[IN THE HOUSE OF LORDS.]

METROPOLITAN WATER BOARD . . . APPELLANTS ; H. L. (E.)* 1917

AND

DICK, KERR AND COMPANY, LIMITED . RESPONDENTS. *Nov.* 26.

Contract—Performance—Impossibility—Vis Major—Stoppage of Work by Ministry of Munitions—Suspension or Termination.

By a contract made in July, 1914, a firm of contractors contracted with a Water Board to construct a reservoir to be completed within six years, subject to a proviso that if by reason of (inter alia) any difficulties, impediments, or obstructions whatsoever and howsoever occasioned the contractors should, in the opinion of the engineer, have been unduly delayed or impeded in the completion of the contract it should be lawful for the engineer to grant an extension of the time for completion. By a notice given by the Ministry of Munitions in February, 1916, in exercise of the powers conferred by the Defence of the Realm Acts and Regulations, the contractors were required to cease work on their contract and they ceased work accordingly. The contractors claimed that the effect of the notice was to put an end to the contract:—

Held, that the provision for extending the time did not apply to the prohibition of the Ministry; that the interruption created by the prohibition was of such a character and duration as to make the contract when resumed a different contract from the contract when broken off, and that the contract had ceased to be operative.

Tamplin Steamship Co. v. *Anglo-Mexican Petroleum Products Co.* [1916] 2 A. C. 397 distinguished.

Hadley v. *Clarke* (1799) 8 T. R. 259 disapproved by Lord Finlay L.C.

Decision of the Court of Appeal [1917] 2 K. B. 1 affirmed.

APPEAL from a decision of the Court of Appeal reversing a decision of Bray J. (1)

The question raised by the appeal was whether a contract in writing dated July 24, 1914 (as modified by a supplemental contract dated May 10, 1915), between the appellants and the respondents for the construction of a reservoir at Littleton, in the county of

* *Present:* LORD FINLAY L.C., LORD DUNEDIN, LORD ATKINSON, and LORD PARMOOR.

(1) [1917] 2 K. B. 1.

H. L. (E.) 1917

METROPOLITAN WATER BOARD v. DICK, KERR AND COMPANY.

Middlesex, was terminated by a notice given by the Ministry of Munitions under the powers of the Defence of the Realm Acts and Regulations, whereby the respondents were required to cease work under the contract, or was still in existence as a binding contract.

The notice was given by a letter, dated February 21, 1916, written by the Secretary to the Ministry of Munitions to the respondents. The letter was as follows :—

"I am directed by the Minister of Munitions to inform you that he has found it necessary to take steps to restrict the work which you are carrying out at Staines for the Metropolitan Water Board and the employment of workmen there, and to remove the plant therefrom with a view to increasing the production of munitions elsewhere. I am, therefore, to inform you that in exercise of the powers conferred upon him by the Defence of the Realm (Consolidation) Act, 1914, the Defence of the Realm Amendment (No. 2) Act, 1915, the Defence of the Realm (Consolidation) Regulations, 1914, and the Ministry of Munitions Order, 1915, the Minister hereby requires you forthwith to cease work on your contract for the Metropolitan Water Board.

"I am further to require you to comply with such instructions with regard to your plant and the labour at your disposal as may be conveyed to you on the Minister's behalf by Mr. John Hunter, Director of Factory Construction in the Ministry of Munitions."

On May 19, 1916, the appellants commenced this action against the respondents claiming (inter alia) that the contract of July 24, 1914, as modified by the supplemental contract of May 10, 1915, was still binding on the parties and had not been determined by the notice of February 21, 1916.

The defence was that by reason of this notice the further performance of the contract had become impossible and illegal and that both parties were released from all further liability thereunder.

The facts and the material portions of the contract of July 24, 1914, are fully set out in the judgment of the Lord Chancellor.

Bray J. held that the delay created by the stoppage of work was not so great as to render the completion of the contract physically impossible or commercially impracticable, and, further, that the prohibition of the Ministry was covered by the clause in the conditions of the contract enabling the engineer to grant an extension of

time. He therefore made a declaration that the contract had not been abrogated or determined.

The Court of Appeal (the Master of the Rolls, Warrington L.J. and Scrutton L.J.) reversed the decision of Bray J. and held that the contract was at an end.

1917. Oct. 23, 25, 26. *P. O. Lawrence, K.C.* (with him *Holman Gregory, K.C.*, and *Joshua Goodland*), for the appellants. The action of the Minister of Munitions has not put an end to this contract inasmuch as it has neither frustrated the object of the contract nor made the completion thereof physically impossible or commercially impracticable. It has only suspended the carrying on of the works under the contract, and such suspension is covered by the clause empowering the engineer to grant an extension of the time for completion. In determining whether the contractors are relieved from the further performance of this contract a contract for the execution of public works of a permanent character stands on a different footing from an ordinary commercial contract or from a contract for the building of a dwelling-house for a private person, who may require to inhabit it immediately. Moreover, this contract at the time of suspension had been partly performed. This case is covered by *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (1) and falls directly within the principle of law there propounded by Earl Loreburn. The general rule is that impossibility which arises subsequently to the contract does not excuse from performance: *Paradine* v. *Jane* (2); *Atkinson* v. *Ritchie* (3); *Barker* v. *Hodgson* (4); *Spence* v. *Chodwick.* (5) In the last cited case Wightman J. states the principle as follows: "The defendant here was prevented by inevitable necessity from performing his contract. But he might have provided in his contract against the consequences of such a contingency; he has not done so, and is without excuse." The exceptions to this general rule fall under two heads: (1.) Where the impossibility does not depend upon any question of illegality; (2.) where the impossibility arises from some change in the law subsequent to the contract rendering its further

(1) [1916] 2 A. C. 397.
(2) (1647) Aleyn, 26.
(3) (1809) 10 East, 530.
(4) (1814) 3 M. & S. 267.
(5) (1847) 10 Q. B. 517, 530.

