War's Possible Effect on Clients

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WAR'S POSSIBLE EFFECT ON CLIENTS

WITH the imminence of the next world-wide war contingent only upon the necessary detonation to precipitate the world's intensely nationalistic states into immediate war it behooves the far-seeing lawyer to reexamine the law applicable to such conflicts. At least casual consideration should be given to the possible effects another world-wide war would have upon his clients, even though it is apparent that the rulers anxious for war may indefinitely withhold its incipience because of their well justified fears for the safety of their own positions as rulers once they have selected a course necessitating the arming of their entire citizenry.

Excluding from this article and reserving for later writing the interesting problems arising from sea warfare, the maintenance of neutrality, and the complex issues involved in determining the very existence of war itself, this memorandum can comprehend only the question of a war's possible effect upon the person of individuals resident within the United States, upon their property, including rights under contracts, and upon the remedy in the enforcement of the

1 Paradoxical though it may seem, there is a "law of war," such having been the concern of the greatest writers on international law from before the time of Grotius to the present day.
rights that the war has not abrogated. Having assumed that
war exists, of immediate concern is the effect of the rules of
land warfare upon a client’s person, upon his property, and
upon his remedies.

In foreign communities the problem of the attorney is
most acute because of the probability that the outbreak of
a war will have a direct effect upon the person of his clients.
According to the principles of international law \(^2\) incorporated in the municipal law of the United States \(^3\) all such
clients who are “natives, citizens, denizens, or subjects of
the hostile nation or government, being of the age of four-
teen years and upwards, who shall be within the United
States and not actually naturalized, shall be liable to be ap-
prehended, restrained, secured and removed as alien en-
emies.” \(^4\) Although all unnaturalized nationals of the enemy
country are subject to internment, during the War of 1914-
1919, because of the great number of the subjects of the
enemy resident within our borders, such imprisonment was
not universal and only the factious aliens were incarcerated.\(^5\)

Although nationality is the test of enemy character for
internment, a resident of the United States owing allegiance
to the enemy retains many of his rights even though he be
confined in a concentration camp.\(^6\) Notable among these is

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\(^3\) 50 U. S. C. A. § 21.
\(^5\) Internment is a war measure, and an interned alien is a prisoner of war. The
That such internment is not in violation of “due process,” see: Minoto v.
Bradley, 252 Fed. 600 (D. C. Ill. 1918); De Lacey v. United States, 249 Fed.
625 (C. C. A. 9th, 1918).
\(^6\) It is interesting to note that although most of the aliens interned during
the War of 1914-1919 were so restrained because of their seditious character, many
were interned to protect them from attacks by their neighbors, which offenses
were common in Great Britain during enemy air raids and in the United States
after the sinking of the Lusitania.
\(^6\) A contract of agency is not terminated by war and temporary internment.
Nordman v. Rayner and Sturges, 33 T. L. R. 87 (1916). A trustee of an estate
is not necessarily ousted as trustee even though he be interned as a dangerous
alien and unable to act as trustee. In re Amsink’s Estate, 169 N. Y. S. 336 (1918)
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his right to private property, for, applying the rule of international law, first expressed as a pious wish by Grotius 7 but long since a common rule in land warfare, private property is not subject to confiscation. 8 Because of its theoretical nature and because of its exhaustive treatment by others, a consideration of the moot question of whether the rule against confiscation of private property in land warfare was applied in the economic clauses of the Versailles Treaty will be omitted from this memorandum. Suffice it to say that a proportionate number of those who have considered the question believe that mere lip-service was accorded the rule in that one-sided treaty. 9

While it is realized that any demarcation between the rights on a contract and the remedies for its enforcement must be arbitrary, it is believed that war does have a direct effect on some contracts; and this will be examined before proceeding into an inquiry of the effect of war upon the parties' remedies. To facilitate an analysis of the law on this subject it is expedient to divide contracts into three classes, namely, contracts entered into after the beginning of the war; contracts made before the war but still wholly executory at its incipiency; and contracts entered into before the war but only partially performed at its incipiency.


