Privy Council Appeal No. 171 *of* 1924.

The Lord Strathcona Steamship Company, Limited - - - *Appellants*

v.

The Dominion Coal Company, Limited - - - - *Respondents*

FROM

THE SUPREME COURT OF NOVA SCOTIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 17TH NOVEMBER, 1925.

Present at the Hearing:

VISCOUNT HALDANE.
LORD SHAW.
LORD WRENBURY.
LORD CARSON.
LORD BLANESBURGH.

[*Delivered by* LORD SHAW.]

This is an appeal from a judgment and order of the Supreme Court in Appeal of Nova Scotia (En Banc), dated the 1st March, 1924, which affirmed a judgment and order of Mr. Justice Mellish in the Supreme Court of Nova Scotia, dated the 18th May, 1922.

The questions involved in the case depend upon a consideration of the charter party about to be mentioned and of the actings of parties under and in reference to that contract.

The charter was dated the 20th April, 1914, corrected to 24th July, 1914. It was made between the Lord Curzon Steamship Company, Limited, as the owners of the steamship "Lord Strathcona," and the respondents as charterers thereof. The charter was a long term charter, namely, for 10 consecutive St. Lawrence seasons, commencing with the year 1915, with the option to the respondents of continuing the charter for a further period of five more seasons and a still further option of three more seasons thereafter. Should these options be exercised by

the respondents as charterers the period of the contract thus extended to 18 years. The St. Lawrence season referred to was to commence, except as to the first season 1915, five days prior to the opening of navigation to Montreal and not later than the 15th day of May in each year. The re-delivery to the owners of the steamship was to be between the 15th November and the 15th December in each year.

The ship went into the service of the respondent in 1916. She was delivered, or commenced service on 10th July, and she continued during the St. Lawrence season, namely, until 14th December, 1916, being used by the respondents for their trade purposes under the charter party. The British Government, which had previously intimated that the vessel would be required for the purposes of war in 1915, when she was ready for the year, abandoned this position and allowed the use of the vessel under the charter for the season 1916 as stated.

They made, however, an effective requisition of the vessel at the close of the 1916 season, and the vessel remained under requisition for 1917 and 1918 by the British Government. She came on service again by the withdrawal of the Government requisition on 2nd July, 1919, and remained on service till the end of the season, namely, December, 1919. Shortly put, the vessel was thus under requisition for some two and a half years, namely, from the end of the 1916 season until early in July, 1919. During the course of these years various changes, to be afterwards referred to, were made in the ownership of the vessel.

There are three questions which arise in the appeal—these are, first, whether the contract under the charter party was frustrated by the action of the Government, as just described. Second, whether any rights of the Dominion Coal Company, as charterers of the vessel, existed as against the appellants, the Lord Strathcona Steamship Company, as owners thereof, there having been no direct privity of contract between those parties. The third question has reference to an order upon the appellants to repay a portion of the hire of the "Lord Strathcona" under an agreement made without prejudice.

The questions will be dealt with in their order.

1. On the question of frustration their Lordships are clearly of opinion that this doctrine, which has been much developed and commented upon in recent years, cannot be applied to the facts of the present case. Put shortly, frustration can only be pleaded when the events and facts on which it is founded have destroyed the subject matter of the contract, or have, by an interruption of performance thereunder so critical or protracted as to bring to an end in a full and fair sense the contract as a whole, so superseded it that it can be truly affirmed that no resumption is reasonably possible.

It is a mistake to say that the doctrine of frustration is a hard and fast doctrine which can be applied as a general principle in a definite measure to all cases alike. The facts and circum-

stances of each particular contract as well as the nature and duration of the interruption to performance must all be taken into account. Shipping cases afford easy illustrations of the variety of circumstances alluded to. A voyage is arranged to be made during fixed dates. The substantial interruption of such a voyage almost necessarily concludes the question of frustration in the affirmative. Or, again, a charter is for a short term and into that term such an interruption is projected as to preclude business arrangements being readjusted so as to suit limited and disjointed periods of time; then, again, it becomes wellnigh clear that frustration has resulted.

