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Development of the Doctrine of Impossibility of Performance

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THE DEVELOPMENT OF THE DOCTRINE OF IMPOSSIBILITY OF PERFORMANCE

I

IN common with other systems of law, Anglo-American law has grown in part by the use of analogies; and in part, by receptions from other systems of law.

Analogy is a method by which every progressive system of law has grown. The principles, rules and standards which work well in one branch of the law are frequently taken over into other branches of law which deal with different subjects. The success which attends an attempt to develop law by analogy depends, to a large extent, on the ability of the court which attempts to develop the law in this way to work together the original rules of law and the rules and principles borrowed by analogy. To take over a legal principle or rule from one branch of law into another branch of law, dealing with a different subject and controlled by different legal concepts, may be very helpful if the principle or rule which is taken over is so modified that it harmonizes with the general underlying principles of the topic into which it has been carried. To refuse to develop any given topic of the law by the free use of analogies is to stunt its growth and arrest its development. On the other hand, to add together different principles or rules taken from different subjects without any attempt to work them together into a consistent whole, may result in marvelous translations of the law, but not in that progress which will today lay a foundation on which tomorrow can build with safety.

While every system of law that has grown has done so by its partial reception of other systems of law, the ready reception and wholesale assimilation of other systems has characterized the growth of the Anglo-American law, as it has characterized the growth of the English language. Without this ready reception and wholesale assimilation it could never have developed from the law of barbaric tribes into the law of the English-speaking races of the world of today.

When the mist and fog of the Norman Conquest begin to clear in the reign of Henry II, we find that the English law had been receiving a large part of the feudal law of the continent, a reception which was no doubt as unwilling as the English reception of William of Normandy as their lawful king, and as thorough. In the

latter part of the eighteenth century there occurred the last great reception in England of a body of extrinsic law—the reception of the Law Merchant. If the Common Law had refused to receive the Law Merchant, its own development would have been greatly stunted. If Equity had received the Law Merchant, instead of the Common Law, the jurisdiction of Equity would have been widened enormously and the center of gravity of the unwritten law might readily have shifted to Equity. If neither Equity nor Common Law had received the Law Merchant, the courts of the Law Merchant would in all probability have arisen by the side of the courts of the Common Law and the courts of Equity; and the unwritten law would have been broken into three divisions, instead of into two. As it was, the reception of the Law Merchant by the Common Law contributed in no small degree to the ability of the Common Law to maintain its position by the side of Equity.

Between the reception of the feudal law after the Norman Conquest, and the reception of the Law Merchant during Mansfield's control of the common law courts, a number of other receptions had taken place. The law of testaments and legacies is marked by the influence of the ecclesiastical law, and as far as the courts of law or equity take cognizance of such rights, they have received the ecclesiastical law. In the United States the end of the eighteenth century and the beginning of the nineteenth century were marked by the reception of the Common Law and Equity of England, a reception which is frequently overlooked by those who assume that the law of the United States ought to be an exact replica of the law of England—a reception which might possibly have been a reception of French law instead of English law; and which, as it turned out, was a reception of English law with many restrictions and modifications.

In striking contrast to these different receptions of different bodies of law was the determination of the common law courts to close the register of writs, to refuse to recognize new forms of action, and to refuse to recognize or to enforce the rights or to grant the remedies which we have come to speak of as equitable. If a definite body of principles and rules of equity had been worked out, outside of England, and if they had come before the English courts as an entire system, it is possible that the courts might have received them as a more or less complete body of law. As it was, the kings' courts refused to recognize equitable principles, rights, or remedies as they came before the kings' courts, one by one. The result has been the tearing in two of our unwritten law; the split between law and

equity which so hampers the development of each, and which makes it impossible, as long as it lasts, to build up a harmonious and symmetrical body of unwritten law.

The refusal to adopt new ideas or to receive other systems of law, in whole or in part, is therefore fatal to any advance in the unwritten law. To insist that its existing principles are all-sufficient and that its existing classifications are all-comprehensive is the characteristic symptom of arrested development of any judicial system. On the other hand, the law which is received must be incorporated into the existing system. The general principle of the system which grants the reception must be extended, even though in a modified form, into the system of law which is received. To attempt to take over a system of law without modifying it so as to secure at least a comparative degree of harmony between the old and the new, results in confusion and not in progress.

II

The doctrine of discharge of contract by supervening impossibility of performance has had difficulties in youth and maturity in getting a foothold in the English law. Misleading analogies, followed by receptions of foreign legal principles, followed by other misleading analogies, have so combined that while the doctrine of impossibility is left alive, it is at times hard even for its friends to recognize it. From an early period of the English law it has been assumed that a contract which was personal in its nature was discharged by the death of the party from whom performance was due.¹ This was probably the true rule of early English law. Indeed, if we go back far enough, it is harder to find obligations that survive against executors or heirs than it is to find obligations which die with the person. The cases which are cited in support of this proposition, however,² go no farther than to say, in what appear to be *obiter*, that a personal covenant dies with the person; and to raise the question whether a covenant to pay quit-rent and the like was a personal covenant or not.

While no reference is made in these opinions to any principle of Roman law, and while there does not seem to be any tendency in these cases to receive the Roman law of voluntary extinction of obligations, the principle thus laid down is essentially the same as the principle of Roman law that obligations were extinguished by

¹ *Hyde v. Dean of Windsor*, Cro. Eliz. 552 [citing 48 Ed. III pl. 2, and Dyer 114 a.]

² *Hyde v. Dean of Windsor*, Cro. Eliz. 552 [citing 48 Ed. III pl. 2, and Dyer 114 a.]

the death of the debtor or the creditor if the action were one which was not hereditary.

A promise by a bailee to redeliver an animal which was bailed to him to be redelivered on demand, was held to be discharged by the death of the animal without the fault of the bailee before demand was made by the bailor.³ While the result which was reached in this case is substantially the same that would be reached by applying the Roman law doctrine of obligations *de certo corpore*, no reference is made in the opinion to this doctrine; and no tendency to receive the Roman law on this subject appears from any of the reports of the case. This was probably due more to a lack of familiarity with the Roman law than to wealth of English authority on this subject, since the leading authority cited in support of the decision is the Old Testament.

The lack of authority on this subject in English law is indicated, not only by the reference to the Hebraic Code, but also by the fact that the court decided the case in analogy to the law of carriers; and held that the bailee was discharged because it had become impossible by the act of God for him to perform his promise to redeliver the animal.

It may be added, parenthetically, that the analogy which was adopted in this case has been abandoned by most courts as part of the law of impossibility of performance.⁴ While in a number of cases impossibility is caused by a so-called 'Act of God,' the idea of impossibility and of the act of God are distinct. The notion of the act of God was taken over from the law of common carriers, where, for the purpose of avoiding the danger of fraud and collusion, the courts required the carrier to show not only that loss or injury to the goods was due to a cause beyond his own control, but also that it was not due to any human agency whatever.⁵ It is evident that

³ *Williams v. Lloyd*, 1 W. Jones 170 [citing Exodus 22, 10; Bracton lib. 2, f. 80; 40 E. III 3,6; and also reported at greater length as *Williams v. Hide*, Palmer 548.]

⁴ *Taylor v. Caldwell*, 3 Best. & S. 826; *Ainsworth v. Ritt*, 38 Cal. 89; *Alexander v. Dorsey*, 12 Ga. 12, 56 Am. Dec. 443; *Womack v. McQuarry*, 28 Ind. 103, 92 Am. Dec. 306; *Prather v. Latshaw*, (Ind.) 122 N. E. 721; *Cox v. Chase*, 95 Kan. 531, L. R. A. 1915-E, 590, 148 Pac. 766; *Runyon v. Culver*, 168 Ky. 45, L. R. A. 1916-F, 3, 181 S. W. 640; *Stockwell v. Hunter*, 52 Mass. (11 Met.) 448, 45 Am. Dec. 220; *Roberts v. Lynn Ice Co.*, 187 Mass. 402, 73 N. E. 523 (obiter); *Graves v. Berdan*, 26 N. Y. 498 [affirming, *Graves v. Berdan*, 29 Barb. (N.Y.) 100]; *Winton v. Cornish*, 5 Ohio 477; *Moving Picture Co. v. Scottish & National Ins. Co.*, 244 Pa. St. 358, 90 Atl. 642; *C. & St. L. Ry. v. Heikens*, 112 Tenn. 378, 65 L. R. A. 298, 79 S. W. 1038 (obiter); *Arbens v. Ezley*, 52 W. Va. 476, 61 L. R. A. 957, 44 S. E. 149 (obiter).

⁵ *Gulf Coast Transportation Co. v. Howell*, 70 Fla. 544, L. R. A. 1916-D, 974, 70 So. 567; (obiter); *Wald v. Pittsburgh, C., C. & St. L. R. Co.*, 162 Ill. 545, 53 Am. St. Rep. 332, 35 L. R. A. 356, 44 N. E. 888; *Shellabarger Elevator Co. v. Illinois Central Railroad Co.*, 278 Ill. 333, L. R. A. 1917-E, 1011, 116 N. E. 170 (obiter); *Armstrong v.*

a number of facts which cause impossibility in the proper sense of the term may be the result of human agency. Indeed, in the subsequent development of the doctrine of impossibility the courts have ignored the distinction between human agency and the act of God wherever this distinction would have produced any legal consequences. On the one hand impossibility, due to human agency, is recognized,⁶ while on the other hand the fact that performance is

Illinois Central Railroad Co., 26 Okla. 352, 29 L. R. A. (N.S.) 671, 109 Pac. 216; *St. Louis & Santa Fe Railroad Co. v. Dreyfus*, 42 Okla. 401, 141 Pac. 773, [sub nomine *St. Louis & San Francisco Railroad Co. v. Dreyfus*, L. R. A. 1915-D, 547] (obiter).

