[IN THE COURT OF APPEAL.]

C. A.
1920
Feb. 23.
March 2, 3, 26.

RALLI BROTHERS *v.* COMPAÑIA NAVIERA SOTA Y AZNAR.

Shipping—Charterparty—Freight—Foreign Law—Conflict of Laws—Mutual Inability of Charterers and Shipowners—Liability of Charterers.

An English firm in July, 1918, chartered a Spanish steamship from the owners, who were a Spanish firm, to carry a cargo of jute from Calcutta to Barcelona at a freight of 50*l.* per ton, one half to be paid to the owners in London on the vessel sailing from Calcutta and the balance to be paid at Barcelona by the receivers of the cargo, as to one half on arrival of the steamship and the remainder concurrently with the discharge. The freight payable at Barcelona was to be paid in cash or approved bills at charterers' option at the current rate of exchange for bankers' short bills on London. The charterparty, which was made in London, was in English and on the charterers' own form, and the charterers' liability to pay freight was thereby preserved. The charterparty also contained an arbitration clause under which disputes were to be decided by commercial men in London. The steamship sailed from Calcutta and half of the freight was duly paid. She arrived at Barcelona on December 28, 1918, and a sum of money was paid in sterling by the receivers of the cargo. By a decree of the Spanish Commission of Supplies, dated July 2, 1918, confirmed by a Royal Proclamation of September 14, 1918, the freight on jute was not to exceed 875 pesetas per ton. Owing to alterations in the rate of exchange the freight reserved by the charterparty was, at the date of the arrival of the steamship at Barcelona, largely in excess of 875 pesetas per ton. The receivers of the cargo atBarcelona tendered the balance of the freight at the rate of 875 pesetas per ton but refused to pay the balance of the freight reserved by the charterparty. The Spanish owners thereupon claimed to recover the balance of the freight from the charterers in England, notwithstanding that it exceeded the freight limited by Spanish law:—

Held, that the charterparty was an English contract to be construed according to English law, but that as that part of the contract dealing with the obligation of the charterers with regard to the payment of the balance of the freight had to be performed in Spain, and as by the law of Spain the payment of freight above 875 pesetas per ton was illegal, that part of the contract which required the payment of freight in excess of 875 pesetas per ton was invalid and could not be enforced against the charterers.

Ford v. *Cotesworth* (1870) L. R. 5 Q. B. 544 and *Cunningham* v. *Dunn* (1878) 3 C. P. D. 443 followed.

Jacobs v. *Crédit Lyonnais* (1884) 12 Q. B. D. 589 considered.

Decision of Bailhache J. [1920] 1 K. B. 614 affirmed.

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APPEAL by the shipowners from a decision of Bailhache J. (1) The facts are fully stated in the report of the case in the Court below and may be sufficiently gathered from the above headnote.

R. A. Wright K.C. and *Claughton Scott* for the shipowners.

Neilson K.C. and *Clement Davies* for the charterers.

The arguments were substantially the same as those used in the Court below. The following additional authorities were cited: *Shepard* v. *De Bernales* (2); *Scott* v. *Lord Ebury* (3); *Castle* v. *Playford* (4); *Ertel Bieber & Co.* v. *Rio Tinto Co.* (5); *Weir & Co.* v. *Girvin & Co.* (6); *Rouquette* v. *Overmann* (7); *Tapley* v. *Martens* (8); *Robinson* v. *Bland* (9); Scrutton on Charterparties, 9th ed., p. 212 n.(*h*); Dicey on Conflict of Laws, 2nd ed., pp. 553, 563, 564; Foote's Private International Jurisprudence, 4th ed., pp. 358, 367, 424.

March 26. LORD STERNDALE M.R. read the following judgment: This appeal from a judgment of Bailhache J. on an award stated by a commercial umpire, raises a difficult question as to the rights of the parties to a charterparty when the performance of the charter, or part of it, is prevented by the law of the country in which the performance was to take place.

