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Contracts-Frustration of Purpose

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COMMENTS

CONTRACTS—FRUSTRATION OF PURPOSE—The contract doctrine of frustration of purpose has evolved from cases in which a promisor seeks to avoid the duty to perform a literally unconditional promise¹ on the ground that supervening events have substantially destroyed the value for him of the promisee's counter-performance. In the leading case of *Krell v. Henry*,² for instance, one who had hired a room from which he could watch the Coronation Parade was not required to pay the promised "rent" when the parade was cancelled due to the King's illness. The promise to pay for the room was said to be subject to an "implied condition" that the parade take place. Commentators have not agreed on the extent to which this doctrine of frustration is a part of American law.³ The purpose of this comment is to discuss the doctrine in terms of its treatment by American courts.⁴ Attention will be given to the limitations which the courts have placed upon the doctrine, the degree to which they accept the doctrine thus limited, the rationales urged for the doctrine's acceptance or rejection, and the forms in which relief is given in frustration situations.

I. THE SHAPE OF THE DOCTRINE

A. Generally

Any discussion of the substance of the doctrine of frustration⁵ is perhaps best initiated by distinguishing cases involving frustration from those involving impossibility or impracticability. The essential difference between these situations is that in a frustration situation, unlike the case of impossibility or impracticability, the basic element is not that the frustrated party's own performance has become physically impossible or difficult, but that the promisee's counter-performance has become of little value.⁶ Frustration has

¹ A "literally unconditional" promise is one which is not expressly conditioned upon the non-occurrence of the subsequent frustrating event.

² [1903] 2 K.B. 740.

³ Compare Smit, *Frustration of Contract: A Comparative Attempt at Consolidation*, 58 COLUM. L. REV. 287, 309 (1958), with Anderson, *Frustration of Contract: A Rejected Doctrine*, 3 DE PAUL L. REV. 1 (1953).

⁴ Occasionally reference will be made to the doctrine's use in Europe.

⁵ The terms "frustration" and "frustration of purpose" are used interchangeably in this comment as names for the doctrine under discussion.

⁶ The factual circumstances of impossibility, impracticability, and frustration cases may, of course, be quite the same. If war restrictions prevent a tenant from carrying on his business, for instance, it will probably be financially difficult and perhaps impossible for him to pay the rent. See e.g., *Signal Land Corp. v. Loechner*, 35 N.Y.S.2d 25 (N.Y. City Ct. 1942). But frustration cases are different from impossibility or impracticability cases.

been aptly characterized as involving “. . . an actual but not literal failure of consideration.”⁷

About half of American frustration cases have involved leases of realty.⁸ The second most prevalent type has involved the sale of chattels.⁹ Other cases have involved contracts as widely varying as a life care agreement¹⁰ and an agreement allowing the frustrated party's guests to use the promisee's golf course.¹¹ As to the causes of frustration, on the other hand, this writer would estimate that almost two-thirds of the American cases arise because unexpected governmental action has caused circumstances subsequent to the contract to be radically inconsistent with the frustrated party's expectations. About half of such cases are related to war regulations.¹² Agencies of frustration other than the government have ranged from fire¹³ to death.¹⁴ Despite this variety of fact situations it is clear that the courts have developed certain limitations upon the use of the doctrine applicable to any case. Before the courts will allow a frustrated party to avail himself of the doctrine of frustration the following must be present: (1) the contract must be at least partially executory; (2) the frustrated party's purpose in making the contract must have been known to both parties when the contract was made; (3) this purpose must have been basically frustrated

Not all frustrated parties would find it difficult to perform if this were required. See, e.g., *Patch v. Solar Corp.*, 149 F.2d 558 (7th Cir.), *cert. denied*, 326 U.S. 741 (1945). In most impossibility and impracticability cases, furthermore, the inherent value of the promisee's performance is as great as it ever was. See, e.g., *City of Vernon v. Los Angeles*, 45 Cal.2d 710, 290 P.2d 841 (1955).

⁷ *Lloyd v. Murphy*, 25 Cal.2d 48, 53, 153 P.2d 47, 50 (1944).

⁸ E.g., *State Realty Co. v. Greenfield*, 110 Misc. 270, 181 N.Y. Supp. 511 (N.Y.C. Munic. Ct. 1920) (tenant held not obligated to pay rent after being drafted); *Burke v. San Francisco Breweries, Ltd.*, 21 Cal. App. 198, 131 Pac. 83 (1913) (tenant required to pay rent although he had lost his saloon permit).

⁹ Compare *Johnson v. Atkins*, 53 Cal. App.2d 430, 127 P.2d 1027 (1942), with *Bardons & Oliver v. Amtorg Trading Corp.*, 123 N.Y.S.2d 633 (Sup. Ct. 1948), *aff'd*, 301 N.Y. 622, 93 N.E.2d 915 (1950), in which contrasting results were reached regarding the status of a buyer who was unable to obtain an export permit.

¹⁰ *Gold v. Salem Lutheran Home Ass'n*, 53 Cal.2d 347 P.2d 687 (1959) (death before beginning of care term held not grounds for rescission).

¹¹ *La Cumbre Golf & Country Club v. Santa Barbara Hotel Co.*, 205 Cal. 422, 271 Pac. 476 (1928) (promisor hotel held under no obligation to continue payments after the hotel had been destroyed by fire).

¹² E.g., *119 Fifth Ave., Inc. v. Taiyo Trading Co.*, 190 Misc. 123, 73 N.Y.S.2d 774 (Sup. Ct. 1947), *aff'd*, 275 App. Div. 695, 87 N.Y.S.2d 430 (1949) (property leased by enemy alien padlocked). The most frustrating peacetime government action was Prohibition. For contrasting decisions on the duty of a saloon tenant to pay rent after Prohibition, see cases cited in note 54 *infra*.

¹³ E.g., *Moreland v. Credit Guide Publishing Co.*, 255 Mass. 469, 152 N.E. 62 (1926) (employer required to continue paying employee although employer's place of business destroyed).

¹⁴ See note 22 *infra*.

by an event¹⁵ not reasonably foreseeable at the time the contract was made, the occurrence of which has not been due to the fault of the frustrated party¹⁶ and the risk of which was not assumed by him.¹⁷ The question of the presence of these requirements is apparently a matter for the court, and the burden of establishing their presence is upon the frustrated party.¹⁸

B. *Requirement That Contract Be Executory*

Most courts do not mention the requirement that the contract be at least partially executory, but it is clear that such a requirement exists. In *Kerr S.S. Co. v. Chartered Bank of India, Australia and China*¹⁹ plaintiff purchased negotiable drafts from defendant bank, drawn on defendant's branch in Manila and made payable to plaintiff's agent in Manila. Because communications were subsequently disrupted by war, plaintiff was unable to remit the drafts to his Manila agent. Emphasizing the chattel characteristics of negotiable instruments the New York Court of Appeals held plaintiff could not recover the money he had paid defendant. The court said that plaintiff, having paid for and received delivery of a negotiable instrument ". . . cannot rescind the transfer to it because it is impossible to use it now for the purpose for which it was acquired."²⁰ The court expressly noted that it was not deciding what result would be reached on the same facts if only a simple con-

¹⁵ A plea of frustration is not likely to succeed if it appears that the promisor originally made a bad bargain. In *Lloyd v. Murphy*, 25 Cal.2d 48, 153 P.2d 47 (1944), the court emphasized that while it was certainly true that war regulations had severely restricted the lessee's auto sales and service business, it appeared that he had been unhappy with the location in question even before the restrictions and was still operating at other locations in the city.

¹⁶ *E.g.*, *Gulf, M. & O. R. R. v. Illinois Cent. R. R.*, 225 F.2d 816 (5th Cir. 1955) (railroad required to continue paying trackage rental where it had voluntarily abandoned the trackage for a more profitable route). Not only must the frustration not be the promisor's fault, but also he must have attempted to defeat the frustrating effect of the supervening event. He cannot, for instance, complain that subsequent war regulations have destroyed a lease's value if he has not availed himself of an opportunity to apply for a release from the government restriction. *Gardiner Properties v. Samuel Leider & Son*, 279 App. Div. 470, 111 N.Y.S.2d 88 (1952).

¹⁷ It is possible, of course, for the parties to have considered the risk of frustration by the supervening event which occurred and, despite failure to deal with it expressly, have intended either the promisee or the promisor to assume the burden of such risk. See, *e.g.*, *Raner v. Goldberg*, 244 N.Y. 438, 155 N.E. 733 (1927). Even though some courts feel the doctrine of frustration is based upon relief of hardship (see note 33 *infra*), it is doubtful that this rationale would be pushed far enough to excuse an intentional assumption of the risk of the supervening event.

¹⁸ *E.g.*, *Mitchell v. Ceazan Tires, Ltd.*, 25 Cal.2d 45, 153 P.2d 53 (1944); *Fisher v. Lohse*, 181 Misc. 149, 42 N.Y.S.2d 121 (Sup. Ct. 1943). *But cf.* *Neuberg v. Avery F. Payne Co.*, 265 App. Div. 1052, 41 N.Y.S.2d 195 (1943).

¹⁹ 292 N.Y. 253, 54 N.E.2d 813 (1944).