⁶ *Wiggins v. Ingleton*, 2 Ld. Raym. 1211; *Melville v. DeWolfe*, 4 El. & Bl. 844; *The Jack Park*, 4 C. Rob. 308; *Taylor v. Caldwell*, 3 Best. & S. 826; *Malcomson v. Wappoo Mills*, 88 Fed. 680; *Ainsworth v. Riit*, 38 Cal. 89; *Alexander v. Dorsey*, 12 Ga. 12, 56 Am. Dec. 443; *Nally v. Nally*, 74 Ga. 669, 58 Am. Rep. 458; *Leopold v. Salkey*, 89 Ill. 412, 31 Am. Rep. 93; *Chicago Edison Co. v. Huyett & Smith Mfg. Co.*, 66 Ill. App. 222; *Wdmack v. McQuarry*, 28 Ind. 103, 92 Am. Dec. 306; *Carroll v. Bowersock*, 100 Kan. 270, L. R. A. 1917-D, 1006, 164 Pac. 143; *Jinnings v. Amend*, 101 Kan. 130, L. R. A. 1917-F, 626, 165 Pac. 845; *Read v. Frankfort Bank*, 23 Me. 318; *Stockwell v. Hunter*, 52 Mass. (11 Met.) 448, 45 Am. Dec. 220; *Roberts v. Lynn Ice Co.*, 187 Mass. 402, 73 N. E. 523 (obiter); *Penas v. Cherveny*, 135 Minn. 427, L. R. A. 1917-E, 655, 161 N. W. 150; *Ganong v. Brown*, 88 Miss. 53, 117 Am. St. Rep. 731, 40 So. 556; *Dame v. Wood*, 75 N. H. 38, 70 Atl. 1081; *Graves v. Berdan*, 26 N. Y. 498 [affirming, *Graves v. Berdan*, 29 Barb. (N.Y.) 100]; *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415; *People v. Globe Mutual Life Ins. Co.*, 91 N. Y. 174; *Lorillard v. Clyde*, 142 N. Y. 456, 24 L. R. A. 112, 37 N. E. 489; *Wilcox v. Equitable Life Assurance Society*, 173 N. Y. 50, 93 Am. St. Rep. 579, 65 N. E. 857; *Lahey v. Lahey*, 174 N. Y. 146, 95 Am. St. Rep. 554, 61 L. R. A. 791, 66 N. E. 670; *Winton v. Cornish*, 5 Ohio 477; *Moving Picture Co. v. Scottish & National Ins. Co.*, 244 Pa. St. 358, 90 Atl. 642; *C. & St. L. Ry. v. Heikens*, 112 Tenn. 378, 65 L. R. A. 298, 79 S. W. 1038 (obiter); *Weis v. Devlin*, 67 Tex. 507, 60 Am. Rep. 38, 3 S. W. 726; *Arbens v. Exley*, 52 W. Va. 476, 61 L. R. A. 957, 44 S. E. 149 (obiter); *Griffith v. Blackwater Boom & Lumber Co.*, 55 W. Va. 604, 69 L. R. A. 124, 48 S. E. 442 [for former opinion, see *Griffith v. Lumber Co.*, 46 W. Va. 56, 33 S. E. 125]; *Boyd v. Mutual Fire Association*, 116 Wis. 155, 96 Am. St. Rep. 948, 61 L. R. A. 918, 90 N. W. 1086, 94 N. W. 171; *Halsey v. Waukesha Springs Sanitarium*, 125 Wis. 311, 110 Am. St. Rep. 838, 104 N. W. 94. A contract for personal services is discharged by the arrest and imprisonment, or involuntary detention of the party by whom such services are to be rendered. *Melville v. DeWolfe*, 4 El. & Bl. 844; *The Jack Park*, 4 C. Rob. 308; *Leopold v. Salkey*, 89 Ill. 412, 31 Am. Rep. 93; *Jinnings v. Amend*, 101 Kan. 130, L. R. A. 1917-F, 626, 165 Pac. 845. Such imprisonment or involuntary detention operates as impossibility and not breach. *Hughes v. Wamsutta Mills*, 93 Mass. (11 All.) 201; *Kowalski v. McAdoo*, — N. J. —, 107 Atl. 477. Involuntary detention leaves the employee free to recover the value of the services rendered by him up to the time of such imprisonment. *Hughes v. Wamsutta Mills*, 93 Mass. (11 All.) 201. A contract for furnishing support is discharged by the imprisonment or involuntary detention of the person to whom such support is to be furnished. *Penas v. Cherveny*, 135 Minn. 427, L. R. A. 1917-E, 655, 161 N. W. 150. In some jurisdictions the dissolution of a corporation, at least if involuntary, is held to discharge its executory contracts. *Malcomson v. Wappoo Mills*, 88 Fed. 680; *Bijur v. Standard Distilling & Distributing Co.*, 74 N. J. Eq. 546, 70 Atl. 934; *People v. Globe Mutual Life Ins. Co.*, 91 N. Y. 174; *Lorillard v. Clyde*, 142 N. Y. 456, 24 L. R. A. 113, 37 N. E. 489; *Griffith v. Blackwater Boom & Lumber Co.*, 55 W. Va. 604, 69 L. R. A. 124, 48 S. E. 442 [for former opinion, see *Griffith v. Lumber Co.*, 46 W. Va. 56, 33 S. E. 125]; *Boyd v. Mutual Fire Association*, 116 Wis. 155, 96 Am. St. Rep. 948, 61 L. R. A. 918, 90 N. W. 1086, 94 N. W. 171. See however, *Spader v. Mural Decoration Mfg. Co.*, 47 N. J. Eq. 18, 20 Atl. 378.

The destruction of a specific subject-matter operates as a discharge on the theory

prevented by a so-called 'Act of God' is not of itself sufficient to show that operative impossibility of performance exists.⁷

With the law in this formative state, (to return from a consideration of the ultimate fate of the theory that impossibility was to be explained as an 'Act of God,') and with little in the reported decisions on the subject of impossibility, whatever the general understanding may have been, a case arose,⁸ which is not a true case of impossibility at all, but which the court decided as though the question of impossibility were raised. The plaintiff declared in debt on lease for years in which rent was reserved; and the de-

of impossibility, whether such destruction is due to an "act of God" or not. *Taylor v. Caldwell*, 3 Best. & S. 826; *Ainsworth v. Ritt* 38 Cal. 89; *Alexander v. Dorsey*, 12 Ga. 12, 56 Am. Dec. 443; *Womack v. McQuarry*, 28 Ind. 103, 92 Am. Dec. 306; *Romero v. Newman*, 50 La. Ann. 80, 23 So. 493; *Stockwell v. Hunter*, 52 Mass. (11 Met.) 448, 45 Am. Dec. 220; *Roberts v. Lynn Ice Co.*, 187 Mass. 402, 73 N. E. 523 (*obiter*); *Graves v. Berdan*, 26 N. Y. 498 [affirming, *Graves v. Berdan*, 29 Barb. (N. Y.) 100]; *Winton v. Cornish*, 5 Ohio 477; *Moving Picture Co. v. Scottish & National Ins. Co.*, 244 Pa. St. 358, 90 Atl. 642; *C. & St. L. Ry. v. Heikens*, 112 Tenn. 378, 65 L. R. A. 298, 79 S. W. 1038 (*obiter*); *Arbenz v. Exley*, 52 W. Va. 476, 61 L. R. A. 957, 44 S. E. 149 (*obiter*).

In building contracts the distinction is not between the act of God and the act of man, but between contracts for work and labor on the building of another, and contracts for the construction of a building. A contract for performing work and labor on the building of another is discharged by the destruction of the building without the fault of either party, whether such destruction is due to a technical "act of God" or not. *Schwartz v. Saunders*, 46 Ill. 18; *Carroll v. Bowersock*, 100 Kan. 270, L. R. A. 1917-D, 1006, 164 Pac. 143; *Lord v. Wheeler*, 67 Mass. (1 Gray) 282; *Ganong v. Brown*, 88 Miss. 53, 117 Am. St. Rep. 731, 40 So. 556; *Dame v. Wood*, 75 N. H. 38, 70 Atl. 1081. A contract to move a building is discharged by its destruction. *Jones-Gray Construction Co. v. Stephens*, 167 Ky. 765, 181 S. W. 659; *Angus v. Scully*, 176 Mass. 357, 79 Am. St. Rep. 318, 49 L. R. A. 562, 57 N. E. 674. A contract for constructing a building may be broken by its destruction, but such contract is not discharged on any theory of impossibility. *Commercial Fire Ins. Co. v. Capital City Ins. Co.*, 81 Ala. 320, 60 Am. Rep. 162, 8 So. 222; *Cutcliff v. McAnally*, 88 Ala. 507, 7 So. 331; *Humbolt Lumber Mill Co. v. Crisp*, 146 Cal. 686, 106 Am. St. Rep. 75, 81 Pac. 30; *School District v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371; *Doll v. Young*, 149 Ky. 347, 149 S. W. 854; *Milske v. Steiner Mantel Co.*, 103 Md. 235, 115 Am. St. Rep. 354, 5 L. R. A. (N.S.) 1105, 63 Atl. 471; *Adams v. Nichols*, 36 Mass. (19 Pick.) 275, 31 Am. Dec. 137; *Trenton Public Schools v. Bennett*, 27 N. J. L. 513, 72 Am. Dec. 373; *Tompkins v. Dudley*, 25 N. Y. 272, 82 Am. Dec. 349.

The theft of an insurance policy, *Wilcox v. Equitable Life Assurance Society*, 173 N. Y. 50, 93 Am. St. Rep. 579, 65 N. E. 857, or the refusal of the beneficiary to return it, *Nally v. Nally*, 74 Ga. 669, 58 Am. Rep. 458; *Lahey v. Lahey*, 174 N. Y. 146, 95 Am. St. Rep. 554, 61 L. R. A. 791, 66 N. E. 670, discharges a provision which requires its surrender as a means of changing the beneficiary. If the impossibility is in fact due to an act of God, the contract is discharged. *Krause v. Board of School Trustees*, 162 Ind. 278, 192 Am. St. Rep. 203, 65 L. R. A. 111, 70 N. E. 264; *Butterfield v. Byron*, 153 Mass. 517, 25 Am. St. Rep. 654, 12 L. R. A. 571, 27 N. E. 667; *Louving v. Buck Mountain Coal Co.*, 54 Pa. St. 291. It is, however, the impossibility that is the operative fact, and not the act of God, as such. *Howell v. Coupland*, L. R. 1 Q. B. Div. 258.

⁷ *Meriwether v. Loundes County*, 89 Ala. 362, 7 So. 198; *Prather v. Latshaw*, (Ind.) 122 N. E. 721; *Cox v. Chase*, 95 Kan. 531, L. R. A. 1915-E, 590, 148 Pac. 766; *Carter v. Wilson*, 102 Kan. 200, 169 Pac. 1139; *Rumyan v. Culver*, 168 Ky. 45, L. R. A. 1916-F, 3, 181 S. W. 640; *Mitchell v. Weston*, 91 Miss. 414, 15 L. R. A. (N.S.) 833, 45 So. 571.

