Counsel for the Appellant—C. T. Williams —G. L. Davies. Agents—Berry Tompkins & Company, Solicitors.

Counsel for the Respondents—R. Swift, K.C. — Shakespeare. Agents — William Hurd & Son, Solicitors.

HOUSE OF LORDS.

Thursday, June 21, 1917.

(Before the Lord Chancellor (Finlay), Earl Loreburn, Viscount Haldane, Lords Dunedin, Atkinson, Shaw, and Wrenbury.)

TENNANTS (LANCASHIRE) LIMITED *v.* C. S. WILSON & COMPANY, LIMITED.

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

Contract — War — Conditions — Delivery of Goods open to being Suspended — "Contingencies Preventing or Hindering Delivery"—"Short Supply."

Contracts for delivery of chemicals by monthly instalments during 1914 contained the condition "delivery may be suspended pending any contingencies beyond the control of the sellers or buyers (such as . . . war . . .) causing a short supply of labour, fuel, raw material, or manufactured produce, or otherwise preventing or hindering the manufacture or delivery of the article."

As a result of the outbreak of war in August 1914 the sources of supply of the chemical were greatly reduced, and the appellants claimed that the above quoted condition had become operative, and intimated to the parties in the different contracts that the contracts were suspended. The parties to the contracts all acquiesced save the respondent. The appellants did obtain subsequently, and at a considerably increased price, small supplies of the chemicals which would have been sufficient to complete the amount in the respondent's contract, leaving all the others unsupplied. The respondent claimed damages.

Held that while the rise in price was not a hindrance to delivery, in fact there was an actual shortage sufficient to hinder delivery (*dis.* Lord Finlay, L.C.) and to justify suspension of the contract.

At delivering judgment—

Lord Chancellor (Finlay)—This action was brought by the respondents to recover damages from the appellants for failure to deliver 240 tons of magnesium chloride contracted to be sold and delivered to the respondents under a contract dated the 12th December 1913.

The appellants pleaded that they were entitled to suspend the deliveries in virtue of the first of the conditions of sale, as delivery had been prevented or hindered by the war. There was also an allegation that there was a submission with an award in favour of the defendants which concluded the plaintiffs, but nothing need be said of this, as it was not established in point of fact.

By the contract in question the appellants sold to the respondents magnesium chloride according to their requirements over the year 1914, estimated at from 400 to 600 tons, to be delivered by equal monthly quantities over 1914 at the price of 63s. per ton delivered to the respondents' works. The first of the conditions of sale was as follows—"Deliveries may be suspended pending any contingencies beyond the control of the sellers or buyers (such as fire, accidents, war, strikes, lock-outs, or the like), causing a short supply of labour, fuel, raw material, or manufactured produce, or otherwise preventing or hindering the manufacture or delivery of the article." It is upon this condition that the decision of the case depends.

The magnesium chloride required in this country was derived from two sources, namely, from the works of the United Alkali Company, Limited, whose manufacture was carried on in this country, and from the works of German manufacturers in Germany. The second of these sources of supply was the more important, and ceased to be available as soon as war had broken out between this country and Germany on the 4th August 1914. The appellants and Messrs Schneider & Company of Glasgow had entered into a contract on the 28th October 1911 with the United Alkali Company, Limited, by which the latter sold to the appellants and Messrs Schneider the whole production by the United Alkali Company of chloride of magnesium, which was not to exceed 5000 tons, deliverable in equal monthly quantities from January to December 1913. The purchasers had the option of extending the contract over the years 1914 and 1915, and this option was exercised as regards the year 1914, but on the 12th August 1914 the United Alkali Company cancelled the contract on the ground that the purchasers were agents for a German convention.

The appellants had at the time of the outbreak of war a number of contracts running for the delivery by them of magnesium chloride on terms similar to those of the contract with the respondents. The purchasers under all these contracts other than the respondents (sixteen in number) accepted the appellants' claim to suspend deliveries under the first condition.

On the 15th August 1914 the appellants sent to the respondents the following letter:—"Messrs. C. S. Wilson & Co., Liverpool.—Dear Sirs,—Owing to the war our principals have cancelled their contract with us for magnesium chloride, and we have therefore no option but to advise you that our contract with you of the 12th Dec. 1913 is also cancelled. The works are continuing and will continue to make magnesium chloride as long as possible, but they are unable to say how long this may be. They have advanced their price for the present by 10s. per ton, and have instructed us to do the same and not to accept any orders without

first submitting these to them. We have an order from you for forty drums which we shall have to submit to our principals, but in any case they will not enter except at 10s. per ton advance.—Your immediate attention will oblige yours truly, TENNANTS (LANCASHIRE) LIMITED."

The United Alkali Company were the principals referred to in this letter.

On the 1st September 1914 the appellants invoiced a certain quantity (10 tons) of magnesium chloride at an advance of 10s. over the contract price—that is 73s. as against 63s. On the 4th September the appellants advised the respondents that the works (the United Alkali Company) had again advanced the price of magnesium chloride a further 20s. per ton, and on the 7th September the respondents wrote protesting against the increase being thrown upon them. By letter of the 11th September the appellants told the respondents that they could only regulate their prices by the advances which the makers imposed from time to time, and added—"We cannot say that any price is fixed until the order is actually executed."

The respondents wrote on the 26th September complaining of non-delivery under the contract, and of the proposed increase of price, and again on the 29th they informed the appellants that they claimed that the contract was not cancelled, and that they must hold the appellants responsible for non-delivery. On the 19th October the appellants by letter of that date admitted there was "no cancellation, but a suspension of deliveries under contract."

In certain arbitration proceedings an award was made dated the 30th November 1914 deciding that the 10 tons which had been delivered could only be charged for at the contract price (63s.), and that the 73s. at which they had been invoiced must be reduced to that amount.

By agreement dated the 7th December 1914 the United Alkali Company appointed the appellants their sole agents for consumption in the United Kingdom for 1915, the appellants engaging to take from the United Alkali Company 7000 tons in that year and having liberty to manufacture to a limited extent if more was required. The prices were to be fixed by the United Alkali Company, and there was an agreement as to the commission.

