

proper interpretation of the language which the parties have used which is always a matter of construction. I have stated above that if an error in law is made there are the remedies provided by the Arbitration Act, and the further remedy of direct application to the courts if an award is bad on its face.

In order to meet this difficulty Mr Leslie Scott argued that the words "the contract" in the arbitration clause were limited to so much of the contract between the parties as appeared in the actual written language, although this did not contain the true bargain between the parties or regulate their rights and obligations in reference to the dispute which had arisen. I think that to import such a limitation is inconsistent with the terms of the submission, and that the parties did not agree to refer a dispute except one which had arisen in reference to the bargain which they had made, and the decision of which would affect their mutual rights and obligations.

In my opinion the appeal should be allowed.

The order was as follows:—That the House declares that the motion of which notice was given on the 11th July 1914 ought to be dismissed as to grounds two, three, and four contained in the notice, and the case remitted to the Divisional Court to determine it upon the first ground contained in the notice.

Counsel for the Appellants—Sir R. Finlay, K.C.—Leck, K.C.—Mackinnon, K.C. Agents—Walton & Company, Solicitors.

Counsel for the Respondents—Leslie Scott, K.C.—Dunlop. Agents—W. A. Crump & Son, for Andrew M. Jackson & Company, Hull, Solicitors.

HOUSE OF LORDS.

Friday, January 21, 1916.

(Before Earl Loreburn, Lords Atkinson, Shaw, Parmoor, and Wrenbury.)

HORLOCK v. BEAL.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Ship—Master and Servant—Contract—Impossibility of Fulfilment—Wages of Seaman—Voyage Ended by Seizure of Vessel and Internment of Crew.

Claim for wages by the representative of a seaman whose ship was detained at a German port after declaration of war between Great Britain and Germany.

Held (diss. Lord Parmoor) that no wages were due after the date on which the crew were removed from the ship to prison.

Decision of the Court of Appeal reversed.

Appeal by the shipowner from a decision of the Court of Appeal (SWINFEN EADY and

BANKES, L.J.J., PHILLIMORE, L.J., dissenting) which affirmed a judgment of ROWLATT, J.

The action was brought by the wife of an interned seaman upon an allotment note.

The facts appear from their Lordships' considered judgment—

EARL LOREBURN—This is a case of great importance at the present time. A seaman had the misfortune to be serving on a British ship which entered the port of Hamburg on the 2nd August 1914. The ship was detained by the German authorities when on the 4th August war broke out.

Ever since that date the ship and the crew have been detained in Germany. We do not know whether the ship has been condemned or not, but we know that she has been kept and her crew imprisoned. From the 4th August till the 2nd November they were kept as prisoners on their own ship, and on the 2nd November were removed to other places of confinement.

In these circumstances this seaman's wife sues on an allotment note. Her right to recover admittedly depends on the question, was the seaman entitled to his wages for the period from the 2nd August to the 10th April 1915? His contract of service required him to serve on the ship "Coralie Horlock" for a voyage not exceeding two years in duration. These articles were signed on the 21st May 1914. An allotment note was issued in favour of the present plaintiff for a monthly payment of £4, 15s.

In my view the first question to be decided is whether or not and at what date the performance of this contract of service became impossible, which means impracticable in a commercial sense. It was at first possible that she might be released in accordance with a practice which has been common in former wars and is recommended though not required by the Hague Convention.

But the removal of the crew from their ship and their imprisonment elsewhere, and the lapse of time, made it clear that whatever hope there may have been of restoration could no longer be entertained. Looking back upon what happened, we may think that there was never any hope, or we may think that there was a period of suspense during which it was not determined whether there should be in accordance with common practice a release on both sides of ships so situated. There is hardly anything to help us except the fact that the men were detained on their own ship until the 2nd November. On the whole it seems to me that there was a period of suspense, and, judging as best I can, I take the 2nd November as the date. It is a surmise, but the opposite view also is a surmise, on what is a question of fact.

Assuming this to be so, does that impossibility of performance dissolve the contract of service and disentitle the seaman to wages from that time onwards? The law, both as it is found in the statute book and as it has been administered in Admiralty Courts, has always been in some respects peculiarly tender and benevolent towards seamen in

regard to their contracts of service, though in earlier days with a notable exception embodied in the maxim that freight is the mother of wages. That was a cruel exception which has been removed now by Act of Parliament. Yet it has always to be remembered in scrutinising the older decisions, because what prevented freight from being earned might prevent wages from being recoverable.

Is there then either in any Act of Parliament or in Admiralty law any rule which prescribes the effect of such a detention by the enemy as makes the performance of a contract of service impossible? There is no proof of condemnation by a court.

We were referred to section 158 of the Merchant Shipping Act. That section tells us what is to be done in regard to wages if there is a wreck or loss of the ship. In my opinion these words refer to physical loss. It is true that a ship is lost to her owner in a real sense when she has been captured and condemned by a competent court. It was argued that she may be equally lost to her owner by a prolonged detention. I should be disposed to say that where the property remains his, and ultimate recovery is to be expected, she is not lost even to him. But if I am right in thinking that both the words used in this section, namely "wreck" and "loss," refer to the ship herself and to her physical condition, then they have no bearing on this case. I will merely add that the Court of Appeal in the "*Olympic*," [1913] P. 92, did not decide anything inconsistent with this view. They merely used the frustration of the voyage as a test by which to determine whether or not the physical injury inflicted amounted to "wreck."

Coming to the law as administered in Admiralty, three cases were cited with a view of showing that prolonged detention of a ship and its crew by a foreign Power did not dissolve a seaman's contract of service. Two of these authorities are in 4 East.—namely *Beale v. Thomson*, 4 East. 546, and *Pratt v. Cuff*, 4 East. 43—the former of which was affirmed in this House more than one hundred years ago, but there is no record to show on what grounds. The third is a case at Nisi Prius, *Delamainer v. Winttingham*, in 4 Camp. R. 186. All of them are cases in which ships and crews were confined for a long time but were ultimately released, and the interrupted voyage completed so as to earn freight and therefore wages. It was held that wages continued to be payable throughout. This could be supported, and was supported in the judgments, on the ground that both employers and employed treated the service as not terminated by the temporary interruption, though there are passages in the judgments which admit of a broader interpretation. There is no distinct authority for the proposition that if a seaman is willing to fulfil his contract he is still entitled to wages, though the performance of it has been made impracticable on both sides by a prolonged captivity.

Accordingly neither statute nor Admiralty law provides special guidance, and I

must recur to common law. The contract was for service on a ship for a voyage within a period of two years. Both ship and crew were forcibly detained; the contemplated service became impracticable, so far as I can judge, on the 2nd November 1914. Had the ship and crew been released on the 2nd November I do not think common law would have treated the contract of service as ended, and I do not think the chance of her release was ended before the 2nd November.

In my opinion neither party was any longer bound by that contract from that date. If they were bound it must mean that wages were to be paid, without any service in return, for the entire duration of this war, or in the present case till the expiry of two years from the commencement of the service. The Napoleonic war after the rupture of the Peace of Amiens lasted for eleven years. I think it was an implied term of this service, subject to any special law affecting seamen, that it should be practicable for the ship to sail on this voyage in that sense which disregards minor interruptions and takes notice only of what substantially ends the possibility of the service contemplated being fulfilled. Both employer and employed made their bargain on the footing that whatever temporary interruption might supervene the ship and crew would be available to carry out the adventure.

Accordingly I think that the appeal should be allowed in respect of the period after the 2nd November. I learned with satisfaction that provision is to be made for cases of this kind from public funds. It cannot, of course, affect the decisions of a court of law, but it is in accordance with the spirit which has always influenced both courts of law and the Legislature in dealing with a deserving class of men. The shipowners in this case have brought it before the courts in order to settle the law, which has been in doubt, and are not open to any reflection.

LORD ATKINSON—The main facts have been already stated by my noble and learned friend who has preceded me. The "*Coralie Horlock*" sailed from Hull at the end of May 1914 on the contemplated voyage to Alexandria, and from thence to other ports, and arrived at Hamburg, a port within the limits, on the 2nd August 1914. War having broken out between Great Britain and the German Empire on the 4th August 1914, this ship has from that date up to the present time been detained in Hamburg by the German Government. The appellants have entirely lost the use of her. Her officers and crew were upon the 2nd November removed to a lodging ship in Hamburg, and on the 8th November were interned at Ruhleben, near Berlin, where they still remain.

