enemy; (2) that the solicitors for the respondent company had no authority to issue the writ in the action.

Held that as the secretary was not *ex officio* authorised to commence actions on the company's behalf, and the directors were precluded by their character of alien enemies from instructing him to do so, the action was irregular and unauthorised.

Observations as to the enemy character of companies registered in the United Kingdom and of their directors and shareholders.

The facts and arguments appear from their Lordships' considered judgment delivered as follows:—

Earl of Halsbury—I am of opinion that this judgment should be reversed.

In my opinion the whole discussion is solved by a very simple proposition that in our law when the object to be obtained is unlawful the indirectness of the means by which it is to be obtained will not get rid

of the unlawfulness, and in this cause the object of the means adopted is to enable thousands of pounds to be paid to the King's enemies. Before war existed between us and Germany an associated body of Germans availed themselves of our English law to carry on a business for manufacturing motor machines in Germany and selling them here in England and elsewhere, as they were entitled to do, but in doing so were bound to observe the directions which the Act of Parliament under which they were incorporated required.

They were entitled to receive in the shape of dividends the profits of the concern in proportion to their shares in it. They were all Germans originally, though one afterwards became a naturalised Englishman. Now the right and proper course to deal in the matter—and I have no reason to suppose that any other course was followed—was to distribute to them rateably, according to their shares, the profits of their adventure. But this machinery, while perfectly lawful in peace time, becomes absolutely unlawful when the German traders are at war with this country. I confess it seems to me that the question becomes very plain when one applies the language of the law to the condition of things when war is declared, between the German who is in the character of shareholder and in control of the company. They can neither meet here nor can they authorise any agent to meet on any company business. They can neither trade with us nor can any British subject trade with them. Nor can they comply with the provisions for the government of the country which they were bound by their incorporated character to observe.

Under these circumstances it becomes material to consider what is this thing which is described as a "corporation?" It is in fact a partnership in all that constitutes a partnership except the names, and in some respects of the position of those whom I shall call the managing partners. No one can doubt that the names and the incorporation were but the machinery by which the purpose—giving moneys to the enemy—would be accomplished. The absence of the authority to issue the writ is only a part of the larger question. No one has authority to issue a writ on behalf of an alien enemy because he has no right himself to sue in the courts of a king with whom his own sovereign is at war. No person or any body of persons to whom attaches the disability of suing under such circumstances can have authority, and to attempt to shield the fact of giving the enemy the money due to them by the machinery invented for a lawful purpose would be equivalent to inclosing the gold and attempting to excuse it by alleging that the bag containing it was of English manufacture. I observe the Lord Chief-Justice says that the company is a live thing. If it were it would be capable of loyalty and disloyalty. But it is not, and the argument of its being incapable of being loyal or disloyal is founded on its not being "a live thing." Neither is the bag in my illustration "a live thing." And the mere machinery to do an illegal act will not purge its illegality—*fraus circuitu non purgatur*. After all, this is a question of ingenious words, useful for the purpose for which they were designed, but wholly incapable of being strained to an illegal purpose. The limited liability was a very useful introduction to our system, and there was no reason why foreigners should not, while dealing honestly with us, partake of the benefits of that institution, but it seems to me too monstrous to suppose that, for an unlawful because—after a declaration of war—a hostile purpose, the forms of that institution should be used, and enemies of the State, while actually at war with us, be allowed to continue trading and actually to sue for their profits in trade in an English court of justice.

There are one or two observations which I think it right to make upon this very singular performance. This is a joint appeal, partly upon a judgment under Order XIV, partly upon a cause — *Continental Tyre and Rubber Company (Great Britain) Limited* v. *Thomas Tilling, Limited*, 112 L.T.R. 324, tried betore Lush, J. With respect to Order XIV, it is almost ludicrous to treat seriously an order made under such circumstances as these, and that observation is sufficiently proved by the short history of this litigation. The second observation I have to make is that if this question turned only upon the question of the secretary's authority to issue the writ, I should certainly not be contented with the position in which that question was left. In the somewhat flippant evidence given by Mr Wolter, it was stated that the secretary was given authority, and a minute recorded of the fact; but in the absence of the learned Judge some search was made for the minute in question, and no such document could be found. I will say no more, since the witness was not again brought before the learned Judge, and therefore had no opportunity of explanation, but I certainly would not act upon evidence such as I have described. I am therefore of opinion that this appeal should be allowed, and I so move your Lordships.

I would like to add that I by no means desire to minimise the value of the weighty judgments to be delivered by your Lordships, but I have thought it important that all may understand the principle that the unlawfulness of trading with the enemy could not be excused by the ingenuity of the means adopted.

VISCOUNT MERSEY—I had prepared a judgment expressing my opinion that this appeal ought to be allowed, but since then I have had the opportunity of reading the judgment prepared by my noble and learned friend Lord Parker, and in that judgment my reasons are so fully expressed that I have thought it better to withdraw the judgment I had written.

I am desired to say that Lord Kinnear also had prepared his judgment, but that he will withdraw his judgment in favour of the judgment of my noble and learned friend Lord Parker.

LORD ATKINSON—This is an appeal from an order of the Court of Appeal, dated the 19th January 1915, affirming an order of Scrutton, J., dated the 27th November 1914, made in an action brought in the name of the respondent company (a private company) to recover from the appellant company on a specially indorsed writ, dated the 23rd October 1914, a sum of £5605, 16s., with interest, the amount due on three bills of exchange drawn by the former company and accepted by the latter. The legal question for decision is whether the order appealed from, made upon additional evidence not before the Master or Scrutton, J., is right. I therefore abstain from considering whether in the events which have happened this appeal is now necessary for the protection of the appellant company.

On the 30th October 1914 the respondents issued a summons pursuant to Order XIV of the Rules of the Supreme Court for leave to sign final judgment in the action. Affidavits were filed on behalf of both the parties litigant respectively in support of and in opposition to the respondents' application. Master Macdonell, upon the affidavits and the documents made exhibits of by them, made the order of the 24th November 1914 granting the leave asked for. Presumably the memorandum or articles of association of the respondent company were brought before the Master and examined by him, as they should have been, although this does not appear on the face of the proceedings. On appeal from this order by the appellant company, Scrutton, J., presumably on the evidence before the Master, made the order already mentioned, dismissing the appeal and upholding the order of the master. The appeal in this case was heard in the Court of Appeal, together with an appeal raising somewhat the same questions arising out of an action brought by the present respondents against a third company, Thomas Tilling Limited (see 112 L.T.R. 324), tried before Lush, J., without a jury. It does not appear from the appendix what were the particular issues raised in that action, but it certainly would appear that not only was the evidence given in it by one of the plaintiffs' witnesses, the secretary, referred to and relied upon by the Lords Justices in the appeal in the present case, but the findings of the learned Judge at the trial were apparently also relied upon against the present appellants as if they had been parties to the suit in which those rulings were made. The evidence of the secretary was, however, much relied on by both sides in argument before your Lordships. Strange as it may appear, the minute book of the company, showing presumably from what centre the business of the company was managed and directed, was not given in evidence before any one of the three tribunals. The embarrassing and, as I think, rather unfortunate result of this admission is that the full facts, showing in what country — England or Germany — lay the real business centre from which the governing and directing minds of the company or its directors operated, regulating and controlling its important affairs, were, save so far as revealed in the evidence of its secretary, never disclosed. These are, however, the very things which, for the purpose of income tax at all events, have been held to determine the place of residence of a company like the respondent company so far as such a fictitious legal entity can have a residence—*De Beers Consolidated Mines Limited* v. *Howe*, 1906 A.C. 455. And I can see no reason why for the purpose of deciding whether the carrying on by such a company of its trade or business does or does not amount to a trading with the enemy they should not equally determine its place of residence. It is well established that trading with the most loyal British subject, if he be resident in Germany, would during the present war amount to trading with the enemy and be a misdemeanour if carried on without the consent of the Crown, the reason being that parts of this action extend to a hostile country and so furnish resources against his own country—*M'Connell* v. *Hector*, 2 B. & P. 113. The same principle would presumably apply to a trading company resident in an enemy country. It would certainly appear to me, therefore, that, having regard to the issue raised in this suit, the residence of the respondent company was of necessity a vital matter for consideration. During the argument a passage was read out from the shorthand writer's notes of the argument before the Court of Appeal, from which it appeared that Mr Gore-Browne, the leading counsel for the Daimler Company Limited, admitted that the residence of the respondent company was in England. He could not well do otherwise since the company was registered and incorporated in England, and all the facts going to show where it really resided were, with the exception already mentioned, shut out from the view of the Court. It by no means follows, however, that despite that admission of counsel your Lordships could not, if sufficient facts were disclosed in evidence before you, hold that the residence of the company was not in England, but in truth in Germany.