7 To be more fully developed later by Bynkershoek.

8 See, 3 Wharton, A Digest of International Law in the United States § 338, for a list of the early and modern authorities, including cases, depicting this rule.

Although private property is not confiscable in land warfare, confiscation can in fact be accomplished in the absence of a treaty to the contrary, in the states which have statutes providing for the forfeiture of real estate held by aliens (friends or enemies) in excess of the statutory period of years. In Illinois such forfeiture is possible after a six-year period. Ill. Rev. Stat. (1935) c. 6, § 2.

9 For an excellent article, written before the treaty was adopted, setting forth the rule against confiscation and indicating a course for our Peace Commission to follow, see, A. W. Lafferty, Should America Return Private Enemy Property? 15 Ill. Law Rev. 79. For the noblest attempted justification of the policy finally adopted by the Allies, see, the paper of Claude Mullins, printed in the publication of the Grotius Society of London, Vol. VIII, p. 89, entitled "Private Enemy Property."
In the first class all contracts between residents of belligerent nations entered into after the inception of a state of war are universally declared to be void as against public policy, following the rule of international law interdicting all communications between the inhabitants of countries at war without the express license of the sovereign. This rule is incorporated in the "municipal" law of the United States in the "Trading with the Enemy Act of 1917."

Although most of the continental countries make nationality the test of enemy character for an avoidance of a contract, the Anglo-American criterion, following Grotius, is residence within the enemy country. That the latter test is consistent with the reason usually advanced for the rule abrogating such contracts is apparent upon an examination of that policy which deems such contracts void because their performance might add to the enemy's resources. As a re-

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10 Although this is treated as a rule of international law it is more properly designated a rule of domestic policy, because in many countries, other than the United States and England, trade is not automatically interdicted but is allowed until expressly forbidden. Even the Anglo-American rule permits trading under an express license of the sovereign, which license is not a violation of international law.

11 Scholefield v. Eichelberger, 7 Pet. 586 (1833); Hanger v. Abbott, 6 Wall. 532 (1868); Hall v. Coppel, 7 Wall. 542 (1868); Briggs v. United States, 143 U. S. 346 (1892); Williams v. Paine, 169 U. S. 55 (1897); Sutherland v. Mayer, 271 U. S. 272 (1925); Kershaw v. Kelsey, 100 Mass. 561 (1868); Robson v. Premier Oil Co. [1915] 2 Ch. 124; Daimler Co. v. Continental Tyre & Rubber Co. [1916] 2 A. C. 307.

12 In spite of the agitation for a relaxation of this rule, that it still existed in the late "World War" is evident from the opinion of Sir Samuel Evans in The Panariellos [1915] 1 Br. & Col. Prize Cases 195, 198: "When war breaks out between States, all commercial intercourse between citizens [residents?] of the belligerents ipso facto becomes illegal, except in so far as it may be expressly allowed or licensed by the head of the State."

13 The common reason now advanced for the operation of this rule is its prevention of aid to the enemy. Kershaw v. Kelsey, op. cit. supra note 11. At times, however, other reasons have been advanced, such as the danger to a state from allowing transactions which so easily might become treasonable communications. See Ertel Bieber & Co. v. Rio Tinto Co. [1918] A. C. 260. In Brandon v. Nesbit, 6 T. R. 23 (1794), the injury that such an interdiction would work upon the enemy was advanced as a pertinent reason. Finally, supervision of all trade would place an intolerable burden upon the supervising country.

