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IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL
(From: Mr. Justice Salmon - Middlesex)

Royal Courts of Justice
20th December 1961

B e f o r e :

LORD JUSTICE SELLERS
LORD JUSTICE UPJOHN
and
LORD JUSTICE DIPLOCK

Between:
HONG KONG FIR SHIPPING COMPANY
v

KAWASAKI KISEN KAISHA LIMITED

**(Transcript of the Shorthand Notes of The Association of Official Shorthandwriters, Ltd.,
Room 392, Royal Courts of Justice, and 2 New Square, Lincoln's Inn, London, W.C.2).**

**Mr. ASHTON ROSKILL, Q.C., Mr. BASIL ECKERSLEY and Mr. B. DAVENPORT (instructed by Messrs. Constant & Constant)
appeared on behalf of the Appellants (Defendants).
Mr. STEPHEN CHAPMAN, Q.C., Mr. MICHAEL KERR, Q.C. and
Mr. C.S.STAUGHTON instructed by Messrs. William & Crump & Son)
appeared on behalf of the Respondents (Plaintiffs).**

HTML VERSION OF JUDGMENT

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LORD JUSTICE SELLERS: Both parties to this action are resident abroad, the plaintiffs in Hong Kong and the defendants in Japan, and, in substitution for the arbitration provisions, they agreed to have the dispute tried in our Commercial Court and it came before Mr. Justice Salmon in the early part of this year.

The litigation arises out of a time charter-party dated Tokyo 26th December, 1956, on the printed form "Uniform Time Charter of the Baltic and International Maritime Conference", the relevant terms of which are set out in the judgment and need not be repeated here.

The plaintiffs had purchased a 25-year-old vessel called the "Antrim", which they renamed the "Hong Kong Fir", of some 5395 tons gross and 3145 tons net register, and this was its first charter under the new owners. The vessel was delivered on the 13th February, 1957, at Liverpool and duly set out in ballast on her intended voyage to Newport Mews, Virginia, and then via the Panama Canal, calling at Cristobal, to Osaka in Japan, which she was expected to reach in about two months. On account of various delays which the learned judge has found were due to the shipowners' breaches of contract, Osaka was not reached until the 25th May, 1957, and because of very extensive repairs to her main engines and auxiliaries which had to be carried out there she was not ready to put to sea again and continue her service until 15th September.

In the meantime the charterers had on the 6th June, 1957, written to the shipowners cancelling the charter-party because of the delay, due, it was said, to the unseaworthiness of the vessel. On the 8th August, 1957, the shipowners intimated that the cancellation was unjustifiable and said that they would treat it as a wrongful repudiation by the charterers of the charter-party and hold them liable for damages. The vessel was offered to the charterers as available to come on hire after the repairs in early September but the charterers maintained their refusal to go *on* with the charter and by the 13th September, 1957, if not before, the charter-party was at an end. The refusal by the charterers has been held to have been wrongful and judgment has been entered for the

plaintiffs. During the currency of the charter-party the freight market had fallen steeply with the result that the judgment awarded them £184,743 damages. There is no doubt that there were prolonged and aggravating delays due to breaches of contract by the shipowners, and at the outset of his argument learned Counsel for the appellants relied strongly on the judge's findings of fact, which he submitted clearly showed the extent and the nature of the shipowners' breaches of contract and justified the charterers in terminating the charter-party.

The learned judge did not accept the charterers' allegations that the vessel's machinery was inefficient and defective and that the vessel was in that respect unseaworthy on delivery at Liverpool. Prom that finding there is no appeal, but it has been emphasised that although Mr. Justice Salmon held that the diesel engines and other machinery were in reasonably good condition on the 13th February, 1957, he found that by reason of their age the engines needed to be maintained by an experienced, competent, careful and adequate engine-room staff. It was held, however, and this has been unchallenged by the shipowners in this appeal, that the engine-room staff was incompetent and insufficient and in this respect the vessel was unseaworthy when handed over and on leaving Liverpool and throughout the voyage to Osaka where she was re-staffed so as to fulfil completely her requirements. She had on delivery five engineers, three fitters and seven greasers. The previous owners had employed seven engineers and eight ratings, and the judgment finds the complement of the engine-room staff insufficient. If they had all been competent and efficient all might have been well notwithstanding the numerical deficiency of officers, but the Chief Engineer was addicted to drink and repeatedly neglected his duties. Incompetence stands out conspicuously in the events in the engine-room which led to delays, and it is not surprising that the judgment finds that the owners were in breach of the obligations under clause 1 of the charter. The same facts and findings, he held, established a breach of the obligation under clause 3 of the charter to maintain the vessel in a thoroughly efficient state in hull and machinery. Although the learned judge recognised the difficulty of obtaining skilled officers and men for the engine-room he found that the shipowners had not exercised due diligence and that they could not escape liability under clause 13 of the charter-party.