H. L. (E.) 1917

METROPOLITAN WATER BOARD v. DICK, KERR AND COMPANY.

performance illegal. The first class may be subdivided as follows:— (*a*) Where the continued existence of some specified thing is essential to the performance of the contract and the destruction or removal of that thing is caused by vis major. In that case the parties are excused from performance: *Taylor* v. *Caldwell* (1); *Appleby* v. *Myers*. (2) *Krell* v. *Henry* (3) (the Coronation case) is an extension of the principle laid down in *Taylor* v. *Caldwell* (1); but compare with that the very similar case of *Herne Bay Steam Boat Co.* v. *Hutton* (4) (the Naval Review case), where the happening of the Naval Review was declared to be not the sole basis of the contract, so that there was no total destruction of the subject-matter. (*b*) Cases relating to marine adventures where the adventure is frustrated by a delay which has occurred without the fault of either party: *Jackson* v. *Union Marine Insurance Co.* (5); *Geipel* v. *Smith* (6); *Scottish Navigation Co.* v. *W. A. Souter & Co.* (7) (*c*) Where the contract depends upon the rendering of personal services which no deputy can perform and the person to perform the services has become disabled by ill-health: *Poussard* v. *Spiers & Pond*. (8) In considering the second class, which turns upon the question of illegality, it is essential to distinguish between (*a*) cases where a permanent prohibition is imposed by Parliament and (*b*) cases where the prohibition is temporary only. Examples of (*a*) are *Baily* v. *De Crespigny* (9) and *Brewster* v. *Kitchell* (10), where it is said that Parliament repeals the covenant. Under head (*b*) fall the cases of trading with the enemy, e.g., *Esposito* v. *Bowden* (11) and *Distington Hematite Iron Co.* v. *Possehl & Co.* (12) Trading with the enemy is illegal at common law, and a declaration of war imports an absolute interdiction of all commercial intercourse or correspondence with the enemy except under licence from the Crown, and any contract running at the date of such declaration is absolutely dissolved. Those cases fall under a distinct category. But the temporary illegality may arise from a change in the law of our own country

(1) (1863) 3 B. & S. 826.
(2) (1867) L. R. 2 C. P. 651.
(3) [1903] 2 K. B. 740.
(4) [1903] 2 K. B. 683.
(5) (1874) L. R. 10 C. P. 125.
(6) (1872) L. R. 7 Q. B. 404.
(7) [1917] 1 K. B. 222.
(8) (1876) 1 Q. B. D. 410.
(9) (1869) L. R. 4 Q. B. 180.
(10) (1697) 1 Salk. 193.
(11) (1857) 7 E. & B. 763.
(12) [1916] 1 K. B. 811.

which results in the suspension or delay in the execution of a contract. There the question to be determined is whether that suspension or delay is such as to frustrate the adventure or the object of the parties in a commercial sense. If not, the contract is not dissolved. Cases of this description in which the contract has been held to be not determined are *Hadley* v. *Clarke* (1), *Beale* v. *Thompson* (2), *Andrew Millar & Co.* v. *Taylor & Co.* (3), and *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (4) This being a case of temporary illegality, the test is whether this temporary interference with the freedom of action of the parties is such as to make the contract a different contract if it has to be performed after the embargo has been taken off, not whether it has inflicted loss or hardship on the parties. A contract such as the present is not abrogated by putting an embargo on its execution even though that compulsion lasts for a considerable time.

Upjohn, K.C., Sir Ernest Pollock, K.C., Hon. F. Russell, K.C., and *Douglas Hogg, K.C.*, for the respondents, were not called upon.

The House took time for consideration.

Nov. 26. LORD FINLAY L.C. My Lords, the question in this case is whether a contract for the construction of reservoirs and waterworks between the Metropolitan Water Board, the appellants, and Messrs. Dick, Kerr & Co., Limited, the respondents, can be treated by the respondents as at an end in consequence of an Order of the Minister of Munitions that work under the contract should cease.

The action was begun by the Metropolitan Water Board by writ dated May 19, 1916, against the contractors, and the statement of claim asked for a declaration that the contract is still in existence as a binding contract and had not been determined. The defence alleges that notice from the Ministry of Munitions, dated February 21, 1916, was given in exercise of the powers conferred by the Defence of the Realm Acts and the Regulations and Orders made thereunder, and that the notice required the contractors to cease work on their contract and that they ceased work accordingly. The defence went on to allege that thereby the contract ceased to be binding.

