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*May 8.
*June 17.

CANADIAN GOVERNMENT MERCHANT MARINE, LIMITED (DEFENDANT) } APPELLANT;

AND

CANADIAN TRADING COMPANY (PLAINTIFF) } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Contract—Affreightment—Ships named under construction—Delay in—completion—Impossibility of performance—Right of shipper to damages—Whether condition as to completion implied—Express condition as to continuance of service.

The respondent, in March, 1920, entered into two contracts of affreightment with the appellant for loading with timber two named ships and carrying it from Vancouver to Australia, the shipments to be made in early April and in April or May respectively. The ships were, to the knowledge of the respondent, under construction for the appellant at the time of the agreements. The contracts contained the following clause: "This contract * * * is entered into conditional upon the continuance of the steamship company's service and the sailings of its steamers between the ports named therein." Owing, apparently, to a dispute between the ship-builders and the appellant a delay occurred in the completion and delivery of the ships, which were not ready to sail in the named months. The respondent cancelled the contracts of affreightment and sued to recover damages.

Held, that the respondent was entitled to succeed. The above quoted provision covers the possibility of the abandonment of the appellant company's undertaking and the complete cessation of its service "between the ports named" and does not cover a temporary suspension of sailing not caused by either of the contingencies mentioned in the clause. Moreover, the principle of *Taylor* v. *Caldwell* (3 B. & S. 826), as to impossibility of performance is not applicable to this case; the contracts cannot be held to be subject to an implied condition excusing performance by the appellant if the ships were not fit for sailing during the months specified through no fault of the appellant.

Judgment of the Court of Appeal ([1922] 1 W.W.R. 662) affirmed.

*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

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CANADIAN GOVERNMENT MERCHANT MARINE, LTD. v. CANADIAN TRADING CO.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, Gregory J., and maintaining the respondent's action for damages for breach of two contracts of affreightment.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgments now reported.

D. L. McCarthy K.C. for the appellant.—The contracts sued upon were not absolute, in the sense of binding the appellant to produce the named ships in any event, but the obligations of the appellant were expressly made conditional upon the actual sailing of the contract ships.

The appellant's obligations under the contracts were subject to an implied condition, that if without any default on the part of the appellant, the contract ships were not in existence when the date arrived for the performance of the contracts, then the appellant was to be excused from performance. *Taylor* v. *Caldwell* (2); *Roche* v. *Johnson* (3); *Howell* v. *Coupland* (4); *Kerrigan* v. *Harrison* (5); *Bank Line Limited* v. *Arthur Capel & Co.* (6).

E. P. Davis K.C. for the respondent.—The appellant was not excused from performance by the express conditions of the contracts; *Elderslie Steamship Co.* v. *Borthwick* (7).

No condition should be implied in the contracts relieving the appellant from responsibility for not performing the contracts. *Baily* v. *De Crespigny* (8); *Krell* v. *Henry* (9); *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (10).

(1) [1922] 1 W.W.R. 662.
(2) [1863] 3 B. & S. 826.
(3) [1916] 53 Can. S.C.R. 18.
(4) [1876] 1 Q.B.D. 258.
(5) [1921] 62 Can. S.C.R. 374.
(6) [1919] A.C. 435.
(7) [1905] A.C. 93.
(8) [1869] L.R. 4 Q.B. 180.
(9) [1903] 2 K.B. 740.
(10) [1916] 2 A.C. 397.

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Idington J.

IDINGTON J.—The respondent sued to recover damages for breaches of two contracts which were respectively made on the 19th and 24th of March, 1920, by the appellant to carry lumber from Vancouver to Australia of which that quantity named in the earlier contract was to be received early in April of said year, and that in the later contract was to be received in April or May of same year.

The respondent incurred considerable preparatory expense for the purpose of performing, if permitted, its part of the contract, by assembling the lumber to be re-loaded, and lost part of a bargain it had made for the sale and delivery of said lumber in Australia, but the appellant failed to produce the vessels named, or either of them, to receive the said lumber.

The defence set up is that the vessels were not finished in time and that the respondent knew when these contracts were entered into that they had not been quite finished.