In the present case there is a seasonal charter extending over a long period of possibly 18 years. The interruption has been concluded and the vessel has been restored in good sailing order after a period of use by the Government of, say, three seasons. Upon these facts then in truth the question has really settled itself in the sense that a long balance of time and season remains during which, after resumption, the contract can be effectively carried on. It happens in the present case that, after the Government interruption had ceased, the parties did resume the practice of running the vessel as owners and charterers. The range of business has not been lost, the suitability of the vessel for performance had not been impaired. In these circumstances their Lordships are clear that the judgments of the Courts below upon this topic are right and that frustration of the contract contained in the charter party did not occur. Had the question accordingly arisen between the original charterers of the vessel the Lord Curzon Steamship Company, as owners, and the respondents as charterers, the case would have been at an end.

2. Upon the point of privity of contract and the nature of the right or remedy still open to the charterers of the vessel the following facts and dates have to be kept in view. The writ was issued by the respondents on the 31st July, 1920. It was directed against the appellants as present owners and against the Lord Curzon Steamship Company as parties to the charter party, and it certainly claimed a declaration and made demands which are of a wide character, and have been exposed to considerable criticism. Generally speaking their Lordship looks upon the writ as an attempt to substitute the appellants in the entirety of the obligations resting upon the Lord Curzon Steamship Company as the original owners. A declaration was claimed by the respondents under the charter party, under which the appellants could be called upon as in an action of specific performance to perform the obligations under the charter in the same sense and degree as the original owners, the Lord Curzon Steamship Company. It will be necessary to see whether, under the principles of English jurisprudence this demand can be justified as stated, or whether, under the other claims made in the writ English equity is able to afford to the charterers against the present owners, the

appellants, any remedy for the wrong arising to them by the threatened loss of their rights under the charter party.

The charter party is dated 20th April, 1914, corrected to 24th July, 1914. The ship had been built in England for the Lord Curzon Steamship Company under plans provided by the Dominion Coal Company, and it was agreed that, when complete, she should be chartered to the respondents, and this was done by the charter party mentioned. Then occurred a series of transmissions of title to the ship. The dates are :—

14th December, 1917 ; Bill of Sale ; Lord Curzon Company to The Century Shipping Company.

25th February, 1919 ; Bill of Sale ; Century Shipping Company to Lord Lathom Company.

18th December, 1919 ; Bill of Sale ; Lord Lathom Company to Lord Strathcona Company (No. 1).

22nd June, 1920 : Bill of Sale ; Lord Strathcona Company (No. 1) to Lord Strathcona Company (incorporated in 1920).

So far as the knowledge of the existence of the charter party was concerned their Lordships are clearly of opinion that all these successive owners were well aware of it, and this knowledge was, by notice, passed very clearly and properly on from each owner to the successor. It was only very late in the day when any flaw on this point was attempted to be taken. An important document in the case is that of 1st September, 1919, namely, a memorandum of agreement by which the Lathom Company agreed with the Strathcona Company about to be formed, which contained the following clause :—

" The steamer is chartered to the Dominion Coal Company as per charter party dated New York, 20th April, 1914, corrected to 24th July, 1914, which charter the buyers undertake to perform and accept all responsibilities thereunder as from date of delivery in consideration of which the buyers shall receive from date of delivery all benefits arising from the said charter. All liabilities up to date of delivery to buyers to be for account of sellers."

In the opinion of the Board the appellants thoroughly understood that the charter party and its responsibilities and obligations thereunder were to be respected. This is not a mere case of notice of the existence of a covenant affecting the use of the property sold, but it is the case of the acceptance of their property expressly *sub conditione*.

The position of the case accordingly is that the appellants are possessed of a ship with regard to which a long running charter party is current, the existence of which was fully disclosed, together, indeed, with an obligation which the appellants appear to have accepted to respect and carry out that charter party. The proposal of the appellants and the argument submitted by them is to the effect that they are not bound to respect and carry forward this charter party either in law or in equity, but that, upon the contrary, they can, in defiance of its terms, of which they had

knowledge, use the vessel at their will in any other way. It is accordingly, when the true facts are shown, a very simple case raising the question of whether an obligation affecting the user of the subject of sale, namely, a ship, can be ignored by the purchaser so as to enable that purchaser, who has bought a ship notified to be not a free ship but under charter, to wipe out the condition of purchase and use the ship as a free ship. It was not bought or paid for as a free ship, but it is maintained that the buyer can thus extinguish the charterer's rights in the vessel, of which he had notice, and that the charterer has no means, legal or equitable, of preventing this in law.