(1) 8 T. R. 259.
(2) (1804) 4 East, 546; (1813) 1 Dow, 299.
(3) [1916] 1 K. B. 402, 410.
(4) [1916] 2 A. C. 397.

H. L. (E.) 1917

METROPOLITAN WATER BOARD v. DICK, KERR AND COMPANY.

Lord Finlay L.C.

The case was tried by Bray J., who gave judgment for the Metropolitan Water Board, holding that the notice should have been dealt with under the terms of the contract by an extension of time for the completion of the contract, and that the contract was still in existence. On appeal this decision was reversed by the Court of Appeal, consisting of the Master of the Rolls, Warrington L.J., and Scrutton L.J. The appellants by the present appeal ask that the decision of Bray J. should be restored.

The contract was one for the construction of extensive reservoirs and other works near Staines, the respondents' tender being accepted by the appellants on July 24, 1914. The decision of Bray J. in favour of the appellants was rested by him upon the 32nd condition of the contract, which is in the following terms :—

" The contractor shall complete and deliver up to the Board the whole of the works necessary to allow the Western reservoir to be filled and brought into use and shall complete the removal of all such temporary works, plant and surplus material as may in the opinion of the engineer be necessary to enable this to be done, within a period of four years from the date of the engineer's written order to commence the works and the contractor shall complete and deliver up to the Board the whole of the works comprised in this contract and shall complete the removal of all temporary works, plant and surplus material within a period of six years from the date of the engineer's written order to commence the works. The whole of the works to be delivered up complete in every respect, in a clean and perfect condition. Provided always that if by reason of any additional works or enlargements of the works (which additions or enlargements the engineer is hereby authorised to make), or for any other just cause arising with the Board or with the engineer, or in consequence of any unusual inclemency of the weather, or general or local strikes, or combination of workmen, or for want or deficiency of any orders, drawings or directions, or by reason of any difficulties, impediments, obstructions, oppositions, doubts, disputes, or differences, whatsoever and howsoever occasioned, the contractor shall, in the opinion of the engineer (whose decision shall be final), have been unduly delayed or impeded in the completion of this contract, it shall be lawful for the engineer, if he shall so think fit, to grant from time to time, and at any time or times by writing under his hand, such

extension of time either prospectively or retrospectively, and to assign such other day or days for or as for completion, as to him may seem reasonable, without thereby prejudicing or in any manner affecting the validity of the contract, or the adequacy of the contract price, or the adequacy of the sums or prices mentioned in the third schedule; and any and every such extension of time shall be deemed to be in full compensation and satisfaction for, and in respect of, any and every actual or probable loss or injury sustained or sustainable by the contractor in the premises, and shall in like manner exonerate him from any claim or demand on the part of the Board, for and in respect of the delay occasioned by the cause or causes in respect of which any and every such extension of time shall have been granted, but no further or otherwise, nor for or in respect of any delay continued beyond the time mentioned in such writing or writings respectively."

Bray J. held that this condition applied, and that the prohibition by the Minister of Munitions should have been dealt with by an extension of time under it. The Court of Appeal, on the other hand, held that the prohibition issued in consequence of the war rendered the prosecution of the works illegal for a period of indefinite duration, and must be treated as having put an end to the contract.

The date of commencement of the works was fixed by the engineer as being August 16, 1914. The war broke out on August 4, 1914, but the works under the contract proceeded. On May 10, 1915, the nature of the works was varied and the amount of payment increased by a supplemental contract of that date. In spite of difficulties occasioned by scarcity of labour and the character of the ground on which the reservoir was to be constructed the works went on and a substantial amount of work, as appears from plan 20A, had been done, when, on February 21, 1916, the work was stopped by the Minister of Munitions and the plant sold under his direction. The prohibition has not been withdrawn up to the present time.

In my opinion the decision of the Court of Appeal was right.

It is admitted that the prosecution of the works became illegal in consequence of the action of the Minister of Munitions. It became illegal on February 21, 1916, and remains illegal at the present time. This is not a case of a short and temporary stoppage, but of a prohibition in consequence of war, which has already been in

H. L. (E.) 1917

METROPOLITAN WATER BOARD v. DICK, KERR AND COMPANY.

Lord Finlay L.C.

force for the greater part of two years, and will, according to all appearances, last as long as the war itself, as it was the result of the necessity of preventing the diversion to civil purposes of labour and material required for purposes immediately connected with the war. Condition 32 provides for cases in which the contractor has, in the opinion of the engineer, been unduly delayed or impeded in the completion of his contract by any of the causes therein enumerated or by any other causes, so that an extension of time was reasonable. Condition 32 does not cover the case in which the interruption is of such a character and duration that it vitally and fundamentally changes the conditions of the contract, and could not possibly have been in the contemplation of the parties to the contract when it was made.

It was not disputed, as I understand the argument for the appellants, that in the case of a commercial contract, as for the sale of goods or agency, such a prohibition would have brought it to an end. It was sought to distinguish the present case on the ground that the contract was for the construction of works of a permanent character, which would last for a very long time, and that a delay, even of years, might be disregarded. This contention ignores the fact that, though the works when constructed may last for centuries, the process of construction was to last for six years only. It is obvious that the whole character of such a contract for construction may be revolutionized by indefinite delay, such as that which has occurred in the present case, in consequence of the prohibition.