²⁰ *Id.* at 263, 54 N.E.2d at 817.

tract for the payment of money or for a credit in a foreign exchange were involved.²¹

Thus, with only one exception known to this writer,²² the courts have simply assumed that a fully executed contract is not rescindable on frustration grounds. Some cases, furthermore, hold or suggest that frustration is not an available doctrine if the promisee has fully performed²³ or, as to sales of chattels, if he has tendered performance.²⁴ It is unfortunate that the courts have failed to indicate why a certain degree of execution of a contract should bar any use of the doctrine of frustration. If one grants that there is little substantial difference between mistake and frustration,²⁵ it is certainly not obvious why executed contracts should be rescindable when they involve the former and not when they involve the latter.²⁶ It is probably true that in many cases the parties themselves, had they considered the risk of the occurrence of the frustrating event, would have put upon the frustrated party all risk of frustration subsequent to performance. But this would certainly not be true in every case. In *Kunkel Auto Supply v. Leech*,²⁷ for instance, defendant purchased from plaintiff certain equipment with which he could test automobiles pursuant to a new

²¹ In a dissenting opinion Judge Conway argued that the contract was executory and and therefore rescindable.

²² In *Gellert v. Bank of California*, Nat'l Ass'n, 107 Ore. 162, 174, 214 Pac. 377, 382 (1923), a decedent purchased from defendant bank checks made payable to certain intended donees of the decedent. The decedent died before delivering the checks to the donees. The court allowed the estate's claim for the return of the money paid for the checks, on the ground that "... under a well-established rule, money paid for a purpose which cannot be legally accomplished because of a subsequently intervening obstacle may be recovered." The court said the result would be the same whether the transaction was deemed a sale of a negotiable instrument, the creation of an agency for the transfer of money, or a contract for the sale of credit.

²³ *Kunkel Auto Supply Co. v. Leech*, 139 Neb. 516, 298 N.W. 150 (1941). See also *Wald v. Lenox Ave. & 140th St. Corp.*, 197 Misc. 773, 94 N.Y.S.2d 793 (N.Y.C. Munic. Ct.), *aff'd* 198 Misc. 527, 102 N.Y.S.2d 200 (App. T. 1950).

²⁴ *Swift Canadian Co. v. Banet*, 224 F.2d 36 (3d Cir. 1955) (Canadian seller given normal contract damages although U.S. buyer could not get export permit); *Amtorg Trading Corp. v. Miehle Printing Press & Mfg. Co.*, 206 F.2d 103 (2d Cir. 1953) (dictum); *Bardons & Oliver v. Amtorg Trading Corp.*, 123 N.Y.S.2d 633 (Sup. Ct. 1948), *aff'd*, 275 App. Div. 748, 88 N.Y.S.2d 272 (1949), *aff'd*, 301 N.Y. 622, 93 N.E.2d 915 (1950). *Contra*, *Johnson v. Atkins*, 53 Cal. App.2d 430, 127 P.2d 1027 (1942).

²⁵ A typical mistake situation exists, for example, when parties to a mineral lease have underestimated the quantity of minerals present. The lessee was relieved of his literally unconditional promise to pay minimum royalties in *Byrd v. Anderson*, 207 Ky. 317, 269 S.W. 323 (1925), and *Virginia Iron, Coal, & Coke Co. v. Graham*, 124 Va. 692, 98 S.E. 659 (1919). Presumably, however, if the trouble resulted from an unforeseeable collapse of the mine shaft the case would be one of frustration. Thus the essential difference between mistake and frustration is merely the time when actualities, such as the ability to mine expected amounts, become inconsistent with the parties' assumptions. In mistake the inconsistency exists at the time of contracting; in frustration it develops later.

²⁶ 5 WILLISTON, CONTRACTS §1557 (rev. ed. 1937).

²⁷ 139 Neb. 516, 298 N.W. 150 (1941).

statute requiring such tests. The statute was repealed, however, before it had ever been enforced and the equipment was made worthless to defendant. Defendant was not allowed to rescind after delivery of the equipment, even though it is probable an agreement allowing a more fair allocation of the risk would have been negotiated had the danger of the repeal been foreseen at the time of the purchase. The courts, however, appear to feel strongly that the use of the doctrine of frustration should be rather strictly limited. Whatever its merits,²⁸ the requirement that the contract be at least partially executory has developed as one such limitation.

C. *Requirement of Mutually Known Purpose*

Not only do all courts require that the frustrated party's purpose be known to the other party, but also some courts appear to require that this purpose be shared to the extent that it becomes at least partially the other party's own.²⁹ Although it is sometimes true that the promisee shares the frustrated party's hopes that the latter will be able to make valuable use of what he has received under the contract, as when the amount of a patentee's royalties depend on how much the licensee can use the patent,³⁰ this is not usually the case. It is generally immaterial to a lessor, for instance, whether the lessee can make any use of the premises as long as the lessee can pay his rent. Courts accepting the doctrine of frustration, however, do not refuse to apply it in such situations.³¹ But even conceding that the courts are actually requiring only that the other party *know* of the frustrated party's purpose, it is still difficult to justify the requirement. It will not do to argue that the promisor would have required the promisee to bear the risk of the supervening event had the former known the latter's purpose, for another

²⁸ In *Kerr S.S. Co. v. Chartered Bank of India, Australia, & China*, 292 N.Y. 253, 54 N.E.2d 813 (1944), discussed in Part I-B *supra*, the court was willing to concede that the frustrated party's rights could turn on the purely formal difference between an executed purchase and sale of a negotiable instrument and an executory simple contract for the payment of money.

²⁹ *E.g.*, *Alfred Marks Realty Co. v. Hotel Hermitage Co.*, 170 App. Div. 484, 485, 156 N.Y. Supp. 179, 180 (1915), which speaks of the failure of the "... object in mutual contemplation."

³⁰ See *Patch v. Solar Corp.*, 149 F.2d 558 (7th Cir.), *cert. denied*, 326 U.S. 741 (1945). It is difficult to see any significance in the fact that a promisee's purpose too has been frustrated since he has obviously chosen to register no complaint based on such frustration.

³¹ *E.g.*, *Hizington v. Eldred Refining Co.*, 235 App. Div. 486, 257 N.Y. Supp. 464 (1932) (tenant held not obligated to pay rent after government regulations forbade his business on premises). The requirement, as applied by the courts, is accurately said to involve the frustration of "... a desired object or effect to be attained by either party." 1 RESTATEMENT, CONTRACTS §288 (1932).

limitation dictates that the supervening event itself not be reasonably foreseeable. The courts discussing the matter have, nevertheless, required this mutual knowledge of the frustrated party's purpose.³²

D. *Requirements That the Frustration Be Basic and Not Reasonably Foreseeable*

1. *Generally.* The most restrictive, and most central, of the limitations are those requiring that the frustrating event not have been reasonably foreseeable and that the intervening event frustrate basically the promisor's purpose in entering into the contract. These probably reflect a belief of the courts that the doctrine is bottomed upon a policy of relieving against hardship,³³ and thus should be applied only in hard cases. A by-product of these limitations is the allocation to the promisor of the risk of any foreseeable, but unallocated, occurrence. But the less foreseeable the event, the less likely it is that the parties contracted with reference to it,³⁴ and the greater the need for a court's assistance. Furthermore, the more basic the frustration, the more reasonable it is to assume that the parties themselves would have expressly adjusted their respective rights and duties had they thought of such a possibility.³⁵

³² In *Brown v. Oshiro*, 68 Cal. App.2d 393, 156 P.2d 976 (1945), a lessee was held obligated to continue paying rent for a hotel which had drawn seventy-five per cent of its clientele from the Japanese-American population of Los Angeles. This clientele was lost when the Japanese were evacuated from the area. The court emphasized that while the tenant may have intended to operate a Japanese hotel, it did not appear that the lessor knew of this purpose.

³³ In *Lloyd v. Murphy*, 25 Cal.2d 48, 53, 153 P.2d 47, 50 (1944), frustration doctrine is said to be "... akin to the doctrine of impossibility of performance ... since both have developed from the commercial necessity of excusing performance in cases of extreme hardship. ..."

³⁴ "[T]he true intent of the parties was thwarted by the happening of subsequent events ... which were unforeseen at the time [of contracting] — a condition and situation not within the contemplation and intention and hence unprovided for." *Farlou Realty Corp. v. Woodsam Associates*, 49 N.Y.S.2d 367, 371 (Sup. Ct.) *aff'd*, 52 N.Y.S.2d 575 (1944), *aff'd* 294 N.Y. 846, 62 N.E.2d 396 (1945). "If it [the supervening event] was foreseeable there should have been provision for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed." *Lloyd v. Murphy*, 25 Cal.2d 48, 54, 153 P.2d 47, 50 (1944). It should perhaps be noted that when the courts ask whether an event was "reasonably foreseeable" they are actually seeking to determine whether it would have been reasonable at the time the contract was made to consider the risk of the supervening event. In *Farlou Realty Corp. v. Woodsam Associates*, the lessee of a long-term lease was required to continue to pay rent although war regulations had prevented it from building on the leased property. Expressing doubt that the possibility of such restrictions was not foreseen, the court noted that some restrictive policies were already in effect when the lease was made, and gave considerable emphasis to the fact that the lessee had been represented by highly qualified legal counsel.

