

PICBELL LIMITEDAPPELLANT;

1951

AND

*Feb. 28

*Mar. 1

*June 20

PICKFORD & BLACK, LIMITED.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA
IN BANCO.

Contracts, prohibited—Charter-Party—Order-in-Council requiring Shipping Board's approval as condition precedent ignored—Whether expiry of Order validated contract.

Section 9 of Order-in-Council P.C. 6785 of July 31, 1942, provided that all parties proposing to charter any vessel exceeding 150 tons gross register, other than a fishing vessel, "shall submit in advance full particulars" for the approval of the Canadian Shipping Board and that "no such charter as aforesaid shall be made without such approval". The Order-in-Council was revoked at the end of 1946. On March 30, 1946 the appellant and respondent entered into a written agreement which purported the charter by the appellant to the respondent of a 4,700 ton vessel for a period of 84 months. The respondent took delivery of the ship on April 10, 1946 and operated and paid for it until April 15, 1950, when it notified the appellant that the agreement was a nullity, having been made in contravention of Order-in-Council 6785, and that it would no longer continue to operate or be responsible for the ship. The appellant thereupon brought an action for a declaration that the agreement was a valid and subsisting one, and for specific performance.

Before this Court it put its case on the single ground that the charter party was subject to a condition precedent that the approval of the Canadian Shipping Board under Order-in-Council 6785 should be obtained and, that Order having expired at the end of 1946, that condition dropped, leaving the charter party in full force *ab initio*.

Held: that, as Order-in-Council 6785 required that the terms of such a charter party be submitted "in advance" and approved by the Board and that "no such charter party as aforesaid shall be made without such approval"; there was no authority to give a retroactive approval. Assuming that a binding contract subject to such a condition could be made, the effect of the regulation was that no performance or execution of it could take place before that approval.

APPEAL from a decision of the Supreme Court of Nova Scotia *in banco*, (1), whereby it was held that the charter by the plaintiff to the defendant purporting to be evidenced by, and made pursuant to, the paper writing set out in the Statement of Claim (para. 4), was illegal.

C. F. H. Carson K.C. and *Allan Findlay* for the appellant.

F. D. Smith K.C. and *W. H. Jost* for the respondent.

*PRESENT: The Chief Justice and Rand, Estey, Cartwright and Fauteux JJ.

1951

PICBELL LTD.

v.

PICKFORD &
BLACK LTD.

THE CHIEF JUSTICE: For the reasons stated by my brother Rand, I would dismiss the appeal with costs.

The judgment of Rand, Estey, Cartwright and Fauteux JJ. was delivered by:

RAND J.:—Mr. Carson, abandoning all other points, puts his case on the single ground that the charter party was subject to the condition precedent that approval of the Canadian Shipping Board under Order-in-Council P.C. 6785, s. 9 should be obtained; and the Order-in-Council having expired at the end of December, 1946, that condition dropped, leaving the charter party in full force *ab initio*.

The Order-in-Council required that the terms of such a charter party be submitted "in advance" and approved by the Board and that "no such charter party as aforesaid shall be made without such approval." There was no authority to give a retroactive approval. Assuming that a binding contract or charter party subject to such a condition could be made, the effect of the regulation was that no performance or execution of it could take place before that approval. Here the actual terms stipulated for the charter party to go into effect at least when possession was taken, which was on the 10th of April, 1946; and from that time until the end of the year, the charter party was *de facto* being executed. To say, then, that when, not that the condition became fulfilled, in fact, as it never was, but that the reason for it had been removed in law, the contract as an entirety was rendered effective, is to validate retroactively that portion of the performance, which, as it was being done, was in the face of an express prohibition of law. The charter party so made and so performed could not have been so validated. The conception of a suspension by a condition in such circumstances assumes that the whole performance remains prospective; the facts here negative that and exclude its application.

The question of law as put does not permit the Court to consider the possibility of a finding of the formation of a truncated charter party originating on January 1, 1947, and terminating at the end of the seven-year period. Whether the relations between the parties could be taken to be of such a distributive nature as to warrant a finding to that effect I do not therefore consider; but it was the

fact that they were there of that nature which was the governing circumstance in *Paoli v. Vulcan Iron Works Limited* (1). 1951
PICKBELL LTD.
v.
PICKFORD &
BLACK LTD.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Rand J.
—

Solicitor for appellant: *C. B. Smith.*

Solicitor for respondent: *F. D. Smith.*