In *Crump* v. *Cavendish*, 5 Ex. Div. 211, Thesiger, L.J., at p. 214, dealing with the above-mentioned Order XIV, said — "He (the judge) has to form an opinion on the facts before him, and is to stay his hand only if he is satisfied that the defendant has a good defence upon the merits, or thinks the facts disclosed by the defendant sufficient to entitle him to be permitted to defend the action." I turn now to the affidavits and documents before the Master and Scrutton, J., to consider whether the facts therein disclosed were sufficient to entitle the appellant company within this rule to be permitted to defend the action brought against them. What are those facts? They are (1) that the 25,000 shares into which the capital of the company is divided are held by five individuals and a joint-stock company called the parent company; that this company, incorporated and resident in Hanover, holds 23,398 of these shares; that the three individuals who hold between them 1600 shares are all German subjects

resident in Hanover; that the two remaining shares are held one by the secretary, Hans Frederick Wolter, and one by the managing director, Paul Scharnhost Brodtmann, both according to the list of shareholders having residences in England. (2) That the directors, three in number, excluding the managing director, are also German subjects resident in Hanover. (3) That with the exception of the secretary all the directors and shareholders are German subjects; that the secretary is also a German, but unlike the others, took out naturalisation papers on the 1st January 1910. (4) That the appellant company were ready and willing to pay the amount sued for on two conditions—first, that in doing so they were not acting in contravention of the provisions of the Trading with the Enemy Act 1914; and second, that the respondent company were able to institute this action, and also were entitled to give a good and valid discharge for the amount claimed — affidavit of Oscar Tooley, paragraph 11. (5) That it is averred in the tenth and twelfth and thirteenth paragraphs of the same affidavit that the so-called parent company controlled the respondent company; that the former and all the officers of the latter are alien enemies; that alien enemies who were officers or agents of the company were incapable of acting either in the name of or on behalf of the company, or individually; that the appellant company were advised and believed that the respondent company were incapable of instituting proceedings or giving receipts for sums due to them, or doing any of those acts which must be done through agents or officers, unless and until agents and officers who were not alien enemies have been appointed; that for these reasons the proceedings were wrongly instituted, and that unconditional leave to defend should be given.

Well, this affidavit distinctly challenged the right of the respondent company, or any of its officers acting on its behalf, to institute the present action, or to give a valid discharge for the amount claimed by it. Their secretary filed an affidavit in reply. He contented himself with asserting that his company is an "English company, being registered at Somerset House under the Companies (Consolidation) Act of 1908. and that he himself is a British subject, having been naturalised on the 1st January 1910." He adds lengthy paragraphs relative to his dealings with the Committee on Trade, with sales made to the War Office, with the payments made to his company by some others of its creditors, but not a word as to the place where its important business was conducted, or from which its action was directed by its governing minds, and not a syllable as to his ever having been authorised by the directors, or any of them, or any person connected with the company, to institute actions of any kind on its behalf. This, if ever, was the time for him to have disclosed the fact that he was clothed with authority to bring this action if the fact were so. In my view his silence, on the assumption that he had the authority, is inexplicable. It was greatly pressed in argument that Lush, J., had in the action tried before him (*Continental Tyre, &c., Company (Great Britain) Limited* v. *Thomas Tilling, Limited*) come to the conclusion that the secretary was a truthful though a forgetful and inaccurate witness, and also that he had authority to institute the suit against Thomas Tilling Limited. Well, I have the utmost confidence in any conclusion at which that learned Judge would arrive on the evidence given before him. These affidavits were as I understand not before him, and it is in my view quite unjust to press against the appellant company the conclusions arrived at by Lush, J., without the light which this unaccountable reticence throws on the secretary's character and veracity.

Before dealing with the articles of association, which are by section 14 of the Act of 1908 made binding on the respondent company, I turn to the evidence given by the secretary in the action against Tilling Limited. In my view it tells against rather than in favour of the respondent company in the present proceeding, for first it establishes that Brodtmann, the managing director, who is admittedly a German, was not resident in England when the witness gave his evidence; that none of the directors have been in England since the war commenced; that he, the plaintiff, has not had any communication whatever with any of them since then, and that he had not the express consent of the board of directors to issue the writ in the present case. The secretary is therefore the only shareholder who is not an alien, and the only shareholder now resident in this country. The business of the company in England is managed by himself and two managers named Horten and Ingenson. He proceeds to state that he has full powers to commence actions by issuing writs whenever he thinks fit without consulting the directors, that he got those powers when he was appointed secretary, that there was then a minute made allowing him to issue writs without consulting anybody, and authorising him to represent the company in all its proceedings. The learned Judge then suggested that the minute book should be sent for as he desired to see it. Mr Leslie Scott then put the questions, "Do you suggest that you have power under this minute to start legal proceedings in England, even when the board of directors are here?" And the witness replied, "Yes, of course." "And even when the managing director is here?" Answer, "Oh, yes; of course." The minute book was brought into Court. It was never examined thoroughly, but it showed that there was a minute appointing him secretary, but saying nothing about his duties. No power at all was given to him by minute or resolution relative to litigation, save possibly in reference to bankruptcy proceedings; no power whatever to bring actions in general.

An effort was made in re-examination to rehabilitate this gentleman by asking him if he gave instructions for the issue of writs, and whether if actions were in consequence instituted it had ever been suggested by his board, the managing director, or any

other director that he in so doing had exceeded his powers. This might possibly be relevant if the question for decision was whether the company had not held out the secretary to third parties as possessed of these powers in such a way as to estop them, as against those parties, from repudiating the secretary's authority. But that is not the question for decision. It is no doubt true that when a secretary of a company is found doing certain things in the name of and on behalf of his company which could legally be authorised by it, and no resolution or minute is proved authorising him to do those things, the maxim *Omnia præsumuntur rite esse acta* will be applied, and the necessary authority will be presumed to have been lawfully given to him. This maxim cannot, I think, be legitimately applied where the agent vouches a particular document as the source of the authority he claims to exercise, and it is found that the document when produced gives him no such authority. It cannot be presumed he got the authority by means he has on oath repudiated. His oath rebuts the presumption. It is necessary to examine in some detail the articles of association, because it was solemnly and persistently argued, amongst other things, that owing to the fact that all the shareholders of the company, other than the secretary, have become alien enemies, he himself by virtue of his ownership of one share became, as I understood, while the war continued, the legal entity, the company, or the whole body of the shareholders combined. That he could hold a general meeting himself, take the chair himself over himself, as chairman put any question to himself, decide upon that question by a show of his own hands, and otherwise comply with the requirements of the 62nd and several other of the articles of association. There is no provision in the articles for the appointment of the first body of directors, consequently they must, under table A, clause 68, be appointed by a majority of the subscribers to the memorandum of association, subsequent vacancies being filled up by the shareholders in general meeting (article 58), or in the case of casual vacancies by the directors themselves (article 80). The management and control of the company is vested in the directors (article 102). All orders made by the directors or committees of directors, all appointments of officers, all resolutions and proceedings of general meetings and of meetings of the directors and committees are to be entered in books provided for the purpose (article 108). The number of directors until altered by an extraordinary resolution passed at a general meeting is to be not less than two and not more than five. The qualification of every director other than a managing director is the holding of 100 shares, that of a managing director is such as the directors may determine (articles 76 and 78). The managing director is to be appointed by the directors out of their own body (article 91). At the meeting of the directors two constitute a quorum. The shares of the company are to be under the control of the directors, and certificates of title to the shares must be sealed and signed by two directors, and countersigned by the secretary or some other person appointed by them (article 13). The directors are to provide for the safe custody of the seal, the affixing of which must be attested by two of them and the secretary. They are to convene general meetings at least once each year at such time and place as they may determine, and cause notice thereof to be given to all the members. Two members personally present at these meetings constitute a quorum (article 59), and under section 129 of the Act of 1908 the company is to be wound up, no matter how solvent or successful, if its members are reduced below two.