The particular question in this case is as to the amount of freight payable by the charterers to the shipowners. The charter was one for the carriage of a cargo of jute from Calcutta to Spain; the clauses as to freight were as follow: Clause 1. "That the said steamer shall with all possible speed proceed under steam to Calcutta . . . . and shall there load, in the customary manner at any safe place always afloat, as ordered by charterers or their agents a full and complete cargo of jute, which the said charterers bind themselves to

(1) [1920] 1 K. B. 614.
(2) (1811) 13 East, 565.
(3) (1867) L. R. 2 C. P. 255.
(4) (1872) L. R. 7 Ex. 98.
(5) [1918] A. C. 260.
(6) [1900] 1 Q. B. 45.
(7) (1875) L. R. 10 Q. B. 525.
(8) (1800) 8 T. R. 451.
(9) (1760) 2 Burr. 1077.

ship, not exceeding what she can reasonably stow and carry over and above her tackle . . . . and being so loaded shall therewith proceed with all possible speed, under steam, via the Cape of Good Hope to Barcelona, Valencia, Alicante, Cadiz, Pasajes, or Bilbao as ordered on signing final bills of lading, or so near thereto as she may safely get, and there deliver the same, always afloat, on being paid freight at the rate of 50*l.* per ton of 5 bales of jute." Clause 18: "Cash at the port of loading, for the expenses of which charterers are to be in no way responsible, not exceeding 2500*l.* to be advanced the master, if required by him, at the current rate of exchange for three months' documentary bills. Said advance to be a first charge against the total freight earned, and the master to so endorse on the bill of lading the amount advanced, which is to be deducted from freight due under clause 30." Then clause 25 is: "The freight, except as provided for under clause 30, to be paid at port of discharge on the unloading and right delivery of the cargo; by cash or approved bills (at charterers' option) at the current rate of exchange for bankers' short bills on London." And clause 30 is: "On receipt of telegraphic advice of steamer's sailing from Calcutta charterers undertake to pay in London to owners or their agents in cash without discount, one half of the total freight earned less any disbursements under clause 18. Such payment to be a first charge against the total freight earned and the master to so endorse on the bill of lading the amount advanced, which is to be deducted from freight due on the vessel's arrival at discharging port. The balance of the freight to be paid at the port of discharge by the receivers of the cargo, one half on the arrival of the vessel and the remainder concurrent with discharge." There was also an exception clause, containing amongst other exceptions, that of restraint of princes. There was no cessor clause, although clause 30 provided that the balance of freight was to be collected from the receivers of the cargo, the charterers still remained liable in case of non-payment by the receivers. The charter was on the charterers' usual form and was made in London between the charterers and a firm of Sotar & Aznar

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by telegraphic authority and as agents for the owners, a Spanish company called the Compañia Naviera Sota y Aznar. I have no doubt that it was an English charter and governed by English law.

The umpire has found as a fact that in September, 1918, there came into force in Spain a decree having the force of law fixing the maximum freights payable on jute imported into Spain at 875 pesetas per ton. It appears from the documents produced to us that persons infringing this decree made themselves liable to penalties, the result being, in my opinion, that it became illegal in Spain to pay or receive a higher freight than the maximum fixed by the decree. Messrs. Ralli Bros. had sold the cargo to a firm of Godo & Co. at a price not stated as "c.i.f.," but the invoice shows that the second half of the freight was to be paid as part of the contract price per ton. We have however nothing to do with the rights existing between the charterers and Godo & Co. When the vessel arrived the receivers tendered freight to the amount which they considered correct at the rate of 875 pesetas a ton, but the shipowners refused to deliver the cargo except upon payment of the charter rate of 50*l.* a ton. Certain litigation, which it is not necessary to discuss, took place in Spain, and eventually the rights of the shipowners and charterers upon the contract have to be decided upon the case stated by the umpire.

The most important question is as to the obligation imposed upon the charterers in respect of the payment of freight. It is contended by the shipowners that it is an absolute obligation to pay 50*l.* per ton, and that the subsequent clauses as to payment in Spain are only instructions not altering that obligation. They therefore contend that that part of the contract may be performed in England and that the charterers are therefore liable. I am not sure that, if this were the obligation, the contention would be right. The shipowners are a Spanish company and a debtor must seek his creditor and pay him in his own country. Sota & Aznar, the firm in London, are not the creditors, and have so signed

the charter as to prevent their having rights or liabilities under it.