⁸ *Paradine v. Jane*, Aleyn 26.

fendant pleaded "that a certain German Prince, by name Prince Rupert, an alien born, enemy to the King and Kingdom, had invaded the Realm with a hostile army of men; and with the same force did enter upon the Defendant's possession, and him expelled, and held out of possession from 19 of July 18 Car. until the Feast of the Annunciation, 21 Car., whereby he could not take the profits." According to modern theories of impossibility, no question of impossibility was raised by this plea. The estate for which the lessee had bargained had passed to him; and the fact that he could not enjoy the possession thereof was not due to any act of the lessor, or to eviction by superior title; but to the wrongful act of a third person against whom he could have had adequate legal redress in times of peace. As thus construed, the plea would not be regarded as raising any question of impossibility at modern law. If the plea might be regarded as a statement of the reasons which prevented the lessee from having the money with which to pay the lessor, it can only be said that neither our law nor the Roman law has ever regarded the inability of the debtor to secure the means of payment as impossibility. As far as it has any legal effect, it is breach and not impossibility.⁹ In deciding this case, however, the court laid down a rule which, when taken out of its context, sounds like a principle of impossibility, saying: "When the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, and notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." It is largely owing to the statement just quoted that this case has assumed an *ex post facto* importance in the law of impossibility, which it does not deserve upon its own merits, because of the fact that so many of the cases,¹⁰ as well as some of the text writers on English law,¹¹ have treated this as the leading case on impossibility of per-

⁹ *McCreery v. Green*, 38 Mich. 172; *Lewis v. Atlas Mutual Life Ins. Co.*, 61 Mo. 534; *McCConnell v. Hewes*, 50 W. Va. 33, 40 S. E. 436.

¹⁰ *Paradine v. Jane* is quoted in the note to *Walton v. Waterhouse*, 2 Wms. Saunders 420, as a case of impossibility; and the influence of the learned annotator has led subsequent writers and courts to assume that it is a case of impossibility. See *Hall v. Wright*, El. Bl. & El. 746; *E. A. Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.*, [1916] 2 A. C. 397; *Leiston Gas Co. v. Leiston-cum-Sizewell Urban District Council*, [1916] 2 K. B. 428; *Chinese Mining & Engineering Co. v. Sale*, [1917] 2 K. B. 599.

¹¹ See ANSON ON CONTRACTS [Huffcut's Ed., 1906] pp. 396 and 397.

In POLLOCK ON CONTRACTS [8th Ed., pp. 432 *et seq.*] *Paradine v. Jane* is recognized as a case which is not one of true impossibility. In the first edition of LEAKE ON CONTRACTS, p. 362, *Paradine v. Jane* was treated as a case of impossibility on account of the note to *Walton v. Waterhouse*. In the second edition, p. 693, *Paradine v. Jane* is quoted and this quotation is repeated in the third edition p. 598. In the subsequent editions, the reference to this case disappears.

formance and have regarded the rule already quoted as the statement of the early common law doctrine of impossibility of performance. The fact that the case is not one in which the question of impossibility is raised, and the fact that the result which the court actually reached would have been reached in jurisdictions in which the laxest possible view of impossibility was taken, seems to have been little known and less regarded.

Whether but few cases of impossibility arose during the years that followed the decision in *Paradine v. Jane*, or whether the strenuous *obiter* in this case discouraged litigation, the fact remains that there is little in English law on the question of impossibility from the twenty-third year of the reign of Charles II to the twenty-sixth year of the reign of Victoria. Equity had indicated a willingness to give relief in cases of impossibility in which the law court gave no remedy.¹²

Under a contract to use a vessel in the East India trade for a period of about a year, which contained a provision that compensation was to be paid a certain length of time after the vessel returned to England, equity granted relief where, by the mutual assent of the parties, the vessel was used for a period of three years and, by reason of such use, it became unfit for a return voyage to England, so that the condition upon which the payment was due could not be performed.¹³ While an embargo laid by the British government was held to discharge a contract by which an English subject had chartered a vessel from an alien owner, the performance of which contract was prevented by the embargo,¹⁴ the act of a foreign government in imposing a hostile embargo,¹⁵ or in prohibiting the exportation of articles which one party had agreed to export from such country,¹⁶ was held not to operate as a discharge. In like manner a covenant to send a cargo alongside at a foreign port was held not to be discharged by the fact that, on account of a pestilence, intercourse was forbidden at such port and the performance of such contract was thus prevented by the act of such foreign government.¹⁷

This latter group of cases, it may be added, was frequently used as authority for the general proposition that the English law did not recognize the doctrine of impossibility of performance except in special cases; while it is really authority for the far narrower,

¹² *Edwin v. East India Co.*, 2 Vern. 210.

¹³ *Edwin v. East India Co.*, 2 Vern. 210.

¹⁴ *Touteng v. Hubbard*, 3 Bos. & Pul. 291.

¹⁵ *Forster v. Christie*, 11 East 205.

¹⁶ *Blight [Bright] v. Page*, 3 Bos. & Pul. 295, note a.

¹⁷ *Barker v. Hodgson*, 3 Maule & S. 267.

though probably nonwise, rule that the English law does not recognize the act of a foreign government as creating an impossibility which will operate as a discharge of a contract which is made in England, especially if such contract is eventually to be performed in England.¹⁸

The risk of loss of chattels by fire was held to be that of the owner of the chattels, whether the seller or the buyer;¹⁹ the court assuming in this case, rather than actually deciding, that the destruction of specific chattels after title had passed, and before delivery, would discharge the seller. Serious physical disability was held to discharge a contract to intermarry at the election of the adversary party;²⁰ but, by a closely divided court, it was held that the party who suffered from such physical disability could not take advantage of it to avoid such contract if the adversary party was willing to perform.²¹

In this condition of English law, the owner of a music hall for a valuable consideration agreed to allow it to be used for the purpose of giving certain concerts. After the contract was made, and before the first concert was to be given, the music hall was destroyed by fire. In an action against the owner of the music hall to recover damages for breach of such contract, it was held that performance would be discharged where, from the nature of the contract, it was apparent that the parties contracted on the basis of the continued existence of a specific person or thing.²² In reaching this result the court conceded that there was "no doubt that 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 has become unexpectedly burthensome or even impossible." This concession is made in reliance on some early authorities, which seem to fall far short of establishing such rule,²³ and the court does not cite *Paradine v. Jane*, although this was apparently the case which was relied on chiefly by the attorney for the plaintiff.

The court was aided in reaching this result by a consideration of the texts of the Roman law on the subject of the *obligatio de certo corpore*, although the court declared expressly that the civil law was

¹⁸ See *Jacobs v. Crédit Lyonnais*, 12 Q. B. Div. 589.

¹⁹ *Rugg v. Minett*, 11 East 210.

²⁰ *Atchison v. Baker*, 2 Peake's N. P. C. 1, 103.

²¹ *Hall v. Wright*, El., Bl. & El. 746.

²² *Taylor v. Caldwell*, 3 Best & S. 826.

²³ These cases involved the effect of impossibility on conditions rather than on covenants. 1 ROLLE ABR. 450, Condition G, pl. 10; *Walton v. Waterhouse*, 2 Wms. Saund. 421 a [6th Ed.]; *Hall v. Wright*, El. Bl. & El. 746.

not of itself authority in an English court, but that it afforded great assistance in investigating the principles on which the law was grounded. The court quoted from the Digest: "If a promise has been made to deliver the slave Stichus on a certain day, and he dies before that day, the promisor is not bound."²⁴

The Roman law principle of the discharge of obligations *de certo corpore*, which was thus introduced into the English law, has been repeated with variations by English courts,²⁵ and, as far as repetition can make it, it is now an established principle of the English law.²⁷

In deciding this case, it would seem that the court had sufficient English authority on the subject of impossibility of performance to justify it in reaching the conclusion which it reached; and it might well have stopped after fortifying itself by a consideration of the texts of the Roman law, which showed that that system of law had reached substantially the same result as the English law, and for substantially the same reasons. Unfortunately, however, the court, after reaching the conclusion that the destruction of the music hall rendered the contract impossible of performance, and this operated as a discharge, sought to find another justification of this result in the doctrine of the implied condition. The continued existence of the contractor, or of the specific thing, was said to be a term of the contract and to amount to an implied condition. The death of the contractor, or the destruction of the thing, was therefore regarded as operating as a discharge of the contract in accordance with the intention of the parties as deduced from the language of the contract and from the surrounding circumstances.²⁸

In cases of this sort, the analogy of the implied condition is evi-

²⁴ DIGEST, lib. XLV, tit. 1, l. 33. The amplification of this doctrine in DIG. lib. XLV, tit. 1, l. 23 is also quoted, in which such destruction is treated as the performance of a condition. Pothier's discussion of the rights and liabilities of the *debtor corporis certii* in POTHIER ON OBLIGATIONS, Part III, ch. 6, art. 3. § 668 is also cited. The court might also have quoted, although it did not do so, "If anyone has promised to give a secular thing (*profanam*; that is a thing which has not been devoted to the gods), or the slave Stichus, he is discharged if without any act on the part of the promisor the thing becomes consecrated (*sacra*; that is, devoted to the *Diis superis*), or if Stichus becomes free; and these things are not subject to the obligation if at a later time, through some law, the thing which was devoted to the gods becomes secular, or Stichus is reduced from freedom to slavery." DIGEST, lib. XLV., tit. 1, l. 33. See also DIG. lib. XLV., tit. 1, l. 91.

²⁵ *Krell v. Henry*, [1901] 2 K. B. 740.

²⁶ *Nickoll v. Ashton*, [1901] 2 K. B. 126; *Horlock v. Beal*, [1916] 1 A. C. 486 [reversing (1915) 3 K. B. 627].

²⁷ "The principle seems to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance." *Taylor v. Caldwell*, 3 Best & S. 826, 839.

dently a fiction which is at best unnecessary and at worst misleading. If the contract shows that the parties contemplated the death of the person or the destruction of the thing, or any other act which prevented performance, and if they provided for the consequences of such event in the contract, either in express terms or by fair implication, the doctrine of impossibility of performance has no application.²⁹ If the contract is not otherwise in violation of the rules of positive law, the only function of the court in cases of this sort is to ascertain the intention of the parties and to give effect thereto. These are true cases of conditions, either expressed or implied. Impossibility of performance exists only where there has been an unconditional promise to do a thing, and performance of such promise has been rendered impossible by some subsequent act or event which the parties had not anticipated.