14 "The purpose of the restriction is not arbitrarily and unnecessarily to tie the hands of the individuals concerned, but to preclude the possibility of aid or
result of the application of this rule a resident of the United States, when this country is at war, may not trade with any one resident in the belligerent country though he be a citizen of the United States merely residing with the belligerent state.\textsuperscript{15}

This rule, which is simply "a belligerent's weapon of self-protection,"\textsuperscript{16} is extensively set out by Justice Gray in the leading case of \textit{Kershaw v. Kelsey};\textsuperscript{17} and although it has been approved many times since,\textsuperscript{18} it was thought for years to be solely a check upon commercial intercourse. During the late war, however, a restriction long implied was finally set forth in judicial opinion in the case of \textit{Robson v. Premier Oil Company},\textsuperscript{19} which formally widened the scope of the rule to forbid all, even indirect, aid to the enemy, by denying an enemy bank its right to vote shares of stock in a domestic corporation. That this is not inconsistent with the early American rule is evident, for it is readily appreciated that it might be just as much against the public interest to allow a resident of an enemy country to control the policy of a domestic corporation as it would be to allow commerce to pass between the corporation and the enemy. That the \textit{Robson} case would be followed today in the United States is indicated in the opinion of Mr. Justice Sutherland in \textit{Sutherland v. Mayer}.\textsuperscript{20}

comfort, direct or indirect, to the opposing forces. It is that purpose which gives birth to the rule and indicates its limits." Per Mr. Justice Sutherland in \textit{Sutherland v. Mayer}, 271 U. S. 272, 287 (1925).

\textsuperscript{15} Trotter, in \textsc{The Law of Contract During and After War}, indicates the exceptions to this broad rule. They are: contracts licensed by the sovereign; ransom contracts; contracts of necessity with prisoners of war; and where parties to contract are not separated by line of war.

\textsuperscript{16} Daimler Co. v. Continental Tyre \& Rubber Co., \textit{op. cit. supra} note 11, at 344.

\textsuperscript{17} \textit{Op. cit. supra} note 11.

\textsuperscript{18} See authorities cited in note 11, \textit{supra}.

\textsuperscript{19} \textit{Op. cit. supra} note 11.

\textsuperscript{20} Quoted in note 14, \textit{supra}.

"Trade" is still used in the \textit{Trading With the Enemy Act}, \S 3; but indirect communications are probably prohibited, because the \textit{Trading With the Enemy Act} does not permit all that it fails to expressly prohibit. See \textit{Robson v. Premier Oil Co.}, \textit{op. cit. supra} note 11.
Because the right of residents of the United States to enter into contracts or to carry on commercial intercourse across the "line of war" is controlled by the Trading with the Enemy Act further discussion of this statutory matter will be omitted. It is sufficient to remember that the problem is a statutory one, that the statute interdicts all intercourse between residents of belligerent territories, unless licensed, and that residence within the enemy country is the Anglo-American test of enemy character for the imposition of this prohibition.

Allied with the type of contracts already considered because of the similar manner in which they are disposed of by the courts are contracts entered into before the war but which remain wholly executory at its outbreak. If the performance of such a contract necessitates what the courts interpret to be trading with the enemy it is void for illegality.\(^2\) Not only does the law provide for automatic avoidance but the authorities go so far as to deny the contracting parties the ordinary contract right of expressly providing in the contract for suspension of its performance in the event of the outbreak of war. Such contracts are dissolved rather than suspended, "since the effect of treating such contract as merely suspended will [would] be to strengthen the position of the enemy at the end of the war, and to restrict the use to which the obligor,"\(^2\) during the war, might put the goods contracted for.\(^2\) As Lord Sumner said, in *Ertel Bieber & Co. v. Rio Tinto Co.*,\(^2\) "if these suspensory clauses are valid, the enemy knows three things: the first, that he may expend certain of his material resources without stint, for

\(^{21}\) For much the same reason as the first class of contracts discussed, *Esposito v. Bowen*, 7 El. & Bl. 763 (1857); *Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co.* [1915] 2 K. B. 379.