On the 27th January 1915 the appellants wrote to the respondents stating that they were prepared to contract for chloride of magnesium to the end of 1915 at £5, 10s. a ton, and the respondents replied on the 3rd February that before they would be prepared to consider any proposal of a new contract they would like to know what the appellants proposed as regards completing delivery of the balance of the old contract.

The action was begun on the 17th April 1915. Mr Justice Low decided in favour of the appellants, on the ground that there had been a short supply of magnesium chloride owing to the war, which entitled the appellants to suspend deliveries under the first condition. The Court of Appeal by a majority (Lord Cozens-Hardy, M.R., and Pickford, L.J., Neville, J., dissenting) reversed this decision on the ground that the evidence did not show any prevention or hindrance within the meaning of the condition, but only an increase in price in consequence of the war, and the present appeal was brought from this judgment.

The first question that falls to be decided is the true construction of the first condition. This condition enures for the protection either of sellers or buyers, and entitles them to suspend making or taking delivery pending the events specified. It appears to me to be clear that a mere shortage of supply is not enough unless it prevents or hinders the manufacture or delivery of the magnesium chloride in question. The clause is not grammatically accurate, but the words "or otherwise preventing or hindering" clearly imply that to satisfy the clause the short supply already mentioned must be a shortage which has this effect. It is to my mind a question of difficulty whether the words "manufactured produce" should be confined to manufactured produce which was wanted for the manufacture of the magnesium chloride, or would include magnesium chloride itself. It is not necessary to decide this point. Even if the words "short supply of . . . manufactured produce" would not include a short supply of magnesium chloride itself, the question would remain whether war had otherwise prevented or hindered the manufacture or delivery of the article. In either case, if manufacture or delivery was prevented or hindered by war, deliveries may be suspended. To bring about the right to suspend under condition 1 there must be a prevention or hindrance by war or some other of the enumerated causes either of the manufacture of the goods required for a particular delivery under the contract, or of the delivery itself, as would be the case if the transit of the goods were prevented by warlike operations. The fact that there is a prevention or hindrance in respect of such goods in general would not satisfy the clause. The prevention or hindrance must affect the delivery the suspension of which is claimed, and the suspension is only whilst such prevention or hindrance continues.

That goods could have been obtained by the appellants to satisfy the deliveries under the contract with the respondents is quite clear; in fact, the correspondence shows throughout that the only dispute between the parties was whether the respondents should pay the increased price demanded for the goods. The appellants would not have made the profits which they would have made but for the war, or might have sustained a loss on the performance of their contract under the changed conditions occasioned by the war, but it was hardly contended at the bar of your Lordships' House that this would amount to a prevention or hindrance within the meaning of the clause, and it is obvious that no such contention would have been sustainable.

For the purpose of showing that delivery was prevented or hindered the appellants relied upon the existence of the sixteen other contracts under which they had con-

tracted to deliver magnesium chloride. They argued that after the war they could not get magnesium chloride enough to enable them to perform all these contracts and the respondents'. This was admitted as correct in point of fact, and I think rightly admitted, by Mr Rigby Swift, the leading counsel for the respondents, in his very able argument. Mr Winsloe, the appellants' managing director, in his evidence puts the case as follows:—"392. (Q) In addition to your contract with Hardy, you had running contracts with a large number of people for supply in 1914?—(A) Yes. 393. (Q) Taking all these contracts into consideration, was it possible for you, apart from being hampered, to supply the contract quantity?—(A) No." And a little further down in the transcript of the evidence, just after Q 399 (which refers to the quantity delivered at increased prices), Mr Greer, counsel for the appellants, says—"If we liked to sacrifice the increased price, we could have delivered that quantity, but we refused to do it under the contract as we claimed to be entitled to suspend it." The balance which the respondents claimed under their contract was 240 tons, and the appellants sold to other persons more than this quantity at an increased price. There is a passage in the cross-examination of Mr Winsloe (Q 591 to Q 605) which shows clearly that the appellants could have delivered the goods, but refused to do so because they claimed that the contract was suspended and they could sell them at a higher price. The whole passage is important, but I refer particularly to the following:—"594. (Q) These 287 tons were in truth sold to people with whom you had no contract, is not that so?—(A) Yes. 595. Mr Justice Low—I want to understand this. If you could sell during this period 287 tons to persons with whom you had no contract, why did you not let these people have their 240 tons?—(A) Well, we considered the contract was suspended, and if they wanted the thing and came to us—they did not ask us for any during that period. 599. Mr Justice Low—Do you really tell us that if the plaintiff asked for it he would have got it?—(A) We would have sold it to him, not against the contract, but a separate transaction. 600. (Q) If you had got the stuff to deliver why should you go and make more out of it from somebody else? This is a question of shortage.—(A) We considered the contract was suspended. 601. (Q) I do not follow that. If you got the stuff you ought to perform your contract.—(A) There was an enormous shortage notwithstanding. 602. (Q) That seemed all the more reason why you should have let them have this. 603. Mr Rigby Swift—In truth, you did get more than enough to supply these people with?—(A) If no one else had any. 604. (Q) And you were not supplying anyone else under contract were you?—(A) We were. 605. Mr Justice Low—You sold it to some one else at a higher price? Mr Greer—May I say here that we were entitled to."

This passage shows conclusively that there was in point of fact no prevention or hindrance of either manufacture or delivery of the goods required for the respondents. The terms of Mr Justice Low's judgment show that he decided in favour of the appellants only because he had been by that time erroneously persuaded that the existence of shortage caused by war gave the right to suspend, though it did not in fact prevent or hinder delivery. The answer made by Lord Justice Pickford to the argument based by the appellants upon the existence of these other contracts seems to me to be conclusive. Any effect which these contracts might have had on the case was got rid of owing to the arrangement for their suspension made between the appellants and the holders of these contracts. It is stated by Mr Winsloe, the managing director of the appellants' company, in the following terms:—"606. (Q) Mr Rigby Swift—I understand from you that out of all the contracts which you have refused to complete, Mr Harding, the present plaintiff, is the only one who is suing?—(A) That is so. Yes. 607. (Q) Do I understand from you, that with the exception of Mr Harding, all acquiesced in your suspending your supplies?—(A) Yes. 608. (Q) They all agreed to it?—(A) Yes. 609. (Q) In all the other contracts they agreed that the supply should be suspended?—(A) When we could deliver them they paid the greater price or agreed to suspend until they could get it at the ordinary price. 610. Mr Justice Low—You could have supplied Wilsons out of this 287 tons without running any risk with the other people?—(A) Yes, so far as I know at present." The effect of this was that for all practical purposes of this case the other contracts had been got rid of as effectually as if they had never existed or had been formally cancelled.

