HOUSE OF LORDS.

Monday, July 24, 1916.

(Before the Lord Chancellor (Buckmaster), Earl Loreburn, Viscount Haldane, Lords Atkinson and Parker.)

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

F. A. TAMPLIN STEAMSHIP COMPANY, LIMITED, AND ANGLO-MEXICAN PETROLEUM PRODUCTS COMPANY, LIMITED (*Re* Arbitration).

Ship — War — Contract — Charter-Party — Time Charter — Restraint of Princes — Ship Requisitioned by Government — Effect on Contract.

The charterers hired for a period of five years an oil tank steamship. Two and a quarter years of the contract had expired when the ship was requisitioned by the British Government, who made structural alterations upon it. The shipowners claimed that this determined the contract.

Held (*dis.* Viscount Haldane and Lord Atkinson) that the contract continued to subsist, and the requisition did not suspend it or affect the rights of the owners or charterers under it.

Decision of the Court of Appeal, [1916] 1 K.B. 485, *affirmed.*

Their Lordships' considered judgment, in which the *facts* are stated, was delivered as follows:—

Earl Loreburn.—It is unnecessary to repeat the narrative of what has happened in this case or to analyse again the charter-party. This ship was chartered for five years. She was to be managed and controlled by the owners, but the use to be made of her in carrying merchandise within prescribed limitations depended upon the direction of the charterers. From December 1912 till December 1914 she was employed accordingly. From that date till the hearing of the case she has been employed by His Majesty's Government for purposes connected with the war. There are therefore nineteen months of the five years unexpired. No one knows how long the Government will continue to use this vessel, but so long as they do use her neither party to the contract can carry out their common adventure.

It may be as well to say that the first requisition of this ship was in December 1914 and the second in February 1915, but she was not released from the day she was first taken over.

In these circumstances the owners maintain that Mr Leck's award holding that this charter-party came to an end when the steamer was requisitioned in February 1915 is right.

In order to decide this question it is necessary to ascertain the principle of law which underlies the authorities. I believe it to be as follows:—When a lawful contract has been made and there is no default, a court of law has no power to discharge either party from the performance of it unless either the rights of some-one else or some Act of Parliament give the necessary jurisdiction. But a court can and ought to examine the contract and circumstances in which it was made, not, of course, to vary but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist; and if they must have done so, then a term to that effect will be implied though it be not expressed in the contract. In applying this rule it is manifest that such a term can rarely be implied except where the discontinuance is such as to upset altogether the purpose of the contract. Some delay or some change is very common in all human affairs, and it cannot be supposed that any bargain has been made on the tacit condition that such a thing will not happen in any degree.

In the recent case of *Horlock* v. *Beal*, [1916] 1 A.C. 486, 53 S.L.R. 795, this House considered the law upon this subject and previous decisions were fully reviewed, especially in the opinion delivered by Lord Atkinson. An examination of those decisions confirms me in the view that when our courts have held innocent contracting parties absolved from further performance of their promises it has been upon the ground that there was an implied term in the contract which entitled them to be absolved. Sometimes it is put that performance has become impossible, and that the party concerned did not promise to perform an impossibility. Sometimes it is put that the parties contemplated a certain state of things which fell out otherwise. In most of the cases it is said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them I think that was at bottom the principle upon which the Court proceeded. It is in my opinion the true principle, for no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted.

When this question arises in regard to commercial contracts, as happened in *Dahl* v. *Nelson*, 6 A.C. 38, *Geipel* v. *Smith*, L.R., 7 Q.B. 404, and *Jackson* v. *Union Marine Insurance Company*, L.R., 10 C.P. 125, the principle is the same, and the language used as to "frustration of the adventure" merely adapts it to the class of cases in hand. In all these three cases it was held, to use the language of Lord Blackburn, "that a delay in carrying out a charter-party, caused by something for which neither party was responsible, if so great and long as to make it unreasonable to require the parties to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at end." That seems to me another way of saying that from the nature of the contract it cannot be supposed the parties as reasonable men intended it to

be binding on them under such altered conditions. Were the altered conditions such that had they thought of them they would have taken their chance of them, or such that as sensible men they would have said "If that happens, of course it is all over between us"? What in fact was the true meaning of the contract? Since the parties have not provided for the contingency, ought a court to say it is obvious they would have treated the thing as at an end?

Applying the principle to the present case I find that these contracting parties stipulated for the use of this ship during a period of five years, which would naturally cover the duration of many voyages. Certainly both sides expected that these years would be years of peace. They also expected, no doubt, that they would be left in joint control of the ship as agreed, and that they would not be deprived of it by any act of State. But I cannot say that the continuance of peace or freedom from any interruption in their use of the vessel was a tacit condition of this contract. On the contrary, one at all events of the parties might probably have thought, if he thought of it at all, that war would enhance the value of the contract, and both would have been considerably surprised to be told that interruption for a few months was to release them both from a time charter that was to last five years. On the other hand, if the interruption can be pronounced in the language of Lord Blackburn already cited—"so great and long as to make it unreasonable to require the parties to go on with the adventure"—then it would be different. Both of them must have contracted on the footing that such an interruption as that would not take place, and I should imply a condition to that effect. Taking into account, however, all that has happened, I cannot infer that the interruption either has been or will be in this case such as makes it unreasonable to require the parties to go on. There may be many months during which this ship will be available for commercial purposes before the five years have expired. It might be a valuable right for the charterer during those months to have the use of this ship at the stipulated freight. Why should he be deprived of it? No one can say that he will or that he will not regain the use of the ship, for it depends upon contingencies which are incalculable. The owner will continue to receive the freight he bargained for so long as the contract entitles him to it, and if during the time for which the charterer is entitled to the use of the ship the owner received from the Government any sums of money for the use of her he will be accountable to the charterer. Should the upshot of it all be loss to either party—and I do not suppose it will be so—then each will lose according as the action of the Crown has deprived either of the benefit he would otherwise have derived from the contract. It may be hard on them, as it was on the plaintiff in *Appleby* v. *Myers*, L.R., 2 C.P. 651. The violent interruption of a contract always may damage one or both of the contracting parties. Any interruption does so. Loss may arise to some-one whether it be decided that these people are or that they are not still bound by the charter-party. But the test for answering that question is not the loss that either may sustain. It is this—Ought we to imply a condition in the contract that an interruption such as this shall excuse the parties from further performance of it? I think not. I think they took their chance of lesser interruptions, and the condition I should imply goes no further than that they should be excused if substantially the whole contract became impossible of performance, or in other words impracticable, by some cause for which neither was responsible. Accordingly I am of opinion that this charter-party did not come to an end when the steamer was requisitioned, and that the requisition did not suspend it or affect the rights of the owners or charterers under it, and that the appeal fails.