Unfortunately, the theory of the implied condition, which was suggested in this case, has been adopted as a convenient explanation of the result which is actually reached in determination, whether the act or event in question amounts to impossibility or not.³⁰ In these cases, however, the court is obliged to ascertain, in

²⁹ *Elliot v. Crutchley*, [1916] 1 A. C. 7; *Berg v. Erickson*, 234 Fed. 817, L. R. A. 1017-A. 648; *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446; *Meriwether v. Lowndes County*, 89 Ala. 362, 7 So. 198; *Polack v. Pioche*, 35 Cal. 416, 95 Am. Dec. 115; *School District No. 1 v. Deuchy*, 25 Conn. 530, 68 Am. Dec. 371; *Prather v. Latshaw*, (Ind.) 122 N. E. 721; *In re McIntosh*, 182 Ia. 23, 159 N. W. 223; *Cox v. Chase*, 95 Kan. 531, L. R. A. 1915-E, 590, 148 Pac. 765; *Runyan v. Culver*, 168 Ky. 45, L. R. A. 1916-F, 3, 181 S. W. 640; *Van Wormer v. Crane*, 51 Mich. 363, 47 Am. Rep. 582, 16 N. W. 686; *Abby v. Billups*, 35 Miss. 618, 72 Am. Dec. 143; *Mitchell v. Weston*, 91 Miss. 414, 15 L. R. A. (N.S.) 833, 45 So. 571; *Beach v. Crain*, 2 N. Y. 86, 49 Am. Dec. 369; *Cameron-Hawm Realty Co. v. Albany*, 207 N. Y. 377, 49 L. R. A. (N.S.) 922, 101 N. E. 162; *Hoy v. Holt*, 91 Pa. St. 88, 36 Am. Rep. 659; *Miller v. Morris*, 55 Tex. 412, 40 Am. Rep. 814; *Ross v. Overton*, 7 Va. (3 Call.) 309, 2 Am. Dec. 552.

The fact that an unqualified promise is made by one who is presumed to foresee the possibility of the event which is claimed to make performance impossible, and that he makes no provision therefor, is held to show an intention on his part to assume such risk. *Prather v. Latshaw*, (Ind.) 122 N. E. 721; *Cox v. Chase*, 95 Kan. 531, L. R. A. 1915-E, 590, 148 Pac. 766; *Carter v. Wilson*, 102 Kan. 200, 169 Pac. 1139; *Runyan v. Culver*, 168 Ky. 45, L. R. A. 1916-F, 3, 181 S. W. 640.

³⁰ *Horlock v. Beal*, [1916] 1 A. C. 486; *F. A. Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.*, [1916] 2 A. C. 397; *Nickoll v. Ashton*, [1901] 2 K. B. 126; *Appleby v. Myers*, L. R. 2 C. P. 651; *Howell v. Coupland*, L. R. 1 Q. B. Div. 258; *Robinson v. Davison*, L. R. 6 Ex. 269; *Reed v. United States*, 78 U. S. (11 Wall.) 591, 20 L. ed. 220; *Chicago, Milwaukee & St. Paul Ry. v. Hoyt*, 149 U. S. 1, 37 L. ed. 625; *Greil Bras. Co. v. Mahson*, 179 Ala. 444, 43 L. R. A. (N.S.) 664, 60 So. 876; *Levy v. Caledonian Ins. Co.*, 156 Cal. 527, 105 Pac. 598; *Krause v. Board of Trustees*, 162 Ind. 278, 102 Am. St. Rep. 203, 65 L. R. A. 111, 70 N. E. 264; *American Mercantile Exchange v. Blunt*, 102 Me. 128, 120 Am. St. Rep. 463, 10 L. R. A. (N.S.) 414, 10 Am. & Eng. Ann. Cas. 1022, 66 Atl. 212; *Hooper v. Mueller*, 158 Mich. 595, 133 Am. St. Rep. 399, 123 N. W. 24; *Dow v. Sleepy Eye State Bank*, 88 Minn. 355, 93 N. W. 121; *Holloran v. Schmidt Brewing Co.*, 137 Minn. 141, L. R. A. 1917-E, 777, 162 N. W. 1082; *Dexter v. Morton*, 47 N. Y. 62, 7 Am. Rep. 415; *Stewart v. Stone*, 127 N. Y. 500, 14

the first instance, whether the act or event amounts to an impossibility which discharges the contract before it is able to determine whether it is an implied condition or not. If the case is found to be one of impossibility, the fiction of the implied condition is then invoked to explain the result; while if the case is found not to be one of impossibility, it is said that the implied condition does not exist. The very courts that invoke the doctrine of the implied condition as a justification for treating the contract as discharged insist that it is impossible to imply further conditions for mutual restitution in case of supervening impossibility if the law does not recognize quasi-contractual rights arising out of such discharge.³¹ In other words, the condition is implied to the extent to which the law treats impossibility as a discharge, and no farther.

Little harm would be done by the use of this unnecessary fiction if it were not for the fact that the courts are occasionally led to talk, and possibly to reason, as if impossibility of performance were a question of the actual intention of the parties, instead of operating only when the parties had no intention as to the effect of the combination of facts which has arisen after the contract was made, and which prevents performance.

III

At the outbreak of the War in 1914³² the Anglo-American law had therefore recognized at least three well settled classes of supervening impossibility of performance: impossibility due to the destruction of the subject-matter where the contract called for a specific subject-matter as distinguished from a general subject-matter;³³

L. R. A. 215, 28 N. E. 505; *Dolan v. Rodgers*, 149 N. Y. 480, 44 N. E. 167; *Buffalo & Lancaster Land Co. v. Bellevue Land & Improvement Co.*, 165 N. Y. 247, 51 L. R. A. 951, 59 N. E. 5; *Cameron-Hawn Realty Co. v. Albany*, 207 N. Y. 377, 49 L. R. A. (N.S.) 922, 101 N. E. 162; *Parker v. Macomber*, 17 R. I. 674, 16 L. R. A. 858, 24 Atl. 464; *Heart v. East Tennessee Brewing Co.*, 121 Tenn. 69, 130 Am. St. Rep. 753, 19 L. R. A. (N.S.) 964, 113 S. W. 364; *Virginia Iron, Coal & Coke Co. v. Graham*, (Va.) 98 S. E. 659; *The Stratford v. Seattle Brewing & Malting Co.*, 94 Wash. 125, L. R. A. 1917-C, 931, 162 Pac. 31.

³¹ "It is impossible to import a condition into a contract which the parties could have imported and have not done so." *Civil Service Co-operative Society v. General Steam Navigation Co.*, [1903] 2 K. B. 756.

³² Cases arising after 1914, decided in accordance with the general principles then laid down, will not be omitted.

³³ *Taylor v. Caldwell*, 3 Best & S. 826; *Howell v. Coupland*, L. R. 1 Q. B. Div. 258; *Baily v. De Crespigny*, L. R. 4 Q. B. Cases, 180; *Anglo-Egyptian Navigation Co. v. Rennie*, L. R. 10 C. P. 271; *Nickoll v. Ashton*, [1901] 2 K. B. 126; *Arlington Hotel Co. v. Rector*, 124 Ark. 90, 186 S. W. 622; *Ainsworth v. Ritt*, 38 Cal. 89; *Ontario Deciduous Fruit Growers' Association v. Cutting Fruit Packing Co.*, 134 Cal. 21, 86 Am. St. Rep. 231, 53 L. R. A. 681, 66 Pac. 28; *Alexander v. Dorsey*, 12 Ga. 12, 56 Am. Dec. 443; *Nally v. Nally*, 74 Ga. 669, 58 Am. Rep. 458; *Schwartz v. Saunders*, 46 Ill. 18; *Walker*

impossibility due to the death of one of the parties to the contract where the contract was one which provided for personal performance;³⁴ and impossibility caused by a subsequent change of law,

v. *Tucker*, 70 Ill. 527; *Siegel v. Eaton & Prince Co.*, 165 Ill. 550, 46 N. E. 449; *Chicago Edison Co. v. Huyett & Smith Mfg. Co.*, 66 Ill. App. 222; *Womack v. McQuarry*, 28 Ind. 103, 92 Am. Dec. 306; *Krause v. Board of School Trustees*, 162 Ind. 278, 102 Am. St. Rep. 203, 65 L. R. A. 111, 70 N. E. 264; *Wells v. Sutphin*, 64 Kan. 873, 68 Pac. 648; *Carroll v. Bowersock*, 100 Kan. 270, L. R. A. 1917-D. 1006, 164 Pac. 143; *Jones-Gray Construction Co. v. Stephens*, 167 Ky. 765, 181 S. W. 659; *Romero v. Newman*, 50 La. Ann. 80, 23 So. 493; *Knight v. Bean*, 22 Me. 531; *Pinkham v. Libby*, 93 Me. 575, 49 L. R. A. 693, 45 Atl. 823; *Stockwell v. Hunter*, 52 Mass. (11 Met.) 448, 45 Am. Dec. 220; *Lord v. Wheeler*, 67 Mass. (1 Gray) 282; *Eliot National Bank v. Beal*, 141 Mass. 566, 6 N. E. 742; *Gilbert & Barker Mfg. Co. v. Butler*, 146 Mass. 82, 15 N. E. 76; *Butterfield v. Byron*, 153 Mass. 517, 25 Am. St. Rep. 654, 12 L. R. A. 571, 27 N. E. 667; *Angus v. Scully*, 176 Mass. 357, 70 Am. St. Rep. 318, 49 L. R. A. 562, 57 N. E. 674; *Roberts v. Lynn Ice Co.*, 187 Mass. 402, 73 N. E. 523; *Broune v. Fairhall*, 213 Mass. 290, 45 L. R. A. (N.S.) 349, 100 N. E. 556; *Ganong v. Brown*, 88 Miss. 53, 117 Am. St. Rep. 731, 40 So. 556; *Dame v. Wood*, 75 N. H. 38, 70 Atl. 1081; *Perlee v. Jeffcott*, 89 N. J. L. 34, 97 Atl. 789; *Graves v. Berdan*, 26 N. Y. 498 [affirming *Graves v. Berdan*, 29 Barb. (N.Y.) 100]; *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415; *Stewart v. Stone*, 127 N. Y. 500, 14 L. R. A. 215, 28 N. E. 595; *Wilcox v. Equitable Life Assurance Society*, 173 N. Y. 50, 93 Am. St. Rep. 579, 65 N. E. 857; *Lahey v. Lahey*, 174 N. Y. 146, 95 Am. St. Rep. 554, 61 L. R. A. 791, 66 N. E. 670; *Pasquotank & North River Steamboat Co. v. Eastern Carolina Transportation Co.*, 166 N. Car. 582, 82 S. E. 956; *Winton v. Cornish*, 5 Ohio 477; *Board of Education v. Townsend*, 63 O. S. 514, 52 L. R. A. 868, 50 N. E. 223; *Powell v. Dayton, Sheridan & Grande Ronde Ry Co.*, 12 Or. 488; *Louving v. Buck Mountain Coal Co.*, 54 Pa. St. 291; *Moving Picture Co. v. Scottish & National Ins. Co.*, 244 Pa. St. 358, 90 Atl. 642; *Yerrington v. Greene*, 7 R. I. 589, 84 Am. Dec. 578; *C. & St. L. Ry. v. Heikens*, 112 Tenn. 378, 65 L. R. A. 208, 70 S. W. 1038; *Weis v. Devlin*, 67 Tex. 507, 60 Am. Rep. 38, 3 S. W. 726; *Tatro v. Bailey*, 67 Vt. 73, 30 Atl. 685; *R. J. Mens Lumber Co. v. McNeeley*, 58 Wash. 223, 28 L. R. A. (N.S.) 1007, 108 Pac. 621; *Arbenz v. Exley*, 52 W. Va. 476, 61 L. R. A. 957, 44 S. E. 149; *Halsey v. Waukesha Springs Sanitarium*, 125 Wis. 311, 110 Am. St. Rep. 838, 104 N. W. 02.