Article 61, taken in conjunction with article 59, is much relied upon by the respondent company. It provides that in the case of a meeting not convened by requisition, if within half-an-hour from the time appointed for the meeting a quorum be not present the meeting is to stand adjourned till that day week, at the same time and place, and if at the adjourned meeting a quorum be not present the members who are present shall be a quorum and may transact the business for which the meeting was called. This, it is insisted, shows that one member may constitute a general meeting, because although the word "members" is used in the plural in the article, the definition clause (article 1) provides that words importing the singular only include the plural, and *vice versa*. There are several answers to this contention. The first is that article 1 does not provide absolutely that the singular number is always to include the plural and *vice versa*, but only is to do so where there is nothing in the subject or context inconsistent therewith; and second, that the succeeding article prescribing what is to be done at the meeting deals with a member or members who may be present not personally but by proxy, as do also articles 63 and 68. The article, in my opinion, obviously means this, that if there be one member personally present, he and the member or members present by proxy may proceed to transact the business. The subject and the context are inconsistent with any other meaning of the word "members." And of course the point remains that the time and place of meeting must be fixed by the directors. Apart then from the question of delegation, to be hereafter considered, it would appear to me to be impossible for the business of the company to be carried on in the manner prescribed by the articles either where the directors of the company have ceased to exist, or, as in this case, where admittedly by reason of their becoming alien enemies, their rights, powers, and duties are suspended and in abeyance. Though it is necessary in this case that the directors should be shareholders, it is not necessary in every case that they should be so, and it may well be that where this latter is the case the business of the company might well be carried on while, as is contemplated in section 115 of the Act of 1908, there was only one shareholder. Again, it may well be that if there

remained a number of shareholders, not being alien enemies, sufficient to re-elect directors not alien enemies, and so set up again, in accordance with the articles, an organisation for the control and management of the company's affairs, its business might legitimately be carried on, but such a residue of shareholders does not exist in the present case. And whatever else one shareholder may be, he cannot be two directors. The directors of a company, said Lord Cairns in *Ferguson* v. *Wilson*, L.R., 2 Ch. 77, 89, are "then the agents of a company. The company cannot act in its own person, for it has no person. It can only act through its directors, and the case is, as regards these directors, merely the ordinary case of principal and agent." Well, on the outbreak of the war those agents in this case became incapable of acting for their principal though that principal might continue to exist—(*Ex parte Boussmaker*, 13 Ves. Jun. 71; *Esposito* v. *Bowden*, 7 E. & B. 764; *Jansen* v. *Driefontein Consolidated Mines Limited*, 1902 A.C. 484). And if a company should not have and not be able lawfully to appoint any directors other than alien enemies, then though the legal entity, the company, might continue to exist, its action in its trade in this country would be paralysed in point of law, the status of its agents as distinct from that of its shareholders rendering it incapable of making any contract. If while the directors could act they delegated to the secretary power to institute what actions he pleases, then he would, I think, continue, despite the suspension of their powers, to be the agent of the company—not of the directors—for the purposes of that delegation. And as the writ in this action was issued in the month of October 1914, it is, in my opinion, only under and by virtue of that delegation, if at all, he could have got power to institute this action.

There is no evidence whatever that his mere appointment as secretary conferred this authority upon him. Under article 102, sub-section 17, the directors are empowered "(1) to institute, conduct, defend, compound, or abandon any legal proceedings by or against the company or its officers, or concerning the company; (2) to compound and allow time for payment or satisfaction of any debts due and of any claims or demands by or against the company." According to his evidence the directors, when he was appointed by minute, practically substituted him for themselves for the purposes of this article. As to the matter mentioned in No. (1), he did not expressly state that he had authority to give receipt for sums sued for, or as to all or any of the things mentioned in the second number of this section. If the directors had desired to clothe him with the vast and compromising powers he claims, it is strange they did not appoint him by power of attorney their attorney under article 106. It is admitted they did not do so. It is article 102, section 15, that is relied upon on this point. That enables the directors "to appoint at their discretion, remove, or suspend such managers, officers, clerks, and servants for permanent or temporary services as they from time to time may think fit, and to invest them with such powers as they may think expedient, and to determine their duties and fix their salaries or emoluments, and to require security in such instances and to such amounts as they may think fit." This provision would rather look as if it contemplated the investiture of the officers with the powers it was designed to give them on the occasion and at the times of their respective appointments. And this was evidently the idea in the mind of the secretary when he deposed that the powers he claimed were conferred upon him by minute when he was appointed; but I do not think this provision of the section prohibits an increase of powers and duties after appointment. Now as to the proof of the delegation. There is not a scrap of writing of any kind given in evidence in this case to prove that any power to institute actions or give receipts for money recovered was ever conferred upon the secretary. The only document he referred to as conferring it upon him contradicts every statement made by him on the point. It seems incredible that he ever was clothed with the power, without consulting his directors or managing directors, to institute in the name of the company any actions of any kind he pleased. There is no proof other than his own testimony that he ever instituted any action or gave any instructions for its institution. If the directors were in England when he did so they could of course ratify and adopt his action. Not so now. The burden of proving that the secretary had power and authority to institute the present action some months after the outbreak of the war rested on the respondent company. I am clearly of opinion that they have not discharged that burden. I do not think Lush, J., had evidence before him sufficient to support his finding on this point; but even if I thought otherwise I should still hold that in the absence of a clear consent to be bound by his findings thus come to in a suit to which the appellants were no parties that his decision was not binding upon them. I do not find any clear consent of that kind in the present case. I think this appeal should be allowed. Having formed this opinion, I do not desire to express any opinion on the other and main point raised in the case further than to say that, the question of residence of the company apart, I do not think that the legal entity, the company, can be so identified with its shareholders, or the majority of them, as to make their nationality its nationality or their status its status, so completely as to make it an alien enemy because they are alien enemies, or to give it an enemy character because they have that character. I think the judgment of Lord Macnaghten in *Jansen* v. *Driefontein Mines* is inconsistent with any such view. Speaking of a Transvaal company he said—"If all its members had been subjects of the British Crown the corporation itself would have been none the less a foreign corporation and none the less in regard to this country an alien." I think it is much to be regretted that the appellant

company were not permitted to defend, as in my opinion they should have been, so that all the facts might have been elicited, and it could be determined whether the company resides and trades in Germany or not.

I think the order suggested by my noble and learned friend Lord Parker should be made.

LORD SHAW—The Daimler Company is indebted to the Continental Company in certain sums of money. It was willing to pay these sums if payment could have been made with safety. The Continental Company took legal proceedings to recover the moneys. To these proceedings the Daimler Company tabled two defences. The first is that payment would be of the nature of trading with the enemy, and the second is a challenge of the authority to institute the action.

Upon the first point I am of opinion that the judgment of the Court of Appeal is right. Upon the second point, and with regret, I am of opinion that it is erroneous.

The first point is of much general importance. It was carefully and anxiously argued. My views upon it in its general aspect and apart from the statutes and proclamations —which were the subject of a keen analysis and which are afterwards referred to—may be expressed in the following propositions. Before stating them, however, may I say that I have found myself to be in substantial agreement with Lord Parmoor in the judgment about to be pronounced by him, supported, as in my humble opinion it is, by the authorities which he has cited and which I do not here repeat.

(1) There is no debate at this time of day on the general proposition that the direct and immediate consequence of a declaration of war by or against this country is to make all trading with the enemy illegal. The proposition was dealt with recently in this House in the case of *Horlock* v. *Beal*, 1916 A.C. 486, 53 S.L.R. 795. War is war, not between sovereigns or governments alone. It puts each subject of the one belligerent into the position of being the legal enemy of each subject of the other belligerent, and all persons bound in allegiance and loyalty to His Majesty are consequently and immediately by the force of the common law forbidden to trade with the enemy Power or its subjects.

(2) This obligation and restraint is binding in every sense. It is therefore no defence to a breach of the duty to forbear from trading with the enemy that the act was done, not for personal benefit or advantage, but in the service or under the agency or orders of another who is not so bound. No one subject to the laws of this country could be permitted to escape from obedience thereto by pleading that he was acting merely as the hand of others, say a German, Austrian, or Turkish company. The prohibition against trading is binding in regard to all action, direct or indirect, personal or representative.

(3) In so far as the obligation and restraint imposed by the common law are rested upon the allegiance or loyalty of the subject, the application of such ideas to a limited company is incongruous. Allegiance and loyalty are personal by the nature of the case. An incorporated company cannot with propriety have such terms applied to it as if it were a mind subject to emotions or passions or a sense of duty. It is a creation of the law convenient for the purposes of management, of the holding of property, of the association of individuals in business transactions—in short, for all the purposes and with the limitations and remedies set forth in the Companies Acts.

(4) Once, however, it is clear that although this may be so under proposition (3), yet that under proposition (2) every individual subject to the common law is inhibited and interpelled from trading with the enemy, then trading with the enemy on behalf of a company is just as much prohibited as personal trading. A limited company incorporated in England, and although English as regards all the results which flow from such incorporation, is thus completely barred by the Trading with the Enemy Acts—not by reason of the company's allegiance or loyalty, but by reason of the fact that there is no human agency possible within the realm through which and within the law trading with the enemy could be accomplished. In obedience to that law all trading with the enemy, direct or indirect, stops. No firm or company wheresoever or howsoever directed can so trade, nor can anything be negotiated or transacted for it through any person or agency in this country.

(5) Transactions and trading require two parties, and the same principle applies to trading by the enemy as to trading with the enemy. In this way—A company registered in Britain may have shareholders and directors who are alien enemies. Transactions or trading with any one of them becomes illegal. They have no power to interfere in any particular with the policy or acts of companies registered in Britain. Alien enemy shareholders cannot vote; alien enemy directors cannot direct. The rights of all these are in complete suspense during the war.