The arrangement with regard to the other sixteen contracts was obviously entered into about the middle of August, and by it the holders of these contracts were precluded from insisting on delivery during the continuance of the state of things then existing produced by the war. It was on the 15th August that the appellants wrote to the respondents advising them that their contract was "cancelled," and I infer that it was at or about the same time that the appellants put forward the same claim against the other contractors who acquiesced in it while the respondents refused. The question of the right of the appellants to suspend deliveries to the respondents had not to be decided once for all on the facts as they existed in the middle of August 1914. The right of suspension would have to be determined in each month as the delivery fell due according to the state of things then existing. As the right to delivery under the sixteen other contracts was got rid of in the middle of August they could not affect the deliveries to the respondents falling due in the subsequent months, nor, indeed, the August delivery, which might have been made in the second half of that month. What Pickford, J., says as to the effect of the arrangements made with the other contractors cannot be displaced by any contention that the rights of the appellants and respondents had to be determined

as things stood in the middle of August, and that the arrangements with the other contractors were subsequent and could not affect the respondents. Such an argument fails on two grounds—(1) That though the right to suspend might have been settled once for all in August, as it was in the case of the sixteen other contractors, this could be done only by agreement, and as the respondents refused to agree it had to be settled with them as each delivery fell due, and (2) that the arrangements with the other contractors were not subsequent but in the middle of August.

In truth after the arrangements made with the other contractors the only effective contract was that with the respondents, and the case must be dealt with on this footing.

It was argued for the appellants that apart from the existence of other forward contracts they were entitled to carry on business in ordinary course and might have entered into other contracts, which would have had the same effect upon deliveries to the respondents after the war. If in the ordinary course of business the appellants had before the war entered into other contracts, the obligation to deliver under them, coupled with the shortage caused by the war, might have prevented delivery to the respondents within the meaning of condition 1. But it seems obvious that the appellants could not for this purpose have relied upon any contracts entered into by them after the war. To admit such a claim would be to enable the dealers to break an existing forward contract and to take advantage of the rise in prices. This is in effect what the appellants contend for.

It is unnecessary to consider what would have been the result if the purchasers under the other sixteen contracts had, like the respondents, insisted on their right to deliveries. Probably it would be held in such a case that the deliveries would fall to be made in the order of priority as they fell due, and that in the event of delivery being due under several contracts at the same time the amount which it was possible to obtain to implement the contracts would fall to be divided among them *pro rata*, and that as regards any balance remaining undelivered there would be a prevention within the meaning of the clause. As however the purchasers under the other sixteen contracts waived any claim to delivery it is unnecessary to decide anything upon this point.

I am unable to agree with the ground on which Low, J., based his decision. He thought it enough that there was in fact a short supply of magnesium chloride owing to the war, and did not think it necessary to find that the deliveries in question were as a matter of fact prevented or hindered by this short supply.

The dissenting judgment of Neville, J., in the Court of Appeal proceeds upon the view that there would be prevention or hindrance within the meaning of the condition if there was a rise in price in consequence of the war. I think that Pickford, L.J., was right when he pointed out that a rise in price, even if very great, would not amount to a prevention of delivery on the true reading of the condition, that "prevention" in such a clause must refer to physical or legal prevention and not an economical unprofitableness, and that "hindering" must refer to an interference with the manufacture or delivery from the same cause as "preventing," but interference of a less degree.

Pickford, L.J., found that there was no prevention or hindering by war, inasmuch as all the appellants' contracts except that with the respondents had been got rid of as regards any claim to delivery, and there was no doubt that magnesium chloride could have been obtained by the appellants in quantities sufficient to satisfy the respondents' contract, though they would have had to pay an enhanced price for it; and for the reasons I have already given I think that his judgment, concurred in by the Master of the Rolls, was right.

EARL LOREBURN—In this case sellers of chloride of magnesium failed to deliver according to contract, and the only question in this appeal is whether they can be excused under the first condition of sale. The facts as well as the contract are fully examined in more than one of the opinions that I have had the advantage of reading in print. I will therefore merely state what, in my opinion, the sellers (now appellants) had to establish in order to make good their excuse, and then state my view as to the case they have made out. What had the sellers to show in the actual circumstances of this case?

They had to show that the war caused a short supply of magnesium chloride which hindered delivery. By short supply is meant, I think, that the quantity available to the seller was substantially less than his requirements. By "hindering" delivery is meant interposing obstacles which it would be really difficult to overcome. I do not consider that even a great rise of price hinders delivery. If that had been intended different language would have been used, and I cannot regard shortage of cash or inability to buy at a remunerative price as a contingency beyond the seller's control. The argument that a man can be excused from performance of his contract when it becomes "commercially" impossible, which is forcibly criticised by Pickford, L.J., seems to me a dangerous contention, which ought not to be admitted unless the parties have plainly contracted to that effect.

Upon the facts of this case I agree that there was a short supply of this commodity. The German source of supply, on which these sellers had relied, was cut off by the war. There other chief source of supply was also, in fact, cut off or greatly diminished between the 4th August and the end of 1914. After that year larger supplies were available, but the sellers became entitled to them in their capacity of agents for the Alkali Company, and were not free to deliver them to their buyers (the now respondents) except upon conditions as to price prescribed by the Alkali Company. In other words, they were not free agents to dispose of the com-

modity they so obtained. The evidence in this case was given in a very confused way, but the conclusion of it is that the sellers could not have obtained enough of the chloride of magnesium during the relevant period of time to satisfy the requirements of their business even if they had paid the prices required, but that they could have obtained enough to satisfy their contract with the present respondents if they had disregarded other contracts and other business necessities in order to satisfy the respondents. To place a merchant in the position of being unable to deliver unless he dislocates his business and breaks his other contracts in order to fulfil one surely hinders delivery.