But I do not think that this contention correctly states the charterers' obligation. I think the clauses as to place of payment constitute part of the obligation to pay, and are not merely instructions. The contract and obligation therefore are to pay on delivery in Spain in cash, that is, Spanish currency, or approved bills at the charterers' option. The simultaneous acts of delivery and payment are both to be performed in Spain, and the shipowners are a Spanish company. As I have shown, it was illegal in Spain to pay or receive more freight for imported jute than 875 pesetas a ton, and therefore the performance of the contract was illegal by the law of the place of its performance. In my opinion the law is correctly stated by Professor Dicey in his work on the Conflicts of Laws, 2nd ed., at p. 553, where he says: "A contract . . . . is, in general, invalid in so far as . . . . the performance of it is unlawful by the law of the country where the contract is to be performed. . . . . "

I think this is in accordance with the cases of *Ford* v. *Cotesworth* (1) and *Cunningham* v. *Dunn*. (2) These cases have been criticised, notably in Carver on Carriage by Sea, § 129, but they are still authorities, and support the view which I have expressed. It was argued by the appellants that they are inconsistent with the cases of *Barker* v. *Hodgson* (3) and *Sjoerds* v. *Luscombe* (4), and that these last cases are the authorities applicable to this case. When those cases were decided the doctrine that a person who contracted absolutely to perform a contract must do so whatever the difficulties, as laid down in *Paradine* v. *Jane* (5), had not been qualified, as has been the case in later authorities. They may be reconciled with the later cases I have cited in the manner suggested in Scrutton on Charterparties, 9th ed., at p. 327; but, if there be a difference between them and *Ford* v.

(1) L. R. 5 Q. B. 544.
(2) 3 C. P. D. 443.
(3) (1814) 3 M. & S. 267, 270.
(4) (1812) 16 East, 201.
(5) (1647) Aleyn, 26.

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Cotesworth (1) and *Cunningham* v. *Dunn* (2), I prefer to follow the later authorities.

The appellants also relied upon the case of *Jacobs* v. *Crédit Lyonnais* (3), and the headnote at first sight seems to bear out their contention. I do not however think the headnote is correct. The procuring or shipment of the cargo of esparto grass was not illegal, but, by reason of insurrection, and consequent Government prohibitions had become difficult and perhaps impossible. There was no clause in the contract applicable to such a state of things, but it would have amounted in French law to force majeure, and it was attempted to introduce that exception of force majeure into the contract because it had to be performed in France. That is not at all the question which is raised here. That case is examined and criticized by Professor Dicey in Conflict of Laws, 2nd ed., at p. 554.

I think on principle and on authority that the charterers are not bound to perform that part of the contract, that is, the payment of freight above the maximum allowed by Spanish law, which has become illegal by the law of the place of its performance. We have not before us, and I do not decide, any question as to what the result of this decision may be upon the rights of the parties as to delivery and disposal of the cargo. I do not think it necessary to express any opinion as to whether the exception of restraint of princes applies to the obligations of the charterers as well as to those of the shipowners.

In my opinion the decision of Bailhache J. was right, and the appeal must be dismissed with costs.

WARRINGTON L.J. read the following judgment: This is an appeal from an order of Bailhache J. on an award stated in the form of a special case by a commercial umpire in an arbitration between shipowners and charterers. The question in the arbitration was whether the owners could require the charterers to pay the full amount of the unpaid balance of the chartered freight or only such sum, if any, as together

(1) L. R. 5 Q. B. 544. (2) 3 C. P. D. 443.
(3) 12 Q. B. D. 589.

with the sums already paid would make up the maximum freight by Spanish law in force at the time the freight was payable, allowed to be paid or received in respect of a cargo of jute consigned, as the cargo in the present case was, to Spanish consignees at a Spanish port. Bailhache J. has on this question adopted the contention of the charterers that they cannot be called upon to pay any larger amount or freight than that allowed by the Spanish law. The owners appeal.