The House is greatly obliged to Mr. P. O. Lawrence for his very able and exhaustive analysis of the authorities. I do not think it necessary to examine these authorities in detail, as the principle applicable in such cases has been often laid down and is well established. I will only refer to the judgment of the Queen's Bench delivered by Hannen J. in *Baily* v. *De Crespigny* (1), especially at pp. 185-186, and to the judgment of Rowlatt J. in *Distington Hematite Iron Co.* v. *Possehl & Co.* (2) The contract in the present case was for the completion and handing over of these works within six years from August 16, 1914. The effect of the prohibition may be that the works cannot be resumed until, at all events, the greater part of the six years has expired, and by that time all con-

(1) L. R. 4 Q. B. 180. (2) [1916] 1 K. B. 811, 814.

ditions as regards labour and materials may be absolutely different. This, in the words of Rowlatt J., would be "not to maintain the original contract, but to substitute a different contract for it." The difference of opinion in *Horlock* v. *Beal* (1) and *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (2) was not so much upon principle as in the application of the principle to the particular cases. The case of *Hadley* v. *Clarke* (3) cannot be relied upon as an authority.

In my opinion this appeal should be dismissed with costs.

LORD DUNEDIN. My Lords, I concur. The general law on the subject of what supervening event will excuse the performance of a contract has been so recently dealt with in elaborate opinions in your Lordships' House in the cases of *Horlock* (1) and *Tamplin* (2) that I think it would be useless again to review the past authorities in any detail. It is true that in *Tamplin's Case* (2) there was a narrow majority in favour of the judgment pronounced, but after a careful consideration of the opinions delivered I have come to the conclusion that there was no difference in the opinions of the majority and of the minority in the principles of law applicable to such cases, those principles having already been expressed in *Horlock's Case* (1), but that the only difference lay in their application to the facts of the case then under consideration.

My Lords, I shall content myself with one quotation from the opinion of one of the majority. Earl Loreburn points out that in all cases it must be said that there is an implied term of the contract which excuses the party, in the circumstances, from performing the contract, and then continues (4): "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." He further points out that the particular ratio decidendi in various cases is sometimes 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.

(1) [1916] 1 A. C. 486.
(2) [1916] 2 A. C. 397.
(3) 8 T. R. 259.
(4) [1916] 2 A. C. 404.

H. L. (E.) 1917

METROPOLITAN WATER BOARD v. DICK, KERR AND COMPANY.

Lord Dunedin.

Now a subsequent law may be the cause of an impossibility, whether by actually forbidding an act undertaken in the contract—which is the direct meaning of illegality—or whether by means of taking away something from the control of the party, as to which thing he has contracted to do or not to do something else. An example of the latter class may be found in the case of *Baily* v. *De Crespigny*. (1)

But to make what I may call a clean case of illegality the illegality must be permanent. The appellants here say that the illegality of working on the reservoir is only temporary, and will some day be withdrawn, and they seek to liken it to the interruption of the contract of affreightment in *Tamplin's Case* (2), which they say was held by the majority to be only temporary, or at least not proved to be permanent. I shall revert to *Tamplin's Case* (2), but I should like first to point out that I think the appellants rather mistake the effect of the force of legislation in the present case. The order pronounced under the Defence of the Realm Act not only debarred the respondents from proceeding with the contract, but also compulsorily dispersed and sold the plant. It is admitted that an interruption may be so long as to destroy the identity of the work or service, when resumed, with the work or service when interrupted. But quite apart from mere delay it seems to me that the action as to the plant prevents this contract ever being the same as it was. Express the effect by a clause. If the Water Board had, when the contract was being settled, proposed a clause which allowed them at any time during the contract to take and sell off the whole plant, to interrupt the work for a period no longer than that for which the work has actually been interrupted, and then bound the contractor to furnish himself with new plant and recommence the work, does any one suppose that Dick, Kerr & Co. or any other contractor would have accepted such a clause? And the reason why they would not have accepted it would have been that the contract when resumed would be a contract under different conditions from those which existed when the contract was begun. It may be said that it is possible that plant may be cheaper after the war. But no one knows, and the contractor is not bound to submit to an aleatory bargain to which he has not agreed. It will also be kept in mind

(1) L. R. 4 Q. B. 180. (2) [1916] 2 A. C. 397.

that the contract was a measure and value contract. The difference between the new contract and the old is quite as great as the difference between the two voyages in the case of *Jackson* v. *Union Marine Insurance Co.* (1)