³⁴ *Hyde v. Dean of Windsor*, Cro. Eliz. 552; *Siboni v. Kirkman*, 1 M. & W. 418; *Hovey v. Blakeman*, 4 Ven. Jr. 596; *In re Overweg*, [1900] 1 Ch. 209; *Howe Sewing Machine Co. v. Rosensteel*, 24 Fed. 583; *Herren v. Harris*, (Ala.) 78 So. 921; *Leaky v. Cheney*, 90 Conn. 611, L. R. A. 1917-D. 809, 98 Atl. 132; *Campbell v. Faxon*, 73 Kan. 675, 5 L. R. A. (N.S.) 1002, 85 Pac. 760; *Lapleau v. Succession of Lapleau*, 144 La. 988, 81 So. 597; *Marvel v. Phillips*, 162 Mass. 399, 44 Am. St. Rep. 370, 26 L. R. A. 416, 38 N. E. 1117; *Mills v. Smith*, 193 Mass. 11, 6 L. R. A. (N.S.) 865, 78 N. E. 765; *Browne v. Fairhall*, 213 Mass. 290, 45 L. R. A. (N.S.) 349, 100 N. E. 556; *Adriance v. Rutherford*, 57 Mich. 170, 23 N. W. 718; *Clifton v. Clark*, 83 Miss. 446, 102 Am. St. Rep. 458, 36 So. 251; *Homan v. Redick*, 97 Neb. 299, L. R. A. 1915-C, 601, 149 N. W. 782; *Spalding v. Ross*, 71 N. Y. 40, 27 Am. Rep. 7; *Sargent v. McLeod*, 200 N. Y. 360, 52 L. R. A. (N.S.) 380, 103 N. E. 164; *Siler v. Gray*, 86 N. Car. 566; *McDonald v. Black*, 20 Ohio 185, 55 Am. Dec. 448; *Parker v. Macomber*, 17 R. I. 674, 16 L. R. A. 858, 24 Atl. 464; *Mendenhall v. Davis*, 52 Wash. 169, 21 L. R. A. (N.S.) 914, 100 Pac. 336.

The destruction of a general subject-matter, such as a building to be constructed by a contractor, did not operate as a discharge. *Commercial Fire Ins. Co. v. Capital City Ins. Co.*, 81 Ala. 320, 60 Am. Rep. 162, 8 So. 222; *Cutcliff v. McAnally*, 88 Ala. 507, 7 So. 331; *Humboldt Lumber Mill Co. v. Crisp*, 146 Cal. 686, 106 Am. St. Rep. 75, 81 Pac. 307; *School District v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371; *Doll v. Young*, 149 Ky. 147, 140 S. W. 854; *Milske v. Steiner Mantel Co.*, 103 Md. 235, 115 Am. St. Rep. 354, 5 L. R. A. (N.S.) 1105, 63 Atl. 471; *Adams v. Nichols*, 36 Mass. (19 Pick.)

or by the subsequent act of the state by whose law such contract was governed.³⁵ Whether these classes were exhaustive was an-

275. 31 Am. Dec. 137; *Trenton Public Schools v. Bennett*, 27 N. J. L. 513, 72 Am. Dec. 373; *Tompkins v. Dudley*, 25 N. Y. 272, 82 Am. Dec. 349; *Voght v. Hecker*, 118 Wis. 306, 95 N. W. 90. A contract of agency which did not create a so-called "power coupled with an interest" is discharged by the death of either party thereto. *In re Overweg*, [1901] 1 Ch. 209; *Hovey v. Blakeman*, 4 Ves. Jr. 596; *Howe Sewing Machine Co. v. Rosensteel*, 24 Fed. 583; *Mills v. Smith*, 103 Mass. 11, 6 L. R. A. (N.S.) 865, 78 N. E. 765; *Adrianne v. Rutherford*, 57 Mich. 170, 23 N. W. 718; *Homan v. Redick*, 97 Neb. 299, L. R. A. 1915-C, 601, 149 N. W. 782; *McDonald v. Black*, 20 Ohio 185, 55 Am. Dec. 448.

A contract which provides for the performance of services of a personal nature is discharged by the death of the party who is to perform such services. *Stubbs v. Holywell Ry. Co.*, L. R. 2 Exch. 311; *Conke v. Colecraft*, 2 W. Bl. 856; *Herren v. Harris*, (Ala.) 78 So. 921; *Leahy v. Cheney*, 90 Conn. 611, L. R. A. 1917-D, 800, 98 Atl. 132; *Lapleau v. Succession of Lapleau*, 144 La. 988, 81 So. 597; *Marvel v. Phillips*, 162 Mass. 399, 44 Am. St. Rep. 370, 26 L. R. A. 416, 38 N. E. 1117; *Browne v. Fairhall*, 213 Mass. 290, 45 L. R. A. (N.S.) 349, 100 N. E. 556; *Clifton v. Clark*, 83 Miss. 446, 102 Am. St. Rep. 458, 36 So. 251; *Sargent v. McLeod*, 209 N. Y. 360, 52 L. R. A. (N.S.) 380, 103 N. E. 164; *Blakely v. Sousa*, 197 Pa. St. 305, 80 Am. St. Rep. 821, 47 Atl. 286; and also by the death of the party for whom such services are to be performed. *Krumdick v. White*, 92 Cal. 143, 28 Pac. 219; *Homan v. Redick*, 97 Neb. 299, L. R. A. 1915-C, 601, 149 N. W. 782; *Lacy v. Getman*, 119 N. Y. 109, 16 Am. St. Rep. 806, 6 L. R. A. 728, 23 N. E. 452.

Among contracts of this sort are contracts by one to support another; *Glidden v. Korter*, 90 Me. 269, 38 Atl. 150; *Parker v. Macomber*, 17 R. I. 674, 16 L. R. A. 858, 24 Atl. 464; contracts for rendering professional services, such as attorney, *Whitehead v. Lord*, 7 Exch. 691; *Moyle v. Landers*, 78 Cal. 90, 12 Am. St. Rep. 22, 20 Pac. 241; *Turnan v. Temke*, 84 Ill. 286; *Clegg v. Baumberger*, 110 Ind. 536, 9 N. E. 700; *Cloyton v. Merrett*, 52 Miss. 353; *Clifton v. Clark*, 83 Miss. 446, 102 Am. St. Rep. 458, 36 So. 251; *Sargent v. McLeod*, 209 N. Y. 360, 52 L. R. A. (N.S.) 380, 103 N. E. 164; or consulting engineer; *Stubbs v. Holywell Ry. Co.*, L. R. 2 Exch. 311; contracts for acting as manager; *Herren v. Harris*, (Ala.) 78 So. 921; *Campbell v. Fason*, 73 Kan. 675, 5 L. R. A. (N.S.) 1002, 85 Pac. 760; *Marvel v. Phillips*, 162 Mass. 399, 44 Am. St. Rep. 370, 26 L. R. A. 416, 38 N. E. 1117; *Blakely v. Sousa*, 197 Pa. St. 305, 80 Am. St. Rep. 821, 47 Atl. 286; contracts to make certain payments out of earnings in a professional employment; *Lapleau v. Succession of Lapleau*, 144 La. 988, 81 So. 597; and contracts to render personal services as a servant. *Leahy v. Cheney*, 90 Conn. 611, L. R. A. 1917-D, 800, 98 Atl. 132. A contract in which the personal credit of one of the parties is material, is discharged by the death of such party before he has given the note which, by the contract, he is required to give. *Browne v. Fairhall*, 213 Mass. 290, 45 L. R. A. (N.S.) 349, 100 N. E. 556. An executory contract to form a partnership is discharged by the death of one of the parties. *Dow v. State Bank*, 88 Minn. 355, 93 N. W. 121. Whether the death of one of the parties to a joint contract for personal services operated as a discharge of the entire contract, is a question upon which there has been a conflict of authority. See on this question *Griggs v. Swift*, 82 Ga. 302, 14 Am. St. Rep. 176, 5 L. R. A. 405, 9 S. E. 1062; *Martin v. Hunt*, 83 Mass. (1 All.) 418; *Hughes v. Gross*, 166 Mass. 61, 55 Am. St. Rep. 375, 32 L. R. A. 620, 43 N. E. 1031; *Clifton v. Clark*, 83 Miss. 446, 102 Am. St. Rep. 458, 36 So. 251.

³⁵ *Ottawa v. Ottawa Electric Ry. Co.*, 1 Ont. Law Rep. 377; *Louisville & Nashville Ry. v. Motley*, 219 U. S. 467, 55 L. ed. 297, 34 L. R. A. (N.S.) 671 [reversing, *Louisville & Nashville Ry. v. Motley*, 133 Ky. 652, 118 S. W. 982]; *Malcomson v. Wappoo Mills*, 88 Fed. 680; *Fresno Milling Co. v. Fresno Canal & Irrigation Co.*, 126 Cal. 640; 59 Pac. 140; *Macan & Birmingham Ry. Co. v. Gibson*, 85 Ga. 1, 21 Am. St. Rep. 135, 11 S. E. 442; *Jamieson v. Indiana Natural Gas & Oil Co.*, 128 Ind. 555, 12 L. R. A. 652, 28 N. E. 76; *Baltimore & Ohio Ry. v. Miller*, 183 Ind. 323, 107 N. E. 545; *Howell v. Hough*, 46 Kan. 152, 26 Pac. 436; *Dale v. Commonwealth*, 101 Ky. 612, 38 L. R. A. 808, 42 S. W. 93; *Louisville & Nashville Ry. v. Crowe*, 156 Ky. 27, 49 L. R. A. (N.S.)

other question. There was a strong feeling that there might be other classes of impossibility outside of these three classes.³⁸

As a justification for holding contracts of these classes, and possibly of other classes, discharged by supervening impossibility, the courts were able to invoke the doctrine of impossibility at common law and also the doctrine of impossibility at Roman law which had been received to some extent into the common law. They were also able to justify such holding in some cases by invoking the theory of the act of God; and they were able to justify it in all cases by the doctrine of implied conditions.