\(^{22}\) *Page on Contracts* § 2733.


his right to replenish them in enormous quantities is assured at or shortly after the conclusion of peace; the second, that the present employment of these raw materials as British resources during the war, whether in the way of commerce or in the actual supply of combatant needs, is hampered by the existence of huge future commitments, performable at an uncertain and perhaps not distant date; the third, that he may rest assured that the imposition of commercial disadvantages in the treaty of peace is pro tanto neutralized, and that military resistance may be prolonged in proportion. I think it is plain, as it was thought by the Courts below, that such suspensive clauses as are in question here tend to defeat the successful conduct of the war on His Majesty's part, and are therefore contrary to public policy and render the contracts void."

As a greater amount of executory contracts existing at the outbreak of war are not between parties separated by the line of war, ordinary contract principles govern their validity; and we find "true cases of dissolution when the contract, being initially valid, is deemed by law to be dissolved because of emergent impossibility of fulfillment of the objects of the contract, or impossibility of fulfillment of the ultimate purpose for which the contract was entered into." As "the law upon the matter is undoubtedly in the process of evolution," it is consonant with the purpose of this memorandum to present herewith this development in summary fashion. Although impossibility is now recognized in some degree by all courts as an excuse for nonperformance of a contract, it was not always so. "Until after the middle of the nineteenth century the defense of impossibility of performance was flatly rejected by the courts 'because he might have provided against it by his contract,' and did not do so." Many were the early common-law cases which de-

25 Keith, Elements of the Law of Contracts 86.
27 Conway, Outline of the Law of Contracts 452.
cided that "if a man undertake for a valuable consideration to do what is impossible, an action will lie against him for nonperformance." 28 That this early common-law rule regarding impossibility as a defense has been modified is indicated by the Coronation case 29 in England and by the case of Mineral Park Land Co. v. Howard 30 in the United States.

Faced with such varied precedents on the law of impossibility in general, the courts of the United States during the late war approached their problem hesitantly. In determining whether the outbreak of war was sufficient to permit the establishment of the plea of impossibility of performance to a suit on a contract, courts reached conflicting results. Our judiciary, steeped in the strict common-law tradition which recognized no impossibility as a defense for nonperformance of a contract, vacillated in the application of this harsh rule from the case of Furness, Withy & Co. v. Muller & Co., 31 in which war in itself was held not to excuse performance of a contract when performance was not in fact impossible, to the other alternative, and in the case of Alfred Marks Realty Company v. Churchills 32 the court implied a condition, of the happening of the event, cancelled because of war, to rationalize its holding that performance of the contract was excused. A stronger case, recognizing war as an intervening impossibility sufficient to excuse performance, can scarcely be imagined than that of "The Kronprinzessin Cecilie," 33 in which the court, speaking through Mr. Justice Holmes, held that a shipowner may not only break a contract to prevent

30 172 Cal. 289, 156 Pac. 458 (1916).
32 90 Misc. 370, 153 N. Y. S. 264 (1915).
33 North German Lloyd v. Guaranty Trust Co., 244 U. S. 12 (1917), reported by the official reporter under the title of "The Kronprinzessin Cecilie."
his ship's capture after the outbreak of war, but that he may reasonably anticipate war, in this determination to break his contract.

Albeit courts after much bewildered thought have survived their dialectic travail and have arrived at a just result, namely, as a matter of law, war may operate as a sufficient impossibility to excuse the performance of a contract, otherwise valid. There remains, however, the onerous duty of determining whether impossibility as a fact exists, before this equitable rule may be applied.

Although from a retrospective examination of the decisions arising out of the so-called "World War" it is now apparent that the complex state of the law surrounding the defense of impossibility has been resolved, it is equally evident that no such clarification was manifest in relation to the law applicable to war's effect upon contracts entered into before the war and but partially performed at its incipiency. This continued perplexity is due perhaps to the dearth of cases on the point growing out of the late war, which, coupled with the fact that most of the law on the subject is found in cases involving insurance policies with the usual ad hominem results, makes a restatement of any general rule practically impossible.