I return to *Tamplin's Case* (2) to show that the views of the majority (for obviously I need not deal with those of the minority) were based upon circumstances which find no proper analogy in the circumstances here. In the first place the person who wanted the contract declared at an end was the owner. The charterer, notwithstanding what had happened, was content to go on paying the hire, and to refrain, during the period while the Government were in possession of the ship, from demanding any services from the owners. Under the contract, as Lord Parker put it (3), "The owners are not concerned in the charterers doing any specific thing beyond the payment of freight as it becomes due." That payment the charterers, as I have already said, were ready to make. The reason, no doubt, was that they had already got, or thought they would get, from the Government a larger sum of money than they had to pay to the owners. So that one view that I think ran through the opinions of the majority was this: No one was hurt by the continuance of the charter, and if the Government relinquished the ship there was no reason why the charter should not be effective for the remaining period of its duration, which might be considerable. But suppose the facts had been slightly different. Suppose the Government had taken the ship, and had said they would pay nothing—a proceeding within their powers—and then suppose that the owner had sued the charterer for the hire during the period while the Government kept the ship. What then? I may be wrong, but it seems to me it would have fallen within the lines of *Horlock* v. *Beal.* (4)

There was another ground of judgment in *Tamplin's Case* (2), and as I read it this was the real ground of Lord Parker's opinion, in which the Lord Chancellor concurred. There was a special exemption clause which contained, inter alia, "restraint of princes." The facts fell within that description, and then, said Lord Parker, you cannot have an implied condition which will contradict an

(1) L. R. 10 C. P. 125.
(2) [1916] 2 A. C. 397.
(3) [1916] 2 A. C. 426.
(4) [1916] 1 A. C. 486.

H. L. (E.) 1917

METROPOLITAN WATER BOARD v. DICK, KERR AND COMPANY.

Lord Dunedin.

expressed condition. The same argument was attempted here. The appellants appealed to s. 32, which has been already quoted. It is enough for me to say that the words " or by reason of any difficulties, impediments, obstructions, oppositions, doubts, disputes or differences whatsoever and howsoever occasioned " only deal, in my view, with more or less temporary difficulties, and do not cover a set of occurrences which would make the contract when resumed a really different contract from the contract when broken off. The argument from *Tamplin's Case* (1) therefore, in my opinion, fails in application.

On the whole matter I think that the action of the Government, which is forced on the contractor as a vis major, has by its consequences made the contract, if resumed, a work under different conditions from those of the work when interrupted. I have already pointed out the effect as to the plant, and, the contract being a measure and value contract, the whole range of prices might be different. It would in my judgment amount, if resumed, to a new contract; and as the respondents are only bound to carry out the old contract and cannot do so owing to supervenient legislation, they are entitled to succeed in their defence to this action.

LORD ATKINSON. My Lords, I concur. The facts have already been fully stated, and I abstain from repeating them. Mr. Lawrence, in opening the appeal, manfully struggled to bring this case within the decision, or supposed decision, of this House in the recent case of *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (1) Only two judgments were delivered in that case by the noble Lords who composed the majority, namely, that of Lord Loreburn and that of Lord Parker, with which latter the then Lord Chancellor concurred. It is, I think, desirable, having regard to the arguments addressed to the House on this appeal, to endeavour to ascertain what were the precise points decided in that case, and then to see how far the principles laid down are applicable to the present case. Lord Loreburn leaves one in no doubt as to what were the grounds of his decision.

At p. 403 of the report he says that an examination of the authorities confirmed him in the view that where our Courts have held

(1) [1916] 2 A. C. 397.

innocent contracting parties absolved from further performance of their promises it has been on the ground that there was an implied term in the contract which entitled them to be absolved. Sometimes it was put that the performance had become impossible and that the party concerned did not promise to perform an impossibility; sometimes that the parties contemplated a certain state of things which fell out otherwise. In most of the cases it was 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, this last-named was, at bottom, the principle upon which the Courts proceeded. It is in my opinion the true principle. It was left to the Court not to absolve but to infer from the nature of the contract and the surrounding circumstances that a condition which was not expressed was the foundation upon which the parties contracted.

On p. 404 Lord Loreburn proceeded to say that where the question arose in regard to commercial contracts, as happened in the three cases he named, the principle was the same, and the language used as to "frustration of the adventure" merely adapted it to the cases in hand; that in these three cases it was held, to use the language of Lord Blackburn, "that a delay in carrying out a charterparty, 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 an end"; that this, however, was only another way of saying that from the nature of the contract it could not be supposed the parties, as reasonable men, intended it to be binding on them under such unreasonable conditions. So far, I think, there is no substantial conflict between this judgment and the judgments of the minority as to the principle of law applicable to the case. Lord Loreburn then examines the facts, and on the following page says that if the interruption could be pronounced, in the language of Lord Blackburn, so great and long as to make it unreasonable to require the parties to go on, 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 that he would imply a condition to that effect, but that, taking into account all that had happened, he could not infer that the interrup-

H. L. (E.) 1917

METROPOLITAN WATER BOARD v. DICK, KERR AND COMPANY

Lord Atkinson.

tion either had been or would be in that case such as made it unreasonable to require the parties to go on. He added that there might be many months during which the ship would be available for commercial purposes before the five years expired. At the bottom of the page and the top of the succeeding page he says the question to be answered is: "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." It will be observed that Lord Loreburn does not say or, I think, suggest that there is any difficulty in applying the principle he lays down to a time charter, while the only reference he apparently makes to the clause in the charterparty referring to the "restraint of princes" is contained in the expression "I think they took their chance of lesser interruptions."