It relies on the following clause in each of the contracts:

> This contract is not transferable and is entered into conditional upon the continuance of the steamship company's service and the sailing of its steamers between the ports named herein. If, at any time, in the judgment of the steamship company or its authorized agents, conditions of war or hostilities, actual or threatened, are such as to make it unsafe or imprudent for its vessels to sail, or if the vessels of the company shall be taken, sold, or chartered for the use of any Government, or in the event of loss of, or damage to, any of the vessels of the company, or vessels chartered by them, resulting from actions of an enemy, perils of the sea, or other cause, the steamship company may discontinue or curtail its service; and in that event the steamship company shall be relieved from any liability hereunder, except that if its service be only curtailed the shipper shall be entitled to the carriage of a proportionate part of this contract.

It contends that under the first sentence I quote it was, under the circumstance, discharged from all liability.

I cannot so construe the said conditions, nor can I read the first sentence as at all intended to excuse the appellant unless the failure to produce either of the vessels named was the result of its having fallen within some one or other of the conditions set forth in the second sentence above quoted, which is not pretended to have been the case.

On the contrary, the only excuse given at the trial was the failure, through a petty squabble between the contractor who had the contract and those who had let the contract to him, about something in regard to which he ultimately yielded.

A further pretence is set up that a strike, or threatened strike, was to blame in part for the delay.

Resting upon this failure of the contractor the appellant invokes the doctrine of impossibility upon which the case of *Taylor* v. *Caldwell* (1) was decided.

I do not think that can be made applicable herein unless we are to so extend the operation of the doctrine as to render almost any and every conceivable contract of little value.

And especially so does that appear to me to be the case when each of the contracts here does absolutely and imperatively provide the implied undertaking on the part of said appellant that unless upon the happening of any of the said events named the vessel named would be available at the time named. And yet at the same time that it provides for its protection the conditions above set forth, it fails to anticipate the possibility of so common a condition of things as a strike against which it is usual to provide if such protection desired.

The appeal, I think, fails and should be dismissed with costs.

(1) 3 B. & S. 826, at p. 833.

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Idington J.

But I see the Chief Justice and Mr. Justice Galliher seem to think assessment of damages needed, yet the formal judgment indicates the contrary.

If any error that had better be spoken to.

DUFF J.—I think the contention of the respondent company as to the construction of the contract must be given effect to. It is a commercial contract. Any plain man reading the second paragraph would read the first and second sentences together and treat the first as subject to the qualifications contained in the second. The distinction between constitutive conditions and resolutory conditions upon which the appellant relies is sadly out of place here. In a practical business sense, if the sweeping scope which the appellant gives to the first sentence is conceded, then the second sentence, or nearly the whole of it, is useless and out of place. In such circumstances it is legitimate to restrict the generality of the first sentence by reading the two together. And it is sufficient to reach the conclusion that such may be the proper construction of the document. An ambiguous document is no protection, as Lord Macnaghten said. *See Nelson* v. *Nelson* (1).

The second ground of appeal relied upon is that the principle of *Taylor* v. *Caldwell* (2), and analogous cases applies and that in conformity with this principle the contracts should have been held to be subject to an implied condition that the ships should be in existence and fit for sailing at the time when the date of sailing arrived and if that fail through no fault of the appellants, the appellants were to be excused from performance.

(1) [1908] A.C. 16 at p. 20.

(2) 3 B. & S. 826.

The principle of *Taylor* v. *Caldwell* (1) has unquestionably been extended to cases in which parties having entered into a contract in terms unqualified it is found when the time for performance arrives, that a state of things contemplated by both parties as essential to performance according to the true intent of both of them fails to exist. *Krell* v. *Heney* (2); *Chandler* v. *Webster* (3). For the purpose of deciding whether a particular case falls within the principle you must consider the nature of the contract and the circumstances in which it was made in order to see from the nature of the contract whether the parties must have made their bargain on the footing that a particular thing or state of facts should be in existence when the time for performance should occur. *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (4). And if reasonable persons situated as the parties were must have agreed that the promissor's contractual obligations should come to an end if that state of circumstances should not exist then a term to that effect may be implied. *Dahl* v. *Nelson* (5). But it is most important to remember that no such term should be implied when it is possible to hold that reasonable men could have contemplated the taking the risk of the circumstances being what they in fact proved to be when the time for performance arrived. *Scottish Navigation Co.* v. *Souter* (6).