They contend that the contract is an English contract to be construed and to have effect according to English law; that according to its true construction it contains an absolute obligation on the part of the charterers to pay the freight fixed by the contract; and that although it contemplates the payment by the receivers of the cargo in Spain and it may be unlawful under Spanish law for them to pay it, this does not affect the obligation of the charterers.

The charterers on the other hand contend that though the contract as a whole is an English one the performance of it in the material respect was to take place in Spain; that the only obligation as to the balance of the freight was that it should be paid in Spain by the Spanish receivers of the cargo; that such an obligation ought to be held to be subject to an implied condition that such payment should not be illegal by Spanish law, and that if it is they cannot be required to pay.

The first question I think is what as regards payment of the freight is the true construction of the contract.

The contract is one of charterparty dated July 3, 1918, made between a Spanish company, owners of the steamship *Eretza Mendi*, and Messrs. Ralli Bros., an English firm carrying on business in London. It is partly written and partly printed, the form used being one of Messrs. Ralli Bros. ordinary forms with certain special variations. It contains an arbitration clause providing for an arbitration in London and for making the submission a rule of the High Court of Justice in England. It is clear I think that the parties are right in treating the contract as a whole as an English contract.

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The contract provides that the steamer, then at sea, is to proceed to Calcutta, there load a cargo of jute, which the charterers bind themselves to ship, and being so loaded is to proceed to Barcelona or another of certain named ports in Spain and there deliver the same on being paid freight at a specified rate per ton. There is no cessor clause as regards liability for freight. There are two clauses dealing with the payment of freight—clauses 25 and 30. Clause 25 is as follows: "The freight, except as provided for under clause 30, to be paid at port of discharge on the unloading and right delivery of the cargo by cash or approved bills (at charterers' option), at the current rate of exchange for bankers' short bills on London," and clause 30: "On receipt of telegraphic advice of steamer's sailing from Calcutta charterers undertake to pay in London to owners or their agents in cash without discount, one half of the total freight earned less any disbursements under clause 18. . . . . The balance of the freight to be paid at the port of discharge by the receivers of the cargo, one half on the arrival of the vessel and the remainder concurrent with discharge."

The true effect of these provisions as regards payment of freight is I think this. There is no unqualified obligation on the part of the charterers to pay the freight; the introductory part of the contract contains no express obligation; "on being paid freight" which qualifies the owners' obligation to discharge the cargo means I think "on being paid in accordance with the provisions hereinafter contained." The express obligation on the charterers is found in clauses 25 and 30. We are not concerned with the first half. This was duly paid. The second half is to be paid by the receivers at the port of discharge in Spain and in Spanish money. The charterers in effect contract for the payment of the balance of the freight by Spaniards in Spain. I will consider the position of the charterers in the event of a failure on the part of the receivers, justified by Spanish law, to make the payment bargained for, after I have stated the remaining material facts.

The charter was entered into by Ralli Bros. for the purposes of a contract for sale of jute made by them with Godo & Co. of Barcelona. The ship arrived at Barcelona on December 28, 1918, and was ready then to discharge her cargo.

Questions then arose as to the amount of freight to be paid, Godo & Co. insisting that they could not be called upon to pay more than the legal rate fixed by Spanish law. There was then some litigation in the Spanish Courts into the particulars of which I do not propose to enter and this arbitration was commenced in London.

The umpire finds that in September, 1918, there came into force in Spain a decree having the force of law fixing the maximum freight on jute at 875 pesetas per ton of 1000 kilogrammes. It appears by the translation of one of the documents annexed to the award that infractions of this decree render the infringer liable to legal penalties.

I think, therefore, that it is sufficiently made out that it would be illegal for a person subject to the law of Spain either to pay or to receive more than the maximum freight and such payment or receipt would render him liable to penalties.

There remains to be considered the legal position arising from the construction which, I think, ought to be placed on the contract and from the facts.

