receive a clear £2500 without deducting any thing for income tax.

The appeal, I think, should be dismissed with costs.

Appeal dismissed.

Counsel for the Appellant — Disturnal, K.C.—Latter. Agents—Nicholson, Patterson, & Freeland, Solicitors.

Counsel for the Respondent — Hon. F. Russell, K.C.—A. M. Bremner. Agents—Capron & Company, Solicitors.

HOUSE OF LORDS.

Monday, March 19, 1917.

(Before Lords Buckmaster, Dunedin, Parker, Sumner, and Wrenbury.)

EBBW VALE STEEL, IRON, AND COAL COMPANY, LIMITED *v.* MACLEOD & COMPANY.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Contract — War — Mines and Minerals — Suspensory Condition — Applicability of the Condition.

The respondents were entitled, under a contract with the appellants for a supply of ore, to determine the contract in the event of war affecting the mine. Owing to loss of business with Germany caused by the war the mine was closed. The respondents claimed to determine the contract, although it was still possible for them to supply the appellants with ore from previous accumulations. The appellants claimed that the effect of the war upon the mine was not sufficiently direct to make the condition operative. *Held* that the mine was affected by the war, although its closing was not directly caused by the operations of war.

The *facts* are given in the opinions of their Lordships, and were as follows:—

LORD BUCKMASTER—The appellants in this case are a coal, steel, and iron company carrying on business at Ebbw Vale, in the county of Monmouth, and the respondents are a firm of iron ore merchants having their chief place of business at Glasgow and a branch house at Bilbao. The business of the respondents is to import ore into the United Kingdom, partly to satisfy contracts already made and partly to store and sell as opportunity offers. One special class of ore in which they deal comes from a mine in Spain, situate about thirty miles from Bilbao, called the Axpe Arrazola Mine, and it was with the ore from these mines that the present dispute is concerned.

On the 16th March 1914 the respondents contracted with the appellants for the sale to them of 15,000 tons of this ore, to be delivered by monthly deliveries from May to September 1914, *ex* steamer, at one of the appellants' wharves at Newport. The contract contained special provisions as to the size of the steamer by which delivery was to be made, but in the view that I take of this matter those provisions are immaterial. The last clause of the contract was a clause entitling either party in certain events wholly or partially to suspend the contract. It is in these words—"In the event of war, restraint of princes or governments, revolutions, civil commotion, imminent hostilities, blockade of shipping or delivery ports, accidents, strikes, lock-outs, political disturbances, riots, epidemics, quarantine, fire, frosts, floods, snow, the act of God, perils and dangers of the seas and of navigation, explosions, negligence of pilot, master, or seaman, delays, interruptions, or stoppage of work through failure of usual coal supply, *force majeure*, breakdowns of machinery, or other occurrences beyond the personal control of the buyer or seller, affecting the mines, ships, railways, docks, wharves, furnaces, or works, from, by means of, or at which the ore is intended to be worked, conveyed, received, smelted, or manufactured, this contract shall, at the option of the party affected, be suspended, wholly or partially, according to the extent of the cause or occurrence during the continuance thereof. Any doubt, difference, or dispute to be settled by arbitration."

In order to give effect to the appellants' argument it will be necessary to examine the clause in detail, but a general consideration of its terms shows that the circumstances contemplated as giving rise to the option are not confined to matters which prevent the fulfilment of the contract. A strike at the buyers' works is one of the conditions enabling suspension, but this certainly does not prevent the contract being carried out, since the contract is completed when the ore is delivered at the appellants' wharves at Newport.

On the 2nd November 1914 a second contract was made between the same parties and in the same terms for the sale of a further 10,000 tons of the ore. Delays took place in the deliveries under the first contract. It is not necessary to inquire into the cause of these delays. They were due to the action of the appellants, but it is no part of the respondents' case on this appeal that that action constituted any breach of the contract. In February 1915, owing to these delays, only 7980 tons of the ore had been delivered. Consequently 7020 remained for delivery under the first contract and the full 10,000 under the second, making in round figures 17,000 tons.

The respondents had no control over the mine from which the ore was obtained. This was worked by a company which had very large trade transactions with Germany. Owing to the war these trade relations were severed, and in consequence on the 10th February 1915 the mine was closed down and all further deliveries ceased. On the 23rd February 1915 the respondents accordingly served upon the appellants notice of suspension under the clause to which reference had been made. The appellants deny that circumstances had arisen

which justified such a notice, and the determination of this question is the only matter in dispute on this appeal.