³⁵ In *119 Fifth Ave., Inc. v. Taiyo Trading Co.*, 190 Misc. 123, 125, N.Y.S.2d. 744, 776 (Sup. Ct. 1947), *aff'd*, 275 App. Div. 695, 87 N.Y.S.2d (1949), the doctrine was said

2. *Non-foreseeability.* The courts vary in the degree of non-foreseeability of frustration required before a frustrated party will be able to avail himself of the frustration doctrine. In *Kahn v. Wilhelm*³⁶ the lessee of a saloon was held to be under no obligation to pay rent after the passage of a city prohibition ordinance even though the contract evidenced some concern of the parties over this possibility. In *Mitchell v. Ceazan Tires*,³⁷ on the other hand, the court, requiring a lessee to continue to pay rent although government war regulations had caused his business to drop 99 percent, suggested that "war talk" prior to the war had given sufficient warning of the possibility of such trouble. The test, however, is not whether the parties actually foresaw the possibility of trouble, but whether they reasonably should have. In *Megan v. Updike Grain Corp.*³⁸ the lessee of a grain elevator lost half of his business as a result of a change in the governmentally-established freight rates. In a suit by the lessor's trustee in bankruptcy both the lessee and lessor testified that they had expected no rate change at the time the lease was made. Requiring the lessee to continue to pay rent, however, the court noted that events at the time the contract was made clearly indicated the possibility of such change and concluded, ". . . [T]he testimony of the men who negotiated the lease that they did not anticipate any important change of rates was not substantial and should have been disregarded."³⁹

3. *Basic Frustration.* Of the various limitations which the courts have developed the requirement that the promisor be basically frustrated has received the most varied treatment. This is due to the fact that a court may indirectly express the degree to which it accepts the doctrine of frustration when it decides whether a particular promisor has been sufficiently frustrated to justify relieving him from his literally unconditional promise. A typical verbal formula requires that the frustrating event must have ". . .

to be applicable ". . . where, since the formation of the contract, there has supervened an event or circumstance of such a character that reasonable men in the position of the parties would not have made the contract, or would not have made it without inserting some appropriate provision, if they had known or anticipated what was going to happen."

³⁶ 118 Ark. 239, 177 S.W. 403 (1915). Compare *Straus v. Kazemekas*, 100 Conn. 581, 124 Atl. 234 (1924).

³⁷ 25 Cal.2d 45, 153 P.2d 53 (1944).

³⁸ 94 F.2d 551 (8th Cir.), *cert. dismissed*, 305 U.S. 663 (1938).

³⁹ *Id.* at 554. Can the occurrence of the precise event which the promise was intended to prevent be deemed not reasonably foreseeable? In *Osius v. Barton*, 109 Fla. 556, 147 So. 862 (1933), enforcement of a restrictive covenant aimed at maintaining a neighborhood was denied because there had been neighborhood deterioration subsequent to the making of the covenant.

made performance vitally different from what was reasonably to be expected.”⁴⁰ But courts vary considerably in their estimates of when performance has become “vitally different.” In *20th Century Lites v. Goodman*⁴¹ the lessee of a neon sign was allowed to rescind the lease after war regulations prevented him from lighting the sign at night. Although the sign’s block lettering made it of some value for daytime use, the court said the sign had ceased to be the illuminated display for which the contract called. In *Popper v. Centre Brass Works*,⁴² on the other hand, one who had agreed to purchase some glass coal for use in the manufacture of imitation fireplaces was held subject to normal contract damages when he refused to accept delivery because unforeseen government war regulations necessitated his closing his business. Thus the shape of the frustration doctrine is quite well defined until the core requirement, that the promisor has been basically frustrated, is considered. Here generalization becomes difficult because intertwined with any court’s decision is the court’s basic attitude toward the doctrine of frustration itself.

II. JUDICIAL ACCEPTANCE OF THE DOCTRINE

Any generalization regarding judicial acceptance of the doctrine must be stated in terms of the precise kinds of cases from which the generalization has been drawn. Expressing such distinctions is important in light of disagreement among commentators on whether the doctrine is accepted in the United States.⁴³ For example, one problem in this area has been the categorization of cases which could be decided by reference to either of two familiar broad classifications of legal principles such as “property law” or “contract law.” The lease is an excellent example. It can be approached in purely “property” terms and thus conceived as passing an estate and the risk of frustration with it. Indeed some frustration-in-fact cases have been so decided without the mention of a single principle of “contract law.”⁴⁴ Other lease cases, on the other hand, have been decided in terms of the frustration of pur-

⁴⁰ *Lloyd v. Murphy*, 25 Cal.2d 48, 54, 153 P.2d 47, 54 (1944).

⁴¹ 64 Cal. App.2d 938, 149 P.2d 88 (1944).

⁴² 180 Misc. 1028, 43 N.Y.S.2d 107 (N.Y. City Ct. 1943).

⁴³ See note 3 *supra*.

⁴⁴ 119 Fifth Ave., Inc. v. Taiyo Trading Co., 190 Misc. 123, 73 N.Y.S.2d 774 (Sup. Ct. 1947), *aff’d*, 275 App. Div. 695, 87 N.Y.S.2d 430 (1949) (criticizing the “estate approach”); 6 WILLISTON, CONTRACTS §1955 (rev. ed. 1938). See also *Wood v. Bartolino*, 48 N.M. 175, 146 P.2d 883 (1944).

pose doctrine without mentioning the lease estate concept.⁴⁵ The policy of this writer has been simply to take the courts at their word. Thus a decision purporting to rest on non-"contract" principles was considered to show nothing concerning the court's willingness to accept the "contract" doctrine of frustration of purpose.⁴⁶

Nevertheless, of the holdings in frustration cases known to this writer, twenty-nine decisions may be classified as reflecting acceptance of the doctrine of frustration.⁴⁷ Ten of these cases, however, involved the same general fact situation of a lease for saloon purposes frustrated by subsequent Prohibition, and in six of these cases the lessee's purposes had been totally frustrated.⁴⁸ Of the remaining cases, five involved the same precise facts,⁴⁹ and seven involved total frustration.⁵⁰ Most of the decisions, finally, were

⁴⁵ *E.g.*, *Adler v. Miles*, 69 Misc. 601, 126 N.Y.S. 135 (App. T. 1910) (tenant held under no further duty to pay rent when government regulations ended his theater business). It should be emphasized that a "contract law" approach to the problem does not necessarily mean that the court will relieve the frustrated party. *E.g.*, *Kollsman v. Detzel*, 184 Misc. 1048, 55 N.Y.S.2d 491 (N.Y. City Ct. 1945) (lessee held under a continuing obligation to pay rent although he had been interned as an enemy alien).

⁴⁶ Alternative holdings, one of which involved a "contract approach," have been here treated. *E.g.*, in *Wood v. Bartolino*, 48 N.M. 175, 146 P.2d 883 (1944), a gasoline station tenant was held under a continuing obligation to pay rent despite the severe effect of war regulations upon his business. The court rested its decision upon the twin grounds that the doctrine of frustration was inapplicable to leases since they involve the passing of an estate, and that even if the doctrine were applicable, there was not sufficient frustration in the case before it. For other types of case in which either of two differing broad legal approaches are possible, see *Kerr S.S. Co. v. Chartered Bank of India, Australia, & China*, 292 N.Y. 253, 54 N.E.2d 813 (1944) (negotiable instruments); *Osius v. Barton*, 109 Fla. 556, 146 So. 862 (1933) (covenants restricting use of realty); and *Banks v. Puma*, 37 Cal.2d 838, 236 P.2d 369 (1951) (joint venture).

⁴⁷ Cases cited in notes 48-50 *infra*.

⁴⁸ *Industrial Dev. & Land Co. v. Goldschmidt*, 56 Cal. App. 507, 206 Pac. 134 (1922); *Levy v. Johnston & Hunt*, 224 Ill. App. 300 (1922); *Schaub v. Wright*, 79 Ind. App. 56, 130 N.E. 143 (1921); *Brunswick-Balke-Collender Co. v. Seattle Brewing & Malting Co.*, 98 Wash. 12, 167 Pac. 58 (1917); *Greil Bros. Co. v. Mabson*, 179 Ala. 444, 60 So. 876 (1912); *Heart v. East Tennessee Brewing Co.*, 121 Tenn. 69, 113 S.W. 364 (1908). The remaining Prohibition cases were *Doherty v. Monroe Eckstein Brewing Co.*, 198 App. Div. 708, 191 N.Y. Supp. 59 (1921); *Kaiser v. Zeigler*, 115 Misc. 281, 187 N.Y. Supp. 638 (App. T. 1921); *Stratford v. Seattle Brewing & Malting Co.*, 94 Wash. 125, 162 Pac. 31 (1916); *Kahn v. Wilhelm*, 118 Ark. 239, 177 S.W. 403 (1915).

⁴⁹ One who had promised to pay for advertising in a souvenir booklet for a yacht race was frustrated when the race was cancelled after the booklets were printed. *Alfred Marks Realty Co. v. Hotel Hermitage Co.*, 170 App. Div. 484, 156 N.Y. Supp. 179 (1915); *Alfred Marks Realty Co. v. "Churchills"*, 90 Misc. 370, 153 N.Y. Supp. 264 (App. T. 1915); *Alfred Marks Realty Co. v. Smith-Serrell Co.*, 154 N.Y. Supp. 1109 (Sup. Ct. 1915); *Alfred Marks Realty Co. v. Geo. Rector*, 152 N.Y. Supp. 1151 (Sup. Ct.), *aff'd*, 172 App. Div. 968, 156 N.Y. Supp. 180 (1915); *Alfred Marks Realty Co. v. Gwilliam Co.*, 152 N.Y. Supp. 1151 (Sup. Ct. 1915).