As a proportionate number of cases regarding the executory contracts in this third classification are suits upon insurance policies, and because a consideration of such cases gives a broad insight into the general problem of executory contracts, the entire treatment of such will be devoted designedly to insurance cases and examples therefrom.

In considering these executory insurance contracts one should constantly bear in mind that "the purpose of war is

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34 As is evident, most of the cases involve insurance contracts with foreign insurers, many of which were allowed to carry on their business under presidential license, provided for in the Trading With the Enemy Act of 1917, § 4, 50 U. S. C. A. (appendix) § 4.
to cripple the power and exhaust the resources of the enemy, and it is inconsistent that one country should destroy its enemy's property and repay in insurances the value of what has been so destroyed." However, many of the losses sued on do not arise out of the destruction of property by act of war; and it is concerning this large group of policies that the courts have expressed such divergent views.

The characteristic contract case of this type arises from circumstances such as the following: Before the war, the insured takes out a policy of insurance, for life or with premiums to be paid in installments, with a foreign insurer. War breaks out and further intercourse between the two parties to the insurance contract is interdicted. During the war the contingency insured against occurs, but not directly because of the war. At the close of the war the insured, or his beneficiary, seeks recovery on the policy. Faced with this difficult problem the courts have arrived at three results.

"In Connecticut and a few other states it has been held that the intervention of war absolutely terminates all rights under the contract." This rule, by avoiding such contracts, makes the timely payment of premiums an immutable condition precedent to liability on the policy.

The New York courts, followed by those of many other states, have held that such insurance contracts are merely suspended by the war, to be revived thereafter, distinguishing, however, cases where the loss was a direct result of the war.

35 6 COUCH, CYCLOPEDIA OF INSURANCE LAW § 1493.
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The rule adopted by the United States Supreme Court, in *New York Life Ins. Co. v. Statham*, makes the time of payment of premiums material and provides for the avoidance of the insurance contract on nonpayment, but the court gives quasi-contractual relief to the insured by allowing him to recover the equitable value of the policy at the outbreak of the war. This anomalous holding gives effect to that part of the contract providing for its avoidance for nonpayment of premiums because of the war, but in effect disregards the corollary clause providing for the forfeiture of the premiums previously paid. Obviously the court in the *Statham* case reached an equitable result, but because of its inconsistency general rules governing war's effect on all such insurance contracts cannot be predicated upon it.

An attorney, preparing to sue on such a policy, can derive considerable help from these opinions, even though they present conflicting results, which may be thus recapitulated: If the loss occurs directly because of the war, recovery thereon is generally denied by the application of the ever-present avoidance clause in the policy; even then quasi-contractual relief might be obtained on a life insurance policy because of its unique nature. Of greatest importance is the answer to the question, When did the contingency insured against occur, before the expiration of the term covered by the premiums already paid, or after? If before, trading with the enemy is not necessary and recovery is merely suspended until hostilities cease. Courts, properly informed, should also allow a similar result where the premiums had expired but the dividends due on the policy were sufficient to carry the premiums until after the loss. If the loss occurred after the premiums paid had expired, and revival of the policy was impossible without further payment across the line of war.

38 93 U. S. 24 (1876).
39 That is by considering the policy as a contract for life instead of from year to year. For complete Note on this subject, see L. R. A. 1917C, 677, 680.
counsel should first urge the adoption of the New York rule and failing in this should seek to recover quasi-contractual relief following the Statham case.

Contracts entered into prior to the war, and fully performed at its outbreak save the mere payment of the contracted price by one of the contracting parties are usually just suspended; but because of the similarity of the result and because the obligee’s right is so intwined with his remedies such contracts will be discussed in the consideration of war’s effect upon a client’s remedies.