The charterers' position was alleviated somewhat by the vessel becoming off hire under clause 11A from time to time and the duration of the charter-party could have been extended by the charterers under clause 32 by adding the off-hire time to the period of the charter.

The judgment found against the charterers' contention that the delays frustrated the commercial purpose of the contract and this contention was not pressed before us. This is not a case of frustration of contract but it was submitted that the delay due to breach of contract by the shipowners was sufficient to entitle the charterers as innocent parties, that is in no way to blame for what had happened, to have regard to their interests under the contract and that it was just in all the circumstances that they should be held free to terminate as they did.

The two main issues of law arising on the findings, formulated by Mr. Ashton Roskill for the appellants, were;

(1) Is the seaworthiness obligation a condition the breach of which entitles the charterers to treat the contract as repudiated?

(2) Where in breach of contract a party fails to perform it, by what standard does the ensuing delay fall to be measured for the purpose of deciding whether the innocent party is entitled to treat the contract as repudiated? Is that standard (as the judgment holds) such delay as is necessary to frustrate the contract or is it, as the appellants contend, unreasonable delay, that is longer time than it would be reasonable in all the circumstances for a charterer to wait?

By clause 1 of the charter-party the shipowners contracted to deliver the vessel at Liverpool "she being in every way fitted for ordinary cargo service". She was not fit for ordinary cargo service when delivered because the engine-room staff was incompetent and inadequate and this became apparent as the voyage proceeded. It is commonplace language to say that the vessel was unseaworthy by reason of "this inefficiency in the engine-room.

Ships have been held to be unseaworthy in a variety of ways and those who have been put to loss by reason thereof (in the absence of any protecting clause in favour of a shipowner) have been able to recover damages as for a breach of warranty. It would be unthinkable that all the relatively trivial matters which have been held to be unseaworthiness could be regarded as conditions of the contract or conditions precedent to a charterer's liability and justify in themselves a cancellation or refusal to perform on the part of the charterer. If, in the present case, the inadequacy and incompetence of the engine-room staff had been known to them, the charterers could have complained of the failure by the shipowners to deliver the vessel at Liverpool in accordance with clause 1 of the charter-party and could have refused to take her in that condition. The vessel was to be delivered not earlier than 1st February, 1957, and not later than 31st March, 1957, apparently. No evidence was directed to the provision "to be narrowed to twenty days within the month of January 1957", but even that clause, if invoked, would have given the shipowners a week in which to bring the engine-room staff into suitable strength and competency for the vessel's "ordinary cargo service". If the shipowners had refused or failed so to do, their conduct and not the unseaworthiness would have amounted to a repudiation of the charter-party and entitled the charterers to accept it and treat the contract as at an end. Ike time of delivery is clearly a condition of the contract and has often been held to be so. Unless a shipowner could in those circumstances have relied on clause 13, a charterer in addition to cancellation would be entitled to damages, if any were suffered, which would not have been so apparently in this case as the freight market had fallen about that time.

If what is done or not done in breach of the contractual obligation does not make the performance a totally different performance of the contract from that intended by the parties, it is not so fundamental as to undermine the whole contract. Many existing conditions of unseaworthiness can be remedied by attention or repairs, many are intended to be rectified as the voyage proceeds, so that the vessel becomes seaworthy; and, as the judgment points out, the breach of a shipowner's obligation to deliver a seaworthy vessel has not been held by itself to entitle a charterer to escape from the charter-party. The charterer may rightly terminate the engagement if the delay in remedying any breach is so long in fact, or likely to be so long in reasonable-anticipation that the commercial purpose of the contract would be frustrated.

Mr. Roskill recognised the weight of authority against him in seeking to make seaworthiness a condition of the contract the breach of which, in itself, was to be regarded as fundamental so as to entitle a charterer to accept it as a repudiation of the charter-party and to regard the charter-party as terminated, and he relied more strongly on his second argument.

We were referred to the whole range of authorities from the early 19th century to the present day in support of both contentions, and the judgment in my opinion very clearly and fairly deals with many of them, applying some and distinguishing others. In Bradford v. Williams (1872) 7 Exchequer, page 259, a case in which a ship's captain refused to load at the place stipulated for the month of September, 1871, but was willing to load at a port he was permitted to select prior to that month and it was held that the breach of the charter-party by the shipowner went to the root of the contract and the charterer was right in his refusal to load, Baron Martin said with much point

> "Contracts are so various in their terms that it is really impossible to argue from the letter of one to the letter of another. All we can do is to apply the spirit of the law to the facts of each particular case. Now I think the words 'conditions precedent' unfortunate. The real question, apart from all technical expressions, is what in each instance is the substance of the contract".