Another doctrine had, however, been growing up, and as the cases arising out of the War of 1914 were presented for decision the English courts, while invoking the older reasons for holding certain types of contract discharged, unfortunately turned to this new doctrine as another analogy which they might use in develop-

848, 160 S. W. 759; *Campbell v. Gullo*, 142 La. 1082, L. R. A. 1918-D, 251, 78 So. 124; *American Mercantile Exchange v. Blunt*, 102 Me. 128, 120 Am. St. Rep. 463, 10 L. R. A. (N. S.) 414, 66 Atl. 212; *Standard Brewing Co. v. Weil*, 129 Md. 487, L. R. A. 1917-C, 929, 99 Atl. 661; *Karez v. Covell*, 180 Mass. 206, 91 Am. St. Rep. 271, 62 N. E. 244; *Hughson v. Winthrop Steamboat Co.*, 181 Mass. 325, 58 L. R. A. 432, 64 N. E. 74; *Hooper v. Mueller*, 158 Mich. 595, 123 N. W. 24; *Burns v. Koochiching*, 68 Minn. 239, 71 N. W. 26; *Halloran v. Schmidt Brewing Co.*, 137 Minn. 141, L. R. A. 1917-E, 777, 162 N. W. 1082; *Brown v. Dillahuntv*, 12 Miss. (4 Sm. & M.) 713, 43 Am. Dec. 499; *School District v. Howard*, (Neb.) 98 N. W. 666; *Rosenbaum v. Credit System Co.*, 61 N. J. L. 543, 40 Atl. 591; *Buffalo East Side Ry. Co. v. Buffalo Street Railway Co.*, 111 N. Y. 132, 2 L. R. A. 384, 19 N. E. 63; *Pennsylvania Co. v. Philadelphia Contribution-ship*, 201 Pa. St. 407, 57 L. R. A. 510, 51 Atl. 351; *Burkhardt v. School Township*, 9 S. D. 315, 69 N. W. 16; *Heart v. East Tennessee Brewing Co.*, 121 Tenn. 60, 130 Am. St. Rep. 753, 19 L. R. A. (N.S.) 964, 113 S. W. 364; *Houston Ice & Brewing Co. v. Keenan*, 99 Tex. 70, 88 S. W. 107; *Cowley v. Northern Pacific Ry.*, 68 Wash. 558, 41 L. R. A. (N.S.) 559, 123 Pac. 998; *The Stratford v. Seattle Brewing & Malting Co.*, 94 Wash. 125, L. R. A. 1917-C, 931, 162 Pac. 31; *Koen v. Fairmont Brewing Co.*, 69 W. Va. 94, 70 S. E. 1098. A contract which provides for issuing railway passes in the future is discharged by subsequent legislation or constitutional provisions which forbid the issuing of passes. *Louisville & Nashville Ry. v. Mottley*, 219 U. S. 467, 55 L. ed. 297, 34 L. R. A. (N.S.) 671 [reversing, *Louisville & Nashville Ry. v. Mottley*, 133 Ky. 652, 118 S. W. 982]; *Louisville & Nashville Ry. v. Crowe*, 156 Ky. 27; 49 L. R. A. (N.S.) 848, 160 S. W. 759; *Cowley v. Northern Pacific Ry.*, 68 Wash. 558, 41 L. R. A. (N.S.) 559, 123 Pac. 998. A lease of property which is to be used for saloon purposes exclusively or primarily, is discharged by legislation or constitutional provisions, enacted thereafter, which forbid the use of such realty for such purpose. *Greil Bros Co. v. Mobson*, 179 Ala. 444, 43 L. R. A. (N.S.) 664, 60 So. 876; *Kahn v. Wilhelm*, 118 Ark. 239, 177 S. W. 403; *Halloran v. Schmidt Brewing Co.*, 137 Minn. 141, L. R. A. 1917-E, 777, 162 N. W. 1082; *Heart v. East Tennessee Brewing Co.*, 121 Tenn. 60, 130 Am. St. Rep. 753, 19 L. R. A. (N.S.) 964, 113 S. W. 364; *The Stratford v. Seattle Brewing & Malting Co.*, 94 Wash. 125, L. R. A. 1917-C, 931, 162 Pac. 31; *Koen v. Fairmont Brewing Co.*, 69 W. Va., 94, 70 S. E. 1098.

³⁸ See "Impossibility of Performance as an Excuse for Breach of Contract," by FREDERICK C. WOODWARD, 1 COL. L. REV. 529; and "Intervening Impossibility of Performance as Affecting the Obligations of Contracts," by WILLIAM C. CONLEN, 66 UNIV. OF PENN. L. REV. 28.

ing discharge by intervening impossibility. This was the doctrine of the "frustration of the venture," which arose in a group of cases in which the parties had in fact contemplated the occurrence of certain events; and the question presented for decision was not one of impossibility, but of the true meaning and intent of the parties. In one of the earlier cases in which this doctrine was applied a charterparty was entered into by which it was agreed to deliver certain freight at Hamburg, "restraints of princes and rulers * * * always excepted." After the charterparty was made, and before the time for performance, war broke out between Germany and France, and the port of Hamburg was blockaded. It was held that the blockade discharged the contract, and did not merely excuse delay, on the ground that the contract contemplated not merely a voyage at some indefinite time in the future, but a "commercial speculation within a reasonable time."⁸⁷ The same principle was applied in an action on a policy of insurance. The question presented was whether there had been a loss of freight by the perils of the seas. The ship had gone ashore and was in such condition that it could not be repaired for some eight months. It was held that this delay ended the commercial speculation for which the voyage was undertaken.⁸⁸ It is evident that cases of this sort do not raise any question of impossibility. The true object of the contract depends on the intention of the parties. The facts which will operate as a discharge of the contract are expressly enumerated, though in general terms. Whether the general terms include the specific facts which have occurred is a matter of the construction of the contract as a whole; and the true object of the contract will be of great importance in ascertaining this intention.⁸⁹

Instead of solving the questions of impossibility which arose out of the War of 1914 on principles of impossibility of performance, or by means of the analogies which they had already followed, the English courts followed the analogy of these cases which construed

⁸⁷ *Geipel v. Smith*, L. R. 7 Q. B. D. 404.

⁸⁸ *Jackson v. Union Marine Ins. Co.*, L. R. 10 C. P. 125. See also *Dahl v. Nelson*, 6 App. Cas. 38, and *Becker v. London Assurance Corporation*, [1918] A. C. 101 [affirming (1916) 2 K. B. 1561].

⁸⁹ It is true that in *Jackson v. Union Marine Ins. Co.*, L. R. 10 C. P. 125, the stranding of the vessel might have operated as a discharge of the contract without any express provision therefor. A similar result was reached in *Nickoll v. Ashton*, [1901] 2 K. B. 126, on the ground that the quality of the vessel as a cargo carrying vessel was destroyed and that the existence of the hull in a condition capable of repairs, but not capable of use under the contract, was equivalent to a destruction of the subject-matter. In other words, the quality of the thing in question was so essentially a part of the contract that when the quality ceased to exist the subject-matter was regarded as ceasing to exist for purposes of performance.

express provisions in charterparties and insurance policies, and they attempted to solve questions of impossibility by the use of the doctrine of frustration of the venture.⁴⁰ In making use of this analogy, the courts at times have attempted to identify the doctrine of the frustration of the venture with the theory of the implied condition of the continued existence of the person or thing.⁴¹ They

⁴⁰ *Embirico's v. Reid*, [1914] 3 K. B. 45; *Millar v. Taylor*, [1916] 1 K. B. 402; *Scottish Navigation Co. v. Souter*, [1917] 1 K. B. 222 [reversing (1916) 1 K. B. 675 and (1916) 1 K. B. 429]; *Anglo-Northern Trading Co. v. Jones*, [1917] 2 K. B. 78; *Leiston Gas Co. v. Leiston-Cum-Sizewell Urban District Council*, [1916] 2 K. B. 428; *Horlock v. Beal*, [1916] 1 A. C. 486 [reversing (1915) 3 K. B. 627]; *F. A. Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.*, [1916] 2 A. C. 397.

⁴¹ *Leiston Gas Co. v. Leiston-Cum-Sizewell Urban District Council*, [1916] 2 K. B. 428; *F. A. Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.*, [1916] 2 A. C. 397. "When a lawful contract has been made and there is no default, a court of law has no power to discharge either party from the performance of it unless either the rights of some one else or some Act of Parliament give the necessary jurisdiction. But a court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract. In applying this rule it is manifest that such a term can rarely be implied except where the discontinuance is such as to upset altogether the purpose of the contract. Some delay or some change is very common in all human affairs, and it cannot be supposed that any bargain has been made on the tacit condition that such a thing will not happen in any degree.

"In the recent case of *Horlock v. Beal* ([1916] 1 A. C. 486) this house considered the law upon this subject, and previous decisions were fully reviewed, especially in the opinion delivered by Lord Atkinson. An examination, of those decisions confirms me in the view that, when our courts have held innocent contracting parties absolved from further performance of their promises, it has been upon the ground that there was an implied term in the contract which entitled them to be absolved. Sometimes it is put that performance has become impossible and that the party concerned did not promise to perform an impossibility. Sometimes it is put that the parties contemplated a certain state of things which fell out otherwise. In most of the cases it is said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them I think that was at bottom the principle upon which the court proceeded. It is in my opinion the true principle, for no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted.

"When this question arises in regard to commercial contracts, as happened in *Dahl v. Nelson, Donkin & Co.* ([1881] 6 App. Cas. 38), *Geipel v. Smith* (L. R. 7 Q. B. 404), and *Jackson v. Union Marine Insurance Co.* (L. R. 10 C. P. 125) the principle is the same, and the language used as to 'frustration of the adventure' merely adapts it to the class of cases in hand. In all these three cases it was held, to use the language of Lord Blackburn, 'that a delay in carrying out a charter-party, caused by something for which neither party was 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.' That seems to me another way of saying that from the nature of the contract it cannot be supposed the parties, as reasonable men, intended it to be binding on them under such altered conditions. Were the altered conditions such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said 'if that

have also attempted to identify the doctrine of the Roman law as to obligations *de certo corpore* with the theory of the frustration of the venture.⁴²

happens, of course, it is all over between us?" What, in fact, was the true meaning of the contract? Since the parties have not provided for the contingency, ought a court to say it is obvious they would have treated the thing as at an end?