In my view this hindered delivery. It did not prevent delivery or make it impossible, but it hindered delivery within the meaning of the contract now under consideration, and therefore I think this appeal should be allowed.

VISCOUNT HALDANE—I think that the meaning of the first of the conditions in the contract was that delivery might be suspended in case of war if the war caused a short supply of labour, fuel, raw material, or manufactured produce, or otherwise, that is, in any other way prevented or hindered the manufacture or delivery of magnesium chloride. The prevention or hindering of manufacture or delivery was thus to be the general difficulty provided against, and a short delivery of manufactured produce was inserted as a particular illustration of the principle. The cases are neither disjunctive nor cumulative, but overlapping, and the words relating to prevention or hindering of manufacture or delivery include a genus in which the short supply is included as a species. This is how I construe in its context the expression "or otherwise," and if I am right the genus extends beyond the illustrative cases such as short supply. If this be so, it implies that a short supply of manufactured produce was a hindrance within the words used. I doubt whether in interpreting this contract the expression "supply of manufactured produce" should be read as confined to intermediate products, or so as to exclude from it magnesium chloride itself, the subject-matter of this contract. For magnesium chloride is itself manufactured produce, and the contract relates to sale and not to manufacture. But whether this be so or not the genus defined by the concluding words of the condition is such that the appellants have only to show that the war had hindered delivery on their part by causing a short supply either of an intermediate product or of the finished article. Now it is not in dispute that there was a serious shortage caused by the suspension of the usual imports from Germany, and it was proved that the appellants had not enough magnesium chloride to fulfil the contracts they had entered into. It was not proved that they could, even by paying a high price, have secured enough of the substance to meet all their obligations. Under these circumstances it appears to me that the case that occurred came within the words of the condition. For I do not see how, on a different footing, the appellants could have lawfully delivered to the respondents without also delivering proportionately to the other firms with whom they had entered into similar contracts. They were either bound to all their customers equally or they were not bound to any of them. If the contention of the respondents is right it only shows that the appellants were at the date of the alleged breach of obligation under similar obligations to other customers which they could not fulfil. If they were entitled to give the notice they did for this reason give in August 1914, it was the giving of the notice and not the consent of the customers other than the respondents which terminated the obligations.

The other point made for the appellants, that the case was concluded by the award of the 30th November 1914, does not arise in this view, and it is not necessary to decide it. I will only observe that a dispute as to whether within the meaning of the contract a case for suspension had arisen appears to me from the correspondence and the award of the 30th November 1914 to have been the subject-matter of the arbitration, and to have been decided by the arbitrators, and that I am not satisfied that their award was objectionable either on the score of vagueness or of error apparent on its face, or as going beyond the reference.

For these reasons I have come to the conclusion that the appeal ought to succeed.

LORD DUNEDIN—The respondents in December 1913 entered into a contract with the appellants by which they bought from the appellants such magnesium chloride as they would require during 1914, estimated at from 400 to 600 tons, at a certain price, delivery to be made in about equal monthly quantities. The contract contained conditions of sale, No. 1 of which was as follows —"Deliveries may be suspended pending any contingencies beyond the control of the sellers or buyers (such as fire, accidents, war, strikes, lock-outs, or the like) causing a short supply of labour, fuel, raw material, or manufactured produce, or otherwise preventing or hindering the manufacture or delivery of the article."

The appellants, as the respondents well knew, were not themselves manufacturers of magnesium chloride. The practical supply of that article came from two sources —first, a limited supply from the United Alkali Company, who had agreed to give the whole of their year's output, which was not to exceed 5000 tons, under reservation of 700 tons, and, second, an unlimited supply from Germany.

Deliveries were duly made under the contract during the first seven months of 1914. On war breaking out on the 4th August 1914 the United Alkali Company, who in their contract with the appellants had contracted with the appellants and another firm as joint agents for a German convention of chloride manufacturers, denounced this contract as effected with an alien enemy and refused further supplies, except upon

new terms, by which they only supplied to them as agents for themselves and at prices fixed by themselves. The supply from Germany stopped altogether owing to the action of the British fleet. On the 15th August the appellants intimated to the respondents that the United Alkali Company having cancelled their contract with them they must do the same as regards their contract with the respondents. This attitude was modified by a subsequent letter of the 14th October which explained that they did not argue that the contract was cancelled but only that it was suspended.

The respondents being in urgent need of magnesium chloride, arranged to take further supplies from the United Alkali Company, through the appellants, at an increased price, but contended that the appellants were still held to the contract, and called on them to go to arbitration on the point. Eventually they raised in April 1915 the present action asking for damages in respect of the enhanced price they had had to pay. The amount undelivered under the original contract was admittedly 240 tons. In defence the appellants pled the above quoted clause.

Two questions have been argued before your Lordships, one as to the construction of the clause, and another as to the application of the facts brought out at the trial.

As to construction, the learned trial Judge, Low, J., held that the words "manufactured produce" covered the completed article magnesium chloride, and that the word "or" was disjunctive. It was therefore, in his view, sufficient in order to bring the clause into operation to show that one of the contingencies, to wit war, had caused a shortage, and he found as a fact that that had occurred. In the Court of Appeal all the learned Judges held that the word "or" was not disjunctive, and that consequently it must be shown that what had happened by reason of war was something which prevented or hindered the manufacture or delivery of the article. Neville, J., held that what had happened did hinder the delivery of the article, reading "hinder" in the general sense of in any way affecting to an appreciable extent the ease of the usual way of supplying the article, thus practically coming to the same result as Low, J. The Master of the Rolls and Pickford, L.J., held that the only hindrance therein was a rise of price, and that a rise of price could not be applied properly to the word "hinder." Forming the majority, they therefore reversed the judgment of the trial Judge.