Fortunately for the practicing attorney, the law, or more properly the policy, respecting the effect of war upon the status of enemies in the courts was clarified during the late war by many cases, the most important of which was Porter v. Freudenberg.\(^4\) So extensive was this opinion that most of the law on the subject can be found discussed within it. The points not adequately treated in this leading case are to be found in many other cases, and the problem may now be treated authoritatively in practically all of its ramifications. It is of course assumed, in the discussion of the standing of an “enemy” in our courts as a plaintiff, that the “enemy” has a right of action which is enforceable unless adversely affected by the outbreak of war.

An “enemy,” one situated across the line of war, has no standing in court as a plaintiff during the continuation of hostilities,\(^4\) unless he comes into the country of the forum under flag of truce, cartel, or other act of sovereign grace.\(^4\) Since residence within enemy territory, and not nationality, is the test of enemy character for purpose of bringing suit

\(^4\) [1915] 1 K. B. 857.

\(^4\) The “Hoop,” 1 C. Rob. 196 (1799); Porter v. Freudenberg, *op. cit. supra* note 41.

\(^4\) The “Hoop,” *op. cit. supra* note 42; Porter v. Freudenberg, *op. cit. supra* note 41. See, also: Clarke v. Morey, 10 Johns. 69 (1813); Princess Thurn and Taxis v. Moffitt [1915] 1 Ch. 58.
an English court properly allowed an enemy national to sue even though he was interned as an alien enemy.\textsuperscript{44}

If war breaks out during the progress of the litigation and the plaintiff thereby becomes an "enemy" under the "residence" test, the general rule is that the suit is suspended during the continuation of the war.\textsuperscript{45} Where a plaintiff recovers his judgment before declaration of war, but is delayed in his collection by defendant's appeal, the United States Supreme Court has determined that the amount of the judgment should be paid over to the Alien Property Custodian to be held until after the war.\textsuperscript{46}

Even where a co-plaintiff is resident within the country of the forum, the proceedings will be stayed on the outbreak of war if the other plaintiff is resident within enemy territory.\textsuperscript{47} Where two of three plaintiffs bringing joint action were rendered "enemies" by outbreak of war the action will not be allowed.\textsuperscript{48} But where the resident plaintiff is the real and substantial party in interest the nominal or minor interest of an "enemy" plaintiff has been held not to bar the action.\textsuperscript{49}

Although it is not the general purpose of this memorandum to delve into the effect of war on corporate persons it is interesting to note \textsuperscript{50} that the leading case involving the question of the efficacy of the corporate fiction arose out of a suit brought in England by the secretary of a corporation

\begin{thebibliography}{99}
  \bibitem{44} Schaffenius v. Boldberg [1916] 1 K. B. 284.
  \bibitem{46} Birge-Forbes Co. v. Heye, 251 U. S. 317 (1920).
  \textit{However, in Rodríguez v. Speyer Brothers [1919] A. C. 59, a firm with one enemy partner, entitled to one fortieth of its profits, was permitted to bring suit in the firm name. So it appears to be a matter of degree.}
  \bibitem{49} Mercedes Daimler Motor Co. v. Maudsley Motor Co., Ltd., 31 T. L. R. 178 (1915).
  \bibitem{50} Daimler Co. v. Continental Tyre & Rubber Co., \textit{op. cit. supra} note 11.
\end{thebibliography}
incorporated in England but owned and controlled by residents of an enemy country. Actually the case decided merely that the secretary was not the proper party to bring the suit in the corporate name; but because of the court's extensive treatment of the question of the real party in interest the case is cited for the proposition that courts will go behind the corporate fiction to discover the enemy character of a plaintiff. It is to be regretted that this far reaching adjective law rule has been enunciated, because a similar result could have been reached without ignoring the fundamental feature of a corporation. A more logical and equitable result could have been attained if instead of disregarding the corporate veil at the outset the court had allowed the suit (assuming the secretary had the right to sue) and, after the favorable judgment, had ordered the money to be paid over to the Alien Property Custodian, by application of the universal substantive international law rule that in the determination of the ownership of property the corporate fiction will be swept aside.