⁵⁰ *Ask Mr. Foster Travel Serv. v. Tauck Tours*, 181 Misc. 91, 43 N.Y.S.2d 674 (Sup. Ct. 1943); *Signal Land Corp. v. Lochner*, 35 N.Y.S.2d 25 (N.Y. City Ct. 1942); *Hizington v. Eldred Ref. Co.*, 235 App. Div. 486, 257 N.Y. Supp. 464 (1932); *Magner v. Mills*, 137 Misc. 535, 242 N.Y. Supp. 705 (N.Y. City Ct. 1930); *Lacumbre Golf & Country Club v. Santa Barbara Hotel Co.*, 205 Cal. 422, 271 Pac. 476 (1928); *Gellert v. Bank of California*

not by courts of last resort. Nineteen holdings, on the other hand, ten of which were by courts of last resort,⁵¹ reflect substantial hostility to frustration doctrine.

There seems to be no substantial correlation between the kind of transaction or the nature of the frustrating event and the application of the doctrine of frustration. Different cases reach different results whether the transaction is one for a lease⁵² or one for a sale of chattels,⁵³ and whether the frustration results from Prohibition⁵⁴ or war.⁵⁵ Because frustration cases necessarily involve weighing factors such as reasonable foreseeability and the degree of frustration, it is inevitable that different courts at different times within the same jurisdiction will vary considerably in their willingness to apply the doctrine. Moreover, this variation is widened by the courts' frequent failure to understand the doctrine.⁵⁶ Frustration is not a doctrine which can easily be said to have been substantially

Nat'l Ass'n, 107 Ore. 162, 214 Pac. 377 (1923); *Adler v. Miles*, 69 Misc. 601, 126 N.Y.Supp. 135 (App. T. 1910). The remaining holdings accepting the frustration principle were *Patch v. Solar Corp.*, 149 F.2d 558 (7th Cir.), *cert. denied*, 326 U.S. 741 (1945); *20th Century Lites v. Goodman*, 64 Cal. App.2d 938, 149 P.2d 88 (1944); *Johnson v. Atkins*, 53 Cal. App.2d 430, 127 P.2d 1027 (1942); *Osius v. Barton*, 109 Fla. 566, 147 So. 862 (1933); *O'Neill v. Derderian*, 138 Misc. 488, 246 N.Y.Supp. 341 (N.Y.C. Munic. Ct. 1930); *State Realty Co. v. Greenfield*, 110 Misc. 270, 161 N.Y.Supp. 511 (N.Y.C. Munic. Ct. 1920); *McCullough Realty Co. v. Laemmle Film Serv.*, 181 Iowa 594, 165 N.W. 33 (1917).

⁵¹ The writer has considered decisions by the U.S. Circuit Courts of Appeals as decisions by courts of last resort. The decisions of the courts of last resort are *Swift Canadian Co. v. Banet*, 224 F.2d 36 (3d Cir. 1955); *Bardons & Oliver v. Amtorg Trading Corp.*, 123 N.Y.S.2d 633 (Sup. Ct. 1948), *aff'd*, 275 App. Div. 748, 88 N.Y.S.2d 272 (1949), *aff'd*, 301 N.Y. 622, 93 N.E.2d 915 (1950) (frustrated promisor denied return of down payment on chattels although no indication that promisee had been damaged by former's failure to accept delivery); *Frazier v. Collins*, 300 Ky. 18, 187 S.W.2d 816 (1945); *Leonard v. Autocar Sales & Serv. Co.*, 392 Ill. 182, 64 N.E.2d 477 (1945), *cert. denied*, 327 U.S. 804 (1946); *Nickolopoulos v. Lehrer*, 132 N.J.L. 461, 40 A.2d 794, *cert. denied*, 325 U.S. 876 (1945); *Wood v. Bartolino*, 48 N.M. 175, 146 P.2d 883 (1944); *Kunkel Auto Supply Co. v. Leech*, 139 Neb. 516, 298 N.W. 150 (1941); *Retail Merchants' Business Expansion Co. v. Randall*, 103 Vt. 268, 153 Atl. 357 (1931); *Moreland v. Credit Guide Publishing Co.*, 255 Mass. 469, 152 N.E. 62 (1926); *McLarren v. Spalding*, 2 Cal. 510 (1852). The remaining decisions are *Kollsman v. Detzel*, 184 Misc. 1048, 55 N.Y.S.2d 491 (N.Y. City Ct. 1945); *Direct Realty Co. v. Birnbaum*, 46 N.Y.S.2d 435 (N.Y. City Ct. 1944); *Davidson v. Goldstein*, 58 Cal. App.2d 909, 136 P.2d 655 (1943); *Colonial Operating Corp. v. Hannan Sales & Serv.*, 265 App. Div. 411, 39 N.Y.S.2d 217 (1943); *Popper v. Centre Brass Works*, 180 Misc. 1028, 43 N.Y.S.2d 107 (N.Y. City Ct. 1943); *Fisher v. Lohse*, 181 Misc. 149, 42 N.Y.S.2d 121 (Sup. Ct. 1943); *Knorr v. Jack & Al*, 179 Misc. 603, 38 N.Y.S.2d 406 (App. T. 1942); *Burke v. San Francisco Breweries*, 21 Cal. App. 198, 131 Pac. 83 (1913); *Kerley v. Mayer*, 10 Misc. 718, 31 N.Y. Supp. 818 (C.P. 1895).

⁵² See note 8 *supra*.

⁵³ See note 9 *supra*.

⁵⁴ Compare *Greil Bros. Co. v. Mabson*, 179 Ala. 444, 60 So. 876 (1912), with *Kerley v. Mayer*, 10 Misc. 718, 31 N.Y. Supp. 818 (C.P. 1895).

⁵⁵ Compare *20th Century Lites v. Goodman*, 64 Cal. App.2d 938, 149 P.2d 88 (1944), with *Frazier v. Collins*, 300 Ky. 18, 187 S.W.2d 816 (1945).

⁵⁶ See Part IV *infra*.

accepted in one jurisdiction and substantially rejected in another. An excellent illustration of this is furnished by the decisions of California courts which exhibit liberal application of the doctrine,⁵⁷ substantial rejection of it,⁵⁸ and numerous dicta suggesting attitudes ranging from hostility⁵⁹ to receptiveness.⁶⁰

Although the expression is little used in frustration cases, there can be little doubt that "each case must stand upon its own facts."⁶¹ While most courts are willing to apply the doctrine in cases involving total frustration,⁶² judicial attitudes toward applicability of the doctrine where the degree of frustration ranges from substantial to severe is rather evenly divided.⁶³ Consequently it is particularly appropriate to analyze the criticisms made of the doctrine by courts who view it with suspicion and the rationales advanced for it by courts who find its principles more appealing.

III. CRITICISMS OF THE DOCTRINE

There are primarily two criticisms raised against the doctrine of frustration, and, interestingly enough, they are basically incon-

⁵⁷ *E.g.*, 20th Century Lites v. Goodman, 64 Cal. App.2d 938, 149 P.2d 88 (1944); Johnson v. Atkins, 53 Cal. App.2d 430, 127 P.2d 1027 (1942). Some of the California decisions cite CAL. CIV. CODE §1511 in support of the frustration doctrine. However, these decisions are treated here as representing common law holdings because they do not rely heavily on §1511 and because that section in reality does not deal with frustration, but with impossibility of performance. See Lloyd v. Murphy, 25 Cal.2d 48, 53, 153 P.2d 47, 50 (1944).

⁵⁸ Davidson v. Goldstein, 58 Cal. App.2d 909, 136 P.2d 665 (1943); McLaren v. Spalding, 2 Cal. 510 (1852).

⁵⁹ Brown v. Oshiro, 68 Cal. App.2d 393, 156 P.2d 976 (1945); Mitchell v. Ceazan Tires, 25 Cal.2d 45, 153 P.2d 53 (1944).

⁶⁰ Lloyd v. Murphy, 25 Cal. 2d 48, 153 P.2d 47 (1944); U.S. Trading Corp. v. Newark Grain Co., 56 Cal. App. 176, 205 Pac. 29 (1922).

⁶¹ The only frustration case known to this writer in which the court asserted this approach to be the proper one is Patch v. Solar Corp., 149 F.2d 558 (7th Cir.), *cert. denied*, 326 U.S. 741 (1945).

⁶² "It is only when the lessee is deprived without his fault of the use of the premises for any purpose that rent ceases. . . ." Kerley v. Mayer, 10 Misc. 718, 721, 31 N.Y.Supp. 818, 821 (C.P. 1895).