The grounds upon which the appellants support their case are these—They say that at the time when the notice was served there remained at Bilbao in the respondents' depot, or as it is described in the evidence "in bing," 14,000 tons of ore, that the respondents had been able to charter a ship known as the "Juan" which would satisfy the conditions of the contract as to size of the vessel, and that they had control of this vessel for a time sufficiently long to enable them to tranship the whole 14,000 tons.

These 14,000 tons therefore, they say, the respondents ought to have delivered under the contract, and to this extent the war and stoppage of the mine did not affect them so as to justify suspension.

In support of this contention they urge that the suspension clause in the contract is to be read with the following interpretations:—First, that "the event of war affecting the mines" means that the mines are actually affected by the havoc and ravage of war, and that the way in which the mines were affected is in the present case too remote to be within the meaning of the clause.

Secondly, they contend that the whole clause only applies so far as the future ore to be won from the mine is concerned, and that the phrase "at which the ore is intended to be worked" is equivalent to "at which the ore necessary for satisfying future deliveries is intended to be worked."

Finally, they say that the respondents were not affected to the extent of the 14,000 tons, since these were available for satisfying the contract, and that the phrase "to the extent of the cause or occurrence," which limits the right of suspension, means the extent to which one of the specified causes has in fact prevented the contract from being performed.

I am unable to agree with this interpretation in any single particular, but before considering the clause in detail for the purpose of explaining the reasons which have led to this conclusion it will be desirable to state the circumstances under which the 14,000 tons had been collected at Bilbao.

In the ordinary course of business the ore is calcined as soon as it is recovered from the mine. By this means all the moisture, of which there is a considerable amount, is driven off. It is then brought down by railway near to Bilbao, put into barges on the river, and in the ordinary course taken from the barges direct into the loading steamer. It is only when there are no steamers ready to load that it is put on land and is then deposited in a bing. It is obvious that for the purpose of satisfying such contracts as those that are in question in the present proceedings it would be the height of folly for the respondents to store the ore in bing unless they were compelled to do so. When so stored it proceeds rapidly to reassimilate moisture. The price which the respondents pay for the ore is the price per ton as delivered in the United Kingdom, while the price which they receive for it under the present contract is on a certain percentage of iron in each ton. It follows therefore that to allow the ore to absorb, as it well may do, from 7 per cent. to 8 per cent. of moisture (a rate which in special cases has been known to go as high as 16 per cent.) would mean that the respondents would both be paying purchase price and freight for the conveyance of water across the sea, without receiving any money for the commodity.

There is no evidence that the 14,000 tons so deposited had ever been, in the intention of the respondents, assigned to the satisfaction of this contract. They were in the habit of shipping about 100,000 tons of this ore a-year. That they would have been at perfect liberty without breach of contract to deal with this ore as they pleased is not really in dispute. There was no difference in the position of the ore at Bilbao from that of any other deposit of ore that they might have had under their control at Glasgow or elsewhere, and there is nothing to show that they ever had assigned, even in their own minds, this ore in bing to the satisfaction of the appellants' contract. Appropriation of the ore, in the sense of determining the legal right of the respondents to deal with the ore as they pleased, was only faintly argued, and is indeed incapable of being made the subject of serious argument.

In these circumstances I am clearly of opinion in the first place that the mine was affected by the war. There is nothing in the contract to limit the war there mentioned to a war in which Spain or the United Kingdom shall be involved. There must therefore have been something in contemplation by the parties other than the physical interference with the mine due to warlike operations. There can, I think, be no doubt that if anyone had been asked why the mines had closed he would have answered without hesitation that they had closed owing to the war, and the answer would have been perfectly accurate.

The phrase "at which the ore is intended to be worked" will not support the meaning for which the appellants contend. They say that the ore in the bing was "the ore intended to be conveyed," and that it was not affected by anything happening to the mines, for it had left the mine for good. How the case would have stood if the sellers had evinced any intention, by giving notice or in some similar way, to satisfy the contract with that stock of ore *pro tanto* and not otherwise need not be decided, for such was not the fact. When the contract was made the "ore intended" was simply Axpe Arrazola ore, and nothing had happened to give the term a more limited meaning. The sellers were still free to supply ore wholly and directly from the mine or wholly or partly from the bing as they chose. The real question therefore is, Were the respondents affected by what occurred? They clearly were, for they were unable to obtain from the mine the deliveries on which they were entitled to rely for the satisfaction of the contract. It is no answer to this to assert that they could have satisfied the

contract out of the material in stock. So no doubt to a large extent they could, but this would have prevented them from dealing with that store, as they were clearly entitled to do, by sale to other persons, it may be at a better price and under more favourable terms; it is impossible in these circumstances to say that they were not affected parties.