The Hague Convention makes certain provisions touching the fate of a ship belonging to one of the belligerents found at the commencement of hostilities in the port of another belligerent. If Germany should observe these provisions the ship will not be confiscated. I utterly refuse to

assume that she will do so. The respondent has failed to prove that the ship has been confiscated. What has happened to her since her detention began has not been proved. She may have been destroyed or sent elsewhere, or devoted to some particular use. The only thing certain about her fate is that the appellants have been absolutely deprived of the use of her since the 4th August 1914, and that her crew have been interned as prisoners of war.

The sole question for decision on this appeal is whether the admitted facts establish satisfactorily that the respondent's husband Thomas Beal ceased to be entitled to £9, 10s. per month on the 4th August 1914, or if not, then at what later date if at all.

The ancient doctrine that freight was, as it was said, the mother of wages—that the crew and the owners of the ship were co-adventurers in the enterprise of earning freight out of which the seaman was to be paid—has been abolished by section 157 of the Merchant Shipping Act 1894, and the seaman is now entitled to be paid his wages whether freight be earned or not. Still his contract is a contract to render his service for the achievement of the adventure or adventures upon which it is contemplated by both parties to his contract the ship is to embark, and though undoubtedly many provisions of the Merchant Shipping Act are framed to protect sailors from the result of their well-known improvidence, still there is no reason whatever why a rule of law applicable to contracts in general should not be applied to the contracts of seamen where these latter are not expressly or impliedly excluded from its operation. The rule I refer to is laid down by Lord Blackburn in the case of *Taylor v. Caldwell*, 3 B. & S. 826, in these words—“Where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract may become unexpectedly burdensome or even impossible. . . . But this rule is only applicable where the contract is positive and absolute, and not subject to any condition express or implied; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears 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 into the contract they must have contemplated such continuing existence as the foundation of what there 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 by the perishing of the thing without default of the contractor.” This principle applies not only to contracts in their executory stage, but when they have been in part performed.

In *Appleby v. Meyers*, L.R., 2 C.P. 651, the rule was, by the judgment of the Exchequer Chamber, applied to the case where the plaintiff contracted to erect certain machinery on the defendant's premises and to keep it in repair for two years, the price to be paid on the completion of the work. After some portions of the work had been finished, and others were in the course of completion, the premises and all the machinery and materials were destroyed by an accidental fire. It was held that both parties were excused from the further performance of the contract, and that the provision as to the payment of the price only after completion disabled the plaintiff from recovering anything in respect of the work done by him.

In *Howell v. Coupland*, 1 Q.B.D. 258, it was applied to a case where a crop which was sold perished by disease.

In *Baily v. De Crespigny*, L.R., 4 Q.B. 180, the performance of a covenant was rendered impossible by an Act of Parliament, and the covenanter was held to be discharged.

In *Krell v. Henry*, 1903, 2 K.B. 740, it was applied to a case where a flat in Pall Mall was hired in order to see the contemplated procession on the occasion of the coronation of his late Majesty King Edward the Seventh, which ceremony was postponed. The contract of hiring did not contain any express reference to the procession, but it was held that the proper inference to be drawn from the surrounding circumstances was that both parties to the contract contemplated the taking place of the procession along the proclaimed route as the foundation of the contract.

In *Melville v. De Wolf*, 4 E. & B. 844, the impossibility arose from an act of State as the primary cause. The plaintiff in the action was a seaman who had signed articles to serve on a voyage to the Pacific and back to a port in the United Kingdom for a term of three years at £7 per month. The captain was sent home from Monte Video by a Naval Court, constituted under the Mercantile Marine Act of 1850, to be tried for shooting one of the crew. The plaintiff was sent home by the same court as a witness against him, and he attended the trial in this country in this capacity. When the trial was over the ship was in the Pacific, and it was practically impossible for him to return to her. The plaintiff claimed wages at the above rate up to the time the trial terminated. The defendant paid into Court a sum sufficient to cover the plaintiff's wages up to the time he left his ship. It was held that he was not entitled to any wages after he left the ship. Lord Campbell on delivering judgment said—“After he was sent home from Monte Video to England he neither served under the articles actively or constructively, and as from that time the relation of employer and employed could not be renewed within the scope of the original hiring, we think that the contract must be considered to be dissolved by the supreme authority of the State, which is binding on both parties.”

It will be observed that the contract so

dissolved was not a mere executory contract but a contract in part performed.

In the case of "*The Friends*," 4 C. Rob. 143, the impossibility was the result of the act of a hostile State. The plaintiff's ship, a British ship, manned by a British crew, was, in the course of a voyage from London to Newcastle and back, captured by a French privateer. The plaintiff and some members of the crew were taken as prisoners of war to France, not because of their special connection with this particular ship, but because they were British subjects. While they were in custody the ship was recaptured, which as far as possible, according to law, restored the antecedent condition of things, but a new hand had been hired to fill the plaintiff's place. The ship continued her homeward voyage and reached the port of London. The plaintiff sued for the wages which would have been due to him had he served on the homeward journey. Sir William Scott (as he then was) in giving judgment said—"Nothing can be better settled than that the act of capture defeats all rights and interests, but it is contended that the former interests revive on recapture. The claimant was not on board at the time of recapture, and the owners were obliged to hire another to fill his place. Under these circumstances the utmost that could be demanded, with any show of reason, would be that the small portion of his wages earned prior to the capture, two days' service, subject to salvage, were due. Beyond that it is impossible to advance a pretension, for what right can a person in captivity have to demand the benefit of the labour of those who carried the ship to London, and still more of those who were hired in his place for the return journey?" The contract in this case also was in part performed, but the service in aid of the adventure which the parties to the contract contemplated the seaman should render in return for his wages was made impossible by his incarceration, and each party to the contract was held therefore to be relieved of the obligation it imposed.

In my opinion the provision contained in the 158th section of the Merchant Shipping Act of 1894 to the effect that the service of a seaman and his title to wages cease when his ship is lost is but a statutory application of this same principle.

I think that the loss referred to in this section does not mean merely the loss of the use of the ship but physical loss. Physical loss, however, is not to be confined to the foundering of the ship, or such like, but physical loss as defined in the judgment of Maule, J., in *Moss v. Smith*, 9 C.B. 94, 103, applicable generally to mercantile contracts, and approved of by Lord Blackburn in *Dahl v. Nelson*, 6 A.C. 38, at p. 52. Maule, J., said—"It may possibly be physically possible to repair the ship, but at an enormous cost, and then also the loss would be total, for in matters of business a thing is said to be impossible when it is not practicable, and a thing is impracticable when it can only be done at an excessive or unreasonable cost. If a ship sustains such extensive damage that it would not be reasonably practicable

to repair her, seeing that the expense of repair would be such that no man of common sense would incur the outlay, the ship is said to be totally lost." Lord Blackburn points out that though these words were used in the case of a policy of insurance they were spoken generally of mercantile contracts, and that it was on the principle thus laid down that *Geipel v. Smith*, 1 Asp. Mar. Law C. 268, L.R., 7 Q.B. 404, and *Jackson v. Union Marine Insurance Company*, L.R., 10 C.P. 125, were decided. It was contended that this section 158 is exhaustive, and that no loss other than the physical loss there referred to can terminate the seaman's contract or his right to wages. In my opinion that is wholly erroneous. It leaves out of consideration effective capture by a belligerent which transfers the property in the ship from its owners to the captor and enables that captor to give an effective title to his vendee, and it also leaves out capture by pirates, which transfers the possession and custody of the ship though not her ownership.