Such difficulty as has arisen in construction is probably due to the fact that the terms of this contract are set out by filling up a printed form, which form is strictly appropriate to a manufacturer's and not a merchant's contract, on the side of the seller. At the same time it is legitimate in construction to remember what was the position of the merchant in the trade, and to consider what it is he would be likely to wish to protect himself against. It was not a trade of a common article where the markets are many and wide. Practically the sources of supply were only two—the United Alkali Company for a limited amount, Germany for all else. It was therefore only natural that he should wish to meet the case of his not being able to get the stuff himself through some contingency over which he had no control. Nevertheless, grammatically, I think the argument of Mr Rigby Swift was right, that "manufactured produce" does not mean the completed article, but one of the ingredients to form the completed article, and so far the opinion of Low, J., was wrong. But I confess I think the discussion becomes quite academic, and I think Low, J., in the succeeding part of his opinion is also of this view when we come to the further words of the clause "or otherwise preventing or hindering," which necessarily to my mind show that the former words as to shortage are illustrative of things which prevent or hinder, as the case may be. So that though Mr Rigby Swift gains so far as to show that to bring in the clause under the circumstances there must be something due to the war which prevents or hinders, he is presently hoist with his own petard, because, taking manufactured produce as meaning ingredients, then the clause clearly shows that in the view of the contracting parties a shortage of ingredients which can only directly touch the manufacturer and not the merchant is yet one of the ways by which the merchant may be prevented or hindered from delivering the article. Now the only way it can prevent or hinder him is if owing to the shortage of the ingredients he fails to get the article from the manufacturer himself. Really without the words of the first part of the clause at all this seems agreeable to commonsense. To say that a merchant is not prevented or hindered from delivering to a customer when he gets either none or an insufficient supply of the article from the manufacturer, but is only so prevented or hindered when there is an impossibility or difficulty concerning the transport from him to the customer, would seem to me to be the height of absurdity. It is also, I think, quite evident that a supply insufficient for the merchant's needs for his usual customers hinders him in delivery of the full amount to one customer, and that the words used clearly contemplate this position.

It now only remains to be considered whether in fact there was such a shortage of the article magnesium chloride as to entitle the appellants to invoke the clause. As to this there is, in my opinion, not a shadow of doubt. The figures as shown from the evidence by Sir John Simon speak for themselves. Under running contracts the appellants had on the first August still to deliver within the year 2200 tons, or an average of 440 tons a month. As a matter of fact they succeeded in all in getting from the United Alkali Company 451 tons, not upon their old terms as under the contract, but as the United Alkali Company chose to supply, and 138 from other sources, or on an average 120 tons a month. The German supply, of course, entirely failed. The respondents do not directly controvert

these figures. They say, however, that if the appellants had supplied them in preference to all others there would have been sufficient for them. It is obvious that if this is a good answer each of the other contracting parties could have made it in turn, damages would have been due to all, and the clause would be no protection whatever. What I have already said on construction is a sufficient answer. Then it is said that the other contractors, having acknowledged the efficiency and applicability of the clause (for all except the respondents did so in fact), that left their amounts free to be given to the respondents. But the question must be whether in the circumstances at August the appellants were entitled to suspend; and the conduct of the other parties subsequent to that date cannot affect that question. Besides that, the amounts due to them did not become free in the possession of the appellants, for, as already stated, the United Alkali Company stopped all supplies except upon entirely new terms, which made the appellants mere agents and not purchasers.

In this state of the facts it is not to be wondered at that the leading counsel for the respondents felt himself constrained to give the admission when pressed to do so that the appellants had not sufficient magnesium chloride to satisfy their current contracts. It is true that his junior, with a great expenditure of labour and time, sought to nullify that admission. Fixing his attention on the opening months of 1915 up to the date of the writ in the case, April 1915, he sought to show that the respondents had in those months succeeded in getting sufficient tons to have satisfied all the outstanding arrears under the contracts for 1914. Such an argument is based on a transparent fallacy, even if it could be made out on the figures, as to which I am not satisfied. The fallacy consists in this—that it takes all the tons supplied in the first three and a half months of 1915 to meet the arrears of 1914, and consequently assumes business at a standstill for 1915 requirements. It is difficult to conceive a greater "hindrance" to fully executing an old contract than to have entirely to decline business for the first three months of a new year.

I have dealt with the figures of actual supply. I think it is abundantly proved that actual supply was, as near as may be, possible supply. Where I think, with deference to the learned Judges, the majority of the Court below have gone wrong, is that they have seemingly assumed that price was the only drawback. I do not think that price as price has anything to do with it. Price may be evidence, but it is any one of many kinds of evidence as to shortage. If the appellants had alleged nothing but advanced price they would have failed. But they have shown much more. They have shown a total failure of what after all was the main source of supply to their business, namely, the German article, for before the war their ordinary yearly requirements were about 11,700 tons, whereof 7400 tons were wont to be supplied by Germany. Their position as at the 1st August 1914 I have already dealt with. I am therefore of opinion that the appeal should be allowed and the judgment of Low, J., restored.

Lord Atkinson—On the 12th December 1913 the respondents (plaintiffs) and the appellants entered into a contract for the supply to the former during the year 1914 of from 400 to 600 tons of a substance called magnesium chloride packed in iron drums, at the price of 63s. per ton, to be delivered at the respondents' works in about equal monthly quantities. The contract is printed, and is in the form in general use in Liverpool for both merchants and manufacturers. The conditions of sale, only one—the first—of which is of importance on this appeal, were indorsed on the back of this print and form part of the contract entered into. This condition has been quoted already and I do not read it.

On the 4th August 1914 war broke out between this country and Germany. On the 15th of that month, when 240 tons of this chemical remained to be delivered to the respondents under their contract the appellants wrote to the respondents a letter, the part of which material on this point is as follows:—"Dear Sir—Owing to the war our principals have cancelled their contract with us for magnesium chloride, and we have therefore no option but to advise you that our contract with you of the 12th December 1913 is also cancelled." On the 29th September 1914 the respondents wrote to the appellants claiming that the contract of the 12th December 1913 was not cancelled, and on the 19th October 1914 the appellants wrote to the respondents a letter stating that they admitted there was no cancellation of the contract, but merely a suspension of their obligation to continue to make deliveries under it. The respondents insist, however, that the appellants were not entitled to suspend delivery of the remaining 230 tons of magnesium chloride or any portion of it as claimed, but were, on the contrary, bound to deliver that quantity either before the 31st December 1914, or at latest after the 1st January 1915, at the rate specified in the contract. On the 17th April 1915 they instituted the action out of which this appeal has arisen to recover damages in respect of the appellants' failure to do so.