In the opinion of the Board the case is ruled by *De Mattos* v. *Gibson*, 1858, 4 De G. & J. 276, also a shipping case, the case of the user of a piece of property by a third person (*e.g.*, the respondent company in this case) of "the property for a particular purpose in a specified manner." Their Lordships think that the judgment of Knight Bruce, LJ., plainly applies to the present case :—

> "Reason and justice seem to prescribe that at least as a general rule, where a man by gift or purchase acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person to use and employ the property for a particular purpose in a specified manner, the acquirer shall not to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller."

A principle, not without analogy, had previously been laid down in reference to the user of land.

In the opinion of their Lordships the case of *De Mattos* v. *Gibson* (*supra*), still remains, notwithstanding many observations and much criticism of it in subsequent cases, of outstanding authority.

The general character of the principle on which a Court of Equity acts was explained in *Tulk* v. *Moxhay* (2 Phillips 774). The plaintiff there was owner in fee of Leicester Square, and several houses forming the Square. He sold the property to one Elms in fee, and the deed of conveyance contained a covenant obliging Elms, his heirs and assigns, to "keep and maintain the said piece of ground and Square Garden . . . in its then form . . . in an open state, uncovered with any buildings." Elms sold to others, and the property came into the hands of the defendant, who admitted that he had purchased with notice of the covenant. The defendant, "having manifested an intention to alter the character of the Square Garden, and asserted a right, if he thought fit, to build upon it," the plaintiff, who still remained owner of several houses in the Square, filed a bill for an injunction. All this is familiar knowledge, but it appears to have been sometimes forgotten what was the nature of the argument for the defendant. He contended that the covenant did not run with the land so as to be binding upon him as a purchaser, and Sir Roundell Palmer on his behalf, relied on the dictum of Lord Brougham, Chancellor,

in *Keppell* v. *Bailey* (2 My. & K. p. 547), to the effect that "notice of such a covenant did not give a Court of Equity jurisdiction to enforce it by injunction against such purchaser, inasmuch as 'the knowledge by an assignee of an estate, that his assignor had assumed to bind others than the law authorised him to affect by his contract, had attempted to create a burden upon property which was inconsistent with the nature of that property and unknown to the principles of the law and could not bind such assignee by affecting his conscience.'" No reply was called for to this argument and the Lord Chancellor said that Lord Brougham never could have meant to lay down the doctrine "that this Court would not enforce an equity attached to land by the owner unless under such circumstances as would maintain an action at law." "If that be the result of his observations," added the Lord Chancellor, "I can only say that I cannot coincide with it."

It has sometimes been considered that *Tulk* v. *Moxhay* (*supra*) and *De Mattos* v. *Gibson* (*supra*) carried forward to and laid upon the shoulders of an alienee with notice the obligations of the alienor, and, therefore, that the former is liable to the covenantee in specific performance as by the law of contract, and under a species of implied privity. This is not so; the remedy is a remedy in equity by way of injunction against acts inconsistent with the covenant, with notice of which the land was acquired. The former was the view of Kay J. in *London and South Western Railway Company* v. *Gomm*, 20 Ch.D. 562; but it was corrected by the Court of Appeal substantially in the sense above stated. So confined, that is, to a remedy in equity by injunction against the violation of restrictive covenants, the application of the principle of *Tulk* v. *Moxhay* (*supra*) was affirmed. The same result had been reached in *Haywood* v. *The Brunswick Permanent Benefit Building Society*, 2 Q.B.D. 403, and other decisions have followed in a like sense.