(6) As to shareholders or directors who are not alien enemies, they stand *pendente bello* legally bereft of all their coadjutors who are; and if the company be a company registered in Great Britain they must face the situation thus created by adopting the courses suitable either under the Companies Acts or the recent legislation. In this way, while no payments of assets, dividends, or profits can be made to alien enemy shareholders, yet the property and business of the company may be conserved. There may be loss consequent on commercial dislocation, but neither loss nor forfeiture is imposed by the law. The law is completely satisfied if in the conduct and range of the business trading with the enemy is avoided. To put in a word one plain instance—All British trading by the company is still permitted if there are British shareholders who can carry it on.

With much respect I see no advantage to be gained, but much confusion to result,

from proceeding to a further stage, and treating or even characterising British registered companies as either alien enemies or companies with an alien enemy character. As stated, all the enemy shareholders' rights being placed in suspense, and all trading with these shareholders or with any other enemy being interpelled, there is no principle of law which would, in my humble opinion, justify the incongruity of denominating or regarding the company itself as enemy either in character or in fact.

Much of the discussion at your Lordships' bar—probably the major part of it—had reference to the recent legislation. This was minutely and anxiously analysed. I think it necessary accordingly to deal with it, but I may say at once that I do not think that it invades or varies any of the principles which I have humbly ventured to sketch.

The question, however, with whom this trading is forbidden is one of wide and serious importance. So much of the commerce of the country is now carried on by incorporated companies that it is manifestly critical for the citizen to know what is the scope of the term "enemy," and if it can apply to such companies, and if so to which of them. This is all the more so because the legislation upon the subject almost at its opening creates trading with the enemy a misdemeanour. The obligation under the common law is backed by criminal sanction. Once such a statute is passed it would of course not be open to any citizen to plead his ignorance of the law of the land as a defence against the charge of misdemeanour. This, however, makes it clear that courts of law should give a strict interpretation to statutory provisions of this character—an interpretation which in any case of dubiety or ambiguity shall be favourable to the liberty of the subject.

Speaking for myself, I do not find that the Trading with the Enemy Acts and proclamations now to be considered were such as to leave any substantial doubt in the mind of the citizen as to what should be his attitude with regard to incorporated companies.

By the Trading with the Enemy Act 1914 (4 and 5 Geo. V, c. 87) it was provided, sec. 1, sub.-sec. (2)—"For the purposes of this Act a person shall be deemed to have traded with the enemy if he has entered into any transaction or done any act which was at the time of such transaction or act prohibited by or under any proclamation by His Majesty dealing with trading with the enemy for the time being in force or which by common law or statute constitutes an offence of trading with the enemy; provided that any transaction or act permitted by or under any such proclamation shall not be deemed to be trading with the enemy."

There was much discussion as to this proviso. It appears to me to be a proviso applicable to the whole of the sub-section, and if so applicable to all transactions or acts of trading which either by common law or by this or any other statute constitute trading with the enemy. This in my view is equivalent to a statutory declaration that every transaction or act permitted under proclamation shall, notwithstanding all such common law or statutory prohibitions not be deemed to be trading with the enemy. I look upon this statute as one for direction and guidance; and it does not appear to me legitimate to contend that the direction and guidance were not of this character—that if a thing was permitted by a proclamation it was not trading with the enemy or a contravention of the law.

The statute was dated the 18th September 1914; and the question accordingly is what did the proclamation then in force—namely, that of date the 9th September—provide? It provided, section 5—"From and after the date of this proclamation the following prohibitions shall have effect (save so far as licences may be issued as hereinafter provided), and we do hereby accordingly warn all persons resident carrying on business or being in our dominion (1) not to pay any sum of money to or for the benefit of an enemy."

There occurs in article 3 of the proclamation a definition of enemy. It is as follows —"The expression 'enemy' in this proclamation means any person or body of persons of whatever nationality resident or carrying on business in the enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country. In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country."

It appears to me that this was a plain guide and instruction to persons in the position of the appellants. They were told first that a transaction permitted under the proclamation should not be deemed trading with the enemy; secondly, that in the case of incorporated bodies enemy character attached to those incorporated in an enemy country; but thirdly, that it attached only to those. I think, in short, that it was a very plain intimation that if a company was not incorporated in an enemy country, but was incorporated in our own country, then this was, though negatively expressed, the exact case in which a payment to such a company became unexceptionable and legitimate.

It is not to be forgotten that under the very same statute provisions were enacted to cover the case of companies whose share capital or directorate was either wholly or in certain proportion held by alien enemies. By section 2 (2), for example, in the case of such companies, when a third or more of the issued share capital or the directorate was so held, the Board of Trade might obtain authority to inspect the books, &c., and appoint an inspector. By section 3 further cautionary provisions were made giving to the Board of Trade power to apply to the Court for the appointment of a controller. So that—to carry the legislation no further than the one Act of Parliament referred to—it was clear that the case of companies held by a majority or even by a minority of alien enemies was put under surveillance to such an extent that payments

made or transactions carried on with such a company in this country would have been under official inspection. It appears to me to be a somewhat strong proposition under these circumstances to hold that one is entitled to go behind the English incorporation of the company and to declare that all these statutory stipulations were vain, seeing that such a company was an enemy, to trade with whom, directly or indirectly, was a misdemeanour.

Further, it appears to me to be equally unsound for a court of law to announce that notwithstanding all those statutory provisions the law of the land is such that the shareholding of a company incorporated in England has to be investigated, and trading with it is forbidden if the substantial majority of shares is found to be, say, German. Such an operation would write out a large portion of the statute. It would render meaningless the particular proviso which declared that enemy character attached only to companies incorporated in an enemy country. It is also fairly clear that under the word "substantially" every kind of inquiry would have to be made in individual instances, say, for instance, as to whether there were enough of alien enemy shareholders to make it an alien enemy company; as to whether a majority would determine the matter, with the possible result of seriously injuring large minorities of British shareholders; and, indeed, whether a company whose shares might be transferred from day to day stood to change into and out of its character as an alien enemy in consequence of the change of *personnel* in its shareholders. Such results would necessarily follow from upsetting the plain announcement of the statute which makes British incorporations settle high or low that the company so incorporated is not "enemy."

What happened in the present case? Under the statute the Board of Trade did appoint an inspector. Since the beginning of August—that is, since the war broke out — that inspector has initialled all the cheques given by the company. The company has two banking accounts, into one of which moneys received are paid. When the company receives a sum of money it gives a receipt, and that receipt goes through the hands of the inspector, so that he knows exactly the details. The inspector has charge of the bank account, and the company is not able to pay any money to the shareholders. The fact is that all these shareholders are Germans except one, but not one of these shareholders can receive under such a *régime* and during the war any part of the assets, dividends, or profits of this concern. The company has, however, a stock of rubber goods. I put to the learned counsel for the appellants what would be the result of the argument with regard to such stock. He replied that it could not be dealt with. To the further question "if the stock were perishable?" he replied in effect that it must perish. I think that this was a perfectly logical result, but it appears to confirm the view that the argument itself was unfounded either upon the general law of the case or upon the legislation to which I have referred.

I do not detain your Lordships with what I think to be the extraordinary argument that if assets are realised and a business kept up enemy shareholders of an English company will at the end of the war be benefited. Possibly they may. It is true enough that on the other argument both they and the English shareholders might enormously suffer. So that a species of indirect pillage seems to be involved — pillage first of the enemy, and secondly of English shareholders —thus presumably penalised for their association with others. I must respectfully decline to admit the validity of any argument of the kind.

I may, however, further point out that if the statute and proclamation be construed as the Court of Appeal have, I think, very rightly construed them, the results *post bellum* would be results depending upon the state of British legislation and of the terms of peace. So far as British legislation is concerned it may be mentioned that by the Act to amend the Trading with the Enemy Act 1914, passed on the 27th November last, various provisions were made for the constitution of an office of custodian of enemy property, the custodian being appointed to hold such property "until the termination of the present war," and thereafter to "deal with the same in such manner as His Majesty may by Order in Council direct." In short, it seems plain beyond question that under the existing legislation or under future Acts, or as part of a diplomatic settlement after the war, the question of the disposal of enemy property will be fully dealt with. This does not seem to afford any argument in support of its deterioration or destruction meanwhile, together with the deterioration and destruction of British rights associated with it.