The doctrine of English law is that generally a promissor except to the extent to which his promise is qualified warrants his ability to perform it and this notwithstanding he may thereby make himself answerable for the conduct of other persons.

(1) 3 B. & S. 826.
(2) [1903[2 K. B. 740.
(3) [1904] 1 K.B. 493.
(4) [1916] 2 A.C. 397.
(5) [1880] 6 A.C. 38 at p. 59.
(6) [1917] 1 K.B. 222, at p. 249.

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Duff J.

The seeming rigour of this doctrine is mitigated in the case of commercial contracts by the application of the principle above referred to which rests upon the assumption, as Lord Watson said in *Dahl* v. *Nelson* (1), that in relation to possibilities in the contemplation of the contract but not actually present to the minds of the parties, the parties intended to stipulate for what would be fair and reasonable having regard to their mutual interests and to the main objects of the contract.

The contracts were made on the 19th of March and provided for shipment at the end of April or the beginning of May. Is there anything in the circumstances affording a ground for saying that the agents of appellant and of the respondent as reasonable men could not have contracted on the footing that the appellants should assume the risk of what subsequently happened?

It is important to remember that there is no evidence to indicate that the delay was due to any extraordinary occurrence, to anything outside the ordinary course of events. There is a suggestion of a strike and there is a suggestion of a dispute between the Government and the contractors who were building the ships. The respondents were not aware of the precise relations between the appellants and the contractors and were entitled to assume that the contractors in entering into the contract were duly taking into account the possibilities incidental to those relations. There was nothing in the facts known to them making it unreasonable from the respondent's point of view that they should expect an undertaking as touching the date of sailing unqualified, at all events, in respect of any of the matters

(1) 6 A.C. 38 at p. 59.

which have been suggested as accounting for the appellants' default. Real impossibility of performance arising from destruction of the ships by fire, for example, would have presented a different case. There is nothing in the evidence inconsistent with the hypothesis that the impossibility which no doubt did arise at the last moment was due to lack of energy on part of the Government or to supineness or indifference on part of the appellants. Impossibility arising from such causes is not the impossibility contemplated by the case of *Taylor* v. *Caldwell* (1). See *Hick* v. *Raymond* (2).

The appeal should be dismissed with costs.

ANGLIN J.—The Court of Appeal, reversing the judgment of Gregory J., who dismissed the action, awarded the plaintiff $7,701.93 for breach of a contract of affreightment.

The defendant failed to provide two vessels in which it had contracted to carry lumber of the plaintiff from British Columbia to Australian ports. The contractor for the construction of the vessels delayed delivery of them to the owner—the Dominion Government—which was consequently unable to turn them over to the defendant, an operating company.

Two distinct defences and grounds of appeal are preferred:—(a) that by an express term of each of the two contracts of affreightment performance of it by the defendant is made contingent upon the named ship sailing on the contract voyage; (b) that, if performance was not excused by the express term relied upon, it was an implied condition of the defendant's obligation that the named vessels should be available for the service.

(1) 3 B. & S. 826.

(2) [1893] A.C. 22 at 37.

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(a) The express provision on which the defendant relies reads as follows:

> This contract * * * is entered into conditional upon the continuance of the steamship company's service and the sailings of its steamers between the ports named herein.

I agree with the construction put on this clause by Mr. Davis that

> conditional upon the continuance of the steamship company's service

covers the possibility of the abandonment of the company's undertaking and the complete cessation of its service. If the word "service" were qualified by the phrase "between the ports named herein," it would mean the cessation of such service between those ports. I incline however to the former construction. This member of the clause, in my opinion, is not open to the view that it covers any merely temporary interruption in the service such as that which actually occurred. The word used is "continuance" and not "continuity" which the construction urged by the defendant would require.

