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Implied Condition Involving Impossibility of Performance

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IMPLIED CONDITION INVOLVING IMPOSSIBILITY OF PERFORMANCE.—Early in 1914 the defendants contracted to sell to the plaintiffs a quantity of Finland birch timber. The practice was to send the timber direct by sea from Finnish ports. Before any timber was delivered the war broke out and the presence of German warships in the Baltic made the direct shipment by water impossible. The contract contained no war, *force majeure* or suspension provision. *Held*, that the contract was not dissolved, and the defendants were liable for damages for non-delivery of the timber. *Blackburn Robbin Co., Lim. v. Allen & Sons, Lim.* (1918) 87 L. J. K. B. 1085.

The doctrine of implied conditions has been brought before the English courts more prominently since the outbreak of the war than ever before, by reason of the many causes of impossibility of performance produced by the war. On the whole it is clear that the courts of England have not allowed themselves to be drawn away from established rules in spite of the great pressure of the war emergency, thus exhibiting in a striking way the judicial poise which has always been characteristic of British judges.

The leading recent case was *Krell v. Henry* [1903] 2 K. B. 740, which held that a contract for hiring a flat on Pall Mall for the two days on which it was announced that the coronation procession would pass along Pall Mall, was subject to the implied condition that the procession should take place, though nothing was said about it in the contract. The language of that case

was rather broad, basing the dissolution of the contract on impossibility of performance due to the "non-existence of the state of things assumed by both contracting parties as the foundation of the contract," whether this state of things was mentioned in the contract or not. The cases arising out of the war have not tended to enlarge that language. In *Horlock v. Beal* [1916] 1 A. C. 486, the House of Lords applied the rule to the case of a seaman's contract of service, where the ship and crew were interned in a German port, and held that the contract was dissolved. In *F. A. Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.* [1916] 2 A. C. 397, it was held that the requisition of a ship by the government for war purposes did not put an end to a five years' contract for the use of the ship, though LORDS HALDANE and ATKINSON dissented and LORD LOREBURN said he would be of a different opinion if it were established (as events doubtless did establish) that the ship would be used by the government for substantially the remainder of the five years, for in such an event the contracting parties would have been so placed "that as sensible men they would have said, 'if that happens, of course it is all over between us.'" In *Shipton, Anderson & Co. v. Harrison Brothers & Co.* [1915] 3 K. B. 676, a contract for the sale of specific wheat was held to be dissolved by implied condition when the wheat was requisitioned by the government. In *Metropolitan Water Board v. Dick, Kerr & Co.* (1918) 87 L. J. K. B. 370, a contract for the construction of certain reservoirs was stopped and the plant and materials sold by order of the Minister of Munitions, and it was held by the House of Lords, on very full consideration, that the impossibility of performance created by law excused the contractor from performance.

In the principal case the court was unable to say that the continuance of the normal mode of shipping timber from Finland was a matter which both parties contemplated as necessary for the fulfillment of the contract. The buyers were not interested in the means or the route by which the sellers should make delivery, and it appeared that they were in fact unaware how the timber was to be shipped or whether it might not be already held in stock in England. The rule was doubtless properly applied. It is a rule which must be applied with caution, for "if it be extended too far," as said by McCARDIE, J., in giving judgment in the court below, "it may tend to sap the foundations of contract law as they now exist."

E. R. S.