There remains the consideration of the extent to which they were thus affected. The extent was measured by the cut-off of the whole of their future supplies. Had the mine only partially closed, it might be that they would only have been able to excuse delivery to the extent to which such partial cessation of output interfered with their receipts of ore, but as the whole source of their supply was stopped I think they were affected to the whole extent of their contract until such time as the supplies might recommence.

I am therefore of opinion that the judgment of Bailhache, J., and that of the Court of Appeal is perfectly correct, and that this appeal should be dismissed with costs.

LORD PARKER desires me to say he has seen the judgment I have just read and concurs with it.

LORD DUNEDIN—I agree. I need only say I entirely concur in the judgment that has been delivered.

LORD SUMNER—I have had an opportunity of considering the judgment in print and agree with it.

LORD WRENBURY—I also concur.

Their Lordships dismissed the appeal with expenses.

Counsel for the Appellants—Sir J. Simon, K.C.—L. Scott—Micklethwait. Agents—Herbert Smith Goss, King, & Gregory, London—Colborne, Coulman, & Laurence, Newport, Mon., Solicitors.

Counsel for the Respondents—Roche, K.C.—R. A. Wright. Agents—Botterell & Roche, London.

HOUSE OF LORDS.

Tuesday, March 13, 1917.

(Before Earl Loreburn, Viscount Haldane, Lords Kinnear, Shaw, and Parmoor.)

GREAT WESTERN RAILWAY COMPANY *v.* WILLS.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Carrier—Railway—Contract—Goods Carried at Owner's Risk—Short Delivery—Question whether a Consignment has been Delivered when Part of it is Missing.

An owner's risk contract excluded from the exemption from liability conferred on the railway company "the non-delivery of any package or consignment fully and properly addressed."

Of 750 carcases carried by the appellant company fourteen were lost in transit. The respondent claimed the value of the missing carcases. The appellant claimed to have delivered the consignment, and to be exempt under the contract from damages for short delivery.

Held (*dis.* Lord Shaw) that short delivery was not equivalent to failure to deliver the consignment under the contract note.

Decision of the Court of Appeal, [1915] 1 K.B. 199, *reversed.*

The *facts* fully appear from the considered judgments, which were as follows:—

EARL LOREBURN—What alone matters in this case is the construction to be placed on the owner's risk note.

The Railway Company are relieved from liability for loss, damage, misdelivery, delay, or detention, subject to a qualification which does not apply here. But the agreement does not exempt the company "in the following cases of non-delivery, pilferage, or misdelivery, that is to say, the non-delivery of any package or consignment fully and properly addressed."

There is again a qualification which does not apply here, so I omit further reference to these qualifications.

Ordinarily not liable for a loss but liable for non-delivery (which is a loss) when the thing not delivered is a package or consignment fully and properly addressed. That is the general effect of it. You are to distinguish packages or consignments so addressed from other things, no doubt because it is easier to convey them safely if so identified and addressed.

If it is desired the consignor can send each article as a separate consignment fully and properly addressed, and then the Railway Company would be answerable for every single article. Probably this is in many cases practically an impossible thing to do, or it might entail a heavier charge for carriage. But if he does not do that, then in my opinion the question is whether or not the consignment as a whole has been delivered.

It was argued that when you have such a package or consignment the Railway Company is liable unless everything contained in it or of which it consists is delivered—for example, that the loss of one egg out of 500 or of one handle in a piece of furniture amounts to non-delivery of the package or consignment. Subtle arguments might be multiplied on this footing, as all kinds of things are packed or consigned.

In my opinion it is not a question of law but a question of fact in each case whether there has been delivery or non-delivery, which are the antitheses the one of the other. And a judge or jury ought to answer the question—was there in substance and in a business sense delivery or not? They would answer it according to the circumstances, as they would answer about the delivery of a cargo, and would look at the nature of the things packed or consigned.