> Conditional upon the continuance * * * of the sailings of its steamers between the ports named

provides, I think, for the service between these ports being abandoned although the company's vessels should be placed on other routes. The phrase "between the ports named" gives the cue to the scope and purpose of this member of the provision. Mr. Justice Galliher very succinctly states the purview of the two members of the clause now under consideration in these words:

> I think it simply means that if the company went out of business or ceased sailing vessels between these ports, then the contract was off.

Neither member of the clause relates merely to an interruption in the continuity of the company's service between Canada and Australia due to the vessel named in either contract being temporarily unavailable. I am quite satisfied that an omission of a schedule trip or trips due to that fact is not within the purview of the express provision of the contracts on which the defendant relies.

(b) Neither, in my opinion, do the circumstances admit of the implication of a term excusing performance because the Government failed to deliver to the defendant the two ships for carriage by which the contracts were made.

In addition to the stipulation already mentioned, each of the contracts expressly provides that performance by the defendant shall be excused in several events—loss of, or damage to, its vessels, suspension of service owing to hostilities actual or threatened, and requisition of its vessels by the government. It may be that the parties should be held in this enumeration to have exhausted the conditions on which the defendant was to be excused for not fulfilling its contract; *Horlock* v. *Beal* (1); but see *Nickoll and Knight* v. *Ashton, Edridge & Co.* (2).

It was known to the contracting parties that the vessels in question were still under construction, although nearly completed when the contracts were made. The following statement of the law by Hannen J., in *Baily* v. *De Crespigny* (3), is generally recognized as authoritative:

(1) [1916] 1 A.C.486 at pp. 496, 506.
(2) [1901] 2 K.B. 126, at pp. 134, 140.
(3) L.R. 4 Q.B. 180 at p. 185.

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We have first to consider what is the meaning of the covenant which the parties have entered into. 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.

Subject to certain expressed conditions, none of which covers this case, the defendant bound itself by contracts absolute in form to transport the plaintiff's goods by named vessels at a stated time. I am not disposed to take the view that this should be regarded as a case of

impossibility arising from any act or default of the promissor.

But I find it difficult to conceive that delay in the delivery of the vessels was not a contingency which

was or might have been anticipated and guarded against in the contract—

that it was an event that cannot reasonably be said to have been in the contemplation of the parties at the date of the contract. *Krell* v. *Henry* (1). If it was, having failed to provide for it, a term containing an additional qualification of the defendant's contractual obligation, in order to cover default due to non-availability of the vessels due to this cause, should not be implied. Such a term will not be implied merely because the court may think it reasonable, but only if the court think it necessarily implied in the nature of the contract the parties have made. *Lazarus* v. *Cairn Line of Steamships* (2); *Hamlyn* v. *Wood* (3).

(1) [1903] 2 K.B. 740 at p. 751. (2) [1912] 106 L.T. 378.
(3) [1891] 2 Q.B. 488 at p. 491-2.

If, on the other hand, delay in delivery of the vessels was a contingency which neither was in fact, nor might have been, anticipated, the court should not imply the term that the contracts will thereby be put an end to without inquiring what the parties, as reasonable men, would presumably have agreed upon had that contingency been present to their minds. *Dahl* v. *Nelson Donkin & Co* (1); *F. A. Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (2). I find it difficult to believe that the plaintiff would have assented, or could have been expected to assent, to such a term as the defendant asks to have implied. Why should the plaintiff be expected to assume the entire risk of the consequences of the defendant's default, however innocent? The case, in my opinion, is not one for the application of the doctrine of *Taylor* v. *Caldwell* (3), and kindred authorities relied upon.

I would for these reasons dismiss this appeal.

BRODEUR J.—The Canadian Trading Company, in March, 1920, entered into two contracts of affreightment with the Canadian Government Marine for loading with timber two ships of the latter called the *Inventor* and the *Prospector* plying between Canada and Australia. The shipment was to be made in early April 1920 on the *Inventor* and in April or May 1920 on the *Prospector*.

When the contracts were made, the ships were under construction and should have been quickly completed. But for reasons which are not clearly shown in the evidence, they were not delivered to the appellant company to permit the Canadian Trading Company to load its timber at the time stipulated in the contracts.