The cases on this branch of the law are legion. But following the leading authorities just cited there may be specially mentioned that of *Catt* v. *Tourle*, 4 Ch. App 656. in which Selwyn LJ., affirms, with precision, the principles of *Tulk* v. *Moxhay* (*supra*) and *De Mattos* v. *Gibson* (*supra*).

But *Tulk* v. *Moxhay* (*supra*) is important for a further and vital consideration, namely, that it analyses the true situation of a purchaser who having bought upon the terms of the restriction upon free contract existing, thereafter when vested in the lands, attempts to divest himself of the condition under which he had bought,

> "it is said that the covenant being one which does not run with the land, this Court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than

that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken."

In the opinion of the Board these views, much expressive of the justice and good faith of the situation, are still part of English equity jurisprudence, and an injunction can still be granted thereunder to compel, as in a Court of Conscience, one who obtains a conveyance or grant *sub conditione* from violating the condition of his purchase to the prejudice of the original contractor. Honesty forbids this : and a Court of Equity will grant an injunction against it.

It may be mentioned that essentially the same principle has been applied by the House of Lords in the Scotch case of the *Earl of Zetland* v. *Hislop*, 7 A.C. 427, in which the superior of land (according to law holding the *dominium directum* thereof and, therefore, of course, having a continuing patrimonial interest therein) granted contracts of feu to various vassals holding the *dominium utile* of the land under that permanent tenure. By these contracts the vassal, his heirs and assignees and their tenants were prohibited from using the property for carrying on the trade of a publican. Various transactions of sale and transfer of the property had occurred : four of the purchasers asserted their right to carry on a publican's business, and the Earl of Zetland asked interdict (or injunction) against such a violation of the restrictions contained in the feu charter. In the House of Lords, as stated, the patrimonial interest of the superior was affirmed and also his right to interdict unless (which was alleged and which was made the subject of a remit for probation) he was precluded from this remedy by acquiescence and waiver.

It has been said—it was strongly urged for the appellant in this case—that a remedy by way of injunction against the owners not disposing of their ship in any other way than under the charter party could not be granted because there was no such negative covenant to enforce by injunction.

Lord Selborne, in *Wolverhampton and Walsall Railway Company* v. *London and North Western Railway Company*, 16 Equity, 433, at p. 440, disposed of such an argument thus, in language which still remains unimpaired in force :—

"The technical distinction was made that if you find the word 'not' in an agreement—'I will not do a thing'—as well as the words 'I will,' even although the negative term might have been implied from the positive, yet the Court, refusing to act on an implication of the negative, will act on the expression of it. I can only say that I should think it was the safer and the better rule if it should eventually be adopted by this Court, to look in all such cases to the substance and not to the form. If the substance of the agreement is such that it would be violated by doing the thing sought to be prevented, then the question will arise, whether this is the Court to come to for a remedy. If it is, I cannot think that ought to depend on the use of a negative rather than an affirmative form of expression."

A perusal of the numerous decisions on this branch of the law shows that much difficulty has been caused by the attempt to extend these principles to cases to which they could not, by the nature of the case, have been meant to apply. It has been forgotten that—to put the point very simply—the person seeking to enforce such a restriction must, of course, have and continue to have, an interest in the subject matter of the contract. For instance, in the case of land he must continue to hold the land in whose favour the restrictive covenant was meant to apply. That was clearly the state of matters in the case of *Tulk* v. *Moxhay* (*supra*) applicable to the possession of real estate in Leicester Square. It was also clearly the case in *De Mattos* v. *Gibson* (*supra*), in which the person seeking to enforce the injunction had an interest in the user of the ship. In short, in regard to the user of land or of any chattel, an interest must remain in the subject matter of the covenant before a right can be conceded to an injunction against the violation by another of the covenant in question. This proposition seems so elementary as not to require to be stated. And it is only mentioned because in numerous decisions, as is clearly brought out in the judgment of Lord Wrenbury, then Lord Justice Buckley, in *London County Council* v. *Allen and others*, 1914, 3 K.B. 642, at 656–658, it was necessary to shear away this misapplication or improper extension of the equitable principle. As Romer LJ., said in *Formby* v. *Barker*, 1903, 2 Ch., Div. 539, at 554 :—

> " If restrictive covenants are entered into with a covenantee, not in respect of or concerning any ascertainable property belonging to him, or in which he is interested, then the covenant must be regarded, so far as he is concerned, as a personal covenant, that is as one obtained by him for some personal purpose or object."