"Applying the principle to the present case, I find that these contracting parties stipulated for the use of this ship during a period of five years, which would naturally cover the duration of many voyages. Certainly both sides expected that these years would be years of peace. They also expected, no doubt, that they would be left in joint control of the ship, as agreed, and that they would not be deprived of it by any act of state. But I cannot say that the continuance of peace or freedom from interruption in their use of the vessel was a tacit condition of this contract. On the contrary, one at all events of the parties might probably have thought, if he thought of it at all, that war would enhance the value of the contract, and both would have been considerably surprised to be told that interruption for a few months was to release them both from a time charter that was to last five years. On the other hand, if the interruption can be pronounced, in the language of Lord Blackburn already cited, 'so great and long as to make it unreasonable to require the parties to go on with the adventure,' then it would be different. Both of them must have contracted on the footing that such an interruption as that would not take place, and I should imply a condition to that effect. Taking into account, however, all that has happened, I cannot infer that the interruption either has been or will be in this case such as makes it unreasonable to require the parties to go on. There may be many months during which this ship will be available for commercial purposes before the five years have expired. It might be a valuable right for the charterer during those months to have the use of this ship at the stipulated freight. Why should he be deprived of it? No one can say that he will or that he will not regain the use of the ship, for it depends upon contingencies which are incalculable. The owner will continue to receive the freight he bargained for so long as the contract entitles him to it, and if, during the time for which the charterer is entitled to the use of the ship, the owner received from the Government any sums of money for the use of her, he will be accountable to the charterer. Should the upshot of it all be loss to either party—and I do not suppose it will be so—then each will lose according as the action of the Crown has deprived either of the benefit he would otherwise have derived from the contract. It may be hard on them as it was on the plaintiff in *Appleby v. Myers* (L. R. 2 C. P. 651). The violent interruption of a contract always may damage one or both of the contracting parties. Any interruption does so. Loss may arise to some one whether it be decided that these people are or that they are not still bound by the charter party. But the test for answering that question is not the loss that either may sustain. It is this: Ought we to imply a condition in the contract that an interruption such as this shall excuse the parties from further performance of it? I think not. I think they took their chance of lesser interruptions, and the condition I should imply goes no further than that they should be excused if substantially the whole contract became impossible of performance, or in other words impracticable, by some cause for which neither was responsible. Accordingly I am of the opinion that this charter-party did not come to an end when the steamer was requisitioned and that the requisition did not suspend it or affect the rights of the owners or charterers under it, and that the appeal fails." *F. A. Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.*, [1916] 2 A. C. 397.

⁴²*Horlock v. Beal*, [1916] 1 A. C. 486 [reversing (1915) 3 K. B. 627]. "Several of the citations from the Digest on this subject are made by Blackburn, J., in the leading case of *Taylor v. Caldwell* (3 B. & S., 826, 835, 839), 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 neg-

It is possible that in these cases the English courts meant nothing more, by the use of the expression "frustration of the venture,"

lect, 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 Blackburn, J., 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*, ([1628] W. Jones 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* ([1903] 2 K. B. 740, 748), 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 Co.* (L. R. 10 C. P. 125) with the doctrine underlying *Taylor v. Caldwell* (3 B. & S. 826), and with sound legal principle.

"Blackburn, J., 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 *obligationes 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 contrahendo 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 capiatur*—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 (*ROMAN LAW*, p. 638): 'Sempronius promises to give a small plot of ground to Maevius. 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 promisor 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

than they had already decided as a part of the doctrine of impossibility of performance; namely, that impossibility, in order to operate as a discharge, must, like other forms of discharge without the agreement of the parties, either cause a total failure of consideration or at least must affect the vital and essential provisions of the contract.⁴³ If this is the meaning intended, the only serious incon-

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 *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." *Horlock v. Beal*, [1916] 1 A. C. 486, [reversing (1915) 3 K. B. 627].

⁴³ Both English and American courts had agreed that the impossibility of performance of one of a number of covenants was to be solved by applying the test which was usually applied in cases of breach; namely, was the covenant, the performance of which became impossible, an essential, vital and material part of the contract, or was it a minor and subsidiary provision? If it was a vital covenant, subsequent impossibility operated as a discharge of the entire contract. *Ottawa v. Ottawa Electric Ry. Co.*, 1 Ont. Law Rep. 377; *Macon & Birmingham Ry. Co. v. Gibson*, 85 Ga. 1, 21 Am. St. Rep. 135, 11 S. E. 442; *Baltimore & Ohio Ry. v. Miller*, 183 Ind. 323, 107 N. E. 545; *Louisville & Nashville Ry. v. Crowe*, 156 Ky. 27, 49 L. R. A. (N.S.) 843, 160 S. E. 759; *American Mercantile Exchange v. Blunt*, 102 Me. 128, 120 Am. St. Rep. 463, 10 L. R. A. (N.S.) 414, 66 Atl. 212; *Standard Brewing Co. v. Weil*, 129 Md. 487, L. R. A. 1917-C, 929, 99 Atl. 661; *Halloran v. Schmidt Brewing Co.*, 137 Minn. 141, L. R. A. 1917-E, 777, 162 N. W. 1082; *Brown v. Dillahuntz*, 12 Miss. (4 Sm. & M.) 713, 43 Am. Dec. 499; *Heart v. East Tennessee Brewing Co.*, 121 Tenn. 69, 130 Am. St. Rep. 753, 19 L. R. A. (N.S.) 964, 113 S. W. 364; *Cowley v. Northern Pacific Ry.*, 68 Wash. 558, 41 L. R. A. (N.S.) 559, 123 Pac. 998; *The Stratford v. Seattle Brewing & Malting Co.*, 94 Wash. 125; L. R. A. 1917-C, 931, 162 Pac. 31; *Koen v. Fairmont Brewing Co.*, 69 W. Va. 94, 70 S. E. 1098.

On the other hand, impossibility of performing a minor, subsidiary and relatively immaterial covenant did not operate as a discharge of the entire contract. *Standard Brewing Co. v. Weil*, 129 Md. 487, L. R. A. 1917-C, 929, 99 Atl. 661; *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333; *Crouch v. Southern Surety Co.*, 131 Tenn. 260, L. R. A. 1915-D, 966, 174 S. W. 1116; *Brown v. Ehlinger*, 90 Wash. 585, 156 Pac. 544. A lease of realty for a number of purposes, including its use for the sale of intoxicating liquor, is not discharged by subsequent legislation or constitutional provisions which forbid its use for the sale of intoxicating liquor. *O'Byrne v. Henley*, 161 Ala. 620, 23 L. R. A. (N.S.) 496, 50 So. 83; *Lawrence v. White*, 131 Ga. 840, 15 Am. & Eng. Ann. Cas. 1097, 10 L. R. A. (N.S.) 966, 63 S. E. 631; *J. J. Goodrum Tobacco Co. v.*

venience which the use of the term will cause will be a danger of confusion of terms. As in the case of the fiction of the implied condition, the real danger is one of confusion of thought. In determining questions of impossibility on the theory of the frustration of the venture, the English courts have, as a matter of fact, cited and followed cases in which the doctrine was invoked as a means of ascertaining the intention of the parties under specific contractual provisions.⁴⁴

The possibilities which the doctrine of frustration of the venture may contain when used to solve question of pure impossibility may be illustrated by a case⁴⁵ in which the court took the position that the doctrine of frustration could apply only "where the object which both parties have in view is frustrated"; and that while the detention of the vessel frustrated the object of the charterer, which was to make use of it, it did not frustrate the object of the owner, which was to receive the hire to be paid for the vessel by the charterer. This case is saved, however, from being a *reductio ad absurdum* of the doctrine of the frustration of the venture by the fact that it was reversed by the Court of Appeal⁴⁶ on the ground that the parties had contemplated a definite voyage, that by the

Potts-Thompson Liquor Co., 133 Ga. 776, 26 L. R. A. (N.S.) 478, 66 S. E. 1081; *Baughman v. Portman*, (Ky.) 14 S. W. 342, 12 Ky. L. Rep. 342; *Shreveport Ice & Brewing Co. v. Mandel*, 128 La. 314, 54 So. 831; *Standard Brewing Co. v. Weil*, 129 Md. 487, L. R. A. 1917-C, 929, 99 Atl. 661; *Gaston v. Gordon*, 198 Mass. 265, 94 N. E. 307; *San Antonio Brewing Association v. Brents*, 39 Tex. Civ. App. 443, 88 S. W. 368; *Hecht v. Acme Coal Co.*, 19 Wyom. 18, Ann. Cas. 1913-E, 258, 34 L. R. A. (N.S.) 773, 113 Pac. 788, 117 Pac. 132. The lessee cannot insist on an abatement of rent. *Fleming v. King*, 100 Ga. 449, 28 S. E. 239; *Christian Moerlein Brewing Co. v. Roser*, 169 Ky. 198, 183 S. W. 479; *Taylor v. Finnigan*, 189 Mass. 568, 2 L. R. A. (N.S.) 973, 76 N. E. 203; *Teller v. Boyle*, 132 Pa. St. 56, 18 Atl. 1069; *Miller v. Maguire*, 18 R. I. 770, 30 Atl. 966; *Kellogg v. Lowe*, 38 Wash. 203, 70 L. R. A. 510, 80 Pac. 458. By analogy, a lease of realty which passes an interest in the land is not discharged by the subsequent destruction of the buildings on such realty. *Hare v. Groves*, 3 Anstr. 687; *Ware v. Hobbs*, 222 Mass. 327, 110 N. E. 963; *Bowen v. Clemens*, 161 Mich. 493, 126 N. W. 639; *Linn v. Ross*, 10 Ohio 412, 36 Am. Dec. 95; *Moline v. Portland Brewing Co.*, 73 Or. 532, 144 Pac. 572. Even if the covenant, the performance of which is rendered impossible, is a vital covenant, it has been held that the contract is not discharged if the party for whose benefit such covenant is inserted is willing to waive performance thereof and to accept performance of the rest of the contract as full satisfaction thereof. *Hallett v. Parker*, 68 N. H. 598, 39 Atl. 433; *Chapman v. Belts*, 48 W. Va. 1, 35 S. E. 1013.

As breach of an independent covenant does not discharge the contract, the impossibility of performing an independent covenant does not discharge the remaining covenants of such contract. *Varney v. Cole*, 114 Me. 329, 96 Atl. 232.

⁴⁴ *Geipel v. Smith*, L. R. 7 Q. B. D. 404; *Jackson v. Union Marine Ins. Co.*, L. R. 10 C. P. 125.

⁴⁵ *Scottish Navigation Co. v. Souter*, [1916] 1 K. B. 675 (containing a 'restraint of princes' clause).