Some ninety years later those words seem as apt as they then were when the authorities relied on were hut a fraction of those which have accumulated in the ensuing years.

This case calls for consideration of the charter-party obligations and the respective rights of the parties only where the vessel has been accepted and used. Here the charterers had in fact, though with much delay, taken the vessel in ballast across the Atlantic, collected the contemplated cargo and carried it to

the intended destination, Osaka, where it was discharged commencing on the 29th May, 1957. In these circumstances it is not open to the charterers to rely on the obligation of seaworthiness as a condition precedent to an obligation on the charterers to pay freight or hire.

In the early part of last century, before a counterclaim could be raised against a plaintiff's claim, sustained efforts were made, in the problems which arose in the increasing overseas trade, to resist a shipowner's claim by alleging a condition precedent unfulfilled. In Ritchie v. Atkinson (1808) 10 East, page 295, it failed. Lord Ellenborough held that the delivery of a complete cargo was not a condition precedent to the recovery of freight and relied on the reasoning of Lord Mansfield in the well known decision in Boone v. Eyre. Just as the shortage of one nigger could not defeat the whole contract which stipulated for a fixed number of niggers to be transferred, no more would the shortage of some cargo defeat a claim for freight.

The same principle was applied in respect of seaworthiness in Havelock v. Geddes (1809) 10 East, page 555, where Lord Ellenborough pointed out that if the obligation of seaworthiness were a condition precedent the neglect of putting in a single nail after the ship ought to have been made tight, staunch, etc., would be a breach of the condition and a defence to the whole of the plaintiff's demand.

By 1810, in Davidson v. Gwynne (12 East, page 381), Lord Ellenborough was saying that it was useless to go over the same subject again "which has so often been discussed of late" and held the sailing with the first convoy was not a condition precedent, the object of the contract was the performance of the voyage and that had been performed.

Tarrabochia v. Hickie (1856) 1 Hurlstone & Norman, page 183, emphasises the same principle and I think is of no less effect because it relates to a voyage charter. Chief Baron Pollock, whose succinct judgment provides a complete answer to the appellants' case, cites Lord Ellenborough in Davidson v. Gwynne –

> "that unless the non-performance alleged in the breach of contract goes to the whole root and consideration of it the covenant broken is not to be considered as a condition precedent but as a distinct covenant for breach of which the party may be compensated in damages unless by the breach of the stipulation of the fitness of the vessel the object of the voyage is wholly frustrated".

This decision was approved in Stanton v. Richardson (9 Common Pleas, page 390), where the shipowner had undertaken to carry a cargo of wet sugar and the ship was not fit to carry it and, as the jury had found, could not be made fit in such time as not to frustrate the object of the voyage. The molasses had drained from the wet sugar into the hold in large quantities and the ship's pumps were unable to deal with it. The cargo was unloaded and the charterers were held entitled to refuse to reload it or to provide any other cargo. If the defect had been or could have been remedied within a reasonable time so as not to frustrate the adventure it would seem that the charterer's right would not have been to terminate the charter-party but to have claimed damages for any loss occasioned by the delay. Kish v. Taylor (1912 Appeal Oases, page 604) affirms that a contract of affreightment, in that case a voyage charter, is not put an end to by a breach of the stipulation of seaworthiness. The passage in Lord Atkinson's speech at page 617 on which the appellants relied –

> "The fact that a ship is not in a fit condition to receive her cargo or is from any cause unseaworthy when about to start on her voyage will justify the charterer or holder of the bill in repudiating his contract and refusing to he bound by it"

- does not undermine the principle applied in the case. It applies in terms to the commencement of the voyage and it was not relevant to the case to consider the extent and nature of the unfitness or the time and circumstances in which it could be rectified.

Tully v. Howling (1877 2 Queen's Bench, page 182), although in favour of the charterer, gives no support to the appellants here whether it was decided on the ground of the majority that time was the essence of the contract and that the charterer who had a contract for twelve months' service was not bound to ten months' service, or, as Mr. Justice Brett held on appeal, that the ship was not fit for the purpose for which she was chartered and could not be made fit within any time which would not have frustrated the object of the adventure.

The argument for the appellants contrasted the decisions on deviation with those on unseaworthiness and submitted that the latter was at least as grave as the former. But deviation amounts to a stepping out of the contract, or may do, and as such it is a repudiation of it and a substitution of a different voyage or engagement.

The formula for deciding whether a stipulation is a condition or a warranty is well recognised; the difficulty is in its application. It is put in a practical way by Lord Justice Bowen in Bentsen v. Taylor Sons & Co. (1893 2 Queen's Bench page 274-, at page 281);

> "There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages or as a condition precedent by the failure to perform which the other party is relieved of his liability".

In my judgment authority over many decades and reason support the conclusion in this case that there was no breach of a condition which entitled the charterers to accept it as repudiation and to withdraw from the charter.