For the purpose of this appeal it may, I think, be taken that the appellants' letter of the 15th August 1914 was amended so as to bring it into conformity with theirs of October following, and that all they now claim is the right, in the circumstances admitted to have existed or found by the Judge at the trial to have existed on the 15th August 1914, to suspend at that date the delivery of this quantity of magnesium chloride at the times and in the manner specified in the contract. To decide whether the appellants are right in their contention one must determine what on the true construction of this condition No. 1 is the nature and limits of the right which it confers upon the appellants, and secondly, whether the state of things

then admitted or found to exist justified the exercise of this right.

The list of contingencies actually named in condition No. 1 is obviously not exhaustive. The result contemplated as flowing from or caused by them is, I think, a shortage of supply of labour, fuel, or of the materials, whether raw or to some extent manufactured, necessary for the manufacture of magnesium chloride, the article to be delivered. If this shortage should prevent or hinder the manufacture or delivery of this latter chemical, then the appellants have the right "pending" those contingencies to suspend delivery. But that is not by any means, I think, the limit of their right. If other contingencies beyond the control of buyer or seller should arise which prevent or hinder delivery of the chemical purchased the seller has also the right pending these latter contingencies to suspend the delivery of this article. This is the meaning of the words "or otherwise." By "pending" I think is meant while the contingency or contingencies continue to exist. "Preventing" delivery means in my view rendering delivery impossible, and hindering delivery means something less than this, namely, rendering delivery more or less difficult but not impossible. Increase of the price of the article is altogether an ambiguous matter. It may arise from a diminution of supply, or the supply remaining abundant an increase in the cost of production, or the imposition of a tax or the increased cost of transport or such like. If the appellants had been in the habit of obtaining all their supplies from English manufacturers the war would almost certainly have raised the price of this as it has done of other products, though possibly the supply might not have been at all diminished. As it was, however, the outbreak of the war—a contingency beyond the control of either buyer or seller — shut off the appellant's main source of supply. In the year 1913 they, as found by Low, J., had obtained from Germany 7476 tons, and from the United Alkali Company, who were really their principals, 5000 tons of magnesium chloride. Up to August 1914 they had obtained from Germany 3907 tons, and from the Alkali Company 2132 tons of it. So that even if this latter company had delivered to them the same quantity as in the previous year they had only to look forward to a supply from that source of 2868 tons during the five months of August to December in the year 1914. It is quite obvious, however, that they could not in fact have obtained this quantity of magnesium chloride from the United Alkali Company, since that company only manufactured in these five months 1886 tons. All the appellants obtained from this company from the 4th August till the 31st December 1914 was 451 tons, and from other sources 138 tons, making 589 tons in all. On the 4th August the appellants had entered into separate contracts, similar apparently to that entered into with the respondents, with nineteen other buyers, binding them to deliver within the year 1914 English or German manufactured magnesium chloride up to the amount of from 4015 to 4335 tons. Of this quantity only 2030 tons had been delivered, leaving about 2000 tons undelivered. The respondents were amongst these buyers. To them, out of the 400 tons purchased under their agreement sued on there remained on that date 230 tons undelivered. For all that appears the appellants may have entered into other contracts before the 4th August 1914 binding them to make delivery in the year 1915 to other purchasers. I understand that it was admitted that the appellants could not on and after the 4th August 1914, trading with Germany having become illegal and impossible, have obtained at any price enough of the chemical to have fulfilled the nineteen contracts already mentioned. A contingency had on that day arisen which both parties to this contract must obviously have foreseen would, as in fact it did, hinder if not entirely prevent the delivery by the appellants, according to their actual course of business, to their customers of the quantities purchased by the latter.

There was then a shortage of supply with regard to these contracts, having regard to the normal requirements of the appellants' trade, brought about by the occurrences already mentioned. Condition No. 1 immediately applied, and the right of the appellants to suspend delivery in the case of each and every contract containing a condition similar to condition No. 1 sprung into existence. They as against all their customers bound by such contracts put this right in force. With the exception of the respondents all the customers acquiesced in their so doing. The respondents did not acquiesce, and no doubt the acquiescence of those other customers left in the appellants' hands a stock of magnesium chloride sufficient to enable them to implement the respondents' contract. That, however, would appear to me to be irrelevant. The shortage arising from the causes mentioned gave to the appellants the right to suspend delivery in the case of all contracts embodying condition No. 1. They were entitled to enforce, and sought to enforce, that right against all. Those who acquiesced cannot be in a worse position than those who did not acquiesce, because it was the original shortage of supply, not the conduct or action of the customers in reference to it, which conferred the right to suspend delivery.

The whole argument of the respondents has been directed to show that the appellants could have obtained the 230 tons necessary to fulfil their particular contract, and that the appellants were bound to supply them in preference to all others. The respondents were to get what they contracted for, and if their contention be sound the other customers left with a cause of action. But the delivery, which might be prevented or hindered, was not the mere delivery to one purchaser, amongst many, of the quantity purchased by him, but delivery under the normal engagements of their (appellants') trade to the whole body of the customers to whom they were bound to deliver in the year 1914. It is, upon the figures above set forth, clear, I think, that delivery in the latter

sense was, if not absolutely prevented, certainly hindered by the outbreak of war shutting off all German supply. In my view the appellants were entitled at the date of their notice, the 15th August 1914, to suspend the delivery to the respondents of the 230 tons remaining undelivered. I therefore am of opinion that the decision appealed from was wrong and should be reversed. Upon the question of the award made on the 30th November 1914 there is, I think, this difficulty—It is impossible as the case stands to say with certainty what question was referred to the arbitrator to decide. It may have been the question whether the appellants were entitled to cancel the contract or only to suspend deliveries under it. And if the latter, to suspend them for what time? The word "suspended" in accordance with clause 1 of the conditions of sale might mean suspended while the contingencies preventing or hindering delivery last, or it may mean suspending as distinguished from cancelling during the remainder of the year 1914 whether the contingency lasted or not. I incline to the opinion therefore that as the award stands it is void from vagueness and uncertainty. I think the appeal should be allowed with costs here and below.