If it were established that this ship would be used by the Government for substantially the remainder of the five years I should be of a different opinion.

The LORD CHANCELLOR desires me to say he concurs in the judgment prepared by Lord Parker.

VISCOUNT HALDANE—The general principles by which this appeal must be decided do not appear to me to be difficult of ascertainment. The real uncertainty in the case lies in their application. As to this it is with reluctance that I find myself differing from the conclusions at which others of your Lordships have arrived.

When people enter into a contract which is dependent for the possibility of its performance on the continued availability of a specific thing, and that availability comes to an end by reason of circumstances beyond the control of the parties, the contract is regarded as dissolved. The contingency which has arisen is treated, in the absence of a contrary intention made plain, as being one about which no bargain at all was made. The principle applies equally whether performance of the contract has not commenced or has in part taken place. There may be included in the terms of the contract itself a stipulation which provides for the merely partial or temporary suspension of certain of its obligations should some event (such, for instance, as in the case of the charter-party under consideration, restraint of princes) so happen as to impede performance. In that case the question arises whether the event which has actually made the specific thing no longer available for performance is such that it can be regarded as being of a nature sufficiently limited to fall within the suspensory stipulation, and to admit of the contract being deemed to have provided for it and to have been intended to continue for other purposes. Although the words of the stipulation may be such that the mere letter would describe what has occurred, the occurrence itself may yet be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation. If the

course of events can be regarded as consistent with the continuance of the contract it will follow that when the event possesses the more limited character there will under the terms of the special stipulation be mere suspension of particular rights and duties which would otherwise arise under the general terms agreed on. The circumstances that the contract is one not for a single service but for a succession of such services to continue for a definite time is a relevant fact in considering whether there is a mere temporary suspension. And where the interruption is simply one of an interim character and likely to cease so soon as to leave the rest of the period stipulated free for the revival of the rights and duties of the parties after what amounts to no more than a temporary cessation of the power of performance, then not only where there is an express stipulation covering the case which has occurred, but possibly even where there is no such stipulation, the contract may be regarded as not becoming destroyed but only suspended. The question must always turn mainly on the facts. But if the facts be such that it appears that the power of performance has been wholly swept away to such an extent that there is no longer in view a definite prospect of this power being restored, then the contract must be looked upon as being wholly dissolved, and the courts cannot take any course which would in reality impose new and different terms on the parties.

On the general principle there is a long series of authorities, extending from the decision of *Paradine* v. *Jane*, Aleyn 26, more than two centuries ago, through such cases as *Taylor* v. *Caldwell*, 3 B. & S. 826, down to the recent appeal to this House in *Horlock* v. *Beal*, *cit. sup.*, in which last case many of the previous authorities were considered and classified. In the main the decisions given are consistent, although there are dicta which are not everywhere easy to reconcile. But the differences in expression which these authorities disclose do not affect the fundamental principles which they recognise, and I think that what I have ventured to state as the law is in accordance with the weight of judicial opinion. It is important to endeavour to formulate these principles in a case like the present where the task of the tribunal is essentially one of ascertaining the true bearing on the particular facts of the case.

To these facts I now turn. By a charter-party dated the 18th May 1912, on which the question arises, the owners of the tank steamer "F. A. Tamplin" agreed to let the steamer to the respondents as charterers for sixty calendar months from the date at which she was placed at the disposal of the latter, a term which would expire on the 4th December 1917. The steamer was to be employed "in such lawful trades for voyages between any safe port or ports in the United Kingdom and (or) Continent of Europe and (or) any safe port or ports in the United States of America and (or) Mexico and (or) North and South America and (or) Africa and (or) Asia and (or) Australasia and back, finally to a coal port in the United Kingdom, for the carriage of refined petroleum and (or) crude oil and (or) its products, but warranted no B.N.A. or Atlantic except for coaling; warranted no Baltic between the 1st October and the 1st April; warranted no White Sea between the 1st October and the 1st April, as charterers or his agents shall direct," on certain conditions. Among these was that the charterers should pay £1750, reducible later on to £1700, a month, that on the last voyage the charterers should if the vessel had been carrying other than refined oil or spirit, clean the vessel, and load a cargo of refined oil or spirit on that voyage under the charter, that no goods contraband of war were to be shipped, and the vessel was not to be required to enter any port which was blockaded or where hostilities were in progress; that no voyage was to be undertaken or goods or cargoes loaded which would involve risk of seizure, capture, or penalty by British or foreign rulers, and no acids or cargoes injurious to the steamer were to be shipped; that the charterers were to have the option of subletting the steamer to the Admiralty or other service without prejudice to the charter-party, but the charterers to remain responsible. The owners were to provide and pay the crew and for stores and maintenance. Any dispute arising during the execution of the charter-party was to be settled by arbitration.

It is of course obvious that although the contract was described as one of lease there was and could have been no lease properly so called. The real relation was that the owners retained through the officers and crew the possession of the vessel, and that the charterers were entitled to use it for certain purposes and under certain restrictions during a term of five years.

There was another important clause in the charter-party to which I have to refer. This was the usual one providing that certain perils should be excepted. These perils included "arrests and restraints of princes, rulers, and people." The effect of the clause was that if and to the extent to which the perils mentioned interfered with the fulfilment of their obligations the parties were exempted from liability for non-performance.