In conclusion—on this head of the case—I may point out that the Act of November just cited provides by section 14 that it "shall be construed as one with the principal Act"—that is, the Act of August—to which I have referred, and that (2) "no person or body of persons shall, for the purpose of this Act, be treated as an enemy who would not be so treated for the purpose of any proclamation issued by His Majesty dealing with trading with the enemy." It is of course true that this Act cannot bind the parties to the present litigation, but it appears to be entirely in accord with the view of the former Act and of the proclamation of September which has been taken in this opinion. So far as Parliament is concerned the situation is, as stated, that the country of incorporation of the company if English excludes the company from being either an enemy company or of an enemy character, and that all the provisions relative to the working of a company whose shareholders are mixed are provisions which proceed upon that foundation. I am accordingly of opinion that the official of the Daimler Company charged with the payment of moneys who would have ventured to make payment of the debt due by that company to the Continental Company

or to a person properly acting as its representative, would have been safe in doing so and guilty of no misdemeanour. The view taken upon this part of the case by the majority of the Court of Appeal appears to me to be well founded.

It is with regret that, this being so, I find myself constrained to concur in the opinion which your Lordships take as to the initiation of these legal proceedings. I think they naturally followed as part of a course of previous dealings, and I am not surprised at the view taken by Lush, J., in regard to this point. But upon the other hand the point, it is only fair to the appellants to say, has been from the first raised by them. Authority to raise legal proceedings appears to be in the directors, who are all Germans, or in some person to whom they delegated the authority. They did not before the war make such delegation of authority to raise these proceedings. Since the outbreak of war it is not, according to my opinion, competent for enemy directors or shareholders to have anything to do with the management of this company's affairs in England. A different course might possibly have been adopted by the single shareholder in England. But the point against agency and authority to take these particular legal proceedings has been taken, and I do not differ from the view of your Lordships that it is well founded. I agree accordingly to the suit being dismissed upon that ground; but, if I may venture to say so, it does not appear to me to be a case in which costs should be awarded even if such an award could be effective.

LORD PARKER—The judgment I am about to read has been prepared with the assistance and collaboration of Lord Sumner, who authorises me to state that he agrees with it.

In my opinion this appeal ought to be allowed.

When the action was instituted all the directors of the plaintiff company were Germans resident in Germany. In other words, they were the King's enemies, and as such incapable of exercising any of the powers vested in them as directors of a company incorporated in the United Kingdom. They were incapable, therefore, of exercising the institution of this action. The contention that the secretary of the company could authorise 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 authorise the institution of proceedings in the company's name, but they did not do so. Their conduct in holding him out as a person having this power, if they in fact so held him out, may in particular cases have operated to estop the company from denying the authority of a solicitor whom he retained, but it could not confer the power in question.

It follows that this action was instituted without authority from the company, and in my opinion the Court having notice of the fact should have refused relief. It is true that a question whether the plaintiff's solicitor has or has not been validly retained is in general brought before the Court by motion to which the solicitor is made a party. But when the Court in the course of an action becomes aware that the plaintiff is incapable of giving any retainer at all it ought not to allow the action to proceed. It clearly would not do so in the case of an infant plaintiff, and I can see no difference in principle between the case of an infant and the case of a company which has no directors or other officers capable of giving instructions for the institution of legal proceedings. This is more especially so when, by reason of all the shareholders (with one exception) being the King's enemies, no agent or officer capable of giving such instructions can be validly appointed. It was suggested that the secretary, being the only shareholder who is not an enemy, could in some way or other call and hold a meeting of the company at which he might appoint himself a director or agent of the company with such powers as he might think fit. He has not attempted to do so, and after a careful examination of the articles I think it reasonably clear that any such attempt would fail. Further, it is quite clear that the articles of association of the company do not contemplate or provide for the continuance of the company's trading without any directors at all, nor is a secretary of a company an official who *virtute officii* can manage all its affairs with or without the help of servants, in the absence of a regular directorate.

Under these circumstances it is, strictly speaking, unnecessary to consider whether a company incorporated in the United Kingdom can under any and what circumstances be an enemy or assume an enemy character. The question has, however, been so elaborately argued both here and in the Court of Appeal and is of such general importance that it would not be right to ignore it.

The principle upon which the judgment under appeal proceeds is that trading with an incorporated company cannot be trading with an enemy, where the company is registered in England under the Companies Acts and carries on its business here. Such a company it calls an "English company," and obviously likens to a natural-born Englishman, and accordingly holds that payment to it of a debt which is due to it, and of money which is its own, cannot be trading with the enemy, be its corporators who they may. The view is that an English company's enemy officers vacate their office on becoming enemies, and so affect it no longer, and that its enemy shareholders, being neither its agents nor its principals, never in law affect it at all.

Much of the reasoning by which this principle is supported is quite indisputable. No one can question that a corporation is a legal person distinct from its corporators; that the relation of a shareholder to a company which is limited

by shares is not in itself the relation of principal and agent or the reverse; that the assets of the company belong to it, and the acts of its servants and agents are its acts, while its shareholders, as such, have no property in the assets and no personal responsibility for those acts. The law on the subject is clearly laid down in a passage in Lord Halsbury's judgment in *Salomon* v. *Salomon & Company*, 1897 A.C., at p. 30. "I am," he says, "dealing with the provisions of the statute, and it seems to me to be essential to the artificial creation that the law should recognise only that artificial existence apart from the motives or conduct of individual corporators. . . . Short of such proof," *i.e.*, proof in appropriate proceedings that the company had no real legal existence, "it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person, with its rights and liabilities appropriate to itself, and that the motives of those who took part in the formation of the company are absolutely irrelevant in discerning what those rights and liabilities are." I do not think, however, that it is a necessary corollary of this reasoning to say that the character of its corporators must be irrelevant to the character of the company, and this is crucial, for the rule against trading with the enemy depends upon enemy character.

A natural person, though an English-born subject of His Majesty, may bear an enemy character and be under liability and disability as such by adhering to His Majesty's enemies. If he gives them active aid he is a traitor, but he may fall far short of that and still be invested with enemy character. If he has what is known in Prize Law as a commercial domicile among the King's enemies, his merchandise is good prize at sea, just as if it belonged to a subject of the enemy Power. Not only actively but passively he may bring himself under the same disability. Voluntary residence among the enemy, however passive or pacific he may be, identifies an English subject with His Majesty's foes. I do not think it necessary to cite authority for these well-known propositions, nor do I doubt that, if they had seemed material to the Court of Appeal, they would have been accepted.

How are such rules to be applied to an artificial person, incorporated by forms of law? As far as active adherence to the enemy goes, there can be no difference, except such as arises from the fact that a company's acts are those of its servants and agents acting within the scope of their authority. An illustration of the application of such rules to a company (as it happens a company of neutral incorporation, which is an *a fortiori* case) is to be found in *Netherlands South African Company* v. *Fischer*, 18 T. L. R. 116.

In the case of an artificial person, what is the analogue to voluntary residence among the King's enemies? Its impersonality can hardly put it in a better position than a natural person and lead to its being unaffected by anything equivalent to residence. It is only by a figure of speech that a company can be said to have a nationality or residence at all. If the place of its incorporation under municipal law fixes its residence then its residence cannot be changed, which is almost a contradiction in terms, and in the case of a company residence must correspond to the birthplace and country of natural allegiance in the case of a living person and not to residence or commercial domicile. Nevertheless enemy character depends on these last. It would seem, therefore, logically to follow that in transferring the application of the rule against trading with the enemy from natural to artificial persons something more than the mere place or country of registration or incorporation must be looked at.

I think that the analogy is to be found in control, an idea which, if not very familiar in law, is of capital importance and is very well understood in commerce and finance. The acts of a company's organs, its directors, managers, secretary and so forth, functioning within the scope of their authority, are the company's acts and may invest it definitely with enemy character. It seems to me that similarly the character of those who can make and unmake those officers, dictate their conduct mediately or immediately, prescribe their duties and call them to account, may also be material in a question of the enemy character of the company. If not definite and conclusive it must at least be *prima facie* relevant, as raising a presumption that those who are purporting to act in the name of the company are, in fact, under the control of those whom it is their interest to satisfy. Certainly I have found no authority to the contrary. Such a view reconciles the positions of natural and artificial persons in this regard, and the opposite view leads to the paradoxical result that the King's enemies, who chance during war to constitute the entire body of corporators in a company registered in England thereby pass out of the range of legal vision and, instead, the corporation, which in itself is incapable of loyalty, or enmity, or residence, or of anything but of bare existence in contemplation of law and of registration under some system of law, takes their place for almost the most important of all purposes, that of being classed among the King's friends or among his foes in time of war.

What is involved in the decision of the Court of Appeal is that for all purposes to which the character and not merely the rights and powers of an artificial person are material, the personalities of the natural persons, who are its corporators, are to be ignored. An impassable line is drawn between the one person and the others. When the law is concerned with the artificial person it is to know nothing of the natural persons who constitute and control it. In questions of property and capacity, of acts done and rights acquired or liabilities assumed thereby, this may be always true. Certainly it is so for the most part. But the character in which property is held, and the character in which the capacity to act is enjoyed and acts are done, are not *in pari materia*. The latter character is a

quality of the company itself, and conditions its capacities and its acts. It is not a mere part of its energies or acquisitions, and if that character must be derivable not from the circumstances of its incorporation, which arises once for all, but from qualities of enmity and amity, which are dependent on the chances of peace or war and are attributable only to human beings, I know not from what human beings that character should be derived, in cases where the active conduct of the company's officers has not already decided the matter, if resort is not to be had to the predominant character of its shareholders and corporators.