LORD SHAW—The contract between these parties was dated the 12th December 1913. Under it the respondents bought from the appellants their "requirements of magnesium chloride over 1914, estimated at from 400 to 600 tons," and the contract time of delivery was to be "in about equal monthly quantities."

War broke out between this country and Germany on the 4th August 1914. It is agreed that the amount undelivered under the contract for the remainder of the year subsequent to that event is 240 tons. The action is for damages in respect of the non-delivery of this quantity. The defence is that the deliveries after that event, namely, the outbreak of war on the 4th August 1914, were properly suspended in terms of one of the conditions of sale which covered the situation which had arisen.

The case presents undoubted difficulties, and the opinion of the noble and learned Earl on the Woolsack has made me give the case a further consideration. But some at least of these difficulties are removed by articulately construing some of the terms occurring in this condition.

It is, of course, admitted that the general contingency referred to has occurred, and that accordingly the only question is whether results attributable to the contingency have arisen. It was argued that the war had caused "a short supply of . . . manufactured produce." I humbly think, however, that this term "manufactured produce" may possibly be construed as narrower than the ultimate "article" whose delivery was the subject-matter of the contract, and may mean, like raw material itself, one of the constituent elements of that article. To this extent I am not prepared to differ from the respondents' argument as presented.

But a totally different view arises from the remainder of the clause "or otherwise preventing or hindering the manufacture or delivery of the article"—that is to say, of magnesium chloride, which in my opinion was "the article" referred to. I think that merchants making such a contract must be taken to have meant that if war hindered the delivery of magnesium chloride the condition of suspension should apply.

I think that the right of suspension arose when the contingency began to operate; and my further view is that the operation of the contingency was not limited to the actual prevention of the supply of the particular consignments contracted for, but extended to a hindrance in the delivery of a commercial article in such a way as to interfere with the conduct in a full business sense of the appellants' trade in magnesium chloride.

The construction of the expressions used in the condition being thus stated the application of this to the facts is not difficult. I see for myself no reason to differ from the judgment thereon of the learned Low, J., who tried the case. The main supply—about, say, four-fifths of the total supply—of this particular article was from Germany. To tap that source of supply became after the outbreak of war illegal. This being so, Low, J., finds "upon the facts that the manufacture of this particular substance has not increased in this country at all so as to approach the total quantity formerly available of home manufactured plus German product."

What remains in the case is the argument that if rigidly confining their entire or almost their entire business to the particular contract with the respondents it would have been possible for the appellants to deliver. After full consideration I cannot see my way to limit and restrict the right of the merchant to appeal to the condition on the ground stated. The condition appears to me to be one applicable to a hindrance in the delivery of an article of trade in the ordinary and usual course of trade in such an article. A mere fluctuation of price would not constitute such a hindrance, but in the present case the actual article itself is prevented or hindered from coming into the British market. It does not seem to me to make the condition unavailable to the merchant that he could have avoided the situation by interrupting his whole course of trade and concentrating his business on one order. With much respect to the majority of the Court of Appeal, I do not feel myself free so to construe a commercial contract.

I agree in the appeal being allowed.

LORD WRENBURY—The question is as to the true construction of the first condition of sale in the contract of the 12th December 1913 and its application to facts which are not in dispute.

Under that contract the appellants, who were not manufacturers but merchants, were sellers to the respondents of magnesium chloride, deliverable in about equal monthly quantities over the year 1914. Their sources of supply were two, called in

the contract "English make" and "quantities shipped from Germany." The contract price was 63s. a ton delivered at the buyers' works, "the minimum quantity of German to be 50 tons." When war broke out between England and Germany the sellers had delivered 109 tons. A subsequent delivery was made under circumstances which it is unnecessary to detail, and there remained outstanding under the contract 240 tons. For breach of contract to deliver these the respondents brought their action for damages. The appellants say there was no breach—that under the first condition delivery had been suspended.

When war broke out the sellers were under contracts with eighteen other buyers for deliveries to be made during the year 1914. Their aggregate commitments for the year 1914 amounted to 4015 tons as a minimum and 4335 tons as a maximum. Of these 2030 tons had been delivered before August, leaving 1985 to 2305 tons to be delivered.

The sellers were also carrying on a business in which, according to its normal course, spot sales might be, and to a small amount were in fact, made in the last five months of 1914.

This was the position of the sellers, who had in December 1913 entered into the contract which has to be construed.

Condition 1 provides (reading only the relevant words) that deliveries may be suspended pending a contingency such as war "causing a short supply of labour, fuel, raw material, or manufactured produce, or otherwise preventing or hindering the manufacture or delivery of the article."

The respondents have contended that "manufactured produce" here does not mean or include magnesium chloride, but is confined to manufactured produce, which is in its turn to be employed in the manufacture of magnesium chloride. If this were so it would result that the merchant (to whom it matters nothing whether the manufacturer of magnesium chloride is handicapped in his business by reason of such a short supply as the respondents contend is meant) is leaving himself unprotected in the one thing which does matter to him, namely, that there is a short supply of the manufactured article, magnesium chloride, which he is contracting to sell. I see no reason to adopt this construction. Then it was said, but faintly, that this is a common form of contract used by manufacturers—that if a manufacturer were the contracting party the words "manufactured produce" would bear the meaning suggested, and that it must mean the same in the mouth of a merchant. This is an impossible suggestion on a point of construction. If it were true it would be true that if a man in a contract speaks of "my partner" he means somebody else's partner, because if that other person had been the contracting party that would have been the meaning of the words. Further, if a manufacturer and not a merchant had been the contracting party I am at a loss to understand why "manufactured produce" should not mean, or at any rate include, the produce which he manufactures. It is in fact immaterial whether the words "manufactured produce" includes the meaning suggested. It is sufficient if it does not exclude magnesium chloride, and that I think is plainly true.