Lord Parker does not, I think, in his judgment differ as to the general principle. At p. 422 he says: "This principle is one of contract law, depending on some term or condition to be implied in the contract itself and not 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." At p. 425, however, he quotes the 20th condition of the charterparty, referring to restraint of princes, and says at the bottom of p. 426 that he has no doubt that the requisitioning of the steamship by His Majesty's Government was "a restraint of princes" within the meaning of that condition; and proceeds: "The parties therefore have expressly contracted that for 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 charterparty. 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." He added: "Moreover" (and it seemed to him the vital point), "the charterparty 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 impossible and delays which may not."

Lord Parker then proceeds (1) to say that it was difficult, if not impossible, to frame any condition by virtue of which the contract of the parties would be at an end without contradicting the express provisions of the contract and defeating the intention of the parties as disclosed by those provisions. He said the nearest he could get to it would be by a proviso to condition 20, which he sketched, but that even this contradicted the provisions of condition 20. He then winds up by saying that having regard to the difficulty of framing any condition which could be implied without contradicting the express terms 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 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 executory purely, he comes to the conclusion that the decision of the Court of Appeal was right. In reference to this last point it is only right to point out that in *Horlock* v. *Beal* (2) and in several cases therein cited the contract held to be at an end had been in part performed. This is the only judgment given in the case by which such vital effect is given to the provision of condition 20. I hardly think, however, that, great undoubtedly as is the weight which must always be attached to any opinion expressed by Lord Parker, it can be assumed that this House decided that the provisions of the 20th condition of the charterparty had the effect which he attributed to them. Even, however, if they had that effect, the question remains, can the provisions of condition 32 of the first agreement in the present case have a similar effect? Have the respondents contracted themselves out of all claim to be absolved from

(1) [1916] 2 A. C. 427. (2) [1916] 1 A. C. 486.

H. L. (E.) 1917

METROPOLITAN WATER BOARD v. DICK, KERR AND COMPANY.

Lord Atkinson.

the performance of their promises, no matter how prolonged the enforced suspension of their work may be, or how absolute the deprivation of their freedom of action, and have they limited themselves to the relief the engineer may, under that condition, accord to them in the shape of extending the time for completion of the work ? If so, Lord Parker's judgment might possibly apply, as the express provisions of the contract would then be inconsistent with the terms of the implied condition under which they would be relieved from the further performance of their promises. As I understood Mr. Lawrence, he contended that condition No. 32 did contain a provision covering the action of the Ministry of Munitions. It is to be found, he said, in the proviso following the clause requiring that the works are to be completed and delivered up in clean and perfect condition within six years from the date of the engineer's order to commence them. In this clause it is provided that if, in the opinion of the engineer (which is to be final), the respondents should be unduly delayed or impeded in the completion of the contract by any one of a great number of things previously enumerated, the engineer might at any time or times extend the time, and fix such other day or days for completion as to him should seem reasonable without thereby prejudicing or in any way affecting the validity of the contract or the adequacy of the contract prices, &c. The several things enumerated which may cause this undue delay are additional or enlarged works or any just cause arising with the Board or engineer, bad weather, strikes, want or deficiency of orders, drawings or directions, or any difficulties, impediments, obstructions, oppositions, doubts, disputes, or differences whatsoever or howsoever caused. Mr. Lawrence contended that the word " difficulties " used in this condition in a contract made on July 24, 1914, covered the action of the Ministry of Munitions. It is obvious that as the attempt to continue working in defiance of this order of the Ministry would be a crime for which the respondents and the members of their staff employed on the works could be imprisoned, the order did impose difficulties in the respondents' way ; but it is only necessary to read the clause to see that difficulties arising from the exercise by the Executive of their most unprecedented and arbitrary powers, not conferred on them till long after the date of the contract, could never have been within the contemplation of the parties at the time

they entered into the contract. The difficulties they referred to must have been difficulties arising in the execution of the works somewhat analogous in kind and character to those things they had enumerated, or which at least the engineer might adjudge had unduly delayed or impeded the completion of the contract. It would be absurd to leave it in the power of the engineer to decide that the removal of all the plant, coupled with the making it a crime to proceed with the works, had not unduly delayed the completion of the contract. Yet if the argument be sound that would be in his power. I am clearly of opinion, therefore, that the provisions of this condition do not apply to the action of the Ministry of Munitions or its result, and that the case must be decided as if it did not form any part in the contract.

My Lords, that being so, I have no doubt that it was the manifest intention of both parties to this contract that they should, without any default on their respective parts, be each left substantially free to exercise the rights and discharge the obligations the contract conferred and imposed upon them; that the continued existence of that freedom of action till the contract was performed must have been in their contemplation as the very foundation of it at the time they entered into it; and that to give effect to that intention a condition should by implication be read into the contract to the effect that the obligation to perform it should cease if by vis major, such as the action of the Executive Government of this country, they should be deprived to a very substantial extent of their freedom of action. Well, the respondents have been for a considerable time deprived of all freedom of action. The Executive Government, acting no doubt legally and within its powers, has for objects of State made it illegal and impossible for the respondents to do that which they promised to do. No one can tell how long it may continue to be invaded. In my opinion they are entitled to be absolved from the further performance of that promise. In addition it may well be that in this case, just as in that of *Jackson* v. *Union Marine Insurance Co.* (1), the delay may render the adventure the respondents embarked upon as different from what it would have been if completed without interruption, as was the summer voyage which the parties contemplated in that case from the winter voyage which the

(1) L. R. 10 C. P. 125.

H. L. (E.) 1917

METROPOLITAN WATER BOARD v. DICK, KERR AND COMPANY.

delay would have necessitated. The conditions after the war may be entirely changed and the work already done may be deteriorated by the delay. I think the decision of the Court of Appeal was right, therefore, and should be upheld, and this appeal be dismissed, with costs here and below.

LORD PARMOOR. My Lords, on July 24, 1914, the appellants and respondents entered into a contract for the construction of two reservoirs at Littleton, in the county of Middlesex. The contract involved the construction of large works, and the contract price for works comprised under the said contract was 673,811*l.* 15*s.* The contract was, however, framed on the principle of measure and value, and this sum only indicated the probable approximate cost. The original contract was modified by a supplemental contract on May 10, 1915. There were alterations in the works to be executed and the prices to be paid, but in all other material respects the same conditions applied in both contracts. The supplemental contract contained a proviso that "except as hereby is expressly provided nothing herein contained shall be deemed to alter, prejudice, or affect any of the terms or conditions of the principal agreement."

The respondents proceeded with the work under both contracts until February 21, 1916. On that date a letter was sent to both parties that the Minister of Munitions had found it necessary to give directions for the cessation of the work. In accordance with this letter the work ceased to be carried on, and subsequently the plant employed was largely removed to Government works on the instruction of the Ministry of Munitions. The contention of the appellants is that the Order of the Ministry did not affect the validity of the contract, and on May 19, 1916, they issued a writ claiming a declaration that the contract was still in existence as a binding contract between the parties. At the trial Bray J., holding that the delays and impediments created by the stoppage of the work were not so great as to render the completion of the contract physically impossible or commercially impracticable, and that the Order of the Ministry fell within the proviso of clause 32 of the conditions of the contract, made a declaration that the contract had not been abrogated or determined, and further granted an injunction restraining

the respondents from removing any of the plant, tools, or materials on the site at the date of the said judgment, or from receiving the proceeds either of such as had been removed, or which might thereafter be removed. This Order was discharged in the Court of Appeal, without prejudice to any question between the parties not raised by the pleadings in this action. It is against this Order that the appeal has been brought to your Lordships' House.

The question of principle involved in the consideration of this Appeal has been recently considered in your Lordships' House in the cases of *Horlock* v. *Beal* (1) and *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (2) The difficulty arises not so much in the statement of principle as in its application to particular cases. It is under this head that some difference of opinion has arisen. The question is one of contract law, and the decision in each case depends on the ascertainment of the true meaning of the bargain between the parties. If the parties have provided by apt words in the contract for their mutual rights or liabilities, in the event of the contract works being stopped, or indefinitely hindered by the operation of a subsequent law and such provision is not contrary to public policy, then it would be the duty of any Court to give effect to such provision. If, on the other hand, the contract contains no provision for such a contingency as the interference of the Legislature, then the Court must determine whether this contingency is of such a character that it can reasonably be implied to have been in thecontemplation of the parties at the date when the contract was made. Care must always be taken not to imply a condition which would be inconsistent with the expressed intention of the parties. In the present case the judgment of Bray J. largely depends on his opinion that the parties expressly provided for the contingency, which has occurred, under section 32 of the original contract. I am unable to assent to this construction. The contract is one substantially in common form, where works of this character are to be carried out in a fixed time, subject to payment on the basis of measure and value. It is usual in such a contract to authorize the engineer, at his discretion, in certain events to grant by writing under his hand such extension of time as to him may seem reasonable, without thereby prejudicing, or in any way affecting the validity of

(1) [1916] 1 A. C. 486. (2) [1916] 2 A. C. 397.

H. L. (E.) 1917

METROPOLITAN WATER BOARD v. DICK, KERR AND COMPANY.

Lord Parmoor.

the contract. In the present contract the engineer has authority to give extension of time if, in his opinion, the completion of the contract has been unduly delayed or impeded "by reason of any additional works or enlargements of the works (which additions or enlargements the engineer is hereby authorized to make), or for any other just cause arising with the Board or with the engineer, or in consequence of any unusual inclemency of the weather, or general or local strikes or combination of workmen, or for want or deficiency of any orders, drawings, or directions, or by reason of any difficulties, impediments, obstructions, oppositions, doubts, disputes, or differences, whatsoever or howsoever occasioned." This language is no doubt wide, and the general words may be large enough to include the contingency of legislative interference stopping the works or postponing their erection for an indefinite time. I think, however, that the language was used alio intuitu, and that it is not reasonable to hold that it had any reference to such a contingency, or that such a contingency was in the contemplation of the parties when framing the terms of the section. A mere extension of time at the discretion of the engineer is not in any sense an appropriate remedy for the contingency which has occurred. In my opinion neither party intended to leave the decision as to what should be done in such a contingency to the discretion of the engineer, under an ordinary extension of time clause in a works contract.

It is necessary, therefore, for your Lordships to consider what is to be implied as the intention of the parties to the bargain, having regard to the terms of the contract and the nature of the work to which the contract applies. It is not necessary to go through the terms of the contract in any detail. No special provision was called to the attention of your Lordships which would in principle differentiate this contract from an ordinary measure and value contract, in which a definite time is fixed for completion, subject to a clause allowing extension of time in certain events, at the discretion of the engineer. What is the real meaning and purport of such a contract? It is that works shall be carried out at prices fixed with reference to the then outlook for cost of labour, plant, and material, spread over a defined limit of time, which could not fail to affect materially the figures inserted by any contractor in sending in his tender. The same considerations

would affect the appellants in coming to a determination whether a tender should or should not be accepted. During the execution of such a contract a contingency arises by the intervention of the Legislature, or of a department authorized by the Legislature, which renders the further continuance of the execution of the works illegal for a substantial and indefinite time, and which causes the removal of a large portion of the plant employed to Government works or for Government purposes. I use the word "indefinite" since there is no certainty of the time of the duration of the war of which judicial cognizance can be taken. Can it be said that a risk of this kind was in the contemplation of either party at the date of the contracts? The necessary implication appears to me to be that it is a risk which no contractor would contemplate to be a risk under his contract, and which no public body controlling public funds could have regarded as a possibility affecting their liability in the absence of express provision. It is not necessary to say that the works are not physically possible, or could not practically be carried out as a business adventure, at a subsequent date. I agree that the probability of hardship to one side or the other is not a matter of material consideration, but it is quite a different matter when there is an indefinite and indeterminate liability which might impose on either party an unforeseen burden totally foreign to the ordinary incidents in a contract of this character, or which might not improbably eventuate in a loss to both parties without any compensating advantages. In my opinion the original contracts have ceased to be operative. It may well be that at some future period the various works will be executed, but it will be under a different contract based on changed considerations. All the prices will have to be fixed in reference to different conditions, and the time over which the work will be carried on will be wholly different. It is no answer that the engineer has certain powers over prices and time. These powers are incident to the original contracts, and were never intended to give the engineer a power to make new contracts binding either on the respondents or the appellants. I would desire in this connection to quote a passage from the opinion of Lord Atkinson in the *Tamplin Case* (1): "There is here involved such a substantial invasion of that freedom of both parties to exercise the

(1) [1916] 2 A. C. 422.

H. L. (E.) 1917

METROPOLITAN WATER BOARD v. DICK, KERR AND COMPANY.

Lord Parmoor.

rights and discharge the obligations secured to and imposed upon them by the charterparty, the continued existence of which must, I think, have necessarily been in their contemplation as to the foundation of their 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." This passage is applicable to a case like the present, where the continued erection of the contract works has been rendered illegal, and the freedom of both parties has been directly invaded by the operation of law.

My Lords, many cases were called to the attention of your Lordships during the hearing of the appeal, but I think it is only necessary to refer to one of these, in a case depending on illegality. I refer to the case of *Baily* v. *De Crespigny* (1), a leading case on the principles applicable, where land is taken for public purposes under a private Act of Parliament. In this case it was held that the defendant was discharged from a covenant by a subsequent Act of Parliament which compelled him to assign to a railway company, and so put it out of his power to perform the covenant on the principle that "lex non cogit ad impossibilia." I think that the reasoning contained in the judgment of Hannen J. (2) is applicable to the present case, and that the law will not enforce the fulfilment of a contract where the Legislature has introduced substantial and indefinite limitations which the parties cannot be held to have contemplated when making the contract: "There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance, and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promissor. But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens." The learned

(1) L. R. 4 Q. B. 180. (2) L. R. 4 Q. B. 185.

judge later referred to the case of *Brewster* v. *Kitchell* (1), and says (2): "The rule laid down in *Brewster* v. *Kitchell* (1) rests upon this ground, that it is not reasonable to suppose that the legislature, while altering the condition of things with reference to which the covenantor contracted, intended that he should remain liable on a covenant which the legislature itself prevented his fulfilling."

My Lords, in my opinion the appeal fails and should be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, November 26, 1917.

Solicitor for appellants: *Walter Moon.*

Solicitors for the respondents: *Linklater, Addison & Brown.*

[HOUSE OF LORDS.]

GREAT WESTERN RAILWAY COMPANY . . APPELLANTS;

AND

HELPS . . . . . RESPONDENT.

H. L. (E.)* 1917 *Nov.* 30.

Workmen's Compensation—Assessment—Earnings of Railway Porter—Tips—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., par.* 1 (*b*).

For the purpose of assessing the compensation payable under the Workmen's Compensation Act, 1906, to a railway porter who has sustained injuries by accident arising out of and in the course of his employment, gratuities or "tips" received by him from passengers whom he has assisted in the execution of his duties, where the practice of giving and receiving tips is open and notorious and is sanctioned by the railway company, are included in his earnings.

Penn v. *Spiers & Pond, Ld.* [1908] 1 K. B. 766 approved.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal affirming an award of the judge of the Bath County Court under the Workmen's Compensation Act, 1906.

* *Present:* LORD DUNEDIN, LORD ATKINSON, LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD PARMOOR.

(1) Salk. 198. (2) L. R. 4 Q. B. 187.