Early in December 1914 the steamer was requisitioned by the British Government for Admiralty transport service and was engaged in such service until about the 10th February 1915. No question has been raised as to this requisition, which appears to have been accepted by both parties as a merely temporary burden upon their rights under the charter-party. But about the latter date notice was given by the Admiralty Director of Transports to the charterers that the steamer was again requisitioned and that she would be specially fitted by the Government for the service on which she was to be employed. This was done shortly thereafter and the Government made structural alterations and used her for the transport of troops. She has since then, according to what was stated at the bar, been in part at all events restored to something resembling her original condition,

and has been used for the carriage of oil. But I think it is clear that the Admiralty neither regarded their powers as in any way restricted nor had any intention of limiting the period during which they claimed to use the steamer. Had the charterers done what the Government has done their action would have constituted such a breach of contract as would have entitled the owners to treat the contract as at an end.

Under these circumstances a dispute arose between the owners and the charterers as to their rights, and this dispute was, under the arbitration clause, referred to Mr Leck, one of His Majesty's counsel. The owners claimed that what had happened could not be treated as a sub-letting under the contract, but that the basis of the contract was gone, inasmuch as the steamer could no longer be made available under the charter-party, which was therefore either entirely at an end or was indefinitely suspended under the restraint of princes clause. The charterers argued that in reality there had been what was tantamount to a sub-letting to the Admiralty, and that the uses by the latter for purposes outside those prescribed by the charter-party and the making of the structural alterations did not amount to breaches of contract by the charterers, inasmuch as they were covered by the restraint of princes clause. If the charterers were right it would, no doubt, follow that they would be entitled to retain the largely increased monthly payment which Government has been making for the use of the steamer, paying to the owners only the monthly sum stipulated for by the charter-party. If the owners, on the other hand, were right, the charterers would be able to claim compensation from the Government for loss of rights under the terms of a general proclamation issued by the latter, but the owners would be the persons entitled to the hire paid by the Admiralty for the steamer to the use of which the charterers would no longer be entitled. The question of compensation was not, however, raised before the arbitrator, and it is not before us. The only point referred was whether the charter-party was brought to an end, or at all events fully suspended, by the second requisition and what was done under it.

The arbitrator decided this question in the affirmative, but stated a Special Case. On the argument of this Special Case, Atkin, J., and the Court of Appeal differed from him, and gave judgments to the effect that the contract remained in existence and that the restraint of princes clause kept the contract alive while precluding the owners from insisting that the diversion of use and alteration of structure were breaches for which the charterers could be held responsible.

It may well be that, at all events where there is such a clause in the case of a time charter with a substantial period yet to run, an event might occur which while it temporarily interfered with its performance would not destroy its existence. On the other hand, in the case of a charter for a single voyage the same event might be sufficient to destroy the very basis in the case of a voyage charter when it would not have been sufficient to destroy that of a time charter. The question in each case is one of the application of the general principles, to which I referred earlier, to the facts and circumstances of the particular case. And I think that similar considerations must govern the question whether what has happened in the present case can be regarded as falling within the meaning of the restraint of princes clause. That clause may apply to mere structural alterations made by a government. It is a more difficult question whether it can cover a taking possession which may, so far as appears, outlast the period of the charter. In one aspect the act of the government may come within the clause, but in another and equally important aspect it may mean so much more that by destroying the possibility of performing the contract as a whole it destroys the applicability of the clause.

In the case before us I am accordingly of opinion that if the conclusion is once reached that the requisition was of such a character that it would otherwise supersede or indefinitely suspend the contract the special clause cannot assist the charterers. Now it is, no doubt, true that the charter was to remain in force until the 4th December 1917. But the requisition by the Admiralty was one which enabled it to use the steamer for purposes altogether outside the contract, and that for a time to which no limit could be assigned. The time might extend until after the period of the charter-party had run out. It is impossible for any court to speculate as to the duration of the war on which the Admiralty requirements may depend. It is enough that events which are of public notoriety indicate the duration as one about which there is no apparent certainty as to a speedy close of which a court of justice can take cognisance. The question whether the contract was brought to an end must be judged in the light of events as they were in February 1915. The requisition was of a character so sweeping that I think the burden of showing that the purposes of the charter could continue to subsist concurrently with its operation rested on those who maintained the affirmative. *Prima facie* the entire basis of the contract so far as concerned either performance in February 1915, or performance at any calculable period in the future, seems to me to have been swept away. It might thereafter have proved possible to make a fresh start within what turned out to remain over of the time of the charter. But it equally might not. I am therefore unable to see how the contract can be properly looked on as only temporarily interrupted. Such interruption has a meaning if the restraint of princes clause covers the interrupting event. The clause is introduced for the very purpose of saving the foundation of the contract. But if that foundation is gone the contract is gone and the clause with it. Now the basis of the contract here was that the owners should provide a steamer to be used by the charterers for certain purposes only. The use of the ship and the fulfilment of the purposes are swept away by *vis major* for a period to which no

limit can be assigned. It is possible that under different circumstances and with a period as to which there was an obvious inference of fact that it would in all probability outlast the duration of the war the *vis major* might have been regarded as a mere temporary interruption which the special clause covered. But it seems to me that the charterers cannot bring their case up to the point at which it is legitimate to draw such an inference. I am therefore driven to the conclusion that there was here no mere temporary suspension of a subordinate obligation of the charterers. I think that the entire contract was avoided, and with it the clause providing for restraint of princes, and that the appellants were consequently entitled to judgment.

LORD ATKINSON—This case came before Atkin, J., upon an award in the form of a Special Case stated by an arbitrator, and the question for the Court to determine was stated to be whether, on the facts stated in the case, the arbitrator was right in holding that the charter-party dated the 18th May 1912 came to an end when the steamer (*i.e.*, the tank steamer "F. A. Tamplin") was requisitioned by the British Government on the 15th February 1915.

Your Lordships were informed that this is a test case, and the parties on both sides desired that the House should not confine its attention to the facts found by the arbitrator, but should consider in addition all relevant matters which have taken place since the hearing before him, with a view of determining whether or not this charter has come to an end.