Professor Dicey at p. 553 of the 2nd ed. of his Conflict of Laws makes the following statement accepted by both parties in the present case as an accurate statement of the law. "A Contract (whether lawful by its proper law or not) is, in general, invalid in so far as (1.) the performance of it is unlawful by the law of the country where the contract is to be performed, ..." and at p. 563 "When the contract is made in one country, and is to be performed either wholly or partly in another, then the proper law of the contract, especially as to the mode of performance, may be presumed to be the law of the country where the performance is to take place." This last statement is, in substance, identical with a passage in the judgment of Lord Esher in *Chatenay* v. *Brazilian Submarine Telegraph Co.* (1)

(1) [1891] 1 Q. B. 79, 83.

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In the present case I am of opinion that the contract is one the performance of which so far as the payment of the second half of the freight is concerned is to take place in Spain. It is true the obligation with which we are dealing is that of the charterers, but what they promise is that payment shall be made by Spaniards in Spain, and it is only in case of default by those who are to make the payment that their own liability arises. On the facts the default of these persons is justified by the law of Spain where the performance of such a contract is unlawful and the contract would be invalid.

Does this position affect the liability of the English charterers? I think it does. It must be remembered that not only is it illegal in Spain for the Spanish receivers to pay more than the legal rate of freight but it is unlawful for the owners who are also Spaniards to receive it. I think it must be held that it was an implied condition of the obligation of the charterers that the contemplated payment by Spaniards to Spaniards in Spain should not be illegal by the law of that country.

Had the performance of the contract so far as it was to be performed in England become illegal by English law performance would, in my opinion, have been excused, and on the ground that the contract was subject to an implied condition that its performance should not be illegal: see *Metropolitan Water Board* v. *Dick, Kerr & Co.* (1) and many other cases to which it is unnecessary to refer.

That a similar consequence will result from a joint inability of performance arising from illegality by foreign law where that law governs the performance appears, I think, from the decision in *Cunningham* v. *Dunn.* (2)

But it is said that there are authorities which lay down the proposition that if a man contracts absolutely to perform a certain act he is not excused by the fact that such an act is illegal by the law of the place where it is to be performed. A type of such cases is *Barker* v. *Hodgson.* (3) It was conceded by Lord Ellenborough in that case that had performance

(1) [1918] A. C. 119. (2) 3 C. P. D. 443.
(3) 3 M. & S. 267.

been rendered unlawful by the Government of this country both parties would have been excused, but he held that the same principle did not apply where the illegality arose from the law of a foreign country. I am not sure that this and similar cases would have been decided in the same way at the present time owing to the recent development of the law in reference to implied conditions, but however this may be it does not, in my opinion, govern the present case, in which, according to my view of the construction of the contract, there is no absolute obligation on the part of the charterers that they will themselves pay but only that payment shall be made in a particular way—namely, by foreigners at a foreign port.

It was contended that *Jacobs* v. *Crédit Lyonnais* (1) was an authority contrary to the view I have expressed. I think the criticism of Professor Dicey on the suggestion contained in the headnote to that case is well founded: see Conflict of Laws, 2nd ed., p. 554. The performance of the contract itself was not illegal by the foreign law. It was sought to be excused by saying that the collection of the subject-matter was prohibited, that such prohibition would by French law amount to "force majeure" and that "force majeure" would by that law be a good defence. It was this contention which was rejected by the Court.

On the whole I come to the conclusion that in the present case the owners could not in this country maintain an action for a larger amount of freight than that allowed by Spanish law and that the judgment of Bailhache J. must be affirmed, the point of law raised by the special case being there determined in favour of the charterers.

An argument was founded on the exception of restraint of princes. It is unnecessary to decide whether this exception was intended to be mutual and I prefer to express no opinion on the point.

I take it that this judgment decides nothing except that the owners cannot recover more than the freight fixed by Spanish law. How this may affect the legal relations of the

(1) 12 Q. B. D. 589.

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parties in other respects is not before us and I express no opinion about it. I think the appeal fails and must be dismissed.

SCRUTTON L.J. read the following judgment: This is an appeal from the judgment of Bailhache J. on a special case stated by a commercial umpire and raises a question of general importance as to the effect on a contract to be performed in a foreign country of illegality by the law of the place in which it was to be performed.