It was not contended that the maintenance clause is so fundamental a matter as to amount to a condition of the contract. It is a warranty which sounds in damages.

The appellants' argument on the second submission in my judgment equally fails and is to be rejected on many of the authorities already cited.

It was submitted that the doctrine of frustration is quite independent of rights arising out of a breach of contract. If a party by his breach induces delay he cannot claim frustration which would have been self-induced. It was said that a delay which would frustrate a contract was not in the minds of the 19th century judges and that their language permits of a lesser period of delay being sufficient to justify an innocent party from continuing with his bargain after a reasonable delay due to the breach of contract. Reliance was placed on the judgment of Chief Justice Tindal in Freeman v. Taylor (8 Bingham, page 124), which upheld the verdict of a jury in a deviation case where the jury had answered in the affirmative the question whether the deviation was of such a nature and description as to deprive the freighter of the benefit of the contract into which he had entered. It was submitted that that should be the question here and that it should be answered in favour of the charterers.

In Universal Cargo Carriers Corporation v. Citati (1957 2 Queen's Bench, page 401) a similar argument was advanced by Mr. Ashton Roskill (then appearing for shipowners who had cancelled a voyage charter-party because no cargo had been provided) and he relied on passages in the line of cases which he cited to us here and the statement in Scrutton on Charterparties in the earlier editions. After reviewing the authorities, including Clipsham v. Vertue, to which I have not previously referred, Mr. Justice Devlin (as he then was) said that those authorities were conclusive and with that I respectfully agree and with the opinion which they support stated by the learned judge on page 430: "But a party to a contract may not purchase indefinite delay by paying damages....When the delay becomes so prolonged that the breach assumes a character so grave as to go to the root of the contract, the aggrieved party is entitled to rescind. What is the yardstick by which this length of delay is to be measured? Those considered in the arbitration can now be reduced

to two" (as in the present appeal) "first, the conception of a reasonable time, and secondly, such delay as would frustrate the charter-party....In my opinion the second has been settled as the correct one by a long line of authorities".

In my judgment Mr. Justice Salmon was clearly right in the answers he gave to both of the contentions of the charterers relied on in this court, supported as the answers were by established authority and good commercial reason.

I would dismiss the appeal.

LORD JUSTICE UPJOHN: I agree entirely with the judgment which has just been delivered. I shall not recite any of the facts, and propose only to add a few words upon the two main submissions so meticulously argued before us by Mr. Ashton Roskill for the appellants.

Logically his first submission, as he recognised, was that the obligation to provide a seaworthy vessel was a condition for breach of which the charterer was at once entitled to treat the contract as repudiated.

The charter-party (which, incidentally, was dated the 26th December, 1956, though it is common ground that it must in fact have been executed some weeks later for the respondent company was not incorporated at that date) contained the seaworthiness clause in these terms: "She being in every way fitted for ordinary cargo service". At first sight that would seem to be a basic term underlying the whole of the charter-party, for how could the vessel perform the tasks which the owners warranted that she was fit to perform unless she is in fact fit to meet the perils of the sea? So basic is this obligation in a charter-party that unless there is an express clause of exclusion, it will he implied where not expressed.

Yet with all respect to Mr, Roskill's argument, it seems to me quite clear that the seaworthiness clause is not in general treated as a condition for breach of which the charterer is at once entitled to repudiate. This is established by a number of authorities over a long period of years and I mention them without quoting from them. Havelock v. Geddes (10 East, page 555); Tarrabochia v. Hickie (1 Hurlstone & Norman, page 183; Kish v. Taylor (1912 Appeal Gases, page 604).

With regard to the last-mentioned case, Lord Justice Sellers has referred to certain observations of Lord Atkinson in his speech at the foot of page 617. These words were, of course, strongly relied upon by Mr. Roskill to support his argument. In my judgment, either they must be regarded as made *per incuriam*, for they are quite inconsistent with the plain decision of the House in that case and with the speech of the same noble Lord on the previous page; or it is possible that his speech may have been misreported and that the phrase "will justify" should have read "may justify", a suggestion made by Lord Justice Diplock during the course of the argument.

Why is this apparently basic and underlying condition of seaworthiness not, in fact, treated as a condition? It is for the simple reason that the seaworthiness clause is breached by the slightest failure to be fitted "in every way" for service. Thus, to take examples from the judgments in some of the cases I have mentioned above, if a nail is missing from one of the timbers of a wooden vessel or if proper medical supplies or two anchors are not on board at the time of sailing, the owners are in breach of the seaworthiness stipulation. It is contrary to common sense to suppose that in such circumstances the parties contemplated that the charterer should at once be entitled to treat the contract as at an end for such trifling breaches.