Applying that to the case of land and referring to numerous cases upon the subject, Lord Wrenbury says in *London County Council* v. *Allen and others* (*supra*) :—

> " Inasmuch as at the date when the covenant was taken the covenantee had no land to which the benefit of the covenant could be attached, it was held that the benefit of the restrictive covenant could not enure against a derivative owner even where he took with notice."

The Board notes the observations made by Lord Justice Scrutton in the case of *London County Council* v. *Allen and others* (*supra*), in which, alluding to various decisions, the learned Judge puts this point as to the possible inconvenience, not only private but public, which may result from a strict adhesion to the principle that the enforcement of a restrictive covenant must be confined to those having patrimonial interests in the subject matter. His Lordship takes the not unfamiliar case of restrictive covenants imposed by an owner of a large block of land in the terms of conveyance of the various fractions in which it may be split up for private use, and he observes :—

> " I regard it as very regrettable that a public body should be prevented from enforcing a restriction on the use of property imposed for the public

> benefit against persons who bought the property knowing of the restriction by the apparently immaterial circumstance that the public body does not own any land in the immediate neighbourhood. But, after a careful consideration of the authorities, I am forced to the view that the later decisions of this Court compel me so to hold."

The question here alluded to may subsequently arise, and their Lordships are unwilling, because it is unnecessary in the present case, to make any pronouncement upon it; for the present is, as has been seen, a case as to the user of a ship, with regard to the subject matter of which, namely, the vessel, the respondent has, and will have during the continuance of the period covered by the charter party, a plain interest so long as she is fit to go to sea. Again, to adopt the language of Knight Bruce LJ., in the *De Mattos* v. *Gibson* (*supra*) case :—

> "Why should it (the Court) not prevent the commission or continuance of a breach of such a contract, when, its subject being valuable, as for instance, a trading ship or some costly machine, the original owner and possessor, or a person claiming under him with notice and standing in his right, having the physical control of the chattel, is diverting it from the agreed object, that object being of importance to the other? A system of laws in which such a power does not exist must surely be very defective. I repeat that, in my opinion, the power does exist here."

In considering the character of the doctrines of equity in a case like the present it is essential to remember that these doctrines are of several kinds and fall partly, though not exclusively under different heads. If this is not borne in mind uncertainty and confusion are apt to arise. Dicta of eminent judges which apply under one principle get to be regarded as though they illustrated a principle which is in reality different.

Equity has, in addition to the concurrent jurisdiction, auxiliary and exclusive jurisdiction. The enforcement of trusts is in the main an illustration of the exclusive jurisdiction. The scope of the trusts recognised in equity is unlimited. There can be a trust of a chattel or of a chose in action, or of a right or obligation under an ordinary legal contract, just as much as a trust of land. A shipowner might declare himself a trustee of his obligations under a charter party, and if there were such a trust an assignee, although he could not enforce specific performance of the obligation would fail to do so only on the broad ground that the Court of Equity had no machinery by means of which to enforce the contract. Subject to this an assignee of the charterer could enforce his title to the chose in action in equity, even though he could not have done so at law.

There are cases of a different type in which equity is proceeding, not on the footing of trust, but of following, by the exercise of concurrent and auxiliary jurisdiction, the analogy of the common law. Such are the cases of so-called equitable easements. This was explained by the Court of Appeal in *London County Council* v. *Allen* (*supra*). There it was held that an owner of land, deriving title under a person who had entered into a restrictive covenant

concerning the land, which covenant did not run with the land at law, was not bound by the covenant although he took the land with notice of it, if the covenantee were not in possession of or interested in land for the benefit of which the covenant was entered into. In the judgments it was pointed out that such a covenant did not run with the land at law, and that there was a series of authorities which showed that in the case of land mere purchase with notice was not sufficient. The reason was that under this head of its jurisdiction equity had followed law except to the extent of recognising a negative covenant as capable of operating for the benefit of a dominant tenement. The principle proceeded on the analogy of a covenant running with the land or of an easement, as explained by Jessel M.R., in *London and South Western Railway* v. *Gomm* (*supra*). This restriction of the principle on the analogy of easements at law rendered mere notice insufficient, and cut down the jurisdiction from the wider principle stated by Knight Bruce, LJ., in *De Mattos* v *Gibson* (*supra*) to the narrower head established in order to accord with the legal analogy in the case of land.