(1) 6 A.C. 38, at p. 59. (2) [1916] 2 A.C. 397 at p. 404.
(3) 3 B. & S. 826.

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Brodeur J.

The Canadian Trading Company now claims damages from the Canadian Merchant Marine for not having fulfilled its obligation.

The defendant company pleaded that the contracts were not absolute; that it was not bound to produce the ships in any event; but that its obligation was made with the express or implied condition that the actual sailing of the contract ships should take place.

The defendant appellant company relies on a clause in the contract which declares that

> This contract is not transferable and is entered into conditional upon the continuance of the steamship company's service and the sailing of its steamers between the ports named therein.

These provisions of the contract were embodied in the defendant's own form and they are evidently put in for its own protection. They should not be extended and should be construed in their ordinary meaning.

The breach of contract which is charged upon the company defendant has reference to delays in sailing. The contracts contemplated in the condition above quoted a cessation of the service and the discontinuance of the sailing. No such thing has occurred. The company continued its service and the sailings went on without any real interruption.

The condition which I quoted is formed of two sentences which should be read together. They carry out the same idea, viz., a cessation of the appellant's service and not a merely temporary one. *Elsderlie Steamship Co.* v. *Borthwick* (1).

The appellant company contends that there was impossibility on its part to carry out its contract and that there was an implied condition relieving it from responsibility for the performing of the contract.

(1) [1905] A. C. 93.

This defence of impossibility rests on an implied condition. The case of *Taylor* v. *Caldwell* (1), is to the effect that if the impossibility arises subsequently to the making of the contract, it will be no excuse if in its nature the performance might have been possible. In this case there is no evidence that the performance was impossible. The vessel could have been delivered on time and nothing in the evidence shows the impossibility to which reference is made in *Taylor* v. *Caldwell* (1).

Besides the circumstances causing the impossibility could have been very easily foreseen when the contract was made. Many conditions were stipulated and the strike which is alleged as cause of the delay likely existed at the time the contract was made and so provision could have been made in the contract. The ships at the time the contract was made were already late in delivery and in the light of the following decisions, *Lebeaupin* v. *Crispin* (2), *Baily* v. *De-Crespigny* (3), *Krell* v *Henry* (4), I come to the conclusion that there was no implied condition which would relieve the appellant company from liability.

Under these circumstances the appeal should be dismissed with costs.

MIGNAULT J.—The two contracts in question, for the breach of which the appellant was declared liable by the Court of Appeal of British Columbia, were for the shipment of lumber by two named ships, the *Canadian Inventor* and the *Canadian Prospector*, then, to the knowledge of the parties, under construction for the Canadian Government. At the time of the contracts the vessels were nearing com-

(1) 3 B. & S. 826.
(2) [1920] 2 K.B. 714.
(3) L.R. 4 K.B. 180.
(4) [1903] 2 K.B. 740

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pletion and no doubt the parties thought that they would be ready to take on their cargo and sail at the time mentioned in the contracts. However trouble ensued between the Government and the ship builders and the vessels were not ready in time. The respondent sues to recover damages by reason of the appellant's failure to have these ships ready for loading.

The defence was that the appellant was relieved from liability under the conditions of the contracts which said that the contracts were "conditional upon the continuance of the steamship company's service and the sailing of its steamers between the ports named." The contracts also stated that if, at any time, in the judgment of the steamship company, or its authorized agents, conditions of war or hostilities, actual or threatened, were such as to make it unsafe or imprudent for its vessels to sail, or if the vessels of the company should be taken, sold or chartered for the use of any government, or in the event of loss of, or damage to, any of the vessels of the company, or vessels chartered by them, resulting from actions of an enemy, perils of the sea, or other cause, the steamship company might discontinue or curtail its service; and in that event the company should be free from any liability, except that if its service were only curtailed, the shipper would be entitled to the carriage of a proportional part of the contract.

The appellant relies on the first condition as to the continuance of the steamship company's service and the sailing of its steamers between the ports named, and, in the alternative, on an alleged implied condition that if, without any default on its part, the contract ships were not in existence when the date arrived for the performance of the contract, then the appellant was to be excused from performance.