The classification of stipulations in a contract into conditions and warranties is familiar, and in connection with the sale of goods these phrases have statutory definition. These phrases, however, came into being in connection with the ancient system of pleadings "before the Common Law Procedure Act,

1852, and when considering the remedies to which one party may be entitled for breach of a stipulation by the other the decision whether the stipulation is a condition or warranty may not provide a complete answer.

A condition, or a condition precedent to give it its proper title under the old system of pleading, was a condition performance of which had to be averred by the plaintiff in the declaration in order to establish his claim against the defendant. It was decided in the great plantation case of Boone v. Eyre (Henry Blackstone, page 273), however, that it was only necessary to aver as a condition precedent a condition which went to the whole consideration of both sides. The rule is, I think, best stated by Lord Ellenborough in Davidson v, Gwynne (12 East page 380, at page 388):

> "The principle laid down in Boone v. Eyre has been recognised in all the subsequent cases that unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it the covenant broken is not to be considered as a condition precedent but as a distinct covenant for breach of which the party injured may be compensated in damages".

It is open to the parties to a contract to make it clear either expressly or by necessary implication that a particular stipulation is to be regarded as a condition which goes to the root of the contract, so that it is clear that the parties contemplate that any breach of it entitles the other party at once to treat the contract as at an end. That matter is to be determined as a question of the proper interpretation of the contract. Baron Bramwell in Tarrabochia v. Hickie has warned against the dangers of too ready an implication of such a condition. He said at page 188:

> "No doubt it is competent for the parties, if they think fit, to declare in express terms that any matter shall be a condition precedent, but when they have not so expressed themselves, it is necessary for those who construe the instrument to see whether they intended to do it. Since, however, they could have done it, those who construe the instrument should be chary in doing for them that which they might, but have not done for themselves".

Where, however, upon the true construction of the contract, the parties have not made a particular stipulation a condition, it would be unsound and misleading to conclude that, being a warranty, damages is a sufficient remedy.

In my judgment the remedies open to the innocent party for breach of a stipulation which is not a condition strictly so called, depend entirely upon the nature of the breach and its foreseeable consequences. Breaches of stipulation fall, naturally, into two classes. First there is the case where the owner by his conduct indicates that he considers himself no longer bound to perform his part of the contract; in that case, of course, the charterer may accept the repudiation and treat the contract as at an end. The second class of case is, of course, the more usual one and that is where due to misfortune such as the perils of the sea, engine failures, incompetence of the crew and so on, the owner is unable to perform a particular stipulation precisely in accordance with the terms of the contract try he never so hard to remedy it. In that case the question to be answered is, does the breach of the stipulation go so much to the root of the contract that it makes further commercial performance of the contract impossible, or in other words is the whole contract frustrated? If yea, the innocent party may treat the contract as at an end. If nay, his claim sounds in damages only. This is a question of fact fit for the determination of a jury.

If I have correctly stated the principles, then as the stipulation as to seaworthiness is not a condition in the strict sense the question to be answered is, did the initial unseaworthiness as found by the learned judge and from which there has been no appeal, go so much to the root of the contract that the charterers were then and there entitled to treat the charter-party as at an end? The only unseaworthiness alleged, serious though it was, was the insufficiency and incompetence of the crew, but that surely cannot be treated as going to the root of the contract for the parties must have contemplated that in such an event the crew could be changed and augmented. In my judgment, on this part of his case Mr. Roskill necessarily fails.

I turn therefore to his second point: Where there have been serious and repeated delays due to the inability of the owner to perform his part of the contract, is the charterer entitled to treat the contract as repudiated after a reasonable time or can he do so only if delays are such as to amount to a frustration of the contract? Some of my earlier observations on the remedy available for breach of contract are relevant here but I do not repeat them.

I agree with the conclusions reached by the learned judge and by my Lord. I think that Mr. Justice Devlin (as he then was) came to clearly the right conclusion after an exhaustive review of the authorities in Universal Cargo Carriers Corporation v. Citati (1957 2 Queen's Bench, page 401). See also for a much earlier and very clear case Clipsham v. Vertue (5 Queen's Bench, page 265). I only desire to add this. Apart altogether from authority, it would seem to be wrong to introduce the idea that the innocent party can treat the contract as at an end for delays which, however, fall short of a frustration of the contract. Subject to the terms of the contract, of course, neither contracting party can unilaterally withdraw from the contract. If, however, one party by his conduct frustrates the contract, the law says that the other party may treat the contract as at an end. For breaches of stipulation which fall short of that, the innocent party can only sue for damages. I do not see on principle how he can have some unilateral right to withdraw from the contract when the conduct of the other falls short of frustrating the contract. References in some of the earlier cases to reasonable time and so forth are readily explained by the fact that those words were used as synonymous with a frustrating time, that is to say a time "by which the further commercial performance of the contract became impossible.

Mr. Roskill has not seriously urged that in the circumstances of this case the delays, serious though they were, were such as to amount to a frustration of the contract. I think, therefore, that his argument fails on this point also.

Accordingly, I agree that this appeal must be dismissed.

LORD JUSTICE DIPLOCK: The contract, the familiar "Baltime 1939" Charter, and the facts upon which this case turns have been already stated in the judgment of Lord Justice Sellers, who has also referred to many of the relevant cases. With his analysis of the cases, as with the clear and careful judgment of Mr. Justice Salmon, I am in agreement, and I desire to add only some general observations upon the legal questions which this case involves.

Every synallagmatic contract contains in it the seeds of the problems In what event will a party be relieved of his undertaking to do that which he has agreed to do but has not yet done? The contract may itself expressly define some of these events, as in the cancellation clause in a charter-party; but, human prescience being limited, it seldom does so exhaustively and often fails to do so at all. In some classes of contracts such as sale of goods, marine insurance, contracts of affreightment evidenced by bills of lading and those between parties to tills of exchange, Parliament has defined by statute some of the events not provided for expressly in individual contracts of that class; but where an event occurs the occurrence of which neither the parties nor Parliament have expressly stated will discharge one of the parties from further performance of his undertakings it is for the court to determine whether the event has this effect or not.

The test whether an event has this effect or not has been stated in a number of metaphors all of which I think amount to the same things Does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?

This test is applicable whether or not the event occurs as a result of the default of one of the parties to the contract, but the consequences of the event are different in the two cases. Where the event occurs as a result of the default of one party the party in default cannot rely upon it as relieving himself of the performance of any further undertakings on his part and the innocent party, although entitled to, need not treat the event as relieving him of the performance of his own undertakings. This is only a specific application of the fundamental legal and moral rule that a man should not be allowed to take

advantage of his own wrong. Where the event occurs as a result of the default of neither party each is relieved of the further performance of his own undertakings and their rights in respect of undertakings previously performed are now regulated by the Law Reform (Frustrated Contracts) Act, 1943.

This branch of the common law has reached its present stage by the normal process of historical growth, and the fallacy in Mr. Ashton Roskill's contention that a different test is applicable when the event occurs as a result of the default of one party from that applicable in cases of frustration where the event occurs as a result of the default of neither party lies, in my view, from a failure to view the cases in their historical context. The problems in what event will a party to a contract be relieved of his undertaking to do that which he has agreed to do but has not yet done? has exercised the English Courts for centuries, probably ever since assumpsit emerged as a form of action distinct from covenant and debt and long before even the earliest cases which we have been invited to examine; but until the rigour of the rule in Paradine v. Jane (1647) Aleyn page 26 was mitigated in the middle of the last century Toy the classic judgments of Mr. Justice Blackburn in Taylor v. Caldwell (1863) 3 Best & Smith, page 826 and Baron Bramwell in Jackson v. Union Marine Insurance (1874) 10 Common Pleas, page 125) it was in general only events resulting from one party's failure to perform his contractual obligations which were regarded as capable of relieving the other party from continuing to perform that which he had undertaken to do.

In the earlier cases before the Common Law Procedure Act, 1852, the problem tends to be obscured to modern readers by the rules of pleading peculiar to the relevant forms of action-covenant, debt and assumpsit, and the nomenclature adopted in the judgments, which were mainly on demurrer, reflects this. It was early recognised that contractual undertakings were of two different kinds; those collateral to the main purpose of the parties as expressed in the contract and those which were mutually dependent so that the non-performance of an undertaking of this class was an event which excused the other party from the performance of his corresponding undertakings. In the nomenclature of the eighteenth and early nineteenth centuries undertakings of the latter class were called "conditions precedent" and a plaintiff under the rules of pleading had to aver specially in his declaration his performance or readiness and willingness to perform all those contractual undertakings on his part which constituted conditions precedent to the defendant's undertaking for non-performance of which the action was brought. In the earliest cases such as Pordage v. Cole (1607) 1 Williams page 319 and Thorpe v. Thorpe (1700) 12 Modern page 435 the question whether an undertaking was a condition precedent appears to have turned upon the verbal niceties of the particular phrases used in the written contract and it was not until 1773 that Lord Mansfield, in the case which is a legal landmark, Boone v. Eyre (1 Henry Blackstone, page 273), swept away these arid technicalities.

> "The distinction", he said, "is very clear. Where mutual covenants go to the whole of the consideration on both sides they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant and shall not plead it as a condition precedent".

This too was a judgment on demurrer but the principle was the same when the substance of the matter was in issue. Other phrases expressing the same idea were used by other judges in the cases which have already been cited by Lord Justice Sellers, and I would only add to his comments upon them that when it is borne in mind that until the latter half of the nineteenth century the only event that could be relied upon to excuse performance by one party of his undertakings was a default by the other party no importance can be attached to the fact that in occasional cases, and there may be others besides Freeman v. Taylor (1831) 8 Bingham page 124 , the Court has referred to the object or purpose of the party not in default rather than to the object or purpose of the contract, for the relevant object or purpose of the party not in default is that upon which there has been a *consensus ad idem* of both parties as expressed in the words which they have used in their contract construed in the light of the surrounding circumstances.

The fact that the emphasis in the earlier cases was upon the breach by one party to the contract of his contractual undertakings, for this was the commonest circumstance in which the question arose, tended to obscure the fact that it was really the event resulting from the breach which relieved the other party of further performance of his obligations; but the principle was applied early in the nineteenth century and without analysis to cases where the event relied

upon was one brought about by a party to a contract before the time for performance of his undertakings arose but which would make it impossible to perform those obligations when the time to do so did arrive: for example, Short v. Stone (8 Queen's Bench page 358); Ford v. Tiley (8 Barnewall & Cresswell page 325); Bowdell v. Parsons (10 East page 359). It was not, however, until Jackson v. Union Marine Insurance (1874) 10 Common Pleas page 125, that it was recognised that it was the happening of the event and not the fact that the event was the result of a breach by one party of his contractual obligations that relieved the other party from further performance of his obligations.

> "There are the cases", said Baron Bramwell (at page 147. of the report in 10 Common Pleas) "which hold that, where the shipowner has not merely broken his contract, but has so broken it that the condition precedent is not performed, the charterer is discharged. Why? Not merely because the contract is broken. If it is not a condition precedent, what matters it whether it is unperformed with or without excuse? Not arriving with due diligence or at a day named is the subject of a cross-action only. But not arriving in time for the voyage contemplated, but at such a time that it is frustrated is not only a breach of contract, but discharges the charterer. And so it should though he has such an excuse that no action lies".

Once it is appreciated that it is the event and not the fact that the event is a result of a breach of contract which relieves the party not in default of further performance of his obligations two consequences follow. (1) The test whether the event relied upon has this consequence is the same whether the event is the result of the other party's breach of contract or not, as Mr. Justice Devlin pointed out in Universal Cargo Carriers Corporation v. Citati (1957 2 Queen's Bench page 401, at page 434). (2) The question whether an event which is the result of the other party's breach of contract has this consequence cannot be answered by treating all contractual undertakings as falling into one of two separate categories: "conditions" the breach of which gives rise to an event which relieves the party not in default of further performance of his obligations, and "warranties" the breach of which does not give rise to such an event.

Lawyers tend to speak of this classification as if it were comprehensive, partly for the historical reasons which I have already mentioned and partly "because Parliament itself adopted it in the Sale of Goods Act, 1893, as respects a number of implied terms in contracts for the sale of goods and has in that Act used the expressions "condition" and "warranty" in that meaning. But it is by no means true of contractual undertakings in general at common law.

No doubt there are many simple contractual undertakings, sometimes express but more often because of their very simplicity ("It goes without saying") to be implied, of which it can be predicated that every breach of such an undertaking must give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract. And such a stipulation, unless the parties have agreed that breach of it shall not entitle the non-defaulting party to treat the contract as repudiated, is

a "condition". So too there may be other simple contractual undertakings of which it can be predicated that no breach can give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and such a stipulation, unless the parties have agreed that breach of it shall entitle the non-defaulting party to treat the contract as repudiated, is a "warranty ".

There are, however, many contractual undertakings of a. more complex character which cannot be categorised as being "conditions" or "warranties" if the late nineteenth century meaning adopted in the Sale of Goods Act, 1893, and used by Lord Justice Bowen in Bensen v. Taylor Sons & Co. (1893 2 Queen's Bench page 274, at page 280) be given to those terms. Of such undertakings all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and the legal consequences of a breach of such an undertaking, unless provided for expressly in the contract, depend upon the nature of the • event to which the breach gives rise and do not follow automatically from a prior classification of the undertaking as a "condition" or a "warranty". For instance, to

take Baron Bramwell's example in Jackson v. Union Marine Insurance itself (at page 142), breach of an undertaking by a shipowner to sail with all possible dispatch to a named port does not necessarily relieve the charterer of further performance of his obligation under the charter-party, but if the breach is so prolonged that the contemplated voyage is frustrated it does have this effect.