Although an "enemy" is denied the use of the courts to enforce his rights during war time the cases uniformly hold that such rights are not barred by the statute of limitations, which is considered to be in suspension during the period of hostilities.51

Although many jurists and publicists have argued strongly against the inequity of it, the cases have rather consistently held that an enemy resident across the line of war may be sued;52 but such enemy defendant can defend and employ counsel,53 and can appeal from an unfavorable judgment.54

51 Hoare v. Allen, 2 Dall. 102 (1789); Hanger v. Abbott, 6 Wall. 532 (1868); Brown v. Hiatts, 15 Wall. 177 (1873).
52 McVeigh v. United States, 11 Wall. 259 (1870); Porter v. Freudenberg, op. cit. supra note 41.
That there may be a limit, see, Holmes, J., in Birge-Forbes Co. v. Heye, op. cit. supra note 46, at 323.
53 Seymour v. Bailey, 66 Ill. 288 (1872).
54 Porter v. Freudenberg, op. cit. supra note 41.
Because of the affirmative nature of such action, it is generally assumed that an alien enemy may not counterclaim in a suit in which he is defendant,\(^5\) but he may set-off claims arising out of the same transaction, up to the extent of the amount sued for.\(^6\) Again it is submitted that both set-off and counterclaim should be allowed in interest of disposing of the entire litigation in one suit; and in event of a surplus becoming due to the enemy party such could be turned over to the Alien Property Custodian.

Where an enemy has been successful as a defendant, it has been held that no order of court granting him costs will be entered during the war.\(^5\)\(^7\)

Concerning the nature of the defense of "enemy character" the courts are not entirely in accord. In England an enemy alleging the right to sue, under consent of the Crown, must specifically allege and establish such right.\(^5\)\(^8\) In the United States it has been held that the defense of alien enemy, unless specifically pleaded, is waived, thus putting the onus on the defendant.\(^5\)\(^9\) To further give effect to this defense, the English courts will take cognizance of the hostile character of a plaintiff, if it is apparent on the face of the

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\(^5\) Because "enemies" seldom if ever defend during the period of hostilities there are no decisions directly supporting this accepted rule, which has been reasoned from analogous cases holding that in order for a defendant to interpose a counterclaim he must have a subsisting cause of action which could be prosecuted independently against the plaintiff. Turner v. Southeastern Grain and Live Stock Co., 179 N. C. 457, 102 S. E. 849 (1920).

A claim founded on a privateering enterprise, and therefore void, was not permitted to form basis for such a defense in Pond v. Smith, 4 Conn. 297 (1822). A gambling claim was similarly disposed of in Payne v. Loudon, 3 Bibb. (Ky.) 250 (1813). Similarly as to claim against minor. Utterstrom v. Myron D. Kidder, Inc., 124 Me. 10, 124 Atl. 725 (1924). In Shapard v. Lesser, 127 Ark. 590, 193 S. W. 262 (1917), although the court called a counterclaim a set-off it denied a defendant the right to set-off damages for breach of a contract which was void because it was in restraint of trade.

\(^6\) There is a similar dearth of cases on this point, but the rule is reasoned to in much the same manner as in the preceding note.


\(^5\)\(^8\) The Marie Glaeser [1914] P. 218.

\(^5\)\(^9\) McNair v. Toler, 21 Minn. 175 (1875); Burnside v. Matthews, 54 N. Y. 78 (1873).
However, whenever the defense of alien enemy is set up, it must be made out by strict proof, and such proof should be carefully scrutinized when the party alleging the defense predicates the existence of enemy character by a disregard of the corporate fiction.

Such, in general, is a presentation of the more important and fundamental potential effects of war upon an attorney's clients and "lest the lawyers forget," some may be found wanting in the scurry for such information in the event of another war of world proportions.

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61 Harman v. Kingston, 3 Camp. 152 (1811); Tingley v. Muller [1917] 2 Ch. 144, 175.