As to the express condition, the learned trial judge was of opinion that it relieved the appellant from liability, but his judgment was set aside by the Court of Appeal. After much consideration, I do not think that this condition can be said to apply to the contingency which happened. It expressly refers to a discontinuance of the company's service and sailing of its steamers between the ports named. This would not comprise a temporary suspension of sailing other than one caused by one of the contingencies mentioned in the rest of the clause, conditions of war, etc. Much less would it include the failure under these contracts to have the ship ready at the sailing time, for if it was known to both parties that it was nearing completion, the appellant certainly considered that it would be completed in time, and the non-completion of the ship or its failure to be ready was surely not meant by the parties to be guarded against by the general clause as to discontinuance of service. Such a contingency as happened could have been specially provided for and I do not think that it is now open to the appellant to say that it was covered by a general clause like the one in question. And it certainly does not come within the language of this clause reasonably construed.

Whether the implied condition relied on by the appellant relieves it from liability is a question of much nicety. Mr. Justice Blackburn, in *Taylor* v. *Caldwell* (1), laid down a rule which is accepted as settled law. He said:

> Where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering

(1) 3 B. & S. 826.

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into the contract, they must have contemplated such continuing existence as the foundation of what was to be done, there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

Blackburn J., it is interesting to note, referred to the civil law and to Pothier, *Obligations*, No. 668, as laying down the rule that the debtor *corporis certi* is freed from the obligation when the thing has perished neither by his act, nor by his neglect, and before he is in default, unless by some stipulation he has taken on himself the risk of the particular misfortune which has occurred.

It seems to me—and that is certainly the rule of the civil law as I understand it—that the contingency which relieves a party from performing a contract on the ground of impossibility of performance, is an unforeseen event. I take it that this is the rule laid down by Hannen J., in *Baily* v. *DeCrespigny* (1):

> 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.

So that if the event which causes the impossibility could have been anticipated and guarded against in the contract, the party in default cannot claim relief because it has happened.

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

The case of *Nickoll and Knight* v. *Ashton, Edridge & Co.* (1), is an interesting one and I have derived much benefit from the consideration I have given to it. There a cargo had been sold to be shipped by the steamship *Orlando* at an Egyptian port during January, 1900, and to be delivered to the plaintiffs in the United Kingdom. The contract provided that, in case of prohibition of export, blockade or hostilities preventing shipment, the contract or any unfulfilled part should be cancelled. In December, 1899, the *Orlando* was stranded through perils of the sea without default on the defendant's part, and was so much damaged as to render it impossible for her to arrive at the port of loading in time to load during January. It was held by A. L. Smith M.R., and Romer L. J., Vaughan Williams L. J. dissenting, that the contract should be construed as subject to an implied condition that if, at the time for its performance, the *Orlando* should, without default on the defendant's part, have ceased to exist as a ship fit for the purpose of shipping the cargo, the contract should be treated as at an end.

This case may be distinguished from the one at bar in that the stranding of a particular ship can reasonably be said to be an unforeseen event, for although any ship is exposed to the perils of the sea the stranding of a particular ship mentioned in a contract, so as to prevent it from taking on its cargo at the specified time, is certainly something which can be said to be unforeseen. But here the appellant undertook to carry a cargo on a ship nearing completion. It could certainly have been foreseen that something might occur in the ship yard, especially in these days of labour troubles, to delay completion, and by making

(1) [1901] 2 K. B. 126.

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an absolute contract without providing against the contingency of non-completion in time, the appellant, in my opinion, assumed the risk of this contingency. The respondent prepared all its cargo for the ship in time and would be subject to considerable loss if the appellant were relieved from the consequences of non-performance. Such a condition, if it had been stipulated, might not have been accepted by the respondent, which possibly would have preferred to ship its lumber through another steamship company. And I think that the risk of such a contingency cannot be imposed on the respondent as an implied condition now that the loss has occurred.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *R. W. Hannington.*

Solicitors for the respondent: *Coburn & Duncan.*