In 1874 when the doctrine of frustration was being foaled by "impossibility of performance" out of "condition precedent" it is not surprising that the explanation given by Baron Bramwell should give full credit to the dam by suggesting that in addition to the express warranty to sail with all possible dispatch there was an implied condition precedent that the ship should arrive at the named port in time for the voyage contemplated. In Jackson v. Union Marine Insurance there was no breach of the express warranty; but if there had been, to engraft the implied condition upon the express warranty would have been merely a more complicated way of saying that a breach of a shipowner's undertaking to sail with all possible dispatch may, but will not necessarily, give rise to an event which will deprive the charterer of substantially the whole benefit which it was intended that he should obtain from the charter. Now that the doctrine of frustration has matured and flourished for nearly a century and the old technicalities of pleading "conditions precedent" are more than a century out of date, it does not clarify, but on the contrary obscures, the modern principle of law where such an event has occurred as a result of a breach of an express stipulation in a contract, to continue to add the now unnecessary colophon "therefore it was an implied condition of the contract that a particular kind of breach of an express warranty should not occur." The common law evolves not merely by breeding new principles but also, when they are fully grown, by burying their ancestors.

As my "brethren have already pointed out, the shipowner's undertaking to tender a seaworthy ship has, as a result of numerous decisions as to what can amount to "unseaworthiness", become one of the most complex of contractual undertakings. It embraces obligations with respect to every part of the hull and machinery, stores and equipment and the crew itself. It can be broken by the presence of trivial defects easily and rapidly remediable as well as by defects which must inevitably result in a total loss of the vessel.

Consequently the problem in this case is, in my view, neither solved nor soluble by debating whether the shipowner's express or implied undertaking to tender a seaworthy ship is a "condition" or a "warranty". It is like so many other contractual terms an undertaking one breach of which may give rise to an event which relieves the charterer of further performance of his undertakings if he so elects and another breach of which may not give rise to such an event but entitle him only to monetary compensation in the form of damages. It is, with all deference to Mr. Ashton Roskill's skilful argument, by no means surprising that among the many hundreds of previous cases about the shipowner's undertaking to deliver a seaworthy ship there is none where it was found profitable to discuss in the judgments the question whether that undertaking is a "condition" or a "warranty"; for the true answer, as I have already indicated, is that it is neither, but one of that large class of contractual undertakings one breach of which may have the same effect as that ascribed to a breach of "condition" under the Sale of Goods Act and a different breach of which may have only the same effect as that ascribed to a breach of "warranty" under that Act. The cases referred to by Lord Justice Sellers illustrate this and I would only add that in the dictum which he cites from Kish v. Taylor (1912 Appeal Cases page 604, at page 617) it seems to me from the sentence which immediately follows it as from the actual decision in the case and the whole tenor of Lord Atkinson's speech itself that the word "will" was intended to be "may".

What the learned judge had to do in the present case as in any other case where one party to a contract relies upon a breach by the other party as giving him a right to elect to rescind the contract, was to look at the events which had occurred as a result of the breach at the time at which the charterers purported to rescind the charter-party and to decide whether the occurrence of those events deprived the charterers of substantially the whole benefit which it was the intention of the parties as expressed in the charter-party that the charterers should obtain from the further performance of their own contractual undertakings.

One turns therefore to the contract, the Baltime 1939 Charter, of which Lord Justice Sellers has already cited the relevant terms. Clause 13, the "due diligence" clause, which exempts the shipowners from responsibility for delay or loss or damage to goods on board due to unseaworthiness unless such delay or loss or damage has been caused by want of due diligence of the owners in making the vessel seaworthy and fitted for the voyage, is in itself sufficient to show that the mere occurrence of the events that the vessel was in some respect unseaworthy when tendered or that such unseaworthiness had caused some delay in performance of the charter-party would not deprive the charterer of the whole benefit which it was the intention of the parties he should obtain from the performance of his obligations under the contract - for he undertakes to continue to perform his obligations notwithstanding the occurrence of such events if they fall short of frustration of the contract and even deprives himself of any remedy in damages unless such events are the consequence of want of due diligence on the part of the shipowner.

The question which the learned judge had to ask himself was, as he rightly decided, whether or not at the date when the charterers purported to rescind the contract, namely 6th June, 1957, or when the shipowners purported to accept such rescission, namely 8th August, 1957, the delay which had already occurred as a result of the incompetence of the engine room staff, and the delay which was likely to occur in repairing the engines of the vessel and the conduct of the shipowners "by that date in taking steps to remedy these two matters, were, when taken together, such as to deprive the charterers of substantially the whole benefit which it was the intention of the parties they should obtain from further use of the vessel under the charter-party.

In my view, in his judgment - on which I would not seek to improve - the learned judge took into account and gave due weight to all the relevant considerations and arrived at the right answer for the right reasons.

(Appeal dismissed with costs. No order on respondents' cross-notice. Leave to appeal to House of Lords refused. Stay of execution until 19th January 1962, to enable defendants to apply to House of Lords for leave to appeal. Provided petition lodged within the appropriate time, stay continued until the hearing of the application. Usual solicitors' undertaking as to costs).

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