By the charter-party the British tank steamer "F. A. Tamplin," in process of being built at the date of the document, was chartered to the respondents for a period of sixty calendar months, commencing from the 4th December 1912 and expiring on the 4th December 1917, at the hire of £1750 per calendar month for the first twelve months and £1700 per month for the remaining forty-eight months. Under the terms of the charter-party the steamer, described as a tank steamer, was to be placed at the disposal of the charterers at Newcastle-on-Tyne, in a dock or place in which she could safely lie afloat, as the charterers should direct immediately on being ready, she being then tight, staunch, and strong, fully equipped with a full complement of officers, seamen, engineers, and firemen necessary for that service. Now the service for which she was rendered fit and for which she was delivered was this. For voyages between any safe port or ports in the United Kingdom, the Continent of Europe, or the seven other countries named, and back finally to a coal port in the United Kingdom, for the carriage of refined petroleum or crude oil or its products. It is quite true that the charterers are not, according to the letter of this clause, bound to employ this vessel on the particular service named, but they are bound not to employ her on any other service. They might possibly retain her in dock during the entire period of five years, or any part of it, at a cost of £1750 or £1700 per month. But if the parties were not business people, as they are, but merely rational beings, they could not when they entered into the charter-party have contemplated anything of the kind. Whether that be so or not, the contract had secured to the charterers the power to determine whether or not the vessel should be employed in the trade authorised on such voyages as they might select between the ports named; and one of the assumptions upon which I think the contract must have been based was that the charterers should remain free to exercise, as and when they deemed fit, the powers secured to them by their contract. Else why enter into it at all. The same remark applies to the owner. The parties have, no doubt, in one article—article 20, with which I shall presently deal—specified several instances in which the will and intentions of each of them might be overborne by *force majeure*, but if one looks through the conditions upon which the contract was made, it will plainly appear that neither party could perform his side of the contract unless he be left a free agent. For instance, the first condition requires that the owners shall provide all provisions and wages for the crew and maintain the ship in a thoroughly efficient state in hull, machinery, and equipment for and during the service. Article 6 requires that the crew, the servants of the owners, for whom they are responsible, shall do certain work in a particular manner, in the process of loading the ship.

By article 2 the charterers are bound to provide and pay for oil fuel, galley coals, port charges, pilotage, &c. By article 3 the hire is to continue for the time specified for termination of the charter and until the redelivery to the owners (unless lost) at a coal port in the United Kingdom, as provided. By article 13 the captain, although appointed by the owners, is put under the order and direction of the charterers as regards employment, agency, or other arrangements. By article 12 the captain is bound to prosecute his voyages with the utmost dispatch, and render all customary assistance with ship's crew, winches, and boats, and proceed to sea when ordered, if tide and weather permit. If the charterers have reason to be dissatisfied with the conduct of the captain, officers, or engineers, the owners, on receiving particulars of the complaint should investigate the same, and if necessary make a change in the appointment. By article 15 it is provided that the master should be furnished from time to time with all requisite instructions and sailing directions, and shall keep a full and correct log of the voyage or voyages, which shall be submitted to the charterers or their agents when required.

Thus by these several articles, and many others which might be referred to, powers are conferred and obligations imposed upon each of the contracting parties, and active duties are required to be performed by each. None of these things can be done unless the charterers retain possession and control of the ship, and both parties retain their freedom of action. It cannot in my

view be possibly supposed that they by this charter, apart from article 20, ever intended to enter into an absolute contract to perform the impossible—that is, to exercise these powers, fulfil these obligations, and discharge these duties after the ship, in and upon which all these things were to be done, had been taken possession of by a third party who had lawfully removed her from the control of both of them for a considerable portion of the period of hiring and might continue so to do for the whole of that period.

Now I turn to article 20. It is immediately preceded by article 19, which provides that "if the vessel be lost the hire is to cease." But why? Surely because the charterers would thereby lose, possibly through one of the excepted perils, such as the act of God or perils of the sea, the thing they had contracted to pay for, namely, the use of the ship. Yet according to the contention of the respondents the hire is not to cease though they should lose for the entire period of hiring the use of the ship by another of the excepted perils, the restraint of princes.

Article 20 then provides that the "Act of God, perils of the sea, fire, barratry of the master and crew, pirates, thieves, arrest and restraint of princes, rulers, and peoples, collisions, strandings, and other accidents of navigation always excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master, master mariners, or other servants of the shipowner." I think it plain that this clause was introduced mainly for the protection of the shipowner. Either party could, however, rely upon it as a defence to an action brought upon the charter-party to recover damages for a breach of contract, consisting in the omission to do an act that party was bound to do if he was prevented from doing it by one of the accepted perils. This, however, is not all. If the act omitted to be done was the performance or non-fulfilment of a condition-precedent, then in addition the contract might come to an end and both parties be released from all obligations under it. The fallacy underlying the respondents' contention appears to me to be this, that such a contract can never be put an end to through the operation of one of the excepted perils. The following authorities show, I think, that is not the law.