The above-mentioned cases are clearly distinguishable from *Beale v. Thomson*, 4 East. 546, as was pointed out by Lord Campbell in *Melville v. De Wolf*, 4 E. & B. 844. In the former case the ship went out in ballast from England to St Petersburg to bring cargo from thence to London, and was to be paid freight by the ton. The Emperor Paul of Russia, though at peace with England, had this ship with others seized and her crew imprisoned. On his death in six months the ship and crew were released. They were taken back on board of their ship, got her cargo, navigated her back to England, and earned the proper freight. Lord Ellenborough, in delivering judgment, approved of and relied upon the doctrine laid down in different words by Lord Hardwick in *The King v. Castle Church*, 1 Bur. 5, c. 70, and in *The King v. Eaton*, p. 40 of same report, respectively, to the effect in the first place "that where a servant returns and the master receives him, it is always esteemed a dispensation of the master and helps the discontinuance and works in the nature of a remitter," and in the next "the absence of the servant for three weeks was purged by the master's receiving him again, which ought to be received in that case as a dispensation, and in strictness of law he still continues in the service of the master notwithstanding such absence." Lord Ellenborough held that owing to the terms upon which the ship was released, and the property belonging to the ship and the crew restored or compensated for under the order of the Russian Government (at p. 551), there was no capture notwithstanding the hostile nature of the seizure, and laid it down that the right of a mariner to wages depends first on his earning freight for his owners on that voyage for which he was hired, and secondly upon the performance by the mariner of the service he has agreed to perform in respect of his owners during the voyage. The jury found that the plaintiff had performed his services properly, and the freight was admittedly earned. And taking these

three facts into consideration, the reception back of the plaintiff by the owners into their service, the earning of the freight, and the proper performance by the plaintiff of his service, it was held that he was entitled to his wages during the time of his captivity and until he reached London on the return voyage. *Delamaine v. Winteringham*, 4 Camp. 186, is to the same effect.

In the present case the owners have not taken back the seaman Beal into their service. On the contrary, they insist that the contract with him is at an end and that his right to wages has been determined.

In *Wiggins v. Ingleton*, 2 Ld. Rayne 1211, a seaman after serving three months on a voyage from Carolina to London, was impressed under the Queen's authority before reaching the delivery port. It was held that even though the ship reached that port he was only entitled to wages *pro tanto* for the time he actually served.

In *Dahl v. Neilson*, 6 A.C. 38, Lord Blackburn at p. 53 said that it was "held in *Geipel v. Smith* by the whole court, and in *Jackson v. Union Marine Insurance Company* by the majority in the Common Pleas, and in the same case in error by a majority of the Court of Exchequer Chamber, that a delay in carrying out a charter-party caused by something for which neither party are responsible, if so great and long as to make it unreasonable to require the parties to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at an end." Lord Watson on pp. 61 and 62 analysed these two cases at length, and approved of the decisions in them, and Lord Selborne stated he had read the judgments of his two colleagues and concurred in them.

In the first of these cases the defendant vessel had been chartered by the plaintiff to load at a particular place a cargo of coals to be taken to Hamburg. Before any breach of the agreement the port of Hamburg had been blockaded by the French fleet, and the Queen of England had by proclamation enjoined her subjects to strict neutrality, and not to commit any violation of the law of nations. Thereupon the voyage to Hamburg became illegal. The defendant refused to load his ship, and it was held that he was justified in so doing, as the charter-party was for a single adventure to commence at once, and the contract being executory the further performance of it within a reasonable time was prevented by an expected cause—the blockade, which was a restraint of princes. Lush, J., in giving judgment, put the pith of the case thus. He said—"If the impediment had been in its nature temporary I should have thought the plea bad, but a state of war must be presumed to be likely to continue long, and so to disturb the commerce of merchants as to defeat and destroy the object of a commercial adventure like this." It is not necessary therefore in such a case to wait till the delay has occurred. It is legitimate to come to the conclusion that the delay caused by war will be long, and so disturbing to commerce as to defeat the adventure and to act accordingly at once.

In the second case the plaintiff, a ship-owner, entered into a charter-party dated in November 1871, by which his ship was to proceed with all despatch from Liverpool to Newport, and there load a cargo of iron rails for San Francisco. The plaintiff effected an insurance on the chartered freight. The ship sailed from Liverpool on the 2nd January and ran aground on the following day in Carnarvon Bay. On the 15th February, while she was aground, the charterers threw up the charter-party and chartered another ship. On the 18th she was floated, but the necessary repairs could not be effected till August. The plaintiff sued on the policy for the chartered freight. The jury found that the time necessary for getting the ship off and repairing her was so long as to put an end to the adventure in a commercial sense. This, according to Bramwell, B. (as he then was), amounted to finding that the voyage the parties contemplated had become impossible, and that a voyage undertaken after the ship had been repaired would have been a different voyage—a different adventure—and held that there was an implied condition-precedent in the contract that the ship should arrive at the port of loading in a reasonable time, the non-performance of which not only gave the charterer a cause of action but released him from the contract, that he was not bound to load the ship, and that there was therefore a loss of the charterer's freight by perils of the sea. The charterer did not wait till a reasonable time had elapsed before he repudiated the contract. He did that at once when a long delay in the process of repairing was reasonably probable.

In a case tried before Sir William Scott (as he then was) he practically applied many years earlier the same principle to an executed contract, namely, the case of the "*Elizabeth*," 2 Dods. 403. This vessel sailed from London to St Petersburg, took in cargo there, and started on her return voyage. She grounded on a reef of rocks at Gothland, was floated, and brought to Ostergman, where she was beached in order to examine her injuries. She was so damaged that she could not be repaired within the Baltic season, *i.e.*, when the Baltic was sufficiently free from ice to be navigable. Though it is a general rule that a captain cannot discharge his crew in a foreign port, it was held that under these circumstances and having regard to the anticipated delay he was clothed with authority in this case to do so. He did discharge them against their will (as it was taken to be) at once, making provision for their passage home to England. The ship returned to England in the month of April following, manned by a new crew. The plaintiff sued for wages up to the time of the return of the ship to the home port. It was held that he was only entitled to wages up to the date of his discharge. At page 408 of the report the learned Judge, Lord Stowell, said—"The ship proceeded on the original voyage under the expectation entertained on both sides that she would return in the ordinary course of such voyage. A total loss by wreck happens. This operates as a total

loss of wages. There may be cases much short of this semi-naufragium which were not occasioned by the default of either party, but where it has originated from *vis major*, the act of God, which neither party had in contemplation at the time of the contract. . . . I am therefore clearly of opinion that they have no right to claim as they have done wages up to the time of the return of the 'Elizabeth.' If they had obstinately stayed with the ship they would have done wrong, both with respect to the owners and to themselves. I think the master had a right to dismiss them under this extreme pressure." Here the contract of the seamen was not executory; it was in part performed. The time necessary to make the repairs had not elapsed. The delay had only been anticipated when the dismissal took place. It was the prospect that a long time must elapse before the ship was rendered fit for use, not the actual lapse of that time, which justified the captain in treating the adventure for which the crew contracted to serve as at an end and their contracts as terminated.

This case was cited in the case of the "*Olympic*," 1913, P. 92, and commented upon by Buckley, L.J., as he then was. In that case, as in the case of the "*Elizabeth*" and in the present case, the contract of the seamen was in part performed. The "*Olympic*," though very seriously injured, was well worth repairing, but it was the prospect of the delay necessary to effect the repairs required to render her seaworthy which in the opinion of the Court rendered her a wreck within the meaning of this section 158 of the Act of 1894 and justified her owners in treating the particular adventure for which the crew contracted to serve as ended and justified their dismissal.

In my view the provision touching wreck contained in the 158th section of the Merchant Shipping Act of 1894 is merely a statutory application of the principle first laid down in the case of the "*Elizabeth*" to cases when the ship sustains physical injury, not so grave as to amount to loss, yet sufficiently serious to render her unseaworthy until repairs, requiring a substantial time to effect, are carried out upon her.

In the present case it does not appear that the ship is physically injured. Once interned by this enemy Power, the prospect of being interned for a length of time to which nobody can place a limit opened up to her owners. Moreover, any day something may be done which would transfer the property in the ship from them to her captors.

In *Beale v. Thomson*, 4 East., at p. 561, Lord Ellenborough said—"Seizure, even hostile, is not necessarily capture, though such is its usual and probable result. The ultimate act or adjudication of the State by which the seizure has been made assigns its proper and conclusive quality and denomination to its own original proceeding. If it condemns in such case, it is a capture *ab initio*. If it awards restitution as an act of justice, as the Order of the 5th June 1801 expressly does, it pronounces upon its own

act as not being a valid act of capture, but as a temporary seizure and detention upon grounds not warranting the condemnation of the property or the dealing with it as captured. It seems to make no material difference for this purpose whether the restitution were awarded by the Government of the country as an act of State, as in this case it was, or by any of the ordinary courts of civil judicature to which the administration of justice on these subjects is usually dedicated." The meaning of that passage I take to be this, that seizure *per se* is an equivocal act; that whether it shall amount to capture or not depends upon the intention of the captor in making it; that this intention may be shown by acts subsequent, namely, either the condemnation in the proper judicial tribunals of the State of the property taken as lawful prize, or by an act of the government of the country of the captors as an act of State, and that when that intention is shown it operates by relation back to the original seizure, turning it either into a capture *ab initio*, or into a temporary detention *ab initio* not amounting to capture. Thus the circular of the 5th June 1801 was held to determine the character and purpose of the seizure made over six months previously.