Then the respondents contend that the words "preventing or hindering" control the words "short supply," and that there must be shown not merely a short supply but a short supply which prevents or hinders. Upon this I may say that the word "otherwise" in the contract may be read in either one or two ways. The words may mean (1) a contingency such as war "causing a short supply or which (although it does not cause a short supply) prevents or hinders," or (2) "causing a short supply or (in some other way) preventing or hindering." In the former case the words "preventing or hindering" would not—in the latter they would—relate back to and govern the words "short supply." Of these two I prefer the latter for this reason—The sequence of the words is "war causing a short supply or otherwise preventing"—words which seem to mean war preventing in some way which may be by way of a short supply or in some other way. At any rate I will assume that this is their meaning, for this while it is in favour of the respondents does not affect the conclusion at which I arrive against them.

For the purpose of this judgment I read the contract as meaning that the seller may postpone deliveries if war causes a short supply of magnesium chloride which prevents or hinders delivery.

The facts to which this has to be applied are as follows—On the 15th August 1914 the sellers gave the buyers notice that the contract was cancelled. This plainly it was not, and nobody says that it was. On the 19th October the sellers explained that they meant not cancelled but suspended. The remaining eighteen like contracts were in like manner suspended. The eighteen customers accepted that suspension as operative. The nineteenth (the present respondents) did not. On the 17th April 1915 they issued their writ for damages for breach. I do not think it necessary to repeat the figures as to the number of tons which the sellers had in August 1914, or procured before the 17th April 1915. The result of the figures is as follows—Before the war the sellers under a contract with the United Alkali Company were in a position to obtain deliveries from Germany. The war rendered that contract illegal, and the United Alkali Company refused to make, and in fact did not make, any further deliveries under the contract. On the 7th December 1914 the United Alkali Company appointed the appellants their agents, and under that agency the appellants obtained deliveries of magnesium chloride. These deliveries were not their property. They could not dispose of them for their own purposes. They were deliverable only as their principals might direct, and they were in fact delivered at prices largely in excess of the 63s. a ton which was the respondents' contract price. These last-mentioned deliveries are not relevant to the question to be determined. Setting these out of account the appellants

had not in August 1914, and never obtained before April 1915, magnesium chloride to an amount sufficient to supply the nineteen customers with the amounts which but for the suspension clause were deliverable under their contracts, or with more than a very small percentage of those amounts. If spot sales made after August 1914 are taken into consideration—and I see no reason why they should not—their ability in the above matter becomes less. This position was due to the war. In my opinion the contingency had happened that the war had caused a short supply of magnesium chloride which hindered the delivery of the article. The respondents say that the appellants had enough for delivery to them if they ignored their commitments to everyone else. Suppose they had. It remains that for their commitments the supply was short. The "delivery of the article" in condition 1 does not mean that the supply was insufficient to implement the respondents' contract, ignoring all others, but insufficient to a substantial and not an illusory amount to admit of delivery of "the article"—*i.e.*, magnesium chloride—to whomsoever was entitled to require delivery. Suppose that two of the nineteen purchasers had come simultaneously and asked delivery, that each was contractually entitled to delivery of 200 tons, and that the seller had 200 tons and no more. To the first the seller replies, "I am short." The purchaser rejoins, "No, you are not, There are the 200 tons. I shall take them." He, say the respondents, is entitled to take them, and he does so. To the second the seller replies again, "I am short." According to the respondents' contention the second purchaser could rejoin, "No, you are not, because you could have given me what you have just given to my neighbour. Pay me damages." The question answers itself. A trader is insolvent notwithstanding that he is able to satisfy one creditor if he is not able to satisfy all his creditors. A merchant has a short supply notwithstanding that he is able to satisfy one customer when he is not able to satisfy all.

I may add that I do not go with Neville, J., in thinking that the condition protects the seller from rise of price. There may be a rise of price without a shortage of supply. Rise of price is, I think, irrelevant except that it may be evidence when coupled with other facts that there is a short supply. The matter has to be determined upon the answer to the question whether at the date of suspension and subsequently down to the issue of the writ there was a short supply. In my opinion there was.

I have said nothing about the award which was made on the 30th November 1914, and that for two reasons. The parties have sought and obtained a decision from the Court notwithstanding that award, and before your Lordships they have desired that the correctness of that decision should be reviewed. This is a first reason for deciding the matter in this House as if there had been no award. The second reason is that there are not materials for determining what was the subject-matter of the arbitration. There is no evidence whatever as to the terms of the submission upon which the award was obtained, and further, as I think, there is great difficulty in saying what the award means. It may be, and I incline to think it is the fact, that the second paragraph of the award means no more than that 240 tons is the correct figure of tons still to be delivered, and that their delivery is subject to liability to be suspended in accordance with condition 1.

In my opinion the appeal succeeds, the judgment of Low, J., must be restored, and the respondents must pay the costs in the Court of Appeal and before this House.

Their Lordships allowed the appeal.

Counsel for the Appellants—Sir J. Simon, K.C.—Greer, K.C.—A. H. Maxwell. Agents—Rawle, Johnstone, & Company, London—Hill, Dickinson, & Company, Liverpool.

Counsel for the Respondents — Rigby Swift, K.C.—A. R. Kennedy. Agents—Pritchard, Englefield, & Company, London—Simpson, North, Harley, & Company, Liverpool.

HOUSE OF LORDS.

Thursday, November 1, 1917.

(Before Lords Atkinson, Parker, Parmoor, and Wrenbury.)

MOORE & GALLOP *v.* EVANS.

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

Insurance — War — "Loss of, Damage, or Misfortune to the Property"—Jewellery Consigned to Belgium and Germany on Sale or Return.

The appellants, an English firm, insured their stock of jewellery with the respondent under a policy covering "loss of, damage, or misfortune to the property." Previous to 22nd July 1914 the appellants consigned part of their stock to customers in Brussels and Frankfort on sale or return. By reason of the outbreak of war with Germany and the occupation of Brussels by the Germans the return of the goods became temporarily impossible. There was evidence that the goods remained in the possession of the consignees or their bankers. *Held* that the doctrine of constructive loss applicable to marine policies does not apply to other policies of insurance.

At delivering judgment—

LORD ATKINSON—This is an appeal from an order of the Court of Appeal, dated the 15th December 1916, whereby the judgment of Rowlatt, J., in favour of the appellants, dated the 17th December 1915, was set aside and judgment was entered for the defendant with the costs of the action and of the appeal.

The action out of which the appeal arises,