Two well-known cases, many times approved of and followed, establish, in my view, this proposition. First, *Geipel* v. *Smith*, L.R., 7 Q.B. 404, and second, *Jackson* v. *Marine Insurance Company*, L.R., 10 C.P. 125, decided in the Exchequer Chamber on appeal from the Court of Common Pleas, and reported in the Court below in L.R., 8 C.P. 572. In the first of these two cases the charter-party contained a clause somewhat similar to this 20th article, excepting the act of God, Queen's enemies, restraint of princes, rulers, &c. Yet the owners were relieved from their contract to take on board a cargo and carry it to Hamburg, since the port of Hamburg was blockaded by the French fleet; that blockade clearly being a restraint of princes and peoples. Blackburn, J., as he then was, at p. 412, said—"The defendants therefore, the shipowners, could not fulfil their contract by delivery of the cargo without running the blockade. I am unable to see why this was not a restraint of princes; it was clearly a restraint of the then Emperor of France, preventing the cargo from being carried to Hamburg. But then comes another question—Conceding that while the blockade lasted there was a restraint—an obstacle to the fulfilment by the defendants of their obligations under the charter-party—it is said that the moment the blockade was raised the ship might have gone off, and therefore she ought to have been ready with her cargo on board to start at any moment. But I cannot agree that, however long the blockade existed—which might be during all the time the war lasted, and therefore might have been for years—the ship and cargo must be ready to sail as soon as wind and weather permitted after the blockade was raised. It would be most inconvenient to give such a construction to the contract, and would be to frustrate the very object of such a contract, namely, the speedy transfer of the shippers' goods and the remunerative employment of the shipowners' vessel." And Lush, J., at p. 414, said—"I think the fifth plea may also be treated as valid. It alleges the breaking-out of war between France and Germany and a blockade of the port of Hamburg. If the impediment had been in its nature temporary I should have thought the plea bad, but a state of war must be presumed to be likely to continue so long and so to disturb the commerce of merchants as to defeat and destroy a commercial adventure like this." In the second of the cases the action was brought on a policy of insurance effected by the plaintiff on chartered freight valued at £2900 to be earned by the plaintiffs' vessel, the "Spirit of Dawn," on a voyage at and from Liverpool to Newport in tow, and thence to San Francisco. By the charter, dated the 22nd November 1871, entered into between the plaintiff and Messrs Rathbone & Company, this ship was to proceed with all convenient speed from Liverpool to Newport (dangers and accidents of navigation excepted), and there load a cargo of iron rails for San Francisco. The ship, in performance of her owners' obligation under the charter-party, started on the first stage of her voyage, *i.e.*, from Liverpool to Newport, but *en route* took the rocks in Carnarvon Bay, and was got off after considerable delay much damaged. It is an error to suppose that at the time of the accident the owners' contract was in the position of a merely executory contract. It was in truth part performed. The rails were required for the construction of a railway in San Francisco. Time was a matter of importance to the charterers. They accordingly immediately threw up the charter and chartered another ship. The defendants, relying on the clause excepting "dangers and accidents of navigation," denied in their defence that there was any loss by a peril insured against. The case was tried before Brett, J., as he then was. The jury answered

in the affirmative three questions left to them — first, "whether there was a constructive total loss of the ship?" Second, "whether the time necessary for getting the ship off the rocks and repairing her so as to be a cargo-carrying ship was so long as to make it unreasonable for the charterers to supply the agreed cargo at the end of such time?" and third, "whether such time was so long as to put an end to it in a commercial sense?" &c. The learned Judge being of opinion that there was no evidence of a constructive total loss of the ship, and no evidence of a loss of freight by the perils insured against, directed a verdict to be entered for the defendants, reserving leave to the plaintiff to move to enter a verdict for him. A rule *nisi* having been obtained by the plaintiff to enter a verdict for him on cause being shown, it was held by Keating and Brett, JJ., that the charterers were absolved from loading the vessel, and that the shipowner therefore might recover for the loss of the freight. Bovill, C.J., on the contrary, held that the charterers were not entitled to throw up the charter, and that consequently the plaintiffs were not entitled to recover against the underwriters, and that the findings of the jury were immaterial. The decision of the majority was affirmed in the Exchequer Chamber by Bramwell, B., Blackburn, Mellor, and Lush, JJ., Amphlett, B., dissenting. It is therefore a case of high authority. The judgment of the majority was delivered by Bramwell, B., as he then was. That distinguished Judge points out that as no date was fixed for the arrival of the ship at Newport, it should be held that there was an implied condition in the charter-party that she should arrive within a reasonable time. He then proceeds — "Now what is the effect of the exception of perils of the seas and of a delay caused thereby? Suppose it were not there and not implied, the shipowner would be subject to an action for the ship not arriving in a reasonable time, and the charterers would be discharged. Mr Benjamin says the exception would be implied. How that is it is not necessary to discuss, as the words are there; but if it is so, it is remarkable as showing what must be implied from the necessity of the case. The words are there. What is their effect? I think it is this. They excuse the shipowner, but give him no right. The charterers have no cause of action, but are released from the charter. When I say he is, I think both are. The condition-precedent has not been performed by the default of neither. It is as though the charter were conditional on peace being made between countries A and B, and it was not, or as though the charterers agreed to load a cargo of coal (strike of pitmen excepted). If a strike of probably long duration began he would be excused from putting the coals on board, and would have no right to call upon the charterer to wait till the strike is over. The shipowner would be excused from keeping his ship waiting, and have no right to call on the charterer to load at a future time. This seems in accordance with general principles. The exception is an excuse for him who has to do the act, and operates to save him from an action and makes his non-performance not a breach of contract, but does not take away the right the other party would have had if the non-performance had been a breach of contract to retire from the engagement. And if one party may, so may the other." If therefore it be an implied condition-precedent of the contract in the present case that both the parties to it should not without any default on their respective parts be, by the operation of a *force majeure* such as the restraint of princes, deprived for the whole or a substantial portion of this period of five years of all power to exercise the rights or discharge the obligations conferred and imposed by it, the action of the Admiralty destroyed the basis upon which the contract was in the contemplation of the parties based, and in this sense rendered the fulfilment of the condition-precedent impossible—see judgment of Lord Blackburn in *Taylor* v. *Caldwell*, 3 B. & S. 826, at p. 833. Article 20 saves each of the parties from a claim for damages for breach of contract at the suit of the other, but it does not deprive either of them of the right to free himself or themselves from the contract on the ground that the basis upon which it rested has been destroyed.