⁶³ "Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrated, a promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intent appears." 1 RESTATEMENT, CONTRACTS §288 (1932). This section is not frequently cited by the courts. Cases holding in favor of the frustrated promisor which cite §288 are Patch v. Solar Corp., 149 F.2d 558 (7th Cir.), *cert. denied*, 326 U.S. 741 (1945); 20th Century Lites v. Goodman, 64 Cal. App.2d 938, 149 P.2d 88 (1944); Johnson v. Atkins, 53 Cal. App.2d 430, 127 P.2d 1027 (1942); Osius v. Barton, 109 Fla. 556, 147 So. 862 (1933). Professor Anderson, in *Frustration of Contract: A Rejected Doctrine*, 3 DE PAUL L. REV. 1, 8 (1953), argues persuasively that §288 did not reflect the American Law Institute's considered judgment. For a codification of frustration principles with respect to leases, see LA. CIV. CODE ANN. §2699 (Dart 1945). See also Drachsler, *Frustration of Contract: Comparative Law Aspects of Remedies in Cases of Supervening Illegality*, 3 N.Y.L.F. 50, 83-4 (1957).

sistent with each other. The first argument is that the doctrine's application violates the parol evidence rule. The second is that it is contrary to the principle that contracts should be construed by the courts rather than remade by them. In *Neuberg v. Avery F. Payne Co.*⁶⁴ a promisor sought to avoid normal contract damages for failure to accept delivery of chattels on the ground that he could not effect his original intention to export the chattels because of subsequent governmental war regulations. Holding him liable, the court observed, "The defendant buyer is bound by the terms of the contract, and the court is not warranted in going outside the contract to vary its terms."⁶⁵ This argument, however, does not seem to have merit. The argument would be valid if the promisor were asserting that the parties actually agreed that the risk of the supervening event would be on the promisee, but this is obviously not the case since the event itself was not foreseeable.

Frustration cases should involve no more than normal examination of the circumstances as an aid to interpretation; this is closely analogous to cases of mistake.⁶⁶ The problem is not to find a promise different from the one in the contract, but to determine the scope which reasonable men, in the circumstances of the contracting parties, would have expected their promises to have.⁶⁷ The parol evidence argument is not frequently used; courts more frequently reject the doctrine of frustration because they believe its application results in an unwarranted judicial remaking of the contract. However, these objections are inconsistent, for if courts which apply the frustration doctrine are simply relieving a promisor who actually intended to be bound, it cannot be said that these courts have relied upon extrinsic evidence to determine and effectuate the promisor's intent.⁶⁸

Although "[t]he purpose of a contract is to place the risks of performance on the promisor . . . ,"⁶⁹ and judicial reluctance to subvert this purpose is not to be criticized, it cannot be said that every application of the doctrine of frustration remakes a contract. The most vulnerable point of this objection is its initial assumptions that the literally unconditional promise actually went to the

⁶⁴ 37 N.Y.S.2d 366 (Sup. Ct. 1942), *rev'd*, 265 App. Div. 1052, 41 N.Y.S.2d 195 (1943).

⁶⁵ *Id.* at 368.

⁶⁶ See 3 CORBIN, CONTRACTS §§579-80, 590 (1951); Smit, *Frustration of Contract: A Comparative Attempt at Consolidation*, 58 COLUM. L. REV. 287, 310-12 (1958).

⁶⁷ CORBIN, CONTRACTS §§579-80, 590 (1951).

⁶⁸ "[T]he purpose of proving [extrinsic facts] is not to vary the terms of the contract itself, but to show that a state of facts has arisen which results in its termination." 20th Century Lites v. Goodman, 64 Cal. App.2d 938, 942, 149 P.2d 88, 91 (1944).

⁶⁹ Lloyd v. Murphy, 25 Cal.2d 48, 54, 153 P.2d 47, 50 (1944).

contingency of the frustrating event and that performance promised with reference to that contingency is thus being excused. Since the frustrating event itself was neither foreseen nor reasonably foreseeable, the promise was not in fact intended by the parties to extend to such a contingency.⁷⁰ Moreover, it should be emphasized that there are other policies, such as relief against hardship, which may call for excuse of some promised performances.

IV. RATIONALES FOR APPLICATION OF THE DOCTRINE

While criticisms leveled against the doctrine of frustration are subject to serious question, it must also be conceded that courts favoring the doctrine do not generally offer an adequate rationale.⁷¹

A few courts avoid the theoretical marsh in which frustration cases seem to become bogged by simply relieving the frustrated party of the duty to perform his literally unconditional promise without bothering to give the slightest hint of a rationale.⁷² While such cases would be authority for an assertion that the doctrine of frustration has now "arrived," such an assertion is not borne out by the cases.⁷³ Those cases barren of a frustration rationale, furthermore will offer little persuasiveness to a court faced with the problem as a matter of first impression.

Usually, however, courts favoring the doctrine of frustration give one or more⁷⁴ rationales for their position.

A. *Impossibility and "Foundation of the Contract"*

Holdings that the promisor's performance has become impossible or that the frustrating event has destroyed the "foundation of

⁷⁰ *O'Neill v. Derderian*, 138 Misc. 488, 491, 246 N.Y. Supp. 341, 344 (N.Y.C. Munic. Ct. 1930). See also *Levy v. Johnston & Hunt*, 224 Ill. App. 300, 306 (1922); *Farlou Realty Corp. v. Woodsam Associates*, 49 N.Y.S.2d 367 (Sup. Ct.), *aff'd*, 52 N.Y.S.2d 575 (1944), *aff'd*, 294 N.Y. 846, 62 N.E.2d 396 (1945); *Raner v. Goldberg*, 244 N.Y. 438, 155 N.E. 733 (1927); *Kaiser v. Zeigler*, 115 Misc. 281, 187 N.Y. Supp. 638 (App. T. 1921); *Brunswick-Balke-Collender Co. v. Seattle Brewing & Malting Co.*, 98 Wash. 12, 167 Pac. 58 (1917); *Adler v. Miles*, 69 Misc. 601, 609-10, 126 N.Y.Supp. 135 (App. T. 1910). Courts sometimes say the promisor "assumed the risk" of the frustrating event, but it is clear that this is a statement of a legal conclusion rather than a description of the promisor's actual intent. See, e.g., *McLarren v. Spalding*, 2 Cal. 510 (1852).

⁷¹ For rationales used by European courts, see *Smit*, *supra* note 66.

⁷² E.g., *McCullough Realty Co. v. Laemmle Film Service*, 181 Iowa 594, 165 N.W. 33 (1917). See also *Gellert v. Bank of California, Nat'l Ass'n*, 107 Ore. 162, 214 Pac. 377 (1923); *Levy v. Johnston & Hunt*, 224 Ill. App. 300 (1922); *Doherty v. Monroe Eckstein Brewing Co.*, 198 App. Div. 708, 191 N.Y.Supp. 59 (1921).

⁷³ See Part II *supra*.

⁷⁴ It is not rare to find two or three different bases for the doctrine set forth in a single opinion. See, e.g., *Johnson v. Atkins*, 53 Cal. App.2d 430, 127 P.2d 1027 (1942).

the contract" embody the two most popular rationales. Sometimes these two concepts are inextricably bound together.⁷⁵

1. *Impossibility*. Courts espousing the impossibility rationale seem to mean that the performance of the *promisor* has somehow become impossible; this, of course, is not the case.⁷⁶ The promisor can perform, but the value of the promisee's counter performance has been greatly diminished. One court, holding in favor of the frustrated party, even suggested that the case was covered by the jurisdiction's code provision on impossibility.⁷⁷ Those accepting the impossibility argument appear to assume that because a subsequent law has made unlawful the intended use of the leased premises it is also unlawful, and thus impossible, for the lessee to continue paying rent.⁷⁸ Few are the courts which seem to recognize clearly that frustration cases can be decided with reference to the principles of impossibility only by analogy at best.⁷⁹ The reason most courts do not distinguish these analytically different situations stems from the simple fact that they think of both impossibility and frustration as essentially doctrines by which, because of hardship, a promisor is excused actually promised performance.⁸⁰ By bringing to frustration cases all the limitations which have developed about impossibility cases, courts favoring application of frustration doctrine have accepted the premise of the basic argument against

⁷⁵ "[W]here the performance depends upon the continued existence of a thing which is assumed as a basis of the agreement, the destruction of the thing by the enactment of a law terminates the obligation." *Greil Bros. Co. v. Mabson*, 179 Ala. 444, 451, 60 So. 876, 878 (1912).

⁷⁶ The impossibility rationale is sometimes characterized by stating that the "subject matter of the contract" or "that which performance was dependent upon" has been destroyed. These formulations also have strong overtones of the "destruction of the foundation" rationale. See *e.g.*, *Nickolopoulos v. Lehrer*, 132 N.J.L. 461 40 A.2d 794, *cert. denied*, 325 U.S. 876 (1945); *Wood v. Bartolino*, 48 N.M. 175, 146 P.2d 883 (1944). See also note 75 *supra*.