So far as I can find, this precise question has been asked heretofore once and once only, namely, in argument in the case of *Bank of the United States* v. *Deveaux*, 5 Cranch, at p. 81. The judgment of Marshall, C.J., did not answer it, though he decided the case in favour of the party whose counsel suggested this point as part of a wider argument. Accordingly all that can be said is that the suggestion cannot have shocked that great jurist, and his actual decision proceeds upon the assumption that for certain purposes a court must look behind the artificial *persona*—the corporation—and take account of and be guided by the personalities of the natural persons, the corporators.

In the Court of Appeal the Lord Chief-Justice expressed the opinion that the judgment of Marshall, C.J., had not been approved in later cases before the Supreme Court of the United States. I have examined the cases in question—*The Louisville, Cincinnati, and Charleston Railroad* v. *Letson*, 2 Howard 497, and *St Louis and San Francisco Railway Company* v. *James*, 54 Davis 545—and have come to the conclusion that, so far as is material to the question in hand, they do not bear out this criticism. This is how the matter stands. Under the constitution of the United States jurisdiction is given to Federal Circuit Courts to decide controversies between "citizens" of different States. In the case in question Marshall, C.J., held that an artificial person could not be a citizen for this purpose, but not to deny justice to a corporation he took cognisance of the corporators, and finding them all to be citizens of the State which had incorporated the plaintiff bank, he admitted jurisdiction, treated the bank like a citizen of that State, and entertained the suit. It was afterwards contended, and for some time with success, that this decision applied only when all the corporators were citizens of that State and that it required a refusal of jurisdiction when some of them were citizens of another State. It was in this stage that he expressed the doubts referred to in the judgment below. Long after his time the matter was at last set at rest in the case of the *St Louis Railway* when the Court surveyed all the different phases of the controversy. What is remarkable is the way in which this was done. The Federal Courts did not ignore the existence of the corporators and fix their attention on the place where the corporation was chartered or the State under whose laws it was registered. They continued to fix their attention on the citizen corporators, but they conclusively and incontestably presumed that they were all citizens of the State of the incorporation. Such bearing, therefore, as these cases have on the present question is in favour of the appellants, for it is plain that great Judges, trained in the principles of the English common law, have not found it contrary to principle to look, at least for some purposes, behind the corporation, and consider the quality of its members. A somewhat similar observation arises upon *Janson* v. *Driefontein Consolidated Mines*, 1902 A.C. 484. The question fought throughout in that case was, whether it was against public policy for English underwriters to indemnify a company registered in the Transvaal against losses inflicted upon it just before the outbreak of war by the Government of the South African Republic in order to strengthen its resources in the impending conflict with this country. The case was tried before the conclusion of peace, but on the common footing that it should be taken that the war was over. The mere suspension of an enemy's right of suit during war never was relied on at all, and the plea that payment on the policy would be an act of trading with the enemy was dropped. The only case made was that payment would relieve enemies of the Crown from losses which the public policy of this country, applicable to war and war-like conditions, required that they should bear themselves. It was the underwriters who insisted on the enemy character of the company, for the company itself denied it. As I read the judgments of the noble Lords, none purported to decide that the company must be an enemy corporation for all purposes by reason of its registration in the Transvaal. They held that, even if that assumption were made in the underwriters' favour, yet their appeal must fail. The Lord Chancellor expressly stated that the question might be debateable, as it is now actually being debated, and other noble Lords concurred. Lord Lindley, whose observations alone are expressed at length, could not, I think, have meant to intimate thereby that in such a case as the present he would decide for the respondents. What really is significant in that case is this—few, if any, of the shareholders in the company were in fact subjects of the South African Republic. The vast majority were subjects of various European States. The company's argument was—"How can it be contrary to British public policy that individual Frenchmen and Germans or Italians should get the practical benefit of this policy." In the Court of Appeal Sir A. L. Smith, M.R., expressly accepted this argument. To him at least there was no impenetrable screen interposed by registration between the company and its shareholders. Beyond this I think for present purposes the case does not go. Further, the cases of the *English Roman Catholic Colleges in France*, cited to your Lordships from 2 Knapp (pp. 23 and 51) do not seem to me to be in point. They turn on the meaning to be attributed

to the expression "British subjects" in a particular treaty. If anything the reliance placed on the fact of the French Government's control over the colleges and on the existing state of English legislation towards Roman Catholic Ecclesiastics would militate against the respondent's argument. As an illustration of the view which has been taken (under the Income Tax Acts it is true) of the control which one trading company exercises over another company through the ownership of a controlling interest in the latter's shares, I would refer to *St Louis Breweries* v. *Apthorpe*, 79 L.T.R. 555, and *Schönhofen Company* v. *Apthorpe*, 80 L.T.R. 395. In the latter case, in deciding that an English company, which held a controlling interest in the shares of a United States Company, carried on business for income tax purposes in the United States by virtue of that holding and of its control over the business of the latter company, Collins, L.J., expressly said that he was not deterred from so deciding by the decision of your Lordships' House in the case of *Salomon* v. *Salomon & Company*, 1897 A.C. 22, which was so much relied on in the Court below. I think this analogy not without importance. In the case of the "*Roumanian*," 1915, p. 26, it is to be remembered that the Prize Court was dealing with a matter in which the enemy character of goods is by settled rule determined by ownership, and when that case was affirmed in the Privy Council no decision on this point was invited or given.

The truth is that considerations which govern civil liability and rights of property in time of peace differ radically from those which govern enemy character in time of war. Joint-stock enterprise and English legislation and decisions about it have developed mainly since this country was last engaged in a great European war, and have taken little if any account of warlike conditions. The ideal of joint-stock enterprise, that with limited liability the more unlimited the trading the better, is an ideal of profound peace. The rule against trading with the enemy is a belligerent's weapon of self-protection. I think that it has to be applied to modern circumstances as we find them and not limited to the applications of long ago, with as little desire to cut it down on the one hand as to extend it on the other beyond what those circumstances require. Though it has been said by high authority (see *M'Connell* v. *Hector*, 2 B. & P. 113; *Esposito* v. *Bowden*, 7 E. & B. 763) to aim at curtailing the commercial resources of the enemy, it has, according to other and older authorities, the wider object of preventing unregulated intercourse with the enemy altogether. Through the Royal licence, which validates such intercourse and such trade, they are brought under necessary control. Without such control they are forbidden. To my mind the rule would be deprived of its substantial justification and be reduced to a barren canon if it were held in circumstances such as these that it had no application by reason of the mere fact that the company is registered in London.

Having regard to the foregoing considerations, I think the law on the subject may be summarised in the following propositions:—

1. A company incorporated in the United Kingdom is a legal entity—a creation of law with the status and capacity which the law confers. It is not a natural person with mind or conscience. To use the language of Buckley, L.J., "It can be neither loyal nor disloyal; it can be neither friend nor enemy."

2. Such a company can only act through agents properly authorised, and so long as it is carrying on business in this country through agents so authorised and residing in this or a friendly country it is *prima facie* to be regarded as a friend, and all His Majesty's lieges may deal with it as such.

3. Such a company may, however, assume an enemy character. This will be the case if its agents or the persons in *de facto* control of its affairs, whether authorised or not, are resident in an enemy country, or wherever resident are adhering to the enemy or taking instruction from or acting under the control of enemies. A person knowingly dealing with the company in such a case is trading with the enemy.

4. The character of individual shareholders cannot of itself affect the character of the company. This is admittedly so in times of peace during which every shareholder is at liberty to exercise and enjoy such rights as are by law incident to his status as shareholder. It would be anomalous if it were not so also in a time of war, during which all such rights and privileges are in abeyance. The enemy character of individual shareholders and their conduct may, however, be very material on the question whether the company's agents or the persons in *de facto* control of its affairs are in fact adhering to, taking instructions from, or acting under the control of enemies. This materiality will vary with the number of shareholders who are enemies and the value of their holdings. The fact, if it be the fact, that after eliminating the enemy shareholders the number of shareholders remaining is insufficient for the purpose of holding meetings of the company or appointing directors or other officers, may well raise a presumption in this respect. For example, in the present case, even if the secretary had been fully authorised to manage the affairs of the company and to institute legal proceedings on its behalf, the fact that he held one share only out of 25,000 shares, and was the only shareholder who was not an enemy, might well throw on the company the *onus* of proving that he was not acting under the control of, taking his instructions from, or adhering to the King's enemies in such manner as to impose an enemy character on the company itself. It is an *a fortiori* case when the secretary is without authority, and necessarily depends for the validity of all he does on the subsequent ratification of enemy shareholders. The circumstances of the present case were therefore such as to require close investigation, and preclude the propriety of giving leave to sign judgment under Order XIV, r. 1.