It is only necessary, I think, to cite one authority in addition to those cited in *Horlock* v. *Beal*, *cit. sup.* It is *Poussard* v. *Spiers*, 1 Q.B.D. 410. There the plaintiff agreed in writing with the defendants to sing and play in the chief female part in a new opera about to be brought out at the defendants' theatre, at a weekly salary of £11 for three months, commencing about the 14th November, provided the opera should so long run. The first performance of the piece was not announced till the 28th November, but no complaint was made as to this delay. It was an implied though not an express term of the contract that Madame Poussard should attend rehearsals. Owing to delays on the part of the composer the music was not in the hands of the defendants till a few days before the 28th November. The later and final rehearsals did not take place till the week ending the 28th November. Madame Poussard, though she attended some of the rehearsals, unfortunately got ill on the 23rd November and had to leave the rehearsal. On the 4th December, having recovered, she offered to take her place in the opera but was refused, another artiste having in the meantime been engaged to fill the part. The judgment of the Court of Queen's Bench was delivered by Blackburn, J. He said — "My brother Field at the trial expressed the opinion that the failure of Madame Poussard to be ready to perform under the circumstances went so much to the root of the consideration as to discharge the defendants, and that he should therefore enter judgment for the defendants"; but he left five questions to the jury. They found that the non-attendance of Madame Poussard on the night of the opening was not of such material consequence to the defendants as to entitle them to rescind the

contract; but in answer to another question they found that it was of such consequence as to render it reasonable for the defendants to employ another artiste, and that the engagement of this other artiste was reasonable. Lord Blackburn held that this finding enabled the Court to decide as a matter of law that the defendants were discharged. He said—"The analogy is complete between this case and that of a charter-party in the ordinary terms where the ship is to proceed in ballast (the act of God, &c., excepted) to a port and there load a cargo. If the delay is occasioned by excepted perils the shipowner is excused, but if it is so great as to go to the root of the matter it frees the charterer from his obligation to furnish a cargo. See *per* Bramwell, B., delivering the judgment of the majority of the Court of Exchequer Chamber in *Jackson* v. *Union Marine Insurance Company*. And we think that the question whether the failure of a skilled and capable artiste to perform in a new piece through serious illness is so important as to go to the root of the consideration must to some extent depend on the evidence, and is a mixed question of law and fact." The case of *Horlock* v. *Beal* decided that these principles apply to the contract of a sailor to serve on a very lengthened voyage or series of voyages, the duration of which was not to extend beyond a period of two years. The detention of a ship by a hostile power, which might last for more than two years, was held to terminate, before the period had arrived, the contract of the owners to pay the sailor wages.

I am quite unable to agree with the contention urged by the respondents that the principle of these decisions can never apply to a time charter. It is by no means true that a time charter must necessarily be of longer duration than a charter for a single voyage or a round voyage to many different ports. That depends upon the length of the term for which the ship is chartered. It may well be that the "impediment"—to use the words of Lush, J., in *Geipel* v. *Smith*—should be of longer duration in the case of a time charter than in that of a charter for a single voyage in order to be treated as "defeating and destroying" the object of the commercial adventure of the charterer and shipowner. For instance, I think it would be impossible to contend that this adventure would not be "destroyed and defeated" if the restraint was to the knowledge of both parties expressly imposed by the prince or government for the entire length of the period of hiring, or for that portion of it which remained unexpired when the restraint was imposed. I do not think it can make any substantial difference if possession should be taken for a substantial portion of the whole or of the unexpired portion of that period, coupled as in this case with a probability or possibility that it may continue till the end of the period. In any of these events the charterer would not get anything like the thing he contracted for, namely, the use of the ship for the stipulated period, but something wholly different. He could hardly be obliged while deprived of the use of the ship to pay her hire. That would be monstrously unjust. This is not like a grant or demise of land, where the right of property passes though the possession should be withheld. In truth the imposition of the restraint for a lengthened period creates a condition of things to which the charter-party is inapplicable. I can find no authority for the proposition that such a contract as the present sinks into abeyance while the restraint is imposed and the possession of the ship is withheld, and springs into active existence again when the restraint terminates, regulating the right of the parties for the residue of the period of hiring. If the restraint be prolonged for a substantial portion of that period, it goes, I think, to the root of the consideration, as it did in the case of *Jackson* v. *Mutual Insurance Company* and *Poussard* v. *Spiers*, and relieves both parties to the contract from their engagements, and this though the contract be not in the merely executory stage but part performed, as it was in both of these cases. Now, turning to the facts of this case, one finds that early in December 1914 the steamship "F. A. Tamplin" was requisitioned by the British Government for the Admiralty transport service, and was retained in that service until the 10th February 1915, a period of some fourteen months. No question was raised before the arbitrator as to this requisition. At its date over two years of the period of hiring had elapsed. On this 10th February about two years and nine months of that period remained unexpired. The ship was again requisitioned by the Government, and immediately after that date alterations were made in her to fit her for the transport of troops. She has been since retained in the service of the Admiralty, and it is said she has been restored to her former condition as a tank steamer. She may be retained in the same service while the present war lasts, and even after it has terminated. Nobody can possibly tell how long it will last. At the present moment about one year and eight months of the five years remain unexpired. Up to the present time the charterers have only had during the two years from December 1912 till December 1914 what they contracted for and what they were only bound to pay for. They may never get any further use of her. The owners cannot deliver the ship into their possession and control, and may not for years be in a position to do so. Neither of the parties are in default. In the month of March 1915 the owners refused to be longer bound by the charter-party. In my view there is here involved such a substantial invasion of that freedom of both parties to exercise the rights and discharge the obligations secured to and imposed on them by the charter, the continued existence of which must, I think, have necessarily been in their contemplation as to the foundation of this contract when they entered into it that in the events which have happened each of them is now entitled to treat it as at an end.

I have dealt with the case altogether apart from the question of the amount which the charterers have received as compensation

for the use of the ship. The charterers have been treated by the Crown as if they had sublet the ship to the Admiralty. They have not in fact done so. What they have received they have got from the bounty of the Crown. They have no legal right to it. The receipt of it is therefore in my view quite irrelevant. To consider it only obscures the legal point for decision. When the legal rights of the parties have been determined, the Crown will, no doubt, endeavour to do justice to the parties according to those rights. Judging from what has happened up to the hearing of this appeal, I am of opinion that the charter-party is now at an end and that the parties to it are released from all obligations under it. The appeal under these circumstances I think succeeds.

Lord Parker—In considering the question arising on this appeal, it is, I think, important to bear in mind the principle which really underlies all cases in which a contract has been held to determine upon the happening of some event which renders its performance impossible, or otherwise frustrates the objects which the parties to the contract have in view. This principle is one of contract law, depending on some term or condition to be implied in the contract itself and not on something entirely *dehors* the contract which brings the contract to an end. It is of course impossible to imply in a contract any term or condition inconsistent with its express provisions, or with the intention of the parties as gathered from those provisions. The first thing therefore in every case is to compare the term or condition which it sought to imply with the express provisions of the contract, and with the intention of the parties as gathered from those provisions, and ascertain whether there is any such inconsistency.