⁷⁷ *20th Century Lites v. Goodman*, 64 Cal. App.2d 938, 149 P.2d 88 (1944), citing CAL. CIV. CODE §1511; note 57 *supra*. "The essential element in every case involving frustration is impossibility of performance." *119 Fifth Ave., Inc. v. Taiyo Trading Co.*, 190 Misc. 123, 125, 73 N.Y.S.2d 774, 776 (Sup. Ct. 1947), *aff'd*, 275 App. Div. 695, 87 N.Y.S.2d 430 (1949). The leading English frustration case, *Krell v. Henry*, [1903] 2 K.B. 740, relied for its decision upon *Taylor v. Caldwell*, 3 B. & S. 826, 122 Eng. Rep. 309 (1863), which is an impossibility case. There are, of course, a few cases which could legitimately be considered either frustration or impossibility cases. Temporary impossibility, for instance, can cause such a change in expectations that a frustration situation arises. See, *e.g.*, *Pacific Trading Co. v. Mouton Rice Milling Co.*, 184 F.2d 141 (8th Cir. 1950). See also note 6 *supra*. Temporary impossibility cases have not been considered frustration cases, however, for purposes of this comment.

⁷⁸ *E.g.*, *O'Neill v. Derderian*, 138 Misc. 488, 246 N.Y.Supp. 341 (N.Y.C. Munic. Ct. 1930).

⁷⁹ A clear recognition of the distinction is found in *Lloyd v. Murphy*, 25 Cal.2d 48, 153 P.2d 47 (1944), *supra* notes 33 and 57.

⁸⁰ See note 33 *supra*. See also *Smit*, *supra* note 66.

the doctrine, and have set a much more harsh standard for relief of the literally unconditional promise than would the parties themselves had they foreseen the risk of the frustrating event.⁸¹

2. "*Foundation.*" The most difficult to describe of the various rationales urged in support of the doctrine of frustration is one which may be characterized by the phrase "destruction of the foundation of the contract." The basis of this concept is the assumption by both parties that a particular event would take place⁸² or a particular thing⁸³ or state of facts would continue or cease.⁸⁴ When the frustrating event causes circumstances to become other than those presumably assumed by the parties, the foundation of the contract is destroyed, and, consequently, the contract is also. This rationale appears in a wide variety of conceptual and verbal forms.⁸⁵ The frustrated purpose itself has even been proffered as the contract's foundation. Thus in one of the "Cancelled Yacht Race" cases,⁸⁶ *Alfred Marks Realty Co. v. Hotel Hermitage Co.*,⁸⁷ the court concluded, ". . . [T]he situation, as it turns out, has frustrated the entire design on which is grounded the promise. . . . The object in mutual contemplation having failed, plaintiff cannot exact the stipulated payment."⁸⁸ This rationale has the inherent weakness of an "all or nothing" approach. It is, therefore, not surprising that those American courts which think in terms of "destroyed foundation" should also deem the automatic result of a frustrating event to be a destroyed contract.⁸⁹ Thus because the form of relief, if it is granted, will be unresponsive to the individual circumstances of the case,⁹⁰ this approach tends to lead courts to impose a much more harsh standard for relief against the frustrated party than would have been imposed by the parties themselves had they considered the matter when they made their contract.

⁸¹ "While it is undoubtedly true that the tendency of the law is toward the enlargement of the defense of impossibility, such process should be regarded with great caution, since there is danger that courts, in their desire to relieve parties in hard cases, may go too far. The province of courts is to construe and enforce contracts, not to make or modify them." *Retail Merchants' Business Expansion Co. v. Randall*, 103 Vt. 268, 271, 153 Atl. 357, 358 (1931) (a frustration case).

⁸² *E.g.*, *Raner v. Goldberg*, 244 N.Y. 438, 155 N.E. 733 (1927).

⁸³ *E.g.*, *Abbaye v. U.S. Motor Cab. Co.*, 71 Misc. 454, 128 N.Y.Supp. 697 (App. T. 1911).

⁸⁴ *E.g.*, *Straus v. Kazemekas*, 100 Conn. 581, 124 Atl. 234 (1924).

⁸⁵ Compare, *e.g.*, the cases cited in notes 82-84 *supra*.

⁸⁶ Note 49 *supra*.

⁸⁷ 170 App. Div. 484, 156 N.Y.Supp. 179 (1915).

⁸⁸ *Id.* at 485.

⁸⁹ Complete discharge of all rights and duties under the contract is the only remedy applied to frustration cases by most courts. See Part V *infra*.

⁹⁰ See Part V *infra*.

B. "Implied Condition"

Both the impossibility and frustration rationales are frequently stated in terms of an "implied condition." In *Patch v. Solar Corp.*,⁹¹ for instance, the court remarked, "Whether you call it impossibility of performance or frustration, the result is the same. In either event the court will imply a condition excusing both parties from performance. . . ." ⁹² Sometimes, however, a court will assert an "implied condition" in a manner which does not seem merely to be a way of stating an impossibility or foundation rationale.⁹³ These varying uses of "implied conditions" lead to the conclusion that there is a separate rationale for the doctrine of frustration which may be called the "implied condition" rationale. Indeed, one court has asserted that an alternative name for the doctrine of frustration itself is the "doctrine of implied condition."⁹⁴ Certainly this rationale, if it is one, at least has the merit of describing with fair accuracy *what* the courts do when they apply the frustration doctrine, however defective it may be as an explanation for *why* they do it. In fact there is no case more accurately describing the doctrine than *119 Fifth Avenue, Inc. v. Taiyo Trading Co.*⁹⁵ which characterized the doctrine as one ". . . based upon the theory of an implied term which the law imputes to the parties in order to regulate a situation which, in the eyes of the law, the parties themselves would have regulated by agreement if the necessity had occurred to them."⁹⁶ It thus seems that courts favoring the doctrine of frustration are developing a new constructive condition, an implied condition that a promisor's dominant purpose not have been frustrated. Unfortunately, however, there is nothing in this rationale which indicates when, and on what bases, the implication of such a condition is proper.

⁹¹ 149 F.2d 558, 560 (7th Cir.), *cert. denied*, 326 U.S. 741 (1945).

⁹² *Id.* at 560. *E.g.*, the implied condition approach used in conjunction with the foundation rationale in *West v. Peoples First Nat'l Bank & Trust Co.*, 378 Pa. 275, 106 A.2d 427 (1954). A similar coalescence of "implied condition" and "foundation of the contract" is seen in English decisions. See *Smit*, *supra* note 66, at 304-5.

⁹³ In one of the "cancelled yacht race" cases, *Alfred Marks Realty Co. v. Hotel Hermitage Co.*, 170 App. Div. 484, 156 N.Y.Supp. 179 (1915), the contract was said to be subject to the implied condition that contestants for the race be named.

⁹⁴ *Wood v. Bartolino*, 48 N.M. 175, 146 P.2d 883 (1944).

⁹⁵ 190 Misc. 123, 73 N.Y.S.2d 774 (Sup. Ct. 1947), *aff'd* 275 App. Div. 695, 87 N.Y.S.2d 430 (1949).

⁹⁶ *Id.* at 125, 73 N.Y.S.2d at 776. The decisions are not free of suggestion that the term is implied in fact rather than implied in law. See, *e.g.*, *Adler v. Miles*, 69 Misc. 601, 609-10, 126 N.Y. Supp. 135, 139-40 (App.T. 1910). Such a view is unrealistic, however, for by definition the frustrating event was not foreseen.

C. *Failure of Consideration*

Among the frequently used rationales the one which makes the most sense may be characterized "failure of consideration." The heart of the frustrated party's complaint is that because of supervening events he is getting from promisee something which is in form only that for which he contracted. The description of frustration cases as involving "actual but not literal failure of consideration"⁹⁷ is an accurate one. The jump from "literal" to "actual" failure of consideration should not be an insuperably great one for a court endowed with the flexible principles of the common law and equity. It may strain credulity to say, as did the court in *20th Century Lites v. Goodman*,⁹⁸ that the lessee of a neon sign no longer has the display for which he contracted because he cannot turn it on at night.⁹⁹ However, this is mild fiction compared to saying, as many courts do, that it has become impossible for the lessee to continue paying the stipulated rent.¹⁰⁰

Despite the analogical appropriateness of the failure of consideration rationale, courts applying frustration doctrine do not commonly mention it. This is particularly interesting since the constructive condition of exchange could fit so easily into the "implied term" approach popular with the courts. Equally striking, in light of the factual similarity of mistake and frustration cases,¹⁰¹ is the failure of any court known to this writer to have suggested an analogy to the principles of mistake as a rationale for frustration relief.¹⁰² The inability of most courts to distinguish between impossibility and frustration¹⁰³ compels the conclusion that the lack of general judicial acceptance of either a failure of consideration or a mistake analogy rationale stems from a questionable assumption that the problem is not what the agreement actually involved, but simply whether, because of hardship, promised performance shall be excused.¹⁰⁴

⁹⁷ *Lloyd v. Murphy*, 25 Cal.2d 48, 53, 153 P.2d 47 (1944).

⁹⁸ 64 Cal. App.2d 938, 149 P.2d 88 (1944).

⁹⁹ See also *Ask Mr. Foster Travel Service v. Tauck Tours*, 181 Misc. 91, 43 N.Y.S.2d 674 (Sup. Ct. 1943). In *Hizington v. Eldred Ref. Co.*, 235 App. Div. 486, 257 N.Y.Supp. 464 (1932), a lessee was held not obligated for further rent when government regulation made it illegal to continue to operate his gasoline station on the leased premises. The court called this a "constructive eviction," but such a position is not justified by reference to principles of property law. See 1 TIFFANY, REAL PROPERTY §§92, 141-2, 145 (3d ed. 1939).

¹⁰⁰ See Part IV-A *supra*.