5. In a similar way a company registered in the United Kingdom, but carrying on business in a neutral country through agents properly authorised and resident here or in the neutral country, is *prima facie* to be regarded as a friend, but may through its agents or persons in *de facto* control of its affairs assume an enemy character.

6. A company registered in the United Kingdom but carrying on business in an enemy country is to be regarded as an enemy.

The foregoing propositions are not only consistent with the authorities cited in argument, and in particular with what was said in this House in *Jansen* v. *Driefontein Consolidated Mines*, 1902 A.C. 484, but they have, I think, the advantage of affording convenient and intelligible guidance to the public on questions of trading with the enemy. It would be a misfortune if the law were such that during war every one proposing to deal with a British company had to examine the character of its shareholders and decide whether the number of the enemy shareholders, coupled with the value of their holdings, were such as to impose an enemy character on the company itself. It would be still more unfortunate if this question were a question for the jury in each particular case. No one could maintain that a company had assumed an enemy character merely because it had a few enemy shareholders. It might possibly be contended that it assumed an enemy character when its enemy shareholders amounted to, say, one-half, or three-fifths, or five-eighths of the whole, but how, if the one-half, three-fifths, or five-eighths held one-sixth, one-fifth, or one-fourth of the shares? The Legislature might, but no Court could possibly lay down a hard-and-fast rule, and if no such rule were laid down, how could anyone proposing to deal with the company ascertain whether he was or was not proposing to deal with the enemy?

I desire to add this. It was suggested in argument that acts otherwise lawful mght be rendered unlawful by the fact that they might tend to the enrichment of the enemy when the war was over. I entirely dissent from this view. I see no reason why a company should not trade merely because enemy shareholders may after the war become entitled to their proper share of profits of such trading. I see no reason why the trustee of an English business with enemy *cestuis qui trustent* should not during the war continue to carry on the business although after the war the profits may go to persons who are now enemies, or why moneys belonging to an enemy but in the hands of a trustee in this country should not be paid into Court and invested in Government stock or other securities for the benefit of the persons entitled after the war. The contention appears to me to extend the principle on which trading with the enemy is forbidden far beyond what reason can approve or the law can warrant. In early days the King's prerogative probably extended to seizing property on land as well as on sea. As to property on land, this prerogative has long fallen into disuse. Subject to any legislation to the contrary or anything to the contrary contained in the treaty of peace when peace comes, enemy property in this country will be restored to its owners after the war just as property in enemy countries belonging to His Majesty's subjects will or ought to be restored to them after the war. In the meantime it would be lamentable if the trade of this country were fettered, businesses shut down, or money allowed to remain idle in order to prevent any possible benefit accruing thereby to enemies after peace. The prohibition against doing anything for the benefit of an enemy contemplates his benefit during the war and not the possible advantage he may gain when peace comes.

I need only briefly refer to the argument submitted on the effect of the recent statutes against trading with the enemy and the Royal Proclamations connected with them. I have carefully considered them, and do not consider that they exclude common law rules or principles, or in the case of corporations restrict the trade which is unlawful to trading with such corporations as are incorporated under the laws of an enemy country. Equally little can the Proclamations be read as licences to do anything that they do not in terms prohibit. No suggestion has been made that the position of the respondent company is that of an alien enemy commorant within the realm *sub protectione regis*, or that the royal licence has specifically been extended to trading with it.

I feel some little difficulty as to the precise form which your Lordships' order ought to take. The action is altogether irregular and should be struck out, all orders made therein being of course discharged. But there is no one before the House who can be made liable for costs or who can be ordered to replace in Court the moneys paid out to the secretary. There can therefore be no order as to costs, and the appellants must be left to pursue any remedy they may have against the secretary personally in respect of the money which was erroneously paid to him.

LORD PARMOOR—The respondents were registered at Somerset House on the 29th March 1905 as a limited liability company under the Companies Acts 1862 to 1900. At the date of the outbreak of war the company was carrying on business in the United Kingdom under a system of local management. It appears not to be open to question that before the war the company was a British company irrespective of the nationality of the directors and other corporators.

The respondents brought an action against the appellants as acceptors of three bills of exchange for £1100, £1018, 4s. 2d., and £3462, 9s. 4d., in payment of goods supplied before the declaration of war. On the 24th November 1914 Master Macdonell gave leave to the plaintiffs to sign final judgment under Order XIV. This order was affirmed by Scrutton, J., and the Court of Appeal.

At the date of the writ all shares in the respondent company except one were held by a German company, or by subjects of

the German Empire residing in Germany. One share was registered in the name of the secretary of the company, who resides in London, and in January 1910 became a naturalised subject of the Crown. All the directors are subjects of the German Empire and reside in Germany. The appellants do not deny that they accepted the three bills of exchange, but raise two points—(1) that having regard to the enemy character of the shareholders and directors of the respondent company no payment can be enforced by the company during the war of debts owing to the company, and (2) that there was no authority in the solicitors for the company to issue the writ in the action. Both matters are of importance, but the main argument both in this House and in the Court of Appeal has been directed to the question how far the enemy nationality of the directors, and of the shareholders of the company for the time being on the register, affects the status of the company after the outbreak of war, and its right to sue in the British courts.

A company incorporated under the Companies Acts has a continued existence irrespective of the shareholders for the time being on the register. It is a legal person or entity, which comprises not only those shareholders but their predecessors and successors. It has a right to sue and a liability to be sued in the corporate name. It possesses powers and is subject to obligations distinct from those of the shareholders for the time being on the register, acting either individually or in their collective capacity. I see no reason why the word nationality may not be properly applied to a corporate body. The nationality of such a body is wholly distinct from that either of a majority or of the whole number of shareholders for the time being on the register. The contention of the appellants is that when at the outbreak of war the shareholders on the register of a British company carrying on business within the United Kingdom are wholly or largely alien enemies, the company loses the right which it would otherwise have to sue in the British courts.

I do not think that this contention is well founded, and I agree in this respect with the opinion expressed by Lord Shaw. The company after the outbreak of war does not lose the status of a company registered in this country. If there is an agent duly appointed, who may or may not be a shareholder, the outbreak of war does not *per se* terminate the agency, and the company is liable to be sued in respect of obligations and is enabled to sue to enforce its rights. In other words, the company still owes obedience to the laws of this country and is entitled to their protection.

It is not necessary to go through the numerous cases quoted to your Lordships. I agree with the conclusion in the judgment of the Lord Chief-Justice that, subject to the doubtful exception of one case (*City of London* v. *Wood*, 12 Mod. 669), there is no English authority which supports the contention of the appellants. On the other hand there is no direct authority against this contention. Two cases decided in this House support the principle on which the decision of the Court of Appeal is based. In *Salomon* v. *Salomon & Company*, 1897 A.C. 22, Lord Macnaghten in specific terms states his opinion that a company is a different person altogether from the subscribers to the memorandum or the shareholders on the register. In *Jansen* v. *Driefontein Consolidated Mines*, 1902 A.C. 484, the question now in debate was indirectly involved, and there are passages in the opinion of the noble and learned Lords which are entitled to be regarded as a high authority. Lord Macnaghten says—"If all the members of the corporation had been subjects of the British Crown, the corporation itself would be none the less a foreign corporation and none the less in regard to this country an alien." Lord Davey says—"I think it must be taken that the respondent company was technically an alien, and became, on the breaking out of hostilities between this country and the South African Republic, an alien enemy." Lord Brampton says—"The company clearly must be treated as a subject of the Republic notwithstanding the nationality of its shareholders." Lord Robertson says—"That this company was a Transvaal company, and that the nationality of its shareholders is immaterial." Lord Lindley says—"For all purposes material for the determination of the present appeal, the company must, in my opinion, be regarded as a company resident and carrying on business in the Transvaal, although not exclusively there. It was subject to the laws of that country. When war broke out the company became an alien enemy of this country. See the American case of the *Society for the Propagation of the Gospel* v. *Wheeler*, 2 Gallison [U.S.A.] 105. If it becomes material to attribute nationality to the company, it would, in my opinion, be correct to say that the company was a Transvaal company and a subject of the Transvaal Government, although almost all its shareholders were foreigners resident elsewhere and subjects of other countries. But when considering questions arising with an alien enemy, it is not the nationality of the person but his place of business during the war that is important." I have troubled your Lordships at some length with quotations from the opinions of noble and learned Lords in the above case in order to avoid the necessity of further reference to other cases. I do not doubt the proposition that a company registered in this country would, if proved to be carrying on its business through its agent or agents in an enemy country become enemy in character. I draw no distinction in this respect between a British company and a British born subject. The enemy character would be the same, though every shareholder and every director was a British born subject. In the present case there is no evidence that since the outbreak of the war the respondents have carried on business in an enemy country. In the absence of such evidence the respondents have the same right of access to the courts as any other British subject

or subject of a friendly State, and if it is relevant to clothe the company with a nationality, their nationality was British.