Again, in determining whether any such term or condition can be properly implied, the nature of the contract is of considerable materiality. If, for example, the contract be for the hire of a particular horse on a particular day, it would be easy to imply a condition that the horse should still be living on the day in question. If, however, the contract were for the hire of a horse generally, it would be difficult, if not impossible, to imply a term relieving the hirer from liability if his only horse died before the day arrived.

Moreover, some conditions can be more readily implied than others. Speaking generally, it seems to me easier to imply a condition-precedent defeating a contract before its execution has commenced than a condition-subsequent defeating the contract when it is part performed. A contract under which A is to have the use of B's horse for two days' hunting might well be defeated by the death of the horse before the two days commenced. It would be easy to imply a condition-precedent to that effect. But the case would be very different if the horse died at the end of the first day, and it was sought to imply a condition-subsequent relieving A in that event of liability to pay the sum agreed for the hire.

The simplest cases of the application of the principle are, no doubt, those of contracts *de certo corpore*, as in *Taylor* v. *Caldwell*, 3 B. & S. 826. Here there was an agreement by A to allow B the use of his music hall on certain specified days, and the music hall was burnt down before the first of those days arrived. A condition-precedent could easily be implied. A similar case is that of *Appleby* v. *Myers*, L.R., 2 C. P. 651. Here A contracted to erect machinery in buildings belonging to B, and the buildings were burned down before the work was finished. It was not difficult to imply a condition-subsequent.

But the principle applies also to cases when the existence or continued existence of some specific thing is in no way involved, and in such cases its application is not so easy. It applies, for instance, to contracts of service which, from some causes not contemplated by the contract itself, have become impossible of fulfilment. A good instance of this may be found in the recent decision of your Lordships' House in *Horlock* v. *Beal*, *cit. sup.* It applies also to charter-parties where some commercial adventure contemplated by the parties, and in the fulfilment of which both are interested, is brought to an end by the happening of some event for which neither is to blame. The leading case on this branch of the law is *Jackson* v. *Union Marine Insurance Company*, L.R., 10 C. P. 125. Here the ship was to proceed with all possible dispatch (dangers and accidents of navigation excepted) from Liverpool to Newport, and there load and carry to San Francisco a cargo of iron rails. The ship left Liverpool on the 2nd January, and on the 3rd January ran aground in Carnarvon Bay, sustaining considerable damage. It would necessarily be many months before she could be got off and put in such repair as to be able to continue her voyage. In the commercial sense, therefore, the voyage contemplated in the charter-party had been brought to an end, and under these circumstances the contract was held to have determined. The voyage, if resumed when the ship had been got off and repaired, would have been a different voyage, "as different," to use Lord Bramwell's words, "as though it had been described as intended to be a spring voyage, while the one after the repairs would have been an autumn voyage." The season within which the adventure was to be carried out was, in fact, of importance to both parties to the bargain, and it was thus easy to imply a condition that if the voyage became impossible of completion within that season the contract should be at an end. The exception as to dangers of the sea and accidents of navigation no doubt showed that the parties were contemplating and providing for the case of some delay arising from these causes, but they were evidently not contemplating a delay so great that the spring voyage would become altogether impossible. The particular adventure being a voyage to be carried out within reasonable limits of time furnished a definite standard by which it could be determined

whether the delay which actually occurred was or was not within the exception clause. There was, therefore, no inconsistency between the implied condition and the express provisions of the contract.

There is, so far as I can find, no case in which this principle has been applied to time charter-parties as distinguished from charter-parties which contemplate particular voyages. It was suggested in argument that *Tully* v. *Howling*, 2 Q.B. D. 182, was such a case. There the charter-party was a time charter-party for twelve months from the completion of the voyage on which the vessel was then engaged. After the completion of this voyage, and when the charterer was ready to load, the vessel was detained by the Board of Trade as unseaworthy. It took two months to make the vessel seaworthy, and meanwhile the charterer had repudiated the contract. It was held that he was justified in so doing on the ground that time was of the essence. There had been, in fact, a breach of the contract by the owners so material as to give the charterer a right to rescind. Only Brett, J., put the case as one of the frustration of a commercial adventure. Without laying it down that the principle can in no circumstances be applicable to time charter-parties, I am of opinion that its application is in such cases much more difficult than in the case of charter-parties which contemplate a definite voyage within certain limits of time. I concur in this respect with what is said by Bailhache, J., in *Admiral Shipping Company* v. *Weidner & Company*, [1916] 1 K.B., at pp. 437–8. My reasons will appear when I come to consider the terms of the charter-party in the present case.

The contract in the present case is contained in the charter-party of the 18th May 1912, whereby the owners of the steamship "F. A. Tamplin" agreed to provide her with a full complement of officers, seamen, engineers, and firemen, and hold her at the disposition of the charterers for the voyages and other purposes therein mentioned for a period of sixty calendar months from the 4th December 1912, subject, nevertheless, to the conditions therein specified. The charterers were to pay the owners monthly in advance for the first twelve calendar months £1750, and thereafter £1700 per month by way of freight. By the seventeenth condition the freight was suspended in the event of loss of time by reason of deficiency in men or stores, or any defect or breakdown of machinery or damage or accident preventing the working of the vessel for more than twenty-four consecutive hours. By the nineteenth condition the payment of freight was to cease altogether in the event of the vessel being lost. By the twentieth condition the act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates and thieves, arrests or restraints of princes, rulers, or people, and strandings and other accidents of navigation were excepted even when occasioned by negligence, default, or error of the pilot, master, mariners, or other servants of the owners.