⁴⁶ *Scottish Navigation Co. v. Souter*, [1917] 1 K. B. 222.

terms of the charter the vessel could not be used for any other voyage, and that the object of the voyage had been frustrated by the detention of the vessel in a Russian port by the Russian government to avoid capture by German cruisers. Under the application given to the doctrine of the frustration of the venture by the trial court, the whole subject of impossibility might well be written off in our law as a total loss; for few contracts there are in which it can be said that the object of one of the parties, in receiving the benefit of the contract, is frustrated if the adversary party can be compelled to pay.

Comparatively few cases involving questions of impossibility caused by the war have as yet come before the courts of this country. In cases in which a British vessel which had been chartered by its owner and had been taken by the British government, the American courts recognized the existence of the doctrine of frustration of the venture.⁴⁷ It is spoken of as "the modern doctrine of frustration,"⁴⁸ and yet it is at the same time identified with the doctrine of the implied condition.⁴⁹ As the question of the effect of a requisition by the English government upon an English vessel might well be solved by English law, the tendency of the American courts to follow the English cases, as to their reasoning, though possibly not as to their results, is not unnatural.

IV

Whether the doctrine of frustration of the venture is treated as a new idea in the law of impossibility, or whether it is merely a new name for an old idea, its use has not resulted in certainty or simplicity. The doctrine of the frustration of the venture has been applied to many different classes of contracts, including contracts the performance of which is forbidden by the specific order of the government; contracts the performance of which is forbidden by embargo, official detention and the like; contracts the performance of which will involve the risk of seizure as prize or contraband which was not contemplated when the contract was made; and contracts for personal services in which the outbreak of war has caused an increase in personal danger to the party who undertakes to perform such contract, which was not contemplated when the contract was made. The practical results of attempting to

⁴⁷ *Earn Line Steamship Co. v. Sutherland Steamship Co.*, 254 Fed. 126; *The Isle of Mull*, 257 Fed. 798.

⁴⁸ *The Isle of Mull*, 257 Fed. 798.

⁴⁹ *Earn Line Steamship Co. v. Sutherland Steamship Co.*, 254 Fed. 126; *The Isle of Mull*, 257 Fed. 798.

apply the doctrine of the frustration of the venture can best be seen, however, in cases in which a vessel which had been chartered by its owner was requisitioned by the government.

In applying the doctrine of the frustration of the venture to contracts in which vessels which had been chartered for a certain length of time were taken by the government before the expiration of the charter, it was generally conceded that the requisition by the government discharged the owner from any liability because of his inability to furnish the vessel for the period during which the government was making use of it; and the question of the frustration of the venture was used only to determine the effect of such requisition by the government on the charter itself. If such requisition involved the use of the vessel by the government for a substantial period of time, would it suspend the charterparty for the time during which the government made use of the vessel, or would it discharge the contract entirely? The English courts attempted to solve this under the doctrine of the frustration of the venture by comparing the time for which the charterparty was to run at the time that the vessel was taken by the government, and the time for which the government took the vessel, or if no time was fixed, the time for which it appeared probable that the government was taking the vessel. As a result of this doctrine, the fact that a vessel was requisitioned by the government was held not to operate necessarily as a discharge of a preëxisting charterparty.⁵⁰ If the period for which the charterparty was to run at the time that the vessel was taken by the government was so long that there would probably be a substantial period of time after the government had ceased using the vessel during which the charterer could make use of it, requisition by the government was held to suspend the contract and not to discharge it. In the leading case on this subject during the War of 1914, a vessel was chartered for sixty months under a charterparty which conferred upon the charterer the right to sublet such steamer to the Admiralty or for other purposes, and which contained an exception, among other things, of arrests and restraint of princes. It was held that such charterparty was not discharged by the fact that the Admiralty requisitioned such steamer when the original charterparty had three years to run, even though the vessel was chartered as a tank steamship for the transportation of oil and it was altered by the Admiralty so as to serve as a transport

⁵⁰ *F. A. Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.*, [1916] 2 A. C. 397 [affirming (1916) 1 K. B. 485 which affirmed (1915) 3 K. B. 668]; *Modern Transport Co. v. Duneris Steamship Co.*, [1917] 1 K. B. 370 [affirming (1916) 1 K. B. 726]; *Chinese Mining and Engineering Co. v. Sale*, [1917] 2 K. B. 599.

for troops.⁵¹ In this case the charterer wished to treat the charterparty as in effect, to pay the freight agreed upon, and to receive from the government the compensation paid for the use of such vessel.

Questions of impossibility should not depend upon the question of the relative benefit which either party will receive if the contract is either treated as discharged or treated as in effect; and accordingly, it was held in a subsequent case that requisition by the Admiralty would not necessarily discharge the charterparty, although the amount paid by the government was considerably less than the amount to be paid by the charterer.⁵² In this case a charterparty for twelve calendar months was held not to be discharged by the fact that the vessel was requisitioned by the government when the original charter had ten months to run.⁵³ Charterparties for three vessels for five years each were held not to be discharged by the requisition of such vessels by the Admiralty when the charter had from two to four years to run.⁵⁴

If the charterparty had a short time to run when compared with the probable period for which the government would use the vessel, the venture was held to be frustrated; and the charterparty was discharged and not merely suspended. A charterparty which had about five months to run has been held to be discharged by the requisition of the vessel by the Admiralty, at least if it was understood that the vessel was requisitioned for the entire period of the war, and if it was also understood that the war would probably last beyond the duration of the charterparty.⁵⁵ A charterparty was held to be discharged by the requisition of such vessel by the Admiralty when the charterparty had about four months to run.⁵⁶ A contract by which a vessel was to be chartered for twelve months after it was delivered, which gave to the charterers the option to terminate the contract if the vessel was not delivered at the time agreed upon, was held to be discharged by the requisition of such vessel by the Admiralty before such time for delivery.⁵⁷

⁵¹ *F. A. Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.* [1916] 2 A. C. 397 [affirming (1916) 1 K. B. 485 which affirmed (1915) 3 K. B. 668].

⁵² *Modern Transport Co. v. Duneric Steamship Co.* [1917] 1 K. B. 370 [affirming (1916) 1 K. B. 726].

⁵³ *Modern Transport Co. v. Duneric Steamship Co.* [1917] 1 K. B. 370 [affirming (1916) 1 K. B. 726].

⁵⁴ *Chinese Mining and Engineering Co. v. Sale.* [1917] 2 K. B. 599.

⁵⁵ *Countess of Warwick Steamship Co. v. Le Nickel Société Anonyme.* [1918] 1 K. B. 372.

⁵⁶ *Anglo-Northern Trading Co. v. Jones.* [1917] 2 K. B. 78.

⁵⁷ *Bank Line v. Capel.* [1919] A. C. 435.

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The reaction which the doctrine of the frustration of the venture causes depends largely on the mental characteristics and previous training of the court or the lawyer whose reaction is tested. The English courts assume the applicability of the doctrine of the frustration of the venture to cases of impossibility arising during the War of 1914, without discussion;⁵⁸ and the English writers on the subject have made the same assumption.⁵⁹ Indeed, the use of the analogy of the frustration of the venture and the adoption of that principle into the common law doctrine of impossibility has been compared to the reception of the law merchant in Mansfield's day.⁶⁰ The American courts have seemed less sure of their ground; and they have even suggested that war is an abnormal condition which may not recur, and that no great harm will come if the courts decide the questions as they arise without laying down any general rule on which they can base their decisions.⁶¹ If this is to be the method of solving problems of impossibility, it affords some justification for the statement that "the tendency of every body of law which rests upon precedent is to develop into a chaotic mass of formless pseudo-equity."⁶²

Those who have thought and written on the subject have taken positions which range from regarding the incorporation of the doctrine of the frustration of the venture into the law of impossibility as an eminently wise and normal development of the law,⁶³ to re-

⁵⁸ *F. A. Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.*, [1916] 2 A. C. 397 [affirming (1916) 1 K. B. 485 which affirmed (1915) 3 K. B. 668]; *Bank Line v. Capel*, [1919] A. C. 435; *Modern Transport Co. v. Dunerie Steamship Co.*, [1917] 1 K. B. 370 [affirming (1916) 1 K. B. 726]; *Anglo-Northern Trading Co. v. Jones*, [1917] 2 K. B. 78; *Chinese Mining & Engineering Co. v. Sale*, [1917] 2 K. B. 599; *Countess of Warwick Steamship Co. v. Le Nickel Society Anonyme*, [1918] 1 K. B. 372.

⁵⁹ See "War-time Impossibility of Performance of Contract," by ARNOLD D. McNAIR, 35 LAW Q. REV. 84.

⁶⁰ See "War-time Impossibility of Performance of Contract," by ARNOLD D. McNAIR, 35 LAW Q. REV. 84.

⁶¹ "After all, the class of cases to which this belongs is incidental to the Great War. The world has not seen anything like it for 100 years. Everyone everywhere is praying and planning that it shall be the last great clash of arms. Nevertheless it is not unreasonable to hope that a century may pass before we have another. No great harm may come if we do fail to lay down a general rule for the determination of controversies which seldom arise, except when a cataclysmic disturbance engulfs the world." *The Isle of Mull*, 257 Fed. 798.

⁶² "The Need of Law Reform" (I—"The Doctrine of Frustration of Adventure"); 38 CANADIAN LAW TIMES 86, 151, 223.

⁶³ See "War-time Impossibility of Performance of Contract" by ARNOLD D. McNAIR, 35 LAW Q. REV. 84.

garding it as a conclusive indication that the entire doctrine of impossibility of performance ought to be abolished and that a party who is prevented from performing his covenant ought to be compelled to pay damages for such nonperformance.⁶⁴

Both views would seem to be hasty and ill-considered. The authorities which have taken the position that the doctrine of the frustration of the venture should be a part of the law of impossibility of performance have never thought it necessary to give any reasons for such belief. Whether the doctrine of impossibility of performance should be abolished or not cannot be determined definitely until we have given it a fair chance to develop its own principles, unencumbered by false and misleading analogies drawn from cases which were solved by ascertaining the intention of the parties. It is usually a mistake to call a thing that which it is not—at least it does not make for clear thinking. If the results which are reached in determining questions of impossibility are far from harmonious, this is due in part to the inherent difficulties of the subject, and in part to the fact that the courts have been attempting to apply the doctrine of the implied condition and the doctrine of the frustration of the venture concurrently with principles of impossibility. Impossibility is a subject difficult enough from its very nature. The difficulties are increased enormously when there is, at the outset, but one chance in three that a case of impossibility will be solved by an application of the principles of impossibility.

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⁶⁴"The Need of Law Reform" (I—"The Doctrine of Frustration of Adventure"), 38 CANADIAN LAW TIMES 86, 151, 223.