In *Goss v. Withers*, 2 Bur. 683, Lord Mansfield, at pp. 693-695, deals with the principles adopted and practices followed by different European countries on this question of prize. He leaves the matter in many respects undecided. And consistently with everything that has been laid down in these two authorities, it may well be that any act of the Government of a belligerent Power indicating that they have treated a seized ship as their own property, such as the sale of it, for instance, would be sufficient to determine the character and purpose of the original act of seizure so as to make it either a capture proper with all its consequences or mere detention.

We are deciding this case without knowing whether anything of the kind has occurred in this instance. The fact, however, that it might occur at any moment after seizure, renders it all the more reasonable, just, and natural for the owners to have come to the conclusion on the 4th August 1914 that the adventure upon which their ship was embarked was put an end to, and the contracts of the crew, and their right to wages determined. They acted upon that conclusion in the only way, and to the only extent possible under the circumstances, by refusing to pay the allotment. In reference to *Hadley v. Clarke*, 8 T.R. 263, it has been already pointed out that the embargo imposed by the Order in Council appeared only to contemplate a temporary detention, as it was made till "further order." And the point was never made that an embargo, even if originally intended to be temporary, might not put an end to the contract of affreightment if it were prolonged—see Lord Kenyon, 265. All that was in fact decided was the abstract point that a temporary interruption of a voyage by an embargo does not put an end to such a contract.

Moreover, the judgments of Grove, J., and Laurence, J., especially that of the latter, rather indicated that they treated the contract to carry the goods to Leghorn as a positive and absolute contract to do so within a reasonable time—the dangers of the seas only excepted. The latter learned Judge says, page 267, they “absolutely engaged to carry the goods, the dangers of the seas only excepted; that therefore is the only excuse which they can make for not performing the contract. If they had intended that they should be excused for any other cause they should have introduced such an exception into the contract.” Of course if the contract of the parties be thus positive and absolute, they are bound by it, however impossible the performance of it may become.

The contract with the crew in this case was not a positive and absolute contract, and the above case does not appear to me to touch the present case.

Section 134 of the Act of 1894 does not, I think, touch this case. It obviously does not refer to the forcible act of an enemy.

No point was raised as to the two days which elapsed between the 2nd August, the day of arrival, and the 4th August, the day of the outbreak of war.

In my opinion therefore the judgment of the Court of Appeal, as well as that of Rowlatt, J., was erroneous and should be reversed.

LORD SHAW—The respondent is the wife of a seaman who signed articles as second mate on board the “Coralie Horlock,” on the 21st May 1914. He agreed to serve “on a voyage of not exceeding two years’ duration,” within certain limits, “trading in any rotation and to end at such port in the United Kingdom or Continent of Europe (within home trade limits) as may be required by the master.”

His wife, the respondent, was duly made allottee of one-half of his monthly wages. The papers are in order, and there is no question of her right to be paid the one-half of the wages which her husband has earned or to which he is entitled. She founds upon section 143 of the Act of 1894, conferring the right to sue and recover on allotment notes. By sub-section 2 it is provided that the seaman shall be presumed to be duly earning his wages unless the contrary is shown, *inter alia*, by such “evidence as the Court in their absolute discretion consider sufficient to show satisfactorily that the seaman has ceased to be entitled to the wages.”

The question in the case accordingly is whether Beal has become entitled to wages from and after the time when a state of war existed between Great Britain and Germany.

The declaration of war took effect as from 11 p.m. on the 4th August 1914. The “Coralie Horlock” was then in the port of Hamburg, where she had arrived on the 2nd. The ship still remains there. Apart from exceptional or provisional rules or directions agreed by the belligerent States, for her owners or master to trade with the enemy was of course illegal; for her crew

it was equally illegal to assist in trading with the enemy; to attempt an escape, whether with or without cargo, may have been physically impossible; in any case it would have exposed the ship to risk of destruction.

In *Esposito v. Bowden*, 7 E. & B. 779, Willes, J., reviewing the case law, and referring especially to *Potts v. Bell*, 8 T.R. 548, and to the judgment of Lord Stowell in the “*Hoop*,” stated the law in terms which have never since been doubted—“It is now fully established that, the presumed object of war being as much to cripple the enemy’s commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy’s country, and that such intercourse, except with the licence of the Crown, is illegal.”

Without fault on the part of either party to the contract of service, law and force combined to stop the prosecution of this voyage, and the adventure was consequently lost. In my humble opinion that stoppage and loss, having arisen from a declaration of war, must be considered to have been caused for a period of indefinite duration, and so to have effected a solution of the contract arrangements for and dependent upon the completion or further continuance of the adventure.

I say this advisedly, in consequence of the argument presented to the House, and founded on the possibility that after a declaration of war peace may be concluded within a short time, ships may be released, and voyages and shipping adventures be resumed. As the cases show, such resumption does of consent take place, and courts of law pay respect to the terms upon which the resumption was made. But apart from private arrangements of parties, the contracts are in my opinion (and subject to the point as to a period of grace hereafter dealt with) brought to an end by a declaration of war, and all interested are entitled to have affairs settled upon that footing. And I am further of opinion that the contract of service between owners and crews is also terminated in the same way, because it is a contract whose incidents stand or fall with the adventure with which it was bound up.

I do not think that any other rule would be in accord with law or would work. When a ship is put under detention by a declaration of war, I cannot see room for a condition of affairs which would leave parties in suspense, feeling that they are bound if the war be short but free if the war be long. In the case of a vessel in an enemy port the war descends upon master and crew alike, taking no regard of either contract rights or obligations, but putting all alike on the common footing of British citizens, and as such placing their liberty completely at the disposal of the enemy Power. Germany made no lesser claim in the present case. From the 4th August the owners “were deprived of the possession of this said vessel, and the said Tom Rea Beal, with the officers and other members of the crew, were on or about the

2nd November removed from the said vessel to a lodging ship in Hamburg, and on or about the 8th November were interned at Ruhleben, near Berlin," where they still remain.

While the general question as to the effect of a declaration of war should in my opinion be resolved as stated, I should also feel entirely free to hold that the circumstances of the present case leave no doubt as to disruption of the contract relations of parties and the loss of the adventure.

Germany allowed no period of grace for loading or unloading, or for departure with freedom from capture on transit. The practice of nations in this particular has greatly varied. I refer with much satisfaction to the treatment of this subject in Mr Higgins' valuable work on The Hague Peace Conferences. On the outbreak of the Crimean War in 1854 enemy trading ships were allowed a period of six weeks by Russia, on the one hand, and Britain and France on the other. In 1866 Prussia made the same allowance to Austria. Very liberal concessions on this head were made by the United States of America to the ships of Spain on the outbreak of war between those countries in 1898. Since that time the instances show less indulgence to peaceful commerce. On the occurrence of the Russo-Japanese War in 1904 Japan allowed a week, Russia forty-eight hours. In the present instance no allowance was made. The circumstances are specially notable. Great Britain was manifestly willing that the spirit of The Hague Convention should be obeyed and that days of grace should be allowed. On the day of the declaration of war, namely, the 4th August 1914, an Order in Council was issued referring to the practice in the past and to the terms of the Convention. It provided that a period of grace for loading, unloading, and departure should be allowed to all German vessels in British ports, namely, until midnight of the 14th August. This was subject to information being received not later than the 7th that "the treatment accorded to British merchant ships and their cargoes which at the date of the outbreak of hostilities were in the ports of the enemy, or which subsequently entered them, is not less favourable than the treatment accorded to enemy merchant ships" by the Order in Council. Germany did not accept this overture.

The uncertainties and hesitations of nations upon the question are reflected in art. 1 of The Hague Convention of 1907, in which the international consent was reduced to the mere proposition that "it is desirable" that a merchant ship in an enemy port should "be allowed to depart freely, either immediately or after a reasonable number of days' grace." As applied to the case of the "Coralie Horlock" at Hamburg the enunciation of this sentiment has proved worthless.

I observe, however, that section 2 of the Convention is also founded on in the Courts below. It provides that such a ship "may not be confiscated. The belligerent may detain it on condition of restoring it after the war without payment of compensation,

or he may requisition it on condition of paying compensation."