Buckley, L.J. (Lord Wrenbury) has expressed the opinion that, though the respondent company has an independent legal existence and is a British legal person, all its directors and all its corporators on the register are German residents in Germany, and that these apart from technicality determine the thoughts, wishes, or intentions of the company. "The question for determination is whether when all the natural persons who express and give effect to their wishes through the corporation as a legal abstraction are Germans resident in Germany the corporation can sue in this country, because those persons who could not sue are as a matter of law absorbed in a separate legal person which is British, and which (regarding the corporation as a legal person existing apart from and irrespective of its corporators) can sue." Assuming that it is permissible for some purposes to consider the nationality of the corporators on the register, I find it difficult to accept the conclusion that after the outbreak of war the thoughts, wishes, or intentions of the company are the thoughts, wishes, or intentions of Germans resident in Germany. The effect of the outbreak of the war is to suspend as from that date and during the war all rights of the enemy directors or corporators to take any part in the management and direction or control of a British company carrying on business in this country. This is in no sense a technical question but one of substance and reality. If any official of the company in this country entered into any intercourse with the enemy directors or corporators he would be liable to a charge of misdemeanour, and subject if convicted to a heavy punishment. It is fair to say that the secretary of the company has denied that he has had any intercourse with the German directors or corporators since the outbreak of the war, or that any payment to the respondent company since that date has been remitted to the enemy. Furthermore, the Board of Trade has taken control of the books of the respondent company in accordance with the powers conferred upon them by statute. Mr Gore-Browne argued for the appellants that the enemy corporators had disappeared during the period of the war. It is more accurate to say that their rights have been suspended by the outbreak of the war and will remain in suspense during the period of the war. The principle applicable is well stated in *Ex parte Boussmaker* (13 Ves. Jun. 71). A bankruptcy claim was admitted on behalf of an alien enemy, the dividend to be reserved during the continuance of the war. The Lord Chancellor, after referring to the general principle that a contract with an alien enemy would be void, says—"But if the two nations were at peace at the date of the contract, from the time of war taking place the creditor could not sue, but, the contract being originally good, upon the return of peace the right would survive."

Special reference was made in the argument to the case of a corporation sole. Corporations sole are in the main ecclesiastical, but by the Public Trustee Act 1906 a public trustee has been constituted a corporation sole, with perpetual succession and an official seal, and may sue or be sued under the above name like any other corporation sole. The object is to give the corporation a continued existence irrespective of the person holding the office of public trustee for the time being. If the person holding the office for the time being became an alien enemy, or in any other way became disentitled to sue or be sued in the British courts, this would not affect the right of the corporation to sue, or its liability to be sued by any persons entitled to receive payment due from funds held by the corporation as trustees. The distinction between the corporators for the time being and the corporation with perpetual succession is not technical but of essential importance. Similar considerations arise in the case of an ecclesiastical corporation sole. Many of these corporations have existed for centuries with a succession of individual corporators, who are considered in law as one person. A particular bishop or rector might be a person whose rights to sue or be sued had been suspended, but the funds of the corporation are not on that account relieved from liability, and the work of the corporation is not brought to a standstill by a disability to recover debts due in the British courts.

The principle that the enemy character of shareholders on the register does not take away the right of a British company to sue or its liability to be sued is recognised in the Proclamation against trading with the enemy, the 9th September 1914, read in connection with the Trading with the Enemy Act 1914 and the Trading with the Enemy (Amendment) Act 1914. The Proclamation taken by itself can in no way affect the legal position, but it is different if the terms of the Proclamation subsequently receive statutory confirmation. Paragraph 3 of the Proclamation states—"In the case of incorporated bodies enemy character attaches only to those incorporated in an enemy country." In section 1, sub-section 2, of the Trading with the Enemy Act 1914 it is enacted that for the purposes of that Act a person should be deemed to have traded with the enemy if he has entered into any transaction or done any act which was at the time of such transaction or act prohibited by or under any proclamation issued by His Majesty dealing with trading with the enemy for the time being in force, or which at common law or by statute constitutes an offence of trading with the enemy, provided that any transaction or act permitted by or under any such proclamation shall not be deemed to be trading with the enemy. This section is not directed to the determination of what constitutes an enemy, but to transactions and acts prohibited either by proclamation, common law, or statute. The proviso does not in my opinion assist the argument of the appellant company and is not relevant to the question now in debate. It is indeed essential not to confuse the question enemy character with the question of trading with

the enemy. A British subject is liable to all the penalties which attach to enemy trading, but he does not thereby cease to be a British subject or divest himself of his status as a British citizen. Section 14, sub-section 2, of the Trading with the Enemy Amendment Act 1914 is directed to a determination of the persons or body of persons to be treated as enemy. "No person or body of persons shall, for the purposes of this Act, be treated as an enemy who would not be so treated for the purpose of any proclamation issued by His Majesty dealing with trading with the enemy for the time being in force." This definition is limited to the purposes of this Act, but the Act is to be construed as one with the principal Act, and the purpose of the Act is stated in the preamble to be to prevent the payment of money to persons or bodies of persons resident or carrying on business in any country with which His Majesty is for the time being at war. The effect is that a company registered in this country, and which is not carrying on business in an enemy country, is not an enemy company, and that any person paying debts due from him to such company is not trading with the enemy or committing any offence, whatever may be the nationality of its directors and corporators.

At the conclusion of his judgment Lord Wrenbury quotes the language of *Bank of the United States* v. *Deveaux* (5 Cranch, at p. 91)—"The action is by aliens suing by a corporate name." I think that this dictum is not applicable where the aliens are alien enemies whose rights of interference or control in the management of the corporation have been wholly suspended; but it is clear that a British company cannot claim to be in a more favourable position than an ordinary British subject, and that the fact of registration in this country would be no answer if it can be proved that its agent is acting under enemy control or holding any intercourse with alien enemies.

The second question raised by the appellants is that there was no authority in the solicitor for the company to issue the writ in the action. The question is not whether there was a retainer to the solicitor to issue the writ in the action, but whether, under the conditions consequent on the outbreak of the war, there was any representative of the company with authority to give instructions to a solicitor to commence an action on behalf of the company. The cases which decide the practice to be followed when an objection is made to the retainer of a solicitor do not apply. There is no reason why the objection raised in this case on behalf of the appellants could not be entertained at the trial as a defence to the action and to refuse to entertain it might lead to serious injustice. In the case of the *Continental Tyre and Rubber Company Limited* v. *Thomas Tilling Limited*, which was tried before Lush, J. (and in the Court of Appeal was consolidated with the present case in November 1914), evidence was adduced for the purpose of proving that prior to the outbreak of the war the secretary had been given the necessary authority by the company. By arrangement this evidence was admitted as though it had been given on the hearing of the case under debate. The Court of Appeal agreed with Lush, J., that upon the evidence before him there was sufficient ground for holding that the authority of the secretary had been established. If the secretary had the necessary authority at the outbreak of the war there is no evidence that such authority has been revoked, and there is no revocation by operation of law.

Lush, J., finds that the secretary has constantly brought such actions as the present, and that the directors have left it to him to cause a writ to be issued when necessary, and that he has done so in this case with their authority, express or implied. Assuming that this finding is justified by the evidence, it does not, in my opinion, support the proposition that at the outbreak of the war the secretary had authority of the company to initiate litigation on its behalf. There is no minute conferring such authority on the secretary, and there is no satisfactory evidence of any resolution giving such authority although not recorded in a minute. It is advisable that a resolution giving such authority should be formally recorded in a minute, but this would not be conclusive if the fact that such resolution had been passed could be proved from other sources. In my opinion there is no evidence that any such resolution was ever passed, and the finding of Lush, J., comes to nothing more than that it was found convenient to allow the secretary to initiate litigation from time to time whether his authority is to be regarded as conferred in each case or as ratified by subsequent acquiescence.

Mr Upjohn argued that if the secretary had not authority he could obtain it by taking the necessary steps, and that the objection was of a technical character. It is a sufficient answer to this argument to say that whatever steps may be necessary to confer authority on the secretary, no such steps have in fact been taken. As at present advised, I think that there is no way in which the necessary authority could be conferred upon the secretary. The difficulty is certainly not met by the provisions in the articles of association, which purports to provide that a quorum of one is sufficient to constitute an adjourned meeting. In the main contention the respondents have succeeded. I agree in the form of the order proposed by Lord Parker.

Order as follows—"That the appeal be allowed, and all orders made in the case be discharged, and that the action be struck out."

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