The question arises as to the freight payable by English charterers to Spanish shipowners for the transit of jute from Calcutta to Spain on a Spanish ship. The umpire finds that in September, 1918, there came into force in Spain a decree having the force of law fixing the maximum freight on jute (imported into Spain) at 875 pesetas per ton. He adds certain exhibits from which it appears that this decree was part of a system for keeping down the price of goods essential for national welfare by, amongst other means, fixing the freight on goods coming to Spain. And the exhibits, together with the full text of that of November 11, 1916, with which we were furnished, show that penal consequences follow infractions of these laws.

It appears from the special case that on July 2, 1918, Messrs. Ralli Bros. sold to Messrs. Godo & Co., of Barcelona, 28,000 bales of jute at various prices from 118*l.* 10*s.* to 105*l.* per ton, to be shipped by the steamer *Eretza Mendi* from Calcutta to Barcelona. Ralli Bros. were to pay half the freight at Calcutta, Godo & Co. to pay the other half on arrival at Barcelona. The contract document is obscure but the invoice shows that the second half freight was to be paid on account of and as part of the contract price per ton. The *Eretza Mendi* was a Spanish steamer owned by Compañia Naviera Sota y Aznar, a Spanish company with its head office at Bilbao in Spain. Its owners had, on July 3, 1918, chartered the ship to Messrs. Ralli Bros. to load at Calcutta a full cargo of jute, and proceed to Spanish ports as ordered and there deliver the same on being paid freight at the rate of 50*l.*

per ton. Half the freight was to be paid by charterers in London on receipt of telegraphic advice of sailing from Calcutta. The balance of the freight to be paid at the port of discharge by the receivers of the cargo, one half on arrival of the vessel and the remainder concurrent with discharge. The half freight payable at port of discharge was to be paid by cash or approved bills at charterers' option. This half, the freight in question, was payable to Spanish shipowners resident in Spain, for the carriage to and delivery of goods in Spain by a Spanish ship, in Spanish money at a Spanish port of discharge.

On arrival the receivers alleged that a maximum rate of freight for such goods was fixed by Spanish law, and that they could not legally pay more. They paid or tendered what they alleged to be the right amount of freight at 875 pesetas per ton, the maximum freight fixed by Spanish law. The umpire finds that on their own basis, having regard to the rate of exchange, they tendered too little. Complicated proceedings followed in the Spanish Courts. In April, 1919, 23,084 bales had been delivered by the ship, and 6274 bales were still on board. But I understand these proceedings were not brought to ascertain what was the result, if freight was to be paid at 875 pesetas a ton, but to test the claim by the Spanish shipowners that they were entitled to be paid by the English charterer's freight at the rate of 50*l.* per ton, without any regard to the Spanish law.

I accept the contention of the shipowners that the charterers remain liable for the freight, in spite of the provision that half of it is to be paid by the receivers.

But I think they remain liable to pay it in Spanish currency at the Spanish port of discharge to a Spanish company resident in Spain. To pay freight in Spain to a Spaniard for goods to be discharged in Spain at a rate in excess of the maximum freight fixed by Spanish law for the carriage of such goods is illegal by the law of Spain. What then is the effect on the contract of illegality by the law of the place where it is to be performed, such law not being British law?

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Scrutton L.J.

In my opinion the law is correctly stated by Professor Dicey in Conflict of Laws, 2nd ed., p. 553, where he says: "A contract . . . . is, in general, invalid in so far as . . . . the performance of it is unlawful by the law of the country where the contract is to be performed"—and I reserve liberty to consider whether it is any longer an exception to this proposition that this country will not consider the fact that the contract is obnoxious only to the revenue laws of the foreign country where it is to be performed as an obstacle to enforcing it in the English Courts. The early authorities on this point require reconsideration, in view of the obligations of international comity as now understood.

The argument addressed to us was that illegality by foreign law was only impossibility in fact, which the parties might have provided against by their contract, and for which they must be liable, if they had not expressly relieved themselves from liability. This is the old doctrine of *Paradine* v. *Jane* (1): "When the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." It was emphasized by Lord Ellenborough in *Atkinson* v. *Ritchie* (2), where he said: "No exception (of a private nature at least) which is not contained in the contract itself, can be engrafted upon it by implication, as an excuse for its non-performance." And Lord Bowen as late as 1884 in the case of *Jacobs* v. *Crédit Lyonnais* (3) cited Lord Ellenborough's approval of *Paradine* v. *Jane* (1) with approval. But the numerous cases, of which *Metropolitan Water Board* v. *Dick, Kerr & Co.* (4) is a recent example, most of which are cited in McCardie J.'s exhaustive judgment in *Blackburn Bobbin Co.* v. *Allen & Sons* (5) have made a serious breach in the ancient proposition. It is now quite common for exceptions, or exemptions from liability to be grafted by implication on contracts, if the

(1) Aleyn, 26, 27.
(2) (1809) 10 East, 530, 533.
(3) 12 Q. B. D. 589.
(4) [1919] A. C. 119.
(5) [1918] 1 K. B. 540, 546.

parties by necessary implication must have treated the continued existence of a specified state of things as essential to liability on the express terms of the contract. If I am asked whether the true intent of the parties is that one has undertaken to do an act though it is illegal by the law of the place in which the act is to be done, and though that law is the law of his own country; or whether their true intent was that the doing of that act is subject to the implied condition that it shall be legal for him to do the act in the place where it has to be done, I have no hesitation in choosing the second alternative. "I will do it provided I can legally do so" seems to me infinitely preferable to and more likely than "I will do it, though it is illegal."

Great reliance was placed by the appellants on the case of *Jacobs* v. *Crédit Lyonnais*. (1) The headnote in that case speaks of "the prohibition by the constituted authorities of the export of esparto from Algeria." I cannot find any authority for this in the case, which only speaks of difficulty from insurrection and Government commands in collecting and transporting cargo to the port of loading. No express exception covered this, and the attempt in the case was to introduce "force majeure," which would be a defence by the French law, into the English contract. If it had been illegal to export esparto from Algeria the question in this case would have arisen. In *Blight* v. *Page* (2) a ship was chartered with fixed lay days to proceed to Libau and load barley. On her arrival there the Russian Government had prohibited the export of barley. Lord Kenyon held the charterer liable for freight, the foreign illegality being no defence to an action for damages. This was followed in *Barker* v. *Hodgson* (3), where a charterer who had undertaken to load at Gibraltar in fixed days and who was prevented from doing so by prohibition to load due to plague was held liable on the same principle: "if he was unable to do the thing, is he not answerable for it upon his covenant?" In sharp

(1) 12 Q. B. D. 589. (2) (1801) 3 Bos. & P. 295n.
(3) 3 M. & S. 267, 270.

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contrast with these fixed days cases is the decision in *Ford* v. *Cotesworth.* (1) That was a charter to discharge at Callao, no fixed time being mentioned and the law implying a reasonable time. Discharge was prevented for a considerable period by prohibition of landing due to the fear of the arrival of the Spanish Fleet. After a long time discharge was finished. When that case was decided, the interpretation of reasonable time as a reasonable time under the existing circumstances, and not the normal time of discharge in normal circumstances, had not been explained as it subsequently was by the House of Lords in *Hick* v. *Raymond* (2) and *Hulthen* v. *Stewart & Co.* (3) Lord Blackburn in giving the judgment of the Queen's Bench seems to accept the position that reasonable time means normal time, and that the party prevented from performing his contract by an unforeseen circumstance beyond his control would be liable, but distinguishes the case where the act not done is one in which both parties should concur, and which neither can perform, in which case he says that the obligation on each is to use reasonable diligence, and either is excused by events beyond his control. *Ford* v. *Cotesworth* (1) would now, under the House of Lords decisions, be decided as a matter of course in favour of the party sued—for the foreign prohibition would be an existing circumstance to be taken into account in fixing the reasonable time in which the act omitted was by implication to be done. Such reasonable time would not now be construed as normal time under normal conditions. In the Exchequer Chamber the case was again put on reasonable time, as distinguished from fixed time, and the ground that a cause of delay affecting both parties must be considered in fixing reasonable time. In *Cunningham* v. *Dunn* (4) the ship was to proceed to Malta and load dead weight, which both parties knew would be military stores, and then proceed to a Spanish port to load fruit. On arrival at Valencia it was found that the law of Spain did not allow cargo to be loaded on a ship which had

(1) (1868) L. R. 4 Q. B. 127; L. R. 5 Q. B. 544.
(2) [1893] A. C. 22.
(3) [1903] A. C. 389.
(4) 3 C. P. D. 443.

military stores on board, and when it was found that permission could not be obtained the vessel sailed away. The charterer sued her, and the Court of Appeal held that both parties being prevented by superior power neither was liable, citing *Ford* v. *Cotesworth*. (1) The late Mr. Carver forcibly criticises these two cases on the ground that in neither was there really joint disability, but takes the view, in which I concur, that they are both supportable on other grounds, which I take to be that in *Ford* v. *Cotesworth* (1), a reasonable time case, the time must be judged by the then existing circumstances, and that in *Cunningham* v. *Dunn* (2), the parties must be taken to have contracted on the basis that it should be legally possible to load that ship. At the time the two cases were distinguished from *Barker* v. *Hodgson* (3) and other fixed lay day cases, on the ground partly of no fixed time partly on joint inability. It may be possible to put the earlier cases on the ground that a contract to load in fixed days, unless prevented by specified causes, excludes implied causes such as foreign illegality. An instance of this class of case is *Braemount Steamship Co.* v. *Andrew Weir & Co.* (4), where a clause excusing payment of hire in certain named events was not extended to an unnamed event, strikes, which prevented the vessel being profitably used, though "strikes" were included in an exception clause. But in my opinion at the present day, in the absence of very special circumstances, cases which decide that a contracting party who has undertaken to do something in a foreign country is not relieved from his obligation by the fact that such an act is, or becomes, illegal in that foreign country are wrongly decided; and this is the true view to be taken of early cases like *Barker* v. *Hodgson* (3), decided before the Courts had developed the doctrine of continued validity of contracts being dependent impliedly on the existence or continuance of certain states of fact. Bailhache J. treats the case as one of a joint act to be performed by both parties, paying and receiving a fixed amount of freight, in a country where it is illegal to pay or

(1) L. R. 4 Q. B. 127; L. R. 5 Q. B. 544.
(2) 3 C. P. D. 443.
(3) 3 M. & S. 267.
(4) (1910) 15 Com. Cas. 101.

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receive such an amount; and such a joint act prevented by illegality as being within the principle of *Ford* v. *Cotesworth* (1) and *Cunningham* v. *Dunn* (2), which are binding on him. In view of the fact that the recent decisions of the House of Lords would require or enable the results of those decisions to be justified in quite a different way, I should prefer to state the ground of my decision more broadly and to rest it on the ground that where a contract requires an act to be done in a foreign country, it is, in the absence of very special circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that country. This country should not in my opinion assist or sanction the breach of the laws of other independent States. Bailhache J. has arrived at the same result by holding that if there is a contract in spite of its illegality in the place of performance, the charterer is protected by the exception of restraint of princes, rejecting the argument that in this charter the exception clause only protects the shipowner. As the view I have already taken results in the dismissal of the appeal, I prefer to express no opinion on this point. But I may say that as in my experience most charters at the present day avoid the difficulty by using the words "mutually excepted," it would be well in future charters to make clear the intention that the exceptions shall protect both parties.

I understand our decision only to settle the point whether the Spanish shipowner can claim freight from the charterer at the rate of 50*l.* per ton in spite of the law of Spain, and to hold that he cannot. What freight he can claim, in view of the actual facts which are not fully before us, we do not decide.

The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for shipowners: *Wm. A. Crump & Son.*

Solicitors for charterers: *Pritchard & Sons, for Andrew M. Jackson & Co., Hull.*

W. I. C.

(1) L. R. 4 B. B. 127; L. R. 5 Q. B. 544.

(2) 3 C. P. D. 443.