I am not in a position to say whether this head of The Hague Convention will be respected by the Government of Germany. That learned Judge, Swinfen Eady, L.J., says that "in the absence of any evidence to the contrary it must be presumed that she is merely detained on condition of being restored after the war."

It is not necessary, in the view which I take, to discuss the point at length. I have already referred to the action of Germany in regard to the subject of days of grace. Other circumstances might also have to be considered on the point of whether The Hague Convention afforded any presumptive aid in the construction of rights or obligations, or in regard to the action of the present belligerents. Whether even—conventions having been disregarded—rights would have to be determined as in pre-convention days—the days according to Lord Mansfield (2 Douglas 614a) of confiscation "if no reciprocal agreement is made"—on such points no opinion need be indicated. But they do bear on the question of presumption from the terms of The Hague Convention, which is referred to in the Courts below.

I must express the gravest doubt whether any such presumption is in place in the present case. Speaking for myself, I should not feel justified upon the terms of this international convention in allowing my mind to be swayed by such presumptions as would be appropriate to an inviolate document, or to one which is backed by the sanction of municipal law. What, in short, during the course of the war or under the stress of circumstances may happen to this ship no one can foresee. Destruction, confiscation, or return—any of these things may occur, and all are involved in the overwhelming uncertainty both as to time and circumstance which follows from the present state of war. With regard to the effect of a declaration of war there is certainly, however, one presumption. It has been expressed in various decisions, but was clearly stated by Lush, J., in *Geipel v. Smith*, L.R., 7 Q.B. 404, 1 Asp. Mar. C. 268—"A state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants, as to defeat and destroy the object of a commercial adventure like this."

The judgments of the Courts below proceeded upon two propositions—(1) that the ship is *in esse*—she is neither wrecked nor lost—and (2) she is temporarily detained, and therefore that the principle of the old embargo cases applies. I again take leave to refer to this second point. I think an analysis of the embargo cases shows that they depended largely if not altogether on these considerations. In the first place, in the working of the old rule that freight is the mother of wages, the question as to whether wages were due could not be adjusted until after the voyage was over and the freight was earned. Accordingly in the leading case of *Beale v. Thompson*, 4 E. 546, the essential fact founded on was this, that

after an embargo laid on by the Tsar Paul had been taken off by that erratic Sovereign the voyage was resumed, the same ship and the same men employed, and all the men taken on to complete the same voyage under circumstances which showed "a recognition on the part of the master that he and the sailors then stood in their original relative situation to each other under the articles by which that relation was constituted"—4 East, 565. The rule as to the dependency of wages on freight has long ago been abolished by statute, and while of course it might be possible under special bargain to continue or resume contract relations upon special terms, I have great doubt whether the embargo cases to which I have referred can be now relied upon in support of any part of the modern law of seaman's wages. These observations apply in terms to other cases cited, e.g., to *Delamainerv. Winteringham*, 4 Camp. 186.

Upon, however, the proposition that the ship is neither wrecked nor lost I agree with the learned Judges in the Courts below. Upon the other hand, I cannot see my way to hold that there is therefore an indefeasible right to recover, under section 158 of the Act, unless and until such wreck or loss occurs. I venture respectfully upon that subject to adopt the judgment of my noble and learned friend Lord Wrenbury.

I now come accordingly to what is by far the most important point in the case. Granted that a state of war exists, with consequences which include the stoppage of the voyage and the internment of officers and crew, are wages due for a period subsequent to the declaration of war, the ship itself having been neither wrecked nor lost and being still in the port of Hamburg?

It may be conceded that the continued existence of the subject-matter of the contract has formed a large part in the consideration of such a question. Under the law of Rome the illustration of the solution of a contract obligation was frequently given from the case of a promise with regard to a slave. In such a case if the slave died or was manumitted before being handed over the contract was at an end. The vendor, however, remained of course answerable if he was responsible for what had occurred—if he had himself killed the slave or set him free. In all cases, however, where no fault attached the failure of the *corpus certum* released the contracting parties.

Several of the citations from the Digest on this subject are made by Lord Blackburn in the leading case of *Taylor v. Caldwell*, 3 B. & S. 826, and one can entirely assent to that very learned Judge's view that the principle is adopted in the civil law as applicable to every obligation of which the subject is a thing certain. He cites Pothier in support of a definition of much precision as follows:—"The debtor *corporis certi* is freed from his obligation when the thing has perished neither by his act nor 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." In another passage of this judgment Lord Blackburn remarks—"In none of these cases

is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel."

In the course of laying down these principles the cases which had occurred in the English courts were referred to, and that of *Williams v. Lloyd* (reported in *W. Jones' R.* 179) was especially founded on.

It is manifest that the principle last adumbrated was capable of a wider practical and logical application than to the failure of a *certum corpus*. The underlying ratio is the failure of something which was at the basis of the contract—in the mind and intention of the contracting parties.

This ratio has, I am humbly of opinion, been properly developed in recent years. I do not go through all the decisions, but I think it right to mention that of *Krell v. Henry*, 1903, 2 K.B. 740, in which I desire to attach my respectful and pointed concurrence in the opinion delivered by Vaughan Williams, L.J., in these passages—"Whatever may have been the limits of the Roman law, the case of *Nickoll v. Ashton*, 1901, 2 K.B. 126, makes it plain that the English law applies the principle, not only to cases where the performance of the contract becomes impossible by the cessation of existence of the thing which is the subject-matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things going to the root of the contract." This view is fully discussed by the learned Judge. I think it to be in entire accord with that doctrine of frustration of voyage which has become fully accepted since the case of *Jackson v. Union Marine Insurance Company*, 4 L.R., 10 C.P. 125, with the doctrine underlying *Taylor v. Caldwell*, and with sound legal principle.

Lord Blackburn in discussing the civil law only cited Digest 45, 1, 33, and Digest 45, 1, 23, and confined his survey of that law to the failure of a *corpus certum*, developing the doctrine as it were from that point. And Vaughan Williams, L.J., reasons upon the same limited premises, stating that "the Roman law dealt with obligations *de certo corpore*." The passages cited are from the book "De verborum obligationibus." The subject is too large for treatment here, but it may be said that the same principle appears in book 18, "De contrahenda emptione." Even in regard to book 45, however, another text shows that the development and wider application of the principle was not unknown to Roman jurists and was approved. It is Digest 45, 1, 91. After dealing with the case of a slave, the ordinary illustration of a *certum corpus*, and of his death, the review of the principle is broadened thus—"Si sit quidem res in rebus humanis, sed dari non possit, ut fundus religiosus (puta) vel sacer factus, vel servus manumissus, vel etiam ab hostibus si capia-

tur." Then in each of these instances liability under the obligation flies off if the occurrences do not arise from the promisor's fault. Mr Hunter in his invaluable work thus paraphrases the dictum as to the sale of a piece of land—"Sempronius promises to give a small plot of ground to Mævius. After doing so he buries a dead body in the place and thus makes the land *extra commercium*. Sempronius must pay its value. If the land had belonged to another who had buried a body in it, he would have been released." The illustration is not inapt even to the present case, for it shows that it was no answer to say "the land, the *certum corpus*, is there," for the land having through no fault of the promissor become *extra commercium* by burial of the dead, then the basis of the transaction—the root of the contract as that had been contemplated by the parties—had gone, or had suffered such an alteration as to release them from the obligation itself. This was a case analogous to that of the slave who was still alive but had been manumitted or had been captured by the enemy. It is thus not without interest to observe that not only had the principle been laid down but its modern development had been foreshadowed in Roman times.

The application of the principle in the present case can, in my opinion, lead to only one result, namely, that a dissolution of the relation of master and servant occurred in the case of the "Coralie Horlock" upon the declaration of war between Germany and Britain. The vessel being then in the port of Hamburg, remains there, her master, officers, and crew are interned as prisoners, the voyage and adventure contemplated have been brought to an end. No light is thrown upon the question by illustrations of contracts of service which have been terminated, say, by a bankruptcy or a cessation of business; in such cases the servant, having lost his employment, is able to say "I am here, willing, and able to render the service contracted for." In the present case these ideas would be fictional; the ship cannot be navigated, no orders in that regard by the master could be obeyed, and the crew, unhappily, is prevented by hostile force from rendering the ship any service whatsoever. In such circumstances I do not see my way to hold the seaman to be entitled in law to wages which, through no fault of the owners, he is entirely unable to earn by service. Such cases, no doubt, will take their rank among the many desolating circumstances which demand remedial attention at the hand of Parliament or the executive power.

I think that the appeal should succeed.

LORD PARMOOR—In this appeal, involving a question of great general importance, I agree with the decision of Rowlatt, J., and of the majority in the Court of Appeal.

The plaintiff in the action and the respondent in the appeal is the wife of Tom Rea Beal, who signed articles as second mate on board the "Coralie Horlock" on the 21st May 1914. On the same day an allotment note

was duly signed in favour of the respondent for the sum of £4, 15s. to be paid monthly by the appellant during the period of the articles. On the 4th August 1914, at the outbreak of the war, the "Coralie Horlock" was in the port of Hamburg, and was then, and still is, unable to leave by reason of detention by the German authorities. The appellant paid to the respondent, under the allotment note, certain sums up to the 2nd August 1914, but contends that he is not liable to pay to Tom Rea Beal any wages after the 4th August 1914, and in consequence is not liable to make any further payment to the respondent.

The case was tried on an agreed statement of facts. The contract of service as a mariner by Beal was "on a voyage of not exceeding two years' duration to any ports or places within the limits of 75 degrees north and 60 degrees south latitude, commencing at Hull, proceeding thence to Alexandria, and (or) any other ports within the above limits; trading in any rotation and to end at such port in the United Kingdom or continent of Europe (within home trade limits) as may be required by the master." The decision of the appeal depends upon the construction of this contract.

The material facts are contained in paragraphs 7 and 8 of the statement—"On and after the 4th August 1914 a state of war existed between the United Kingdom of Great Britain and Ireland and the Empire of Germany. The said vessel was then and still is in the port of Hamburg, and is unable to leave the said port by reason of detention by the German authorities. The appellant has been since the 4th August 1914 and still is deprived of the possession of his said vessel, and the said Tom Rea Beal, with the officers and other members of the crew, were on or about the 2nd November removed from the said vessel to a lodging ship in Hamburg, and on or about the 8th November were interned at Ruhleben near Berlin."

It is not allowable to make conjectures in favour of the appellant outside the facts contained in the statement and any inferences deducible therefrom. I agree in this respect with the views expressed in the judgments of Rowlatt, J., and Bankes, L.J.

In the course of the argument articles 1 and 2 of The Hague Convention, No. 6 of 1907, were referred to. They are as follows:—"When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately or after a number of days' grace, and to proceed after being furnished with a pass, direct to its port of destination or any port indicated to it. The same principle applied in the case of a ship which has left its last port of departure before the commencement of the war and has entered a port belonging to the enemy while still ignorant that hostilities have broken out." Then article 2—"A merchant ship which owing to circumstances beyond its control may have been unable to leave the enemy port

within the period contemplated in the preceding article, or which was not allowed to leave, may not be confiscated. The belligerent may merely detain it on condition of restoring it after the war without payment of compensation, or he may requisition it on condition of paying of compensation."

The case appears to have been argued on the footing that the vessel was detained in accordance with the conditions of these articles. These articles could not be referred to if they contained provisions inconsistent with the agreed statement of facts, but I think that they are in accord with the said statement, and that there is no objection to the reference which has been made to them in the judgments of the courts below.

The respondent has proved, pursuant to section 143 (2) of the Merchant Shipping Act 1894, that she is the person mentioned in the allotment note, and that the note was given by the owner or by the master or some other authorised agent. Her husband therefore is to be presumed to be duly earning his wages, unless the contrary is shown under sub-section 2 (d), "by such other evidence as the Court in their absolute discretion consider sufficient to show satisfactorily that the seaman has ceased to be entitled to the wages out of which the allotment is to be paid." The question is whether this *onus* has been discharged. The writ was issued on the 10th April 1915, and judgment has been given in favour of the respondent for the amount of the allotment note up to the date of the writ. It is important that this limitation should be observed. My opinion is based on the conditions as they then existed, namely, a detention which had operated from the 4th August 1914 to the 10th April 1915, and of which the subsequent length was indeterminate and not capable of exact definition.

The first question to be decided is whether under the conditions stated in the agreed statement of facts the matter is determined by statutory enactment. It is not suggested that Tom Rea Beal has been discharged abroad under the provisions of the Merchant Shipping Act 1906 or that his right to wages has been suspended under the Merchant Shipping Act of 1894. The relevant section is section 158, which enacts that where the services of a seaman terminate before the date contemplated in the agreement by reason of the wreck or loss of the ship, or of his being left on shore at any place abroad under a certificate granted as provided by that Act of his unfitness or inability to proceed on the voyage, the seaman shall be entitled to wages up to the time of such termination, but not for any longer period. If there has been a loss of the ship within the meaning of this section the appellant is not liable.

It is not necessary to attempt to define exhaustively all the cases which might be included within the term "loss of the ship," but in my opinion it does not include such a case as that of the "Coralie Horlock," of the possession of which the appellant has been deprived since the 4th August 1914 by reason of its detention in the port of

Hamburg. The ship has not been lost by any physical accident, such as might have caused a wreck, and there is no evidence that it has been requisitioned by the German authorities, or that there has been any confiscation of ownership. The use of the vessel has been lost for an indeterminate time. I doubt whether the loss of the use of a vessel comes in any sense within the words "loss of the ship" in section 158 of the Act of 1894. It is not necessary to decide this point. There is no finding in the agreed statement of facts which could justify the inference that owing to its detention the ship has no longer a commercial value, or that the expense incurred or to be incurred in not abandoning her is such that no man as a matter of business would incur the outlay.

I am in agreement with Rowlatt, J., when he said—"Now what I have stated with regard to the position of the ship in Hamburg under The Hague Convention, if it is right, negatives any question as to the loss of the ship. She is there; the property in her has not changed; she is simply detained, and apart altogether from what was said in the case of *Sievrigh v. Allen*, 10 Asp. Mar. C. 251, 1906, 2 K.B. 81, which was cited to me, it is impossible to hold that the ship is lost." It was argued on behalf of the appellant that although section 158 was not exhaustive of the cases in which a seaman was entitled to wages up to a given time, but not for any longer period, yet that the section did cover and was intended to cover a case such as the present, in which if the seaman is no longer entitled to his wages it is by reason of the alleged loss of the ship. I think that there is good reason for this contention, but I prefer to place my opinion on wider grounds. Assuming that section 158 has no application, Tom Rea Beal was, in my opinion, entitled to the payment of his wages up to the date of the issue of the writ on the construction of the contract of service, and the respondent succeeds in her claim as allottee.

The articles which contain the contract of service make no express reference to the contingency which has happened, and which is said to have dissolved the contract and to have defeated any claim to wages.

The detention of the vessel and the imprisonment of the mariners did render it impossible in fact for Tom Rea Beal to be in a position to perform the duties of his service as a mariner, but this condition was not brought about by any default on his part, and there is no suggestion of disobedience to any command or to any refusal on his part to do his duty. Whether under such circumstances the contract is dissolved or a claim to wages under the contract is defeated depends on the bargain of the parties as expressed or implied in the contract which they have made. If the events which have happened subsequent to the date of the contract, and which operate to make its performance no longer possible, are of such a nature and character that they can reasonably be supposed to have been within the contemplation of the contracting parties at the time when the con-

tract was made, then the subsequent contingency does not dissolve the contract or release either party from a continuing liability under the contract. Even though the general liability under the contract continues the claim of a plaintiff may be defeated by proof of non-compliance with any one or more of the special contract stipulations. An illustration arises in the leading case of *Beale v. Thompson*, 4 East. 456. One of the arguments urged on behalf of the defendant in that case was that the articles contained a special stipulation against mariners going on shore under any pretence before the voyage was ended without the leave of the commanding officer on board, and that the plaintiff had gone on shore in contravention of this stipulation. Lord Ellenborough having found that the freight had been earned, and that the contract had not been dissolved, says "that the only remaining question necessary to be decided in order to perfect the plaintiff's claim to have his wages paid out of that fund, *i.e.*, freight, is—Has his service under the articles been duly performed by him?" The special verdict of the jury had found that the plaintiff did his duty as a seaman during the voyage, but it was said that the facts stated in the special verdict showed that during a considerable period of the time for which the wages are claimed the master was out of possession of the vessel, and the crew were all marched up the country and detained as prisoners.

Lord Ellenborough held that the stipulation in the articles that the plaintiff should not be on shore under any pretence before the voyage was ended, without the leave of his commanding officer on board, did not apply to a case of imprisonment, and must be understood as being on shore by the party's own unauthorised act. In the present case there is no question of the breach of a special stipulation in the articles, such as would defeat the claim to wages, if the contract is not dissolved. It was further held in *Beale v. Thompson* that if the imprisonment on shore could be considered as a breach of the stipulations in the articles, such breach had been remedied by the subsequent action of the master, but this alternative finding does not affect the principle of the decision, and is not applicable in the present case.

The question therefore to be determined is whether the detention of the vessel and the imprisonment of the mariners have dissolved the contract of service. The general rule of the common law is that a contract is not dissolved, or the parties excused from their obligations, in cases in which the performance has become impossible owing to conditions which have only become operative subsequent to the contract date. The object of this rule of construction is to give effect to the intention of the contracting parties as expressed in their contract, and it is not applicable if a contrary intention is expressed or implied in a particular contract. In a mariner's contract for wages it has been held in a decision confirmed in this House—*Beale v. Thompson*—that the hostile detention of the vessel and the in-

terment of the crew do not of themselves dissolve the contract of service, and this decision appears to have been uniformly recognised.

In *Beale v. Thompson* the vessel was detained by hostile seizure for a period of about six months and then released. The voyage was continued, and the freight had been specifically earned and received by the owners of the vessel. At this date the doctrine that freight was the mother of wages prevailed, and it was necessary that freight should be earned before a claim to wages could be made good. This condition having been fulfilled, it became necessary to decide whether the detention of the vessel and the imprisonment of the mariners dissolved the contract of service on which the seaman relied for his claim. Lord Ellenborough in his judgment draws a distinction between detention and capture, and holds that detention, as distinguished from capture, did not defeat the plaintiff's claim to wages. It should be noted that this decision was given in reference to a detention which had lasted for a period of about six months and had terminated; but if the detention of the vessel and the imprisonment of the mariners had of themselves operated to dissolve the contract, such contract would have been dissolved as at the date of the commencement of the detention and imprisonment, and there would have been a severance between such contract and any contract subsequently entered into by the master when the vessel was released. This decision was brought before this House by writ of error, and confirmed. The Journals of this House contain the order made—"That the said judgment be in all things affirmed, and that it stand in full force and virtue notwithstanding the causes and matters aforesaid as above assigned in error."

I am unable to draw any material distinction between the relevant facts in the case of *Beale v. Thompson* and the agreed facts of this case. In *Beale v. Thompson* the vessel was unable to leave the port and continue her voyage by reason of hostile detention by the Russian authorities, and in this case by reason of hostile detention by the German authorities. In each case there is a hostile seizure, which Lord Ellenborough distinguishes from capture. In *Beale v. Thompson* the mariners were removed from the ship and imprisoned on land; in the present case the crew were first removed to a lodging ship at Hamburg, and subsequently, on or about the 8th November, were interned at Ruhleben, near Berlin.

The earlier case of *Pratt v. Cuff* is referred to in *Thompson v. Rowcroft*, 4 East. 43. In this case a vessel was captured by the Dutch and carried to Delfziel. The plaintiff was confined on board ship for seven months, and subsequently in Haerlingen prison until the 23rd January in the following year, when the vessel and plaintiff were released. The jury found in favour of the plaintiff for wages during the period of his imprisonment, subject to the opinion of the Court. At a subsequent trial the jury found that the freight had been received by the

defendant. Lord Kenyon is said to have expressed so strong an opinion for the plaintiff that the case was never afterwards pressed by the defendant.

In *Hadley v. Clarke*, 8 Durn. & East. 259, the defendants had contracted to carry goods from Liverpool to Leghorn. On the arrival of the vessel at Falmouth an embargo was laid on her for an indeterminate period—"until the further Order of Council." It was held that even after two years, when the embargo was taken off, the defendants were answerable in damages for the non-performance of the contract. The report shows that it was argued on behalf of the defendants that the case falls within the rule that when a contract which was possible and legal at the time of making it becomes afterwards impossible by the act of God, or illegal by an instrument of the State, the obligation is discharged. This argument was not accepted by the Court as referable to a contract of this character, and Lord Kenyon bases his judgment on the general proposition "that a temporary interruption of a voyage by an embargo does not put an end to such a contract as this." Lord Kenyon further expresses the opinion that no line can be drawn dependent on the duration of the embargo, but it is not necessary to endorse so wide a proposition in the present instance. This decision was given on a contract of carriage and not on a contract of service, but the principle and reasoning are equally applicable to a contract of service.

This case was referred to both in the judgment of Bramwell, B., and in the dissentient judgment of Cleasby, B., in the case of *Jackson v. The Union Marine Insurance Company*, 10 C.P. 125, but its authority is not impugned. In the judgment of Bramwell, B., it is said—"It may safely be said that there the question was wholly different from the present." Cleasby, B., quotes with approval a passage from the judgment of Bovill, C.J., in the Court below—"I have no difficulty in subscribing to the doctrine laid down in *Hadley v. Clarke* that a common embargo does not put an end to any contract between the parties, but is to be considered as a temporary suspension of the contract only, and that the parties must submit to whatever inconvenience may arise thereon, unless they have provided against it by the terms of their contract. . . . The principle of *Hadley v. Clarke* is that an embargo is a circumstance against which it is equally competent for the parties to provide as against dangers of the sea, and therefore if they do not provide against it they must abide by the consequences of their contract."

In the case of *Delamainer v. Winteringham*, 4 Camp. 186, the plaintiff claimed to receive wages during a hostile embargo in a foreign port while he was imprisoned on shore on proof—which was then necessary—that the voyage had been completed and the freight earned. Objection was taken that the nature of the embargo had not been proved. Lord Ellenborough, however, gave judgment for the plaintiff, presuming the fact that the embargo was not of such

a nature as to put an end to the contract between the master and owners of the ship and the mariner, and finding that there was no severance of service.

I am unable to find any case in conflict with the principle laid down by Lord Ellenborough and confirmed in this House in the case of *Beale v. Thompson*, but I have not overlooked the cases quoted in the argument before your Lordships.

In the case of *Melville v. De Wolf*, 4 E. & B. 844, it was held that where a seaman had been sent home as a witness against his captain on a trial for shooting one of the crew, there was a complete dissolution of the contract of service and no claim for wages could be maintained. In this case, however, a distinction was drawn between such a dissolution of the contract of service and a temporary detention. Lord Campbell in his judgment expressly approves *Beale v. Thompson*—"We are certainly bound by the case of *Beale v. Thompson*. . . . We entirely approve of that decision, for there nothing had occurred to dissolve the contract; and the relation constituted between the parties when the ship's articles were signed might well be considered as enduring till the return of the ship to England. The ship was only detained under an embargo, which in its nature is only a temporary act, and it might have been removed at any time from day to day."

In the case of "*The Friends*," 4 Rob. 143, Sir W. Scott says in his judgment—"Nothing can be better settled than that the act of capture defeats all rights and interests; but it is contended that the former interest revives on recapture." In the case of the "*Governor Raffles*," 2 Dods. 17, Sir W. Scott says—"The moment the capture is effected by an enemy the crew are discharged from their duty to their employers." It is not necessary, however, to refer to further cases of a similar character, since whatever may be the result of a hostile capture Lord Ellenborough in *Beale v. Thompson* draws the distinction between the case of capture and the case of detention.

The opinion above expressed finds strong confirmation in a passage from the judgment of Kennedy, L.J., in the "*Olympic*" case, 1913, P. 92, which is quoted in the judgment of Swinfen Eady, L.J.—"The embargo which prevents a laden ship from proceeding from port on her voyage does not dissolve the mariner's engagement, any more than it dissolves the contract between the shipowner and the merchant whose cargo has been loaded." Kennedy, L.J., then refers to a passage in Lord Tenterden's Law of Merchant Ships and Seamen, and says—"In this sentence one of the greatest of judicial authorities on matters of shipping clearly indicates his opinion, even in the case of the embargo of a laden ship, *i.e.*, in the case of an obstacle to the prosecution of the voyage imposed by the Government—an obstacle of indefinite and unascertainable duration—which the detention for repairs is not—that while in his own interest and in order to save himself the risk of expense it may be a reasonable

and indeed a very prudent step on the part of the shipowner to discharge the greater part of the crew, yet if that step is taken the shipowner must compensate those whom he so discharges for the loss of the wages during the unfulfilled residue of the contract period, unless, as is likely enough, they find equally remunerative employment in another ship," and adds, "that what is true of an embargo by the Government to which the ship belongs is true also of the seizure for a temporary purpose by a hostile Power."