But in no other regard does this or any other decision of commanding importance seem to affect the general principle which Knight Bruce LJ., laid down. If a man acquires from another rights in a ship which is already under charter, with notice of rights which required the ship to be used for a particular purpose and not inconsistently with it, then he appears to be plainly in the position of a constructive trustee with obligations which a Court of Equity will not permit him to violate. It does not matter that this Court cannot enforce specific performance. It can proceed, if there is expressed or clearly implied a negative stipulation. The judgment of Lord Chancellor St. Leonards in *Lumley* v. *Wagner* (1 De G. M. and Gordon, 604) appears to be conclusive of the principle.

> "Wherever," says that very eminent Judge at p. 619, "this Court has not proper jurisdiction to enforce specific performance, it operates to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreements, and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give."

For the reasons already fully set forth the Board is of opinion that the injunction granted by Mr. Justice Mellish in the seventh head of his order of the 20th June, 1922, was correct, and was properly affirmed by the Supreme Court for the reasons set forth by Mr. Justice Chisholm. The fundamental point indicated is thus determined.

The consequences of this decision, both as to the future use of the vessel and as to damages, will be applied in the Court below. It is incredible that the owners will lay up the vessel rather than permit its use under the contract, of which they were notified, and the provisions of which it is now determined they ought to respect. The resumption of use under the charter party will thus

simplify the ascertainment of damages. An interlocutory judgment has already been pronounced against the other defendant, the Lord Curzon Steamship Company, and the Court below will determine the working out of the point of damages in view of these circumstances. It is to be hoped that now the question of principle has been determined the parties may work out without further appeal to Courts of law the consequential details.

The question as to the moneys deposited with the Eastern Trust Company at Montreal is one of no little difficulty. The vessel had been redelivered by the Government, and the parties were at variance as to whether the charterers should have the use of the vessel on the charter party terms, the appellants maintaining that the contract had been frustrated. In these circumstances an arrangement was made for chartering the vessel by the appellants to the respondents for the balance of the 1920 season at $66,000 per month, being much in excess of the hire under the charter party. The owners, the appellants, took one half of this, the other half was, from time to time, paid over to the Eastern Trust Company to abide the orders to be made under this litigation. The moneys so paid to the Trust have by paragraph 3 of Mellish J's order been rightly ordered to be repaid to the respondents, and paragraph 3 will accordingly stand. But the learned Judge by paragraph 2 has also ordered the appellants to repay to the respondents the amount by which the hire paid directly to the appellants exceeded the charter party rate. In their Lordships view, however, the true effect of the agreement was that the hire actually payable thereunder to the appellants as distinct from that placed *in medio* was to be retained by the appellants as their own in any event, It was only on this footing that they entered into the agreement. That paragraph (2) will accordingly be struck out.

Their Lordships will, therefore, humbly advise His Majesty that the appeal be allowed for the purpose of variation of Mellish J.'s order as follows :—

1. By omitting from Clause 1 thereof all the words after the words " valid and subsisting contract."
2. By omitting Clause 2.
3. By omitting Clause 4.
4. By omitting from Clause 6 the words "the amounts certified by the Referee under Clause 2 hereof, and the amount of the said damages under Clause 4 hereof when assessed, and,"

subject to these variations, the said Order should be affirmed.

The cause should be remitted to the Court below to deal with the question of damages. There will be no costs of this appeal, the order as to costs in the Court below to stand.

In the Privy Council.

THE LORD STRATHCONA STEAMSHIP COMPANY, LIMITED

v.

THE DOMINION COAL COMPANY, LIMITED.

DELIVERED BY LORD SHAW.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1925.