¹⁰¹ See note 25 *supra*.

¹⁰² On the use of this rationale in Europe, see *Smit*, *supra* note 66, at 290, 301-2, 305.

¹⁰³ See Part IV-A *supra*.

¹⁰⁴ See Part III *supra*.

D. *Relief Against Hardship*

While relief against hardship may be the core of frustration doctrine to many courts, they evidently do not like to admit this. *Lloyd v. Murphy*¹⁰⁵ is the only frustration case known to this writer in which relief against hardship is expressly given as a basis for the doctrine of frustration. It is probable that courts shy from discussing relieving against hardship because to do so would put them too squarely in conflict with the opposite principle that contracts are to be enforced rather than relieved.¹⁰⁶ Terms like "impossibility," "implied condition," and "failure of consideration," with their air of precedent, or a concept like "destruction of the foundation," with its apparent logic that something falls when that upon which it stands falls, seem to allow a court to relieve hardship without mentioning it. Any emphasis upon relieving hardship as a rationale for frustration doctrines would openly require a balancing of the desire for certainty of contract with the sympathy for the frustrated party. Since this would, no doubt, have the effect of allowing application of the doctrine only in the cases of severest frustration, the standard for relief against performance of the literally unconditional promise would be much more harsh than the parties themselves would have set had they considered the risk of the frustrating event.

E. *Gap Filling*

It thus appears that American courts favoring the doctrine of frustration of purpose have not generally developed an adequate rationale for its use. At the base of the theoretical weaknesses in the approach of the courts to frustration, furthermore, is the assumption that the problem in a frustration case is whether to excuse a promisor from an obligation he voluntarily undertook. This writer has already indicated his essential disagreement with that assumption. It is perhaps not surprising, then, that the rationale for frustration relief which this writer considers to be the most sound has its starting point in a diametrically opposite assumption. This opposite premise is simply that the parties did not contract with reference to the unforeseen frustrating event; therefore, the event's effect upon the rights and duties of the parties under the contract is not provided for in the contract. The lack of provision

¹⁰⁵ 25 Cal.2d 48, 153 P.2d 47 (1944), *supra* note 33.

¹⁰⁶ See Part III *supra*.

in the contract for the contingency of the frustrating event may be called a "gap," and the rationale which flows from discerning such a gap is generally designated "gap filling."¹⁰⁷

The court in a frustration case has before it parties who, after creating certain legal relations between themselves by contract, have been forced by supervening events into a situation not covered by their contract and, hence, into the necessity of adjusting their relations with reference to the unprovided-for situation. This is the thrust of the gap-filling doctrine; since the parties cannot agree on this adjustment, the court must fill the gaps for them. The court must either fill the gaps or, refusing to do so, leave the parties as it finds them. Such refusal does not prevent the parties from arriving at a situation different from the one for which they contracted, but simply causes the adjustment of their rights and duties with reference to the new situation to be determined by chance factors such as whether an installment payment was made a day before the frustrating event or a day after. When a court proceeds to apply the doctrine of frustration of purpose it is merely affirming that it, rather than chance, should fill in the gaps.

The basic criticism of the gap-filling rationale is that it calls for the court partially to "make a contract"; this the courts are often thought powerless to do.¹⁰⁸ But courts do have the power to "make contracts" in the sense intended by the criticism;¹⁰⁹ such power is asserted every time a court finds a contract subject to a condition implied in law.

While there is little express authority for the gap-filling rationale in American decisions¹¹⁰ its acceptance is implicit in holdings that the contract actually did not go to the contingency of the frustrating event or that the contract is subject to an implied condition.¹¹¹ The limited American use of the gap-filling rationale is unfortunate because, unlike the rationales which generally are used by the courts, gap filling proceeds from the realistic assumptions that the parties did not contract with reference to the frustrating contingency and that, whether it likes it or not, the court must now adjust the rights and duties of the parties with reference

¹⁰⁷ See generally Smit, *supra* note 66; 6 CORBIN, CONTRACTS §1331 (1951).

¹⁰⁸ See note 81 *supra*.

¹⁰⁹ Smit, *supra* note 66, at 313-15; 6 CORBIN, CONTRACTS §1331 (1951).

¹¹⁰ Acceptance of the doctrine is growing in England. Smit, *supra* note 66, at 306-7.

¹¹¹ *E.g.*, 119 Fifth Ave., Inc. v. Taiyo Trading Co., 190 Misc. 123, 73 N.Y.S.2d 774 Sup. Ct. 1947), *aff'd*, 275 App. Div. 695, 87 N.Y.S.2d 430 (1949); Johnson v. Atkins, 53 Cal. App. 2d 430, 127 P.2d 1027 (1942).

to a situation about which their contract is silent.¹¹² By focusing upon frustration as involving matters not considered by the parties, courts may be expected to evolve a standard of relief more nearly approximating that which the parties themselves would have imposed had they considered the risk of the frustrating event.

V. FORMS OF RELIEF

A. *Discharge of All Obligations*

The courts have not generally matched their ingenuity in finding a wide variety of rationales for giving relief to a frustrated party with a similar inventiveness of forms of relief to be given. In all but three of the twenty-nine holdings cited earlier as relieving the frustrated party, the court merely declared all rights and duties under the contract terminated by the frustrating event.¹¹³ The courts appear unable to evolve any alternative to simple discharge of the contract.

Discharge of all obligations is undoubtedly the proper remedy in many cases. If under a frustrated service contract, for example, the promisor has made compensation at the contract rate for the services performed prior to the frustration, and the promisee has incurred no reliance expenses other than in connection with the services which have been compensated, there is nothing for the court to do except to declare that the frustrating event ended the promisee's duty to continue the service and the promisor's duty to pay for them.¹¹⁴ But this is not always true, and there are cases which suggest that courts have sometimes been more automatic than equitable or reasonable in giving complete discharge as their only relief. Even arbitration clauses, by which the parties have presumably agreed upon a method for adjusting their difficulties, have been held to be defeated with the rest of the contract.¹¹⁵ In

¹¹² Smit, *supra* note 66, at 315.

¹¹³ The twenty-nine holdings are cited in notes 48-50 *supra*. The particular three referred to are Patch v. Solar Corp., 149 F.2d 558 (7th Cir.), *cert. denied*, 326 U.S. 741 (1945); O'Neill v. Derderian, 138 Misc. 488, 246 N.Y.Supp. 341 (N.Y.C. Munic. Ct. 1930); Gellert v. Bank of California, Nat'l Ass'n, 107 Ore. 162, 214 Pac. 377 (1923). In addition to these three holdings, relief other than complete discharge was given in West v. Peoples First Nat'l Bank & Trust Co., 378 Pa. 275, 106 A.2d 427 (1954). The statement made in the text should be qualified in one respect. A lessee will be required to continue paying rent after the frustrating event until he surrenders possession. See, e.g., 140 West Thirty-Fourth St. Corp. v. Davis, 158 Misc. 470, 285 N.Y. Supp. 957 (App. T. 1931).

¹¹⁴ See Ask Mr. Foster Travel Service v. Tauck Tours, 181 Misc. 91, 43 N.Y.S.2d 674 (Sup. Ct. 1943).

¹¹⁵ Johnson v. Atkins, 53 Cal. App.2d 430, 127 P.2d 1027 (1942). *But see* Petition of Prouvost Lefebvre of Rhode Island, 105 F. Supp. 757 (S.D.N.Y. 1952).

*20th Century Lites v. Goodman*¹¹⁶ the lease of a neon sign was declared terminated because war regulations prohibited lighting the sign at night despite the lessor's argument that, in view of his manufacturing and installation costs and the fact that the prohibition had since been repealed, the lease should only be suspended for the period of the prohibition.¹¹⁷ The court did not even consider such questions as whether the lessor had recouped his costs or how the parties would have allocated the risk of such losses had the possibility of the frustration occurred to them. Decisions of this nature not only reach inequitable results¹¹⁸ but, by suggesting that the only relief possible under the doctrine of frustration is the drastic one of complete discharge of all obligations between the parties, undoubtedly cause uncertain courts to be more reluctant to accept the doctrine. Frequently courts which refuse to relieve the frustrated party emphasize at the same time their lack of sympathy with the inequitable position taken by the promisee.¹¹⁹ It is reasonable to suggest that there would be fewer of these cases if the courts created some alternative forms of relief.

This general inability to provide any relief other than full termination of the contract is traceable to two basic judicial attitudes criticized in the preceding section of this comment — the idea that contracts have a "foundation" which has been destroyed by the frustrating event and the assumption that the courts cannot "make contracts." It is difficult to understand how a court can assert that it has no power to make a contract and at the same time insert into a contract the most drastic provision possible, an "implied condition" that the contract be terminated on the occurrence of the frustrating event.¹²⁰

¹¹⁶ 64 Cal. App.2d 938, 149 P.2d 88 (1944).

¹¹⁷ *Ibid.* The failure to give any weight to the lessor's argument for suspension is particularly interesting because the court cited in support of its relief of the lessee a code provision dealing with impossibility which called for performance to be relieved by supervening events only "to the extent to which they operate." CAL. CIV. CODE §1511.

¹¹⁸ Simply discharging the contract and leaving the parties as the court finds them has been characterized as a rule suited for "tricksters, gamblers and thieves." *Cantiare San Rocco v. Clyde Shipbuilding & Engineering Co.*, [1924] A.C. 226, 259.