As I read this contract, the parties are not contemplating the prosecution of any commercial adventure in which both are interested. They are not contemplating the performance of any definite adventure at all. The owners are not concerned in the charterers doing any specific thing beyond the payment of freight as it becomes due. They are only concerned that the charterers shall pay the freight and shall not use the ship contrary to the provisions of the charter-party. It would be to the interest of the owners that the charterers should not make any use of the ship at all. They would thus save the cost of repairs due to wear and tear. On the other hand, the charterers only stipulated that the vessel shall be at their diposal for certain defined purposes. If they so desire they retain full liberty not to use the vessel for any purpose whatever. Further, the contract contemplates that though the charterers desire to use the vessel, it may for intermittent periods of indefinite duration be impossible for them so to do. In such cases there are express provisions differing according to the particular circumstances from which such impossibility arises. In cases within condition 17 there is a suspension of freight only. In cases within condition 20, and not within condition 17, the payment of freight continues, and the owners incur no liability. Thus if the ship cannot put to sea because of deficiency of seamen freight will be suspended. If, however, the vessel cannot put to sea because of an embargo, the freight continues to be payable, nor are the owners liable in damages. It makes no difference at what period during the term of the charter the deficiency of seamen or embargo occurs. Whether it occurs within the first or last six months of the term the result is to be the same.

I entertain no doubt that the requisitioning of the steamship by His Majesty's Government in the present case is a "restraint of princes" within the twentieth condition. The parties therefore have expressly contracted that during the period during which by reason of such restraint the owners are unable to keep the ship at the disposition of the charterers the freight is to continue payable and the owners are to be free from liability. This period may be long or short. It may be certain or indefinite. It may occur towards the beginning or towards the end of the term of the charter-party. The result is to be the same, unless indeed the circumstances are such that the ship can be said to be lost within the meaning of condition 19. Moreover (and this seems to me the vital point), the charter-party does not contemplate any definite adventure or object to be performed or carried out within reasonable limits of time, so as to justify a distinction being drawn between delays which may render such adventure or object impossible and delays which may not.

Under these circumstances it appears to me to be difficult, if not impossible, to frame any condition by virtue of which the contract of the parties is at an end, without

contradicting the express provisions of the contract and defeating the intention of the parties as disclosed by these provisions. The nearest I can get is a proviso to the twentieth condition conceived as follows—"Provided that if the period during which the ship cannot be held at the disposition of the charterers by reason of any of the matters referred to in this condition, though indefinite, be such as will in all reasonable probability extend beyond the term of the charter-party, the contract between the parties shall be determined." But in my opinion even this would contradict the express term of contract. It could, for example, except from its provisions cases in which the ship ran aground so near the end of the term of the charter-party that it would be impossible to get her off or ready to put to sea once more within such term. This would, in my opinion, be contrary to the provisions of condition 20. Further, even if it were permissible to imply such a proviso to the twentieth condition, there is, in my opinion, no reason for holding that the Government will, in all reasonable probability, retain the vessel for the remainder of the term of the charter-party. Whether they will do so or not seems to me to depend on all sorts of circumstances as to which a court of justice cannot speculate. They may do so or they may not. I do not think that one event is more likely than the other.

Having regard to the difficulty of framing any conditions which can be implied without contradicting the express terms of the contract, having regard to the nature of the contract, which is a time charter only, and does not contemplate any commercial adventure in which both parties are interested or indeed any definite commercial adventure at all, and finally having regard to the fact that the condition which is sought to be implied is a condition defeating a contract already part performed and not a condition-precedent to a contract which remains purely executory, I have come to the conclusion that the decision of the Court of Appeal was right and ought not to be disturbed.

I desire to add this. I cannot help thinking that the question really at issue has been somewhat obscured by the fact that the Government has under the terms of the Royal Proclamation of the 3rd August 1914 to pay compensation to "the owners," to be settled in case of difference by arbitration. Owners must in this proclamation include all parties interested. It cannot in the present case mean the owners exclusive of the charterers or the charterers exclusive of the owners. Both are entitled to compensation, and if such compensation be not agreed with either separately, but with both together, the amount so agreed will be divisible between them according to their respective rights and interests. The case was argued before your Lordships on the footing that it would determine which of two possible claimants was to be held entitled to all which might be payable by the Government by way of compensation under the proclamation. I entirely dissent from this view.

The appeal should, in my opinion, be dismissed with costs.

Their Lordships dismissed the appeal.

Counsel for the Appellants—G. Wallace, K.C.—Raeburn. Agents—Holman, Birdwood, & Company, Solicitors.

Counsel for the Respondents—Sir R. Finlay, K.C.—Mackinnon, K.C.—R. A. Wright. Agents—Thomas Cooper & Company, Solicitors.

HOUSE OF LORDS.

Thursday, November 30, 1916.

(Before Earl Loreburn, Lords Atkinson, Shaw, and Sumner.)

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

HORLICK'S MALTED MILK COMPANY *v.* SUMMERSKILL.

Trade Name—Descriptive Title—Sale of an Article under a Title hitherto Applied only to Certain Proprietary Goods.

The respondent offered for sale under the name of "Hedley's Malted Milk" a preparation somewhat similar to the article which had been sold by the appellant company for some years under the name of "Horlick's Malted Milk." *Held* that the term "malted milk" was descriptive, and could not be monopolised by the appellant company.

Their Lordships' judgment was delivered by

Earl Loreburn—In my opinion this appeal fails. It is an action to restrain the defendant from using the words "malted milk" as descriptive of his goods, because it is calculated to mislead the public by the supplying of the defendant's goods as and for the plaintiffs'. At the bottom of the contention, which has been very ably urged on behalf of the appellants, lies this question—"Is the term 'malted milk' merely a descriptive term?" I will not enter upon the other question as to whether, if it be so, it has been so identified with the plaintiffs' goods as to bestow upon them the right of abstracting these words from the English language and limiting others in their right to use them in trade, because that is a field on which one might say a good deal, and I think it is unnecessary to enter upon that question. The question we really have to consider is what is the meaning of the words "malted milk."

In my opinion, in accordance with the opinion of Joyce, J., which was confirmed by the Court of Appeal, that expression is merely descriptive of milk which is combined or prepared with malt or with extract of malt. The claim really is to the use of a part of a designation which the plaintiffs have been in the habit of using. They have been in the habit of using the term "Hor-