contradicting the express provisions of the contract and defeating the intention of the parties as disclosed by these provisions. The nearest I can get is a proviso to the twentieth condition conceived as follows—"Provided that if the period during which the ship cannot be held at the disposition of the charterers by reason of any of the matters referred to in this condition, though indefinite, be such as will in all reasonable probability extend beyond the term of the charter-party, the contract between the parties shall be determined." But in my opinion even this would contradict the express term of contract. It could, for example, except from its provisions cases in which the ship ran aground so near the end of the term of the charter-party that it would be impossible to get her off or ready to put to sea once more within such term. This would, in my opinion, be contrary to the provisions of condition 20. Further, even if it were permissible to imply such a proviso to the twentieth condition, there is, in my opinion, no reason for holding that the Government will, in all reasonable probability, retain the vessel for the remainder of the term of the charter-party. Whether they will do so or not seems to me to depend on all sorts of circumstances as to which a court of justice cannot speculate. They may do so or they may not. I do not think that one event is more likely than the other.

Having regard to the difficulty of framing any conditions which can be implied without contradicting the express terms of the contract, having regard to the nature of the contract, which is a time charter only, and does not contemplate any commercial adventure in which both parties are interested or indeed any definite commercial adventure at all, and finally having regard to the fact that the condition which is sought to be implied is a condition defeating a contract already part performed and not a condition-precedent to a contract which remains purely executory, I have come to the conclusion that the decision of the Court of Appeal was right and ought not to be disturbed.

I desire to add this. I cannot help thinking that the question really at issue has been somewhat obscured by the fact that the Government has under the terms of the Royal Proclamation of the 3rd August 1914 to pay compensation to "the owners," to be settled in case of difference by arbitration. Owners must in this proclamation include all parties interested. It cannot in the present case mean the owners exclusive of the charterers or the charterers exclusive of the owners. Both are entitled to compensation, and if such compensation be not agreed with either separately, but with both together, the amount so agreed will be divisible between them according to their respective rights and interests. The case was argued before your Lordships on the footing that it would determine which of two possible claimants was to be held entitled to all which might be payable by the Government by way of compensation under the proclamation. I entirely dissent from this view.

The appeal should, in my opinion, be dismissed with costs.

Their Lordships dismissed the appeal.

Counsel for the Appellants—G. Wallace, K.C.—Raeburn. Agents—Holman, Birdwood, & Company, Solicitors.

Counsel for the Respondents—Sir R. Finlay, K.C.—Mackinnon, K.C.—R. A. Wright. Agents—Thomas Cooper & Company, Solicitors.

HOUSE OF LORDS.

Thursday, November 30, 1916.

(Before Earl Loreburn, Lords Atkinson, Shaw, and Sumner.)

(On Appeal from the Court of Appeal in England.)

HORLICK'S MALTED MILK COMPANY *v.* SUMMERSKILL.

Trade Name—Descriptive Title—Sale of an Article under a Title hitherto Applied only to Certain Proprietary Goods.

The respondent offered for sale under the name of "Hedley's Malted Milk" a preparation somewhat similar to the article which had been sold by the appellant company for some years under the name of "Horlick's Malted Milk." *Held* that the term "malted milk" was descriptive, and could not be monopolised by the appellant company.

Their Lordships' judgment was delivered by

Earl Loreburn—In my opinion this appeal fails. It is an action to restrain the defendant from using the words "malted milk" as descriptive of his goods, because it is calculated to mislead the public by the supplying of the defendant's goods as and for the plaintiffs'. At the bottom of the contention, which has been very ably urged on behalf of the appellants, lies this question—"Is the term 'malted milk' merely a descriptive term?" I will not enter upon the other question as to whether, if it be so, it has been so identified with the plaintiffs' goods as to bestow upon them the right of abstracting these words from the English language and limiting others in their right to use them in trade, because that is a field on which one might say a good deal, and I think it is unnecessary to enter upon that question. The question we really have to consider is what is the meaning of the words "malted milk."

In my opinion, in accordance with the opinion of Joyce, J., which was confirmed by the Court of Appeal, that expression is merely descriptive of milk which is combined or prepared with malt or with extract of malt. The claim really is to the use of a part of a designation which the plaintiffs have been in the habit of using. They have been in the habit of using the term "Hor-

lick's Malted Milk." They eliminated the word "Horlick's," and ask that the remainder of that description shall be prohibited to the defendant. I do not think, on the ground that these are descriptive words, that that can be done. Of course the question I have been dealing with is a question that lies at the bottom of the right of the plaintiffs and the defendant, but the real point in issue is this—Ought the House to say that we should expect the public to be misled by the use of the term "Hedley's Malted Milk" into buying it as and for "Horlick's Malted Milk?" I do not think so, and although all, I am sure, of the material parts of the evidence which might be relied upon to establish the proposition have been plainly and clearly stated, it does not seem to me that that has been established.

I agree with the opinion of the learned Judge and the opinion of the Court of Appeal.

LORD ATKINSON—I concur.

LORD SHAW—When a name truly descriptive of an article has always been associated with the particular name of the manufacturer, then a monopoly of the name of the article, apart from the name of the manufacturer, is almost impossible to acquire.

With that observation I entirely concur with the judgments of your Lordships and with the Courts below.

LORD SUMNER—I concur.

Their Lordships dismissed the appeal.

Counsel for the Appellants—Walter, K.C. —Sebastian—Whitehead. Agents—Alpe & Ward, Solicitors.

Counsel for the Respondent—Kerly, K.C. —Gover. Agents—Mills & Morley, Solicitors.