I think that the claim of the allottee is good, and that up to the date of issue of the writ there was no severance of service under the contract, and that the judgment of the Court of Appeal should be affirmed.

LORD WRENBURY—The respondent is entitled to one-half her husband's wages, if any. The question for decision is whether after the 4th August 1914, or some later date, the husband is entitled to wages. The appellant denies that he is entitled to wages after the 4th August 1914. He founds himself upon either section 158 of the Merchant Shipping Act 1894 or upon the common law or the law merchant as applicable to the case of a seaman if, as he contends, the statute has not rendered that law inapplicable.

I may dispose of the question upon section 158 in few words. It was decided in the "*Olympic*," 1913, P. 92, that there is a "wreck of the ship" within the section where the vessel has suffered such physical damage by a casualty in the nature of wreck as that she has ceased to be in a seaworthy condition to continue within a reasonable time the adventure as a commercial adventure. The same, I think, is true of the word "loss" in the section. If there have been such a loss as that the adventure has failed as a commercial adventure, the section, I think, applies.

But it remains to determine the meaning of the word "loss." It is confined, I think, to physical loss. The wreck and the loss referred to in the section I understand to be a physical injury if it be a wreck, and a physical loss if it be a loss. Upon the evidence in this case the ship was at Hamburg on the 4th August. She was still there on the 2nd November; there is no evidence as to what has happened to her since. She may be there; she may not. She may be in existence; she may not. She has not, so far as appears, been confiscated. If Germany has obeyed the Hague Convention she will not have been confiscated. I make no assumption that Germany will have obeyed the Hague Convention. It suffices to say that the appellant has not proved confiscation. The result is that the appellant has proved, not that the ship has been physically destroyed or injured, or that the property in the ship has been taken from him, but only that from the 4th August 1914 to the present time he has been deprived of the use of her.

In my judgment detention or deprivation of use is not loss within section 158. It follows that in my opinion section 158 does

not apply. So far I think the respondent is right.

The respondent next began by contending that section 158 is exhaustive; that if that section offers no defence the seaman is entitled to his wages. This seems to me an impossible contention. When a statute provides that in certain events a certain result shall ensue, it is plainly not enacting what is to result in other events. The contention was then modified, and was that the section is exhaustive in the cases with which it deals. This may be, and I think is true, but it leaves the matter where it was. Upon my view of the word "loss" the section does not deal with the case before the House. It follows that the section does not exclude the common law or the law merchant in the case of seamen.

Where a contract has been entered into, and by a supervening cause beyond the control of either party its performance has become impossible, I take the law to be as follows:—If a party has expressly contracted to do a lawful act, come what will—if, in other words, he has taken upon himself the risk of such a supervening cause, he is liable if it occurs, because by the very hypothesis he has contracted to be liable. But if he has not expressly so contracted, and from the nature of the contract it appears that the parties from the first must have known that its fulfilment would become impossible if such a supervening cause occurred, then upon such a cause occurring both parties are excused from performance. In that case a condition is implied that if performance becomes impossible the contract shall not remain binding. The leading case on the subject is *Taylor v. Caldwell*, 3 B. & Sm. 826. *Krell v. Henry*, 1903, 2 K.B. 740, is an illustration of the application of the principle.

On the 4th August 1914 there occurred in the case of this ship a supervening cause which resulted in the impossibility of continuing that adventure which was the subject of the seaman's contract of the 21st May 1914, and that impossibility has continued for such a time as that its character, which might have proved to be temporary, is now known to be for a time so indefinite and so long that the adventure which was the whole basis of the contract has failed. The case falls, I think, within the principle of *Taylor v. Caldwell*. *Melville v. De Wolf*, 4 E. & B. 844, is a like case. The plaintiff there was taken from his employment and sent home by the order of a court, and, as Lord Campbell, C.J., put it, the contract was "dissolved by the supreme authority of the State." The plaintiff was not entitled to wages from the date when he was taken away from the ship and his services closed.

The respondent's counsel was, I think, not prepared to contend that if this had been the case, not of a mariner but of a commercial traveller, subsequent wages could have been claimed. But the case of the mariner, he contends, stands in a different position. *Chandler v. Grieves*, 2 H., Bl. 606n, was a case of a seaman disabled by

accident while on board, who was held entitled nevertheless to payment of his wages for the whole voyage. The case establishes very little for the present purpose. Section 160 of the Act 1894 seems to assume—and, I think, to assume rightly—that a seaman incapable by illness to perform his duty is nevertheless entitled to his wages during the continuance of the adventure in which by the terms of the employment he took part.

On the other hand "*The Friends*," 4 C. Rob. 143, is authority that when the ship is captured and the seaman taken from the vessel his wages cease, and that even if the ship be recaptured his case is not bettered if he has been taken from the vessel and renders no service after the recapture. *Wiggins v. Ingleton*, 2 Ld. Raym. 1211, which was the case of a seaman taken by the press gang, and the "*Governor Raffles*," 2 Dods. 14, where the ship had been taken by mutineers, are authorities to the same effect, although the latter is in point only, for the dictum of Sir Wm. Scott that "the moment capture is effected the crew are discharged from their duty to their employers and the contract between the parties is at an end."

Reverting to the statute, the respondent relies on section 134. I fail to see that the section helps her. Section 134 (a) speaks of the event that the seaman "lawfully leaves the ship at the end of his engagement." These words do not cover the event of the seaman being forcibly removed by the enemy from his employment and from the ship. Section 134 (c) provides that the seaman's wages shall continue to run unless the delay to make payment of his wages is due "to any other cause not being the wrongful act or default of the owner or master." The cause here was an extraneous and supervening cause, and was not any wrongful act or default of the owner or master.

Then section 143 is cited. By that section it is provided in favour of the allottee of wages that "the seaman shall be presumed to be duly earning his wages unless the contrary is shown to the satisfaction of the Court either . . . (d) by such other evidence as the Court in their absolute discretion consider sufficient to show satisfactorily that the seaman has ceased to be entitled to the wages out of which the allotment is to be paid." This simply throws the *onus* of proof on the employer.

Beale v. Thompson, 4 East, 546, 1 Dow. 299, was a case decided when the doctrine prevailed that "freight is the mother of wages"—a doctrine which has been brought to an end by statute (see 7 and 8 Vict. c. 112, sec. 17; Merchant Shipping Act 1854, sec. 183; and now sec. 157 of the Merchant Shipping Act 1894)—and it was a case in which the seaman, after the detention of the vessel was over, took part in her voyage home. The decision involves no more than this, that if the adventure is ultimately carried to a conclusion the seaman is entitled to his wages for the whole period. *Delamainer v. Winteringham*, 4 Camp. 186, is similar.

In *Hadley v. Clarke*, 8 T.R. 259, there was

no finding that the adventure had been frustrated. For the purpose of the decision I may take it that the plaintiff did not care when his goods reached Leghorn so long as they got there. The defendants contracted to take them there and failed to do so. The plaintiff therefore recovered damages. In *Jackson v. Union Insurance Company*, L.R., 10 C.P. 125, 146 2 Asp. Mar. C. 425, Bramwell, B., points out the grounds upon which the decision can be supported. It is, I think, no authority for the general proposition that a contract of marine adventure remains binding when a supervening cause has rendered it impossible to perform it within such a time as that the adventure can be fulfilled as a commercial adventure.

When this vessel was detained at Hamburg on the 4th August the owner was deprived, and he has ever since remained deprived, of the use of her. On the 5th August, if her current charter had been at an end, he could not have offered her to a new charterer, for he could not have ensured that he could deliver possession of her under the charter, and events have shown in fact he could not have done so. The contract with the seaman for employment on the ship for not exceeding two years from the 21st May 1914 was a contract which the owner from no fault of his own was unable to fulfil. As from the 4th August the adventure had become impossible and the contract, in my judgment, ceased to be binding. It is unnecessary, therefore, to consider the later date of the 2nd November, when the seaman was removed from the vessel to another vessel for detention, or that of the 8th November, when he was removed to Ruhleben. If anything more was wanted, I think it clear that the seaman (for no fault of his own it is true) was at those dates taken by superior authority from the place of his employment and from the possibility of performing his service. *Melville v. De Wolf*, 4 E. and B. 844, is authority against his claim as from those dates.

From what I have said it follows that I cannot agree with the learned Judge who tried the case or with the majority in the Court of Appeal. In my judgment this appeal must be allowed.

Appeal allowed.

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