¹¹⁹ *E.g.*, *Fischer v. Lohse*, 181 Misc. 149, 42 N.Y.S.2d 121 (Sup. Ct. 1943). In Europe considerable use is made of various rationales based upon a requirement of good faith between contracting parties. It is deemed a breach of a condition of good faith and an "abuse of right" or "exploitation" to demand literal performance of the frustrated promisor. Smit, *Frustration of Contract: A Comparative Attempt at Consolidation*, 58 COLUM. L. REV. 287, 292-3, 296, 297-8, 301-2 (1958).

¹²⁰ See, *e.g.*, *Kaiser v. Zeigler*, 115 Misc. 281, 187 N.Y.Supp. 638 (App. T. 1921).

B. *Equitable Adjustment*

1. *Theoretical Basis.* The failure of judicial flexibility in the area of remedies for frustration cases stems primarily from inadequate rationales for relief rather than from a lack of power to give relief. The basic merit of the gap-filling rationale in this connection is obvious. By accurately describing what the courts *are* doing when they give *any* form of relief in a frustration case, gap filling suggests, in turn, what they *can* do. Once the court views its function in frustration cases to be the filling of gaps left by the parties, there is no reason to limit the solution to the complete termination of obligations between the parties. "The gap filling doctrine clearly warrants equitable adjustment of the rights and duties of the parties short of discharge, if prevailing notions of good faith and fair dealing so require."¹²¹

Writers in this field are almost unanimous in urging a flexible remedial approach to the problems of frustration.¹²² The formula for equitable adjustment in frustration cases is usually stated in terms which indicate that the court should attempt to arrange the rights and duties of the parties in a manner similar to that which the parties themselves, as reasonable men, probably would have provided had they considered the possibility of the supervening event.¹²³

It is equitable adjustment, rather than simple termination of all obligations, that most preserves the sanctity of contract, for the whole approach of equitable adjustment is to help the parties achieve the attainment of their original contractual purposes.

2. *Acceptance.* There is some support for the equitable adjustment remedy among American cases. It is implicit in the liberal approach of those courts which use "implied conditions."¹²⁴ In addition, four courts¹²⁵ have applied the remedy. Three of

¹²¹ Smit, *supra* note 119, at 314. See also 6 CORBIN, CONTRACTS §§280-3 (1951).

¹²² *Ibid.* See also Drachsler, *Frustration of Contract: Comparative Law Aspects of Remedies in Cases of Supervening Illegality*, 3 N.Y.L.F. 50, 58 (1957); DAWSON, UNJUST ENRICHMENT 112 (1951). Considerable use is made of the remedy in Europe. See Smit, *supra* note 119, at 299; Drachsler, *supra* at 63, 65-70; Zepos, *Frustration of Contract in Comparative Law and in the New Greek Civil Code of 1946*, 11 MOD. L. REV. 36, 43-4 (1948).

¹²³ Sometimes the formula is worded as if the court should attempt to determine what the parties would have provided had they foreseen the event itself, as distinguished from merely foreseeing the *possibility* or *risk* of the event. But this is unrealistic for had the parties in fact foreseen the event it is probable that there would never have been a contract. See Smit, *supra* note 119, at 313.

¹²⁴ *E.g.*, 119 Fifth Ave., Inc. v. Taiyo Trading Co., 190 Misc. 123, 73 N.Y.S.2d 774 (Sup. Ct. 1947), *aff'd*, 275 App. Div. 695, 87 N.Y.S.2d 430 (1949).

¹²⁵ See note 113 *supra*.

them decreed restitution. *O'Neill v. Derderian*¹²⁶ simply allowed the frustrated lessee to get his security back upon vacating the premises. In *Gellert v. Bank of California, National Ass'n*¹²⁷ the estate of the decedent remitter was allowed to recover from the drawer bank money paid it by the decedent for the drafts he had intended to remit. *West v. Peoples First National Bank & Trust Co.*¹²⁸ involved a more complicated problem. The parties, one of whom was a real estate developer, had entered into a joint venture for the development of a certain tract owned by the other. The real estate developer was to execute the project and to look solely to the proceeds from sale of the land for recoupment of his expenses. Despite this provision, when the venture was frustrated by the condemnation of part of the tract, the court allowed the developer to recover his expenses from the owner to the degree that a benefit had been conferred upon the latter. The court's solution gives reasonable weight both to the intent of the parties that the developer assume the risk of losing his expenses and to the fact that the parties had not, however, thought of the risk of the severe type of frustration that resulted.

In the fourth frustration case to apply equitable adjustment, *Patch v. Solar Corp.*,¹²⁹ the licensee of a patent, who had spent \$100,000 in its promotion, was frustrated by war regulations that prohibited manufacturing of the patented item. Rather than accept the patentee's argument that the license agreement terminated because the licensee failed to pay the minimum royalty, the court declared the license agreement to be in force with the royalty merely suspended for the period of the prohibition. The court said that in cases of frustration ". . . the court will imply a condition excusing both parties from performance, and the contract may be wholly dissolved or operation under the contract suspended, depending upon the facts of the particular case."¹³⁰ While minimum royalty provisions are expressly to achieve a degree of risk assumption by the licensee, it is reasonable to assume that had the parties considered the matter they would have inserted a clause suspending performance for the duration of any total government prohibition of the patent's use. This seems particularly probable

¹²⁶ 138 Misc. 488, 245 N.Y.Supp. 341 (N.Y.C. Munic. Ct. 1930).

¹²⁷ 107 Ore. 162, 214 Pac. 377 (1923).

¹²⁸ 378 Pa. 275, 106 A.2d 427 (1954).

¹²⁹ 149 F.2d 558 (7th Cir.), *cert. denied*, 326 U.S. 741 (1945).

¹³⁰ *Id.* at 560.

for even if the patentee were to secure the return of the patent he could make no more functional use of it than could the licensee.¹³¹

3. *Suggested Extensions.* While no case has given frustration relief beyond discharge of obligation, suspension of obligation or restitution of benefit conferred,¹³² this writer sees no reason why, within the principles of gap filling and equitable adjustment, a court should be limited to such relief.¹³³ In *Raner v. Goldberg*,¹³⁴ for instance, a lessor was required to make considerable changes in the premises in order for them to be useful to the lessee as a dance hall. Although the lessee failed to get a permit to operate this dance hall, the court held him to a continuing obligation to pay rent because he had in fact assumed the risk of such failure. Had this been a true frustration case, however, this writer believes it most reasonable to assume that the parties would have provided, had they considered the risk of frustration, that some of the cost of the lessor's reliance be borne by the lessee in the event that frustration should occur. The proper remedy would then have been to give the lessor recovery for that amount. In *Kaiser v. Zeigler*,¹³⁵ on the other hand, a provision in the lease calling for the lessee to sell a certain brand of beer indicated that the lessor had a real interest in his tenant operating a saloon rather than some other business. Had it been necessary in that case for the lessee to make considerable changes in the premises, and had the parties considered the risk of Prohibition, it seems quite reasonable to assume that the lessor would have been willing to bear some of the costs of the lessee's reliance in the event of frustration. The court in such a case should shape its adjustment of the parties' rights and duties accordingly.¹³⁶ Before there will be many holdings of this nature, however, it will be necessary for courts to realize that through remedial in-

¹³¹ A suspension was also appropriate in this case in view of the fact that it appeared at the time of the decision that the prohibition was about to end. Where it appears that the effects of the frustrating event extend beyond the term of the contract, it is probably better to terminate the contract, thus allowing the parties to change their position. See *20th Century Lites v. Goodman*, 64 Cal. App.2d 938, 149 P.2d 88 (1944).

¹³² For further acceptance of the restitution principle, see 2 RESTATEMENT, CONTRACTS §468 (1932).

¹³³ On the extensiveness of adjustment of rights and duties which may be worked by a court in Germany or Greece, see *Smit*, *supra* note 119, at 299; *Zepos*, *supra* note 122, at 43-4.

¹³⁴ 244 N.Y. 438, 155 N.E. 733 (1927).

¹³⁵ 115 Misc. 281, 187 N.Y.Supp. 638 (App. T. 1921).

¹³⁶ For a case with a strong dictum in support of allowing recovery of reliance expenses, see *Gardiner Properties v. Samuel Leider & Son*, 279 App. Div. 470, 111 N.Y.S.2d 88 (1952).

flexibility in cases of frustration, based upon a feeling that the courts cannot "make contracts," they are in effect not only "making a contract" but frequently making one unnecessarily divorced from what the parties themselves would have intended.

CONCLUSION

Upon the assumption that the doctrine of frustration of purpose in contract operates to relieve promisors from hard contracts, the courts have built into the doctrine certain requisites for its application. Primarily they demand that the frustrating event not have been reasonably foreseeable at the time of contracting and that it have worked a basic frustration of purpose. Nevertheless, even thus limited the doctrine of frustration has not yet received substantial acceptance in many states. The doctrine would be more broadly applied if courts would recognize that frustration problems involve an omission — a gap — in the contract. Furthermore, the desirable effect of such an approach would be the likelihood of more flexible relief which could more closely approximate the result for which the parties themselves would have provided had the risk of frustration occurred to them.

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