Chapter 17
The involuntary assignment of contractual rights and liabilities

The automatic assignment by operation of law of contractual rights and liabilities may occur upon the death or bankruptcy of one of the contracting parties.

The general rule of common law, that the maxim *actio personalis moritur cum persona* does not apply to an action for breach of contract, has been confirmed by statute. This provides that on the death of a contracting party 'all causes of action subsisting against or vested in him shall survive against or, as the case may be, for the benefit of, his estate'.[1] If the deceased made a contract with X, his personal representatives, whether executors or administrators, may recover damages for its breach; or may themselves perform what remains to be done and then recover the contract price.[2]

Conversely, they may be sued by X in their representative capacity for a breach of the contract, whether committed before or after the death of the deceased, though they are liable only to the extent of the assets in their hands.[3]

This rule that the right of action survives does not apply where personal considerations are the foundation of the contract. This is the position, for instance, where the contracting parties are master and servant,[4] or racehorse owner and jockey.[5] Thus, if a servant dies his executors are not faced with the alternative of performing the services or of paying damages; if the master dies, the servant is discharged of his obligation to serve.[6]

The object of bankruptcy proceedings is to collect all the property of the bankrupt and to divide it rateably among his creditors The rule, therefore, is that any right of action for breach of contract possessed by him which relates to his property and which, if enforced, will swell his assets, passes to his trustee in bankruptcy.[7] Instances are a contract by a third person to deliver goods or to pay money to the bankrupt. On the other hand, the right to sue for an injury to the character, feelings or reputation of a bankrupt, though arising from a breach of contract, does not vest in the trustee.[8]

1 Law Reform (Miscellaneous Provisions) Act, 1934, s 1(1). For discussion of the effect of death, see North 116 NLJ 1364.
2 *Marshall v Broadhurst* (1831) 1 Cr & J 403.
3 *Wentworth v Cock* (1839) 10 Ad & El 42; *Cooper v Jarman* (1866) LR 3 Eq 98; *Ahmed Angullia bin Hadjee Mohammed Salleh Angullia v Estate and Trust Agencies (1927) Ltd* [1938] AC 624, [1938] 3 All ER 106.
4 *Farrow v Wilson* (1869) LR 4 CP 744.
5 *Graves v Cohen* (1929) 46 TLR 121.
6 *Farrow v Wilson*, above.
7 *Beckham v Drake* (1849) 2 HL Cas 579 at 627; *Jenning's Trustee v King* [1952] Ch 899, [1952] 2 All ER 608.
8 *Rose v Buckett* [1901] 2 KB 449.

> The right of action does not pass where the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect to his body, mind or character, and without immediate reference to his rights of property. [9]

For instance, in *Wilson v United Counties Bank*,[10] a trader entrusted the financial side of his business to a bank during his absence on military duty in the European war of 1914. He was subsequently adjudicated bankrupt owing to the negligent manner in which this contractual duty was performed, and, in an action which he and the trustee brought against the bank, damages of £45,000 were awarded for the loss to his estate and of £7,500 for the injury to his credit and reputation. It was held that of these two sums the £7,500 belonged personally to the bankrupt as representing compensation for damage to his reputation, while the £45,000 went to the trustee for the benefit of the creditors.

If a bankrupt has made a contract for personal services, the question whether his right to sue for its breach remains with him or passes to his trustee depends upon the date of breach. If the breach occurs before the commencement of the bankruptcy, the right of action passes to the trustee; if it occurs after this date the right of action remains with the bankrupt, subject to the power of the trustee to intervene and to retain out of the sum covered what is not required for the maintenance of the bankrupt and his family. Thus the person entitled to recover damages against an employer for the wrongful dismissal of the bankrupt varies according as the dismissal occurs before or after the bankruptcy.[11]

9 *Beckham v Drake*, fn 7, at 604, per Erle J.

10 [1920] AC 102.

11 *Drake v Beckham* (1843) 11 M & W 315 (before bankruptcy); *Bailey v Thurston & Co Ltd* [1903] 1 KB 137 (after bankruptcy).

Chapter 18

Performance and breach[1]

SUMMARY

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A INTRODUCTION

This chapter and the two succeeding chapters deal principally with the problem of discharge, that is, the ways in which the parties, or one of them, may

1 Cartel: *Breach of Contract*: Birds, Bradgate and Villiers, *Termination of Contracts*

be freed from their obligations. In previous editions of this work the subject matter of this chapter has been contained in two chapters entitled, respectively, Discharge by performance and Discharge by breach. It is easy to see that if one party completely and perfectly performs what he has promised to do, his obligations are at an end. However, important and difficult questions arise as to the effect of something less than perfect performance. From the viewpoint of the performer, this is a problem in performance but to the other party it will appear as a problem in breach, since usually[2] a less than perfect performance will be a breach. It seems more convenient, therefore, to consider the problems together, since to a considerable extent one is the mirror image of the other.

B THE ORDER OF PERFORMANCE

In a bilateral contract, where both parties have obligations to perform, questions may arise as to who is to perform first. This is primarily a question of construction of the contract, assisted by presumptions as to the normal rule for contracts of a particular kind. Often, it will not be a case of one party performing all his obligations first but rather of some obligations of one side having to be performed before related obligations of the other side. So in a contract of employment, the employer's obligation to pay wages will normally be dependent on the servant's having completed a period of employment but his obligation to provide a safe system of work will arise from the start of the employment.

It is often helpful to analyse this problem by using the language of conditions.[3] In a contract between A and B, we may discover at least three possibilities, viz: first, an undertaking by A is a condition precedent to an undertaking by B; secondly, undertakings by A and B may be concurrent conditions; or, finally, some undertakings by A and B may be independent. We may illustrate the first two possibilities by considering the obligations of buyer and seller as to delivery of the goods and payment of the price. Under the provisions of the Sale of Goods Act 1979, the obligations of the seller to deliver and of the buyer to pay the price are said to be prima facie concurrent,[4] but in many cases the contract varies this rule. In many commercial contracts, the seller agrees to grant the buyer normal trade terms, for example, payment within thirty days of delivery of invoice. It is clear that in such a case the seller must deliver first and cannot demand payment on delivery.[5] Conversely, in international sales, buyers often agree to pay by opening a banker's commercial credit, and here it is clear that the seller need take no steps until the buyer has arranged for the opening of a credit in conformity with the contract.[6] Where the buyer's and seller's obligations are concurrent, this means in practice that the ability of either party to complain of the other's non-performance depends on his own ability to show that he was ready, willing and able to perform.[7]

2 See p 589, below.
3 See pp 162 ff, above.
4 S 28.
5 This is a very important rule in practice where there have been a series of contracts and the buyer is late in paying in respect of an earlier delivery. See eg *Total Oil (Great Britain) Ltd v Thompson Garages (Biggin Hill) Ltd* [1971] 3 All ER 1226 discussed at pp 608 ff, below.
6 See eg *W J Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189, [1972] 2 All ER 127.
7 As to tendering performance, see p 616, below.

It is quite common for some of the obligations of the parties to be quite independent of performance of obligations by the other party. We have already mentioned the employer's duty to provide a safe system of work; an example on the other side would be the servant's duty of fidelity to the master.[8] In the case of such independent covenants, the covenantor cannot argue that his obligation is postponed until the covenantee has performed some other obligations.

C EXCUSES FOR NON-PERFORMANCE

It was stated above[9] that usually failure to perform will amount to breach. This is true, but it is important to recognise that in certain circumstances failure to perform is excusable.

1 AGREEMENT

The parties may have made some agreement or arrangement after the contract was concluded, which permits one party not to perform or to perform in a different way. This will be examined in detail in the next chapter.

2 IMPOSSIBILITY OF PERFORMANCE AND FRUSTRATION

Sometimes events take place after the contract has been made, which make performance impossible or commercially sterile. In a limited number of cases, this may have the effect of bringing the contract to an end. This possibility is considered more fully in chapter 20.

3 IMPOSSIBILITY OF PERFORMANCE FALLING SHORT OF DISCHARGING FRUSTRATION

In some cases, unforeseeable events, although not bringing the contract to an end, may provide an excuse for non-performance. So in most modern contracts of employment, an employee who did not go to work because he had influenza would not be in breach of contract, although the illness would not be sufficiently serious to frustrate the contract.[10]

4 CONTRACTUAL EXCUSES FOR NON-PERFORMANCE

Outside the relatively narrow scope of the last two headings, the common law has been slow to infer that unforeseen developments should relieve a party from prompt and perfect performance. This attitude is commonly justified on the ground that the parties should make express provision themselves,[11] and this invitation is very often accepted. So, for instance, all the standard forms of building and engineering contract contain provisions which may entitle

8 *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169.
9 P. 588, above.
10 It should be noted that whether he would be in breach and whether he would be entitled to sick pay, are two distinct questions. See Stannard 46 MLR 738.
11 See p. 631, below.

the contractor to extra time for performance where he has been delayed by such matters as exceptionally adverse weather conditions or labour disputes. The effectiveness of these clauses may involve consideration of the law as to exemption clauses though it is thought that many of them should be regarded as defining liability rather than excluding it.[12]

5 LIMITATION

In principle, when one party has failed to perform on time, the other party can sue and at this moment the appropriate limitation period will begin to run. At the end of this period the action will normally no longer be maintainable. This matter is discussed more fully later.[13]

D CAN A PARTY WHO DOES NOT PERFORM PERFECTLY CLAIM PAYMENT OR PERFORMANCE FROM THE OTHER PARTY?

There is no doubt that there are a number of cases where it has been stated that a party who does not perform perfectly is not so entitled. This is vividly illustrated by the old case of *Cutter v Powell*.[14]

> The defendant agreed to pay Cutter thirty guineas provided that he proceeded, continued and did his duty as second mate in a vessel sailing from Jamaica to Liverpool. The voyage began on 2 August and Cutter died on 20 September when the ship was nineteen days short of Liverpool.

An action by Cutter's widow to recover a proportion of the agreed sum failed, for by the terms of the contract the deceased was obliged to perform a given duty before he could demand payment.

In this case, of course, Mr Cutter did not break the contract by dying in mid-Atlantic[15] but his right to payment was held to depend on completion of the voyage and the same principle was held to apply in the case of breach in *Sumpter v Hedges*.[16] In that case the plaintiff, who had agreed to erect upon the defendant's land two houses and stables for £565, did part of the work to the value of about £333 and then abandoned the contract. The defendant himself completed the buildings. It was held that the plaintiff could not recover the value of the work done.

A modern example of this principle is *Bolton v Mahadeva*.[17]

> The plaintiff contracted to install a central heating system in the defendant's house for the sum of £800. He installed the system but it only worked very ineffectively and the defendant refused to pay for it. The Court of Appeal held the plaintiff could recover nothing.

It will be seen that in each of these cases, the defendant made an uncovenanted profit, since he obtained part of what the plaintiff had promised to perform

12 See p 171 ff, above.
13 See pp 706-714, below.
14 (1795) 6 Term Rep 320; see also *Sinclair v Bowles* (1829) 9 B & C 92; *Vigers v Cook* [1919] 2 KB 475; Stoljar 34 Can Bar Rev 288.
15 In modern terms the contract was frustrated, see ch 20, below.
16 [1898] 1 QB 673.
17 [1972] 2 All ER 1322, [1972] 1 WLR 1009.

without having to pay anything. It is not surprising therefore that these results have been criticised nor that attempts have been made to mitigate or avoid them.[17]

1 THE DOCTRINE OF SUBSTANTIAL PERFORMANCE

The courts, in their desire to do justice between contracting parties, have developed what is called the doctrine of substantial performance, which in effect has somewhat relaxed the requirement of exact and precise performance of entire contracts.[18] According to this doctrine, which dates back to Lord Mansfield's judgment in *Boone v Eyre* in 1779,[19] if there has been a substantial though not an exact and literal performance by the promisor, the promisee cannot treat himself as discharged. Despite a minute and trifling variation from the exact terms by which he is bound, the promisor is permitted to sue on the contract, though he is of course liable in damages for his partial non-performance. According to this doctrine, the question whether entire performance is a condition precedent to any payment is always a question of construction.[1] Thus in *Cutter v Powell*[2] the court construed the contract to mean that the sailor was to get nothing unless he served as mate during the whole voyage. Again, in a contract to erect buildings or to do work on another's land for a lump sum, the contractor can recover nothing if he abandons operations when only part of the work is completed, since his breach has gone to the root of the contract. But if, for example, the contractor has completed the erection of the buildings, there has been substantial performance and the other party cannot refuse all payment merely because the work is not in exact accordance with the contract,[3] any more than the employer in *Cutter v Powell* could have repudiated all liability if on one or two occasions the sailor had failed in his duty as mate.[4]

In such circumstances the present rule is that 'so long as there is substantial performance the contractor is entitled to the stipulated price, subject only to a cross-action or counter-claim for the omissions or defects in execution'.[5] If this were not the case and if exact performance in the literal sense were always required, a tradesman who had contracted to decorate a house according to certain specifications for a lump sum might find himself in an intolerable position. If, for instance, he had put two coats of paint in one room instead of three as agreed, the owner would be entitled to take the benefit of all that had been done throughout the house without paying one penny for the work.[6]

18 In 1983 the Law Commission proposed (Law Com No 121) legislation to change them but the dissenting report of Brian Davenport QC appears to have obtained wider support.

19 See Williams 57 LQR 373, 490; Corbin 28 Yale LJ 739; Morison 28 LQR 398, 29 LQR 61; Ballantine 5 Minnesota L Rev 329.

20 (1779) 1 Hy Bl 273, n.

1 *Hoenig v Isaacs* [1952] 2 All ER 176.

2 P 590, above.

3 *H Dakin & Co Ltd v Lee* [1916] 1 KB 566, approved and followed in *Hoenig v Isaacs* [1952] 2 All ER 176, despite the dicta in *Eshelby v Federated European Bank Ltd* [1932] 1 KB 423.

4 *Hoenig v Isaacs*, above, per Somervell LJ.

5 2 Smith LC (13th edn) at 19, approved in *Hoenig v Isaacs*, above. See also *Broom v Davies* (1794) cited 7 East 480n; *Bolton v Mahadeva* [1972] 2 All ER 1322, [1972] 1 WLR 1009; C Beck 88 MLR 415.

6 *Munkenbeck v Steel* (1841) 8 M & W 858 at 870, per Parke B; *H Dakin & Co Ltd v Lee* [1916] 1 KB 566 at 579, per Cozens Hardy MR.

In a sense the substantial performance doctrine can be regarded as a qualification of the rule, rather than as an exception to it, and it will be noticed that in the cases of *Cutter v Powell*, *Sumpter v Hedges* and *Bolton v Mahadeva* there was in fact a failure of substantial performance. A significant key to understanding here is again the distinction between individual undertakings and the whole *corpus* of undertakings which a party makes. It will be very unusual for a party to have to perform exactly every undertaking he has made but much less uncommon for exact compliance with one requirement to be necessary. Clearly the distinctions between conditions and warranties, discussed earlier in this book,[7] can be of substantial significance here.

2 ACCEPTANCE OF PARTIAL PERFORMANCE BY THE PROMISEE

Although a promisor has only partially fulfilled his obligations under the contract, it may be possible to infer from the circumstances a fresh agreement by the parties that payment shall be made for the work already done or for the goods in fact supplied. Where this inference is justifiable the plaintiff sues on a *quantum meruit* to recover remuneration proportionate to the benefit conferred upon the defendant, but an essential of success is an implicit promise of payment by the defendant.

Thus it has been held that if a ship freighted to Hamburg is prevented by restraints of princes from arriving, and the consignees accept the cargo at another port to which they have directed it to be delivered, they are liable upon an implied contract to pay freight *pro rata itineris*.[8]

An implicit promise to pay connotes a benefit received by the promisor, but the receipt of the benefits is not in itself enough to raise the implication. No promise can be inferred unless it is open to the beneficiary either to accept or to reject the benefit of the work.[9] This option exists where partial performance takes the form of short delivery under a contract for the sale of goods. If less than the agreed quantity of goods is delivered, and the buyer, instead of exercising his right of rejection, elects to accept them, he must pay for them at the contract rate.[10]

This principle could not be applied in *Cutter v Powell* since it was not possible for the owners to return the mate's services after his death, nor in *Sumpter v Hedges*, and *Bolton v Mahadeva* since the work had been incorporated in the defendant's property and could not be unscrambled. This was clearly explained by Collins LJ in *Sumpter v Hedges*.[11]

> There are cases in which, though the plaintiff has abandoned the performance of a contract, it is possible for him to raise the inference of a new contract to pay for the work on a *quantum meruit* from the defendant's having taken the benefit of that work, but, in order that that may be done, the circumstances must be such as to give an option to the defendant to take or not to take the benefit of the work done ... Where, as in the case of work done on land, the circumstances are such as to give the defendant no option whether he will take the benefit of the work or not, then one must look to other facts than the mere taking the benefit in order to ground the inference of a new contract. In this case I see no other facts on

7 See above pp 162 ff.

8 *Christy v Row* (1808) 1 Taunt 300. But the acceptance must be such as to raise the fair inference that the further carriage of the cargo is dispensed with: *St Enoch Shipping Co Ltd v Phosphate Mining Co* [1916] 2 KB 624 at 628.

9 *Munro v Butt* (1858) 8 E & B 738.

10 Sale of Goods Act 1979, s 30(1).

11 [1898] 1 QB 673 at 676.

which such an inference can be founded. The mere fact that a defendant is in possession of what he cannot help keeping, or even has done work upon it, affords no ground for such an inference. He is not bound to keep unfinished a building which in an incomplete state would be a nuisance on his land.

3 PREVENTION OF PERFORMANCE BY THE PROMISEE

If a party to an entire contract performs part of the work that he has undertaken and is then prevented by the fault of the other party from proceeding further, the law does not allow him to be deprived of the fruits of his labour. He is entitled, of course, to recover damages for breach of contract, but alternatively he can recover reasonable remuneration on a *quantum meruit* for what he has done. The leading authority for this obvious rule is *Planché v Colburn*,[12] which is discussed later.[13]

4 DIVISIBLE COVENANTS[14]

Another avenue of escape is presented by the distinction between entire and divisible contracts. A contract may be described as divisible in several senses. In contracts of employment, it is usual to provide for payment at weekly or monthly intervals and this has the effect of ousting the principle in *Cutter v Powell* at least for every completed week or month.[15] Similarly in building contracts, it is usual to provide for payment at intervals, usually against an architect's certificate, and this avoids to a substantial extent the result in *Sumpter v Hedges*.[16]

In its technical connotation, the term divisible, means, however, rather that situation where one party's performance is made independent of the other's. In this sense, as we have already seen, it is more accurate to talk of divisible covenants rather than divisible contracts, since in relation to any particular contract, there may be some obligations which are dependent and others which are independent of the other party's.[17]

E CAN AN INNOCENT PARTY WHO HAS PAID IN ADVANCE RECOVER HIS PAYMENT IN THE EVENT OF A FAILURE OF PERFECT PERFORMANCE?

Suppose that in *Bolton v Mahadeva*[18] the defendant had paid for the work in advance, could he have recovered his payment? It is clear that he could not.

12 (1831) 8 Bing 14.

13 P 738, below. Perhaps, also on the facts of this case, the plaintiff could actually have insisted on going on to complete performance. See *White and Carter (Councils) Ltd v McGregor* [1962] AC 413, [1961] 3 All ER 1178, discussed p 685, below.

14 Notes to *Poraage v Cole* (1669) 1 Wm Saund 319; Williams 57 LQR 373, 490.

15 One justification for the actual result in *Cutter v Powell* is that the rate for the voyage was substantially in excess of what would have been earned on a daily, monthly, or weekly, basis, so that the contract had an aleatory element.

16 Such modification is practically essential granted that *Sumpter v Hedges* would apply where the builder stopped work because of financial difficulties, which are endemic in the building industry.

17 See *General Bill Posting Co Ltd v Atkinson* [1909] AC 118; *Taylor v Webb* [1937] 2 KB 283, [1937] 1 All ER 590; *Appleby v Myers* (1867) LR 2 CP 651 at 660-661; *Roberts v Havelock* (1832) 3 B & Ad 404; *Menetone v Athawes* (1764) 3 Burr 1592; *Heywood v Wellers* [1976] QB 446, [1976] 1 All ER 300.

18 [1972] 2 All ER 1322, [1972] 1 WLR 1009; p 590, above.

since the test for recovery in such cases is total failure of consideration. This concept is discussed more fully later,[19] but we may note immediately the striking difference in result that is caused. The defendant would have been limited to an action for damages, which would presumably have provided about £200,[20] and therefore was £600 better off because he was paying on completion rather than in advance. The result is particularly striking in a case such as *Cutter v Powell*[1] where the employer would have had no action for damages, since there was no breach of contract.[2]

F CAN THE INNOCENT PARTY TERMINATE THE CONTRACT?

This question is connected with but distinct from the question discussed in sections 2 and 4 above. So if, for instance, A charters a ship from B for a voyage charterparty to carry frozen meat from Auckland to Liverpool, it is clear that A is under no obligation to load the meat if on arrival at the docks he finds that the ship's refrigeration is not working,[3] but it does not follow that he is entitled to bring the contract to an end. This will depend on whether the law permits B time to repair the refrigerators and whether, if so, he is able to make use of it.

In the case of sale of goods, some very strict doctrines have been developed as to the buyer's right to reject goods which do not conform to the contract. The strictness of the law in this respect is well illustrated by the duty of the seller to make delivery of the goods in exact accordance with the terms of the contract. Thus, if he delivers more goods than have been ordered, the buyer may reject the whole consignment and cannot be required to select the correct quantity out of the bulk delivered.[4] Again, if less than the correct quantity is delivered, the buyer may reject the goods.[5] If the seller delivers the goods ordered accompanied by goods of a different description not ordered, the buyer may accept those which are in accordance with the contract and reject the rest, or he may reject the whole consignment.[6] In one case, for instance:

> A agreed to sell to B tinned fruits and to deliver them in cases each containing thirty tins. He tendered the correct quantity ordered, but about half the cases contained only twenty-four tins.

It was held that the buyer was entitled to reject the whole consignment.[7]

These rules are analogous to those discussed in section 4 since they turn on the classification of these obligations of the seller as conditions, but in this case there is no question of the buyer being able to keep the goods and not pay for them.

19 Pp 728-731, below.
20 The cost of making the work good.
1 (1795) 6 Term Rep 320; p 590, above.
2 But see Law Reform (Frustrated Contracts) Act 1943, discussed pp 596 ff, below.
3 *Stanton v Richardson* (1872) LR 7 CP 421; affd LR 9 CP 390.
4 Sale of Goods Act 1979, s 30(2); *Cunliffe v Harrison* (1851) 6 Exch 903.
5 Sale of Goods Act 1979, s 30(1).
6 Sale of Goods Act 1979, s 30(3); *Levy v Green* (1857) 8 E & B 575. The provision of s 30 of Sale of Goods Act 1979 are amended by the Sale and Supply of Goods Act 1994, s 4.
7 *Re Moore & Co and Landauer & Co* [1921] 2 KB 519. In *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 3 All ER 570, [1976] 1 WLR 989 there are clear hints that these cases may be due for review by the House of Lords.

In what circumstances does a breach entitle the innocent party to terminate the contract?[8]

A breach of contract, no matter what form it may take, always entitles the innocent party to maintain an action for damages, but the rule established by a long line of authorities is that the right of a party to treat a contract as discharged arises only in two types of case.

(1) Where the party in default has repudiated the contract before performance is due or before it has been fully performed.
(2) Where the party in default has committed what in modern judicial parlance is called a *fundamental* breach. A breach is of this nature if, having regard to the contract as a whole, the promise that has been violated is of major as distinct from minor importance.

We will deal separately with these two causes of discharge.

1 REPUDIATION

Repudiation in the present sense occurs where a party intimates by words or conduct that he does not intend to honour his obligations when they fall due in the future.[9] In the words of Lord Blackburn:

> Where there is a contract to be performed in the future, if one of the parties has said to the other in effect 'if you go on and perform your side of the contract I will not perform mine', that in effect, amounts to saying 'I will not perform the contract'. In that case the other party may say, 'you have given me distinct notice that you will not perform the contract. I will not wait until you have broken it,[10] but I will treat you as having put an end to the contract, and if necessary I will sue you for damages, but at all events I will not go on with the contract.'[11]

Repudiation may be either explicit or implicit. An example of the former type is afforded by *Hochster v De la Tour*,[12] where the defendant agreed in April to employ the plaintiff as his courier during a foreign tour commencing on 1 June. On 11 May he wrote that he had changed his mind and therefore would not require a courier. The plaintiff sued for damages before 1 June and succeeded.

A repudiation is implicit where the reasonable inference from the defendant's conduct is that he no longer intends to perform his side of the contract. Thus, 'if a man contracts to sell and deliver specific goods on a future day, and before the day he sells and delivers them to another, he is immediately liable to an action at the suit of the person with whom he first contracted'.[13] So also, if A conveys a house to C which he had previously agreed to devise to

8 Devlin [1966] CLJ 192; Treitel 30 MLR 139. See the valuable papers by Mr Justice McGarvie and Mrs Dwyer on Discharge of Contracts (Leo Cussen Institute for continuing legal education, 1980).

9 This is the most usual sense in which the word is used by the judges and it is retained in the present account, though admittedly it is ambiguous and has been adopted in other contexts: see *Heyman v Darwins Ltd* [1942] AC 356 at 378, 398, [1942] 1 All ER 337 at 350, 360.

10 Since the repudiation itself is an immediate breach of the contract, Lord Blackburn clearly meant that the innocent party need not wait until performance falls due.

11 *Mersey Steel and Iron Co v Naylor Benzon & Co* (1884) 9 App Cas 434.

12 (1853) 2 E & B 678.

13 Ibid at 688, per Lord Campbell.

B, A will be taken to have repudiated the contract.[14] The leading authority on this type of case is *Frost v Knight*[15] where the defendant, having agreed to marry the plaintiff upon the death of his father, broke off the engagement during the latter's lifetime. The plaintiff immediately sued for damages and was successful. This particular situation can no longer recur, since actions for breach of promise of marriage have now been abolished,[16] but the principles laid down in *Frost v Knight* are still of general application.

The result, then, of a repudiation, whether explicit or implicit, is that the innocent party acquires an immediate cause of action. But he need not enforce it. He can either stay his hand and wait until the day for performance arrives or treat the contract as discharged and take immediate proceedings.

A breach of contract caused by the repudiation of obligation not yet ripe for performance is called an *anticipatory breach*.[17] The word anticipatory is perhaps a little misleading, for at first sight it seems illogical to admit that a contract can be capable of breach before the time for its performance has arrived. Kelly CB, for instance, denied this possibility when *Frost v Knight* was argued before the Court of Exchequer. 'If it can be called a breach at all, it is a promissory or prospective breach only; a possible breach, which may never occur, and not an actual breach'.[18] This, however, is an untenable view. On appeal to the Exchequer Chamber, Cockburn CJ demonstrated that the defendant, in retracting his promise to marry the plaintiff, violated not a future, but an existing obligation.

> The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract.[19] On the facts of *Frost v Knight* this would have meant that the plaintiff would have to wait until the death of the defendant's father to see if perchance he was available for performance, meanwhile declining all offers of marriage!

Thus, the promisee, while awaiting performance, is entitled to assume that the promisor will himself remain ready, willing and able to perform his side of the contract at the agreed date. Any conduct by him which destroys this assumption 'is a breach of a presently binding promise, not an anticipatory breach of an act to be done in the future'.[20]

It is not all anticipatory breaches which will entitle the other party to treat the contract as at an end.

> If one party to a contract states expressly or by implication to the other party in advance that he will not be able to perform a particular primary obligation on his part under the contract when the time for performance arrives, the question whether the other party may elect to treat the statement as a repudiation depends on whether the threatened non-performance would have the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the primary obligation of the parties under the contract.[1]

14 *Synge v Synge* [1894] 1 QB 466; *Lovelock v Franklyn* (1846) 8 QB 371.
15 (1872) LR 7 Exch 111. See also *Short v Stone* (1846) 8 QB 358 (A married C having already promised to marry B).
16 Law Reform (Miscellaneous Provisions) Act 1970, s 1(1), which came into force on 1 January 1971. See Cretney 33 MLR 534.
17 Dawson [1981] CLJ 83. Carter 47 MLR 422.
18 *Frost v Knight* (1870) LR 5 Exch 322 at 326-327.
19 *Frost v Knight* (1872) LR 7 Exch 111 at 114.
20 *Bradley v Newsom, Sons & Co* [1919] AC 16 at 53-54, per Lord Wrenbury. See Lloyd 37 MLR 121.
1 Per Lord Diplock in *Afovos Shipping Co Sa v Pagnan* [1983] 1 All ER 449 at 455.

The proof of repudiation

Whether a breach of contract amounts to a repudiation is 'a serious matter not to be lightly found or inferred'.[2] What has to be established is that the defaulting party has made his intention clear beyond reasonable doubt no longer to perform his side of the bargain. Proof of such an intention requires an investigation inter alia of the nature of the contract, the attendant circumstances and motives which prompted the breach. In the words of Lord Selborne:

> You must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract ... and whether the other party may accept it as a reason for not performing his part.[3]

A refusal to proceed with the contract must not be regarded in isolation, for it may be that the party *bona fide*, albeit erroneously, concluded that he was justified in staying his hand. 'A mere honest misapprehension, especially if open to correction, will not justify a charge of repudiation.'[4] If, for instance, his refusal to proceed is based upon a misconstruction of the agreement, it does not represent an absolute refusal to fulfil his obligations, provided that he shows his readiness to perform the contract according to its true tenor. He has merely put its true tenor in issue.[5]

The House of Lords has been presented with this problem in two contrasting cases. In the first, *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc*[6] disputes arose between shipowners and time-charterers over the latter's deduction of counter-claims from their periodic payments of hire. The owners, acting on legal advice, instructed the master not to issue freight pre-paid bills of lading, and to require the bills of lading to be endorsed with the charterparty terms and informed the charterers of these instructions. It was accepted that the owners believed that they were entitled to take these steps and that they were exceptionally coercive to the charterers, who would not be able to operate the ships if they were unable to obtain freight pre-paid bills of lading. The charterers claimed that the owners had wrongfully repudiated the contract and this view was upheld by the House of Lords. Little weight was attached to the owners' belief that they were entitled to act in this way, when weighed against the disastrous impact of the threatened conduct on the charterers' business.

At first sight, this decision is not easy to reconcile with that in the second case, *Woodar Investment Development Ltd v Wimpey Construction (UK) Ltd.*[7]

> The plaintiffs agreed to sell fourteen acres of land to the defendants, completion to be two months after the granting of outline planning permission or 21 February 1980, whichever was the earlier. The market

2 *Ross Smyth & Co Ltd v Bailey, Son & Co* [1940] 3 All ER 60 at 71, per Lord Wright.
3 *Mersey Steel and Iron Co v Naylor Benzon & Co* (1884) 9 App Cas 434 at 438-439; *James Shaffer Ltd v Findlay, Durham and Brodie* [1953] 1 WLR 106; *Peter Dumenil & Co Ltd v James Ruddin Ltd* [1953] 2 All ER 294, [1953] 1 WLR 815.
4 *Ross Smyth & Co Ltd v Bailey, Son & Co* [1940] 3 All ER 60 at 72, per Lord Wright.
5 *Sweet and Maxwell Ltd v Universal News Services Ltd* [1964] 2 QB 699, [1964] 3 All ER 30 esp per Buckley J at 737 and 45, respectively.
6 [1979] AC 757, [1979] 1 All ER 307; Carter [1979] CLJ 270.
7 [1980] 1 All ER 571, [1980] 1 WLR 277; Nicol and Rawlings 43 MLR 696; Carter [1980] CLJ 256.

> having turned against them, the defendants claimed to exercise a right to rescind granted by the contract, but exercisable only in circumstances which did not exist. It was accepted that although their motive was to escape from an unprofitable transaction, the defendants honestly believed that they were entitled so to act. The plaintiffs claimed that the defendants' conduct amounted to a repudiatory breach.

The House of Lords held (Lords Salmon and Russell dissenting) that it did not.

There is clearly force in the minority view that the two cases are identical. In both cases, one party honestly took a view of the contract's meaning, which had no real merit and substance and relying on it, indicated a determination to depart from the contract in a fundamental way. It is however possible to detect a significant difference. In the *Woodar* case, there was no call for the plaintiffs to take immediate action and they could, for instance, have taken out a construction summons to test the correctness of their view of the contract's meaning. Again, the time for completion was some way off. It would seem clear that if Wimpeys had actually refused to complete on this ground, that would have been a repudiatory breach. In the *Federal Commerce* case, although the breach was probably anticipatory, the gap between repudiation and performance was fairly short and the pressure on the charterers correspondingly great.

The question of repudiation often arises where, in the case of a contract for the sale of goods to be delivered by instalments which are to be separately paid for, either the seller makes short deliveries or the buyer neglects to pay for one or more of the instalments. A default of either kind does not necessarily amount to a discharge. It depends in each case, as the Sale of Goods Act 1979 provides, upon the terms of the contract and the particular circumstances whether the breach is repudiation of the whole contract or merely a ground for the recovery of damages.[8]

There have been many decisions upon instalments contracts, several of which are difficult to reconcile; but the leading authority is *Mersey Steel and Iron Co v Naylor Benzon & Co*,[9] where the facts were these:

> The respondents sold to the appellants 5,000 tons of steel, to be delivered at the rate of 1,000 tons monthly, commencing in January, and payment to be made within three days after receipt of shipping documents. In January the sellers delivered about half the correct quantity, and in February made a further delivery, but shortly before payment for these deliveries became due, a petition was presented for winding-up their company. Thereupon the buyers, acting *bona fide* under the erroneous legal advice that pending the petition they could not safely pay the price due without the leave of the court, refused to make any payment unless this leave was obtained. The sellers then declared that they would treat this refusal to pay as discharging them from all further obligation.

It was held that it was impossible to ascribe to the conduct of the buyers the character of a repudiation of the contract.

8 S 31(2); *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 2 All ER 216, [1971] 1 WLR 361.

9 (1884) 9 App Cas 434.

> It is just the reverse: the purchasers were desirous of fulfilling the contract; they were advised that there was a difficulty in the way, and they expressed anxiety that that difficulty should be as soon as possible removed by means which were suggested to them, and which they pointed out to the solicitors of the company.[10]

It will often be difficult in a contract for delivery by instalments to decide whether a particular breach defeats the whole object of the contract so as to amount to a complete repudiation of his obligations by the party in default. It has been indicated, however, by the Court of Appeal that the chief considerations are 'first, the ratio quantitatively which the breach bears to the contract as a whole, and secondly, the degree of probability or improbability that such a breach will be repeated'.[11] It has also been recognised that the further the parties have proceeded in the performance of the contract the more difficult it is to infer that a breach represents a complete repudiation of liability.[12]

The summary dismissal of an employee, founded upon his alleged repudiation of the contract, affords a further illustration of the warning that repudiation of the contract is a serious matter not lightly to be inferred. So drastic a step by the employer will not be justified unless the conduct of the employee has disclosed a deliberate intention to disregard the essential requirements of a contract of service.[13]

2 FUNDAMENTAL BREACH

The second class of case in which a party is entitled to treat himself as discharged from further liability is where his co-contractor, without expressly or implicitly repudiating his obligations, commits a fundamental breach of the contract. Of what nature, then, must a breach be before it is to be called 'fundamental'? There are two alternative tests that may provide the answer. The court may find the decisive element either in the importance that the parties would seem to have attached to the term which has been broken or to the seriousness of the consequences that have in fact resulted from the breach. We have already discussed this question at length[14] and suggested that although the tests are often stated as alternatives, they in fact both have a part to play.

If one applies the first test the governing principle is that everything depends upon the construction of the contract in question. The court has to decide whether, at the time when the contract was made, the parties must be taken to have regarded the promise which has been violated as of major or of minor importance. In the words of Bowen LJ:

> There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will

10 Ibid at 441, per Lord Selborne.
11 *Maple Flock Co Ltd v Universal Furniture Products (Wembley) Ltd* [1934] 1 KB 148 at 157.
12 *Cornwall v Henson* [1900] 2 Ch 298 at 304, per Collins LJ.
13 Contrast, for instance, *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285, [1959] 1 WLR 698 (dismissal not justified), with *Pepper v Webb* [1969] 2 All ER 216, [1969] 1 WLR 514 (dismissal justified); see Grime 32 MLR 575. See also *Cantor Fitzgerald International v Callaghan* [1999] 2 All ER 411.
14 Pp 162 ff, above. *Bunge Corpn v Tradax Export SA* [1981] 2 All ER 513, [1981] 1 WLR 711.

> best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability.[15]

Whether one looks to promise or breach one of the difficulties has been to formulate with any approach to precision the degree of importance that a promise or breach must possess to warrant the discharge of the contract. A variety of phrases has been used in an endeavour to meet this need. It has been said, for instance, that no breach will discharge the innocent party from further liability unless it goes to the whole root of the contract, not merely to part of it,[16] or unless it goes so much to the root of the contract that it makes further performance impossible[17] or unless it affects the very substance of the contract.[18] Sachs LJ, 'at the risk of being dubbed old-fashioned', has recently stated his preference for the expression 'goes to the root of the contract', which has been the favourite of the judges for at least 150 years.

> That leaves the question whether the breach does go to the root as a matter of degree for the court to decide on the facts of the particular case in the same way as it has to decide which terms are warranties and which are conditions.[19]

To speak of 'the root of the contract' is, no doubt, to rely on a metaphor; and Lord Sumner once said that 'like most metaphors it is not nearly so clear as it seems'.[20] It does not solve the problem, but rather restates it in picturesque language. Yet a picture is not without value; and the phrase may help judges to crystallise the impression made on their minds by the facts of a particular case. In the Australian case of *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd*,[1] Jordan CJ said:

> The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor.

Illustrations of cases in which the question of fundamental breach has been raised will be found at an earlier stage in this book.[2] But it may be useful to call attention to the early case of *Ellen v Topp*,[3] where the facts were these:

> An infant was placed by his father as apprentice to learn the trade of a master who was described in the contract as an 'auctioneer, appraiser and corn factor'. After about half the contractual period had elapsed the master

15 *Bentsen v Taylor, Sons & Co (No 2)* [1893] 2 QB 274 at 281.
16 *Davidson v Gwynne* (1810) 12 East 381 at 389, per Lord Ellenborough.
17 *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at 64, [1962] 1 All ER 474 at 484 per Upjohn LJ.
18 *Wallis, Son and Wells v Pratt and Haynes* [1910] 2 KB 1003 at 1012, per Fletcher Moulton LJ.
19 *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 2 All ER 216 at 227, [1971] 1 WLR 361 at 374.
20 *Bank Line Ltd v A Capel & Co* [1919] AC 435 at 459.
1 (1938) 38 SRNSW 632 at 641. Though the decision of the learned Chief Justice was reversed (1938) 61 CLR 286, his test of essentiality was unanimously approved by the High Court of Australia in the later case of *Associated Newspapers Ltd v Bancks* (1951) 83 CLR 322.
2 Pp 189 ff, above.
3 (1851) 6 Exch 424.

abandoned his trade as a corn factor, whereupon the apprentice absented himself on the ground that this abandonment relieved him from further liability.

The master sued for breach of contract and argued that this retirement from the actual practice of one of the three trades did not discharge the contract, since he was still able to teach the apprentice the theory of a corn factor's business. It was held, however, that the apprentice was discharged from further liability. The object of the contract, as clearly shown by its terms, was that the infant should serve the master after the manner of an apprentice in the three trades specified; but, as the court explained, service of this nature imports that the master shall actually carry on the trade which the apprentice is to learn, for otherwise 'the one is teaching and the other learning the trade, not as master and apprentice, but as instructor and pupil'. In the present case, therefore, the master had wilfully made it impossible for the essential object or the substantial benefit of the contract to be attained.

G WHAT IS THE EFFECT OF A REPUDIATION OR A FUNDAMENTAL BREACH?[4]

It must be observed that, even if one of the parties wrongfully repudiates all further liability or has been guilty of a fundamental breach, the contract will not automatically come to an end. Since its termination is the converse of its creation, principle demands that it should not be recognised unless this is what both parties intend. The familiar test of offer and acceptance serves to determine their common intention. Where A and B are parties to an executory contract and A indicates that he is no longer able or willing to perform his outstanding obligations, he in effect makes an offer to B that the contract shall be discharged.

Therefore B is presented with an option. He may either refuse or accept the offer.[5] More precisely, he may either affirm the contract by treating it as still in force, or on the other hand he may treat it as finally and conclusively discharged. The consequences vary according to the choice that he prefers.

1 THE INNOCENT PARTY TREATS THE CONTRACT AS STILL IN FORCE

If the innocent party chooses the first option and, with full knowledge of the facts, makes it clear by words or acts, or even by silence,[6] that he refuses to accept the breach as a discharge of the contract, the effect is that the *status quo ante* is preserved intact. The contract 'remains in being for the future on both sides. Each [party] has a right to sue for damages for *past or future breaches*'.[7] Thus, for instance, a seller of goods who refuses to treat a fundamental breach

4 McGarvie 53 Aust LJ 687; Shea 42 MLR 623; Dawson 96 LQR 239; Hetherington 96 LQR 403; Nicholls 3 JCL 132, 163; Priestley 3 JCL 218; Mason 3 JCL 232.

5 *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 QB 699 at 731, [1968] 3 All ER 513 at 527, per Winn LJ.

6 Ibid at 732 and 527-528 respectively.

7 *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447 at 464-465, [1970] 1 All ER 225 at 233, per Lord Denning MR.

as a discharge of the contract remains liable for delivery of possession to the defaulting buyer, while the latter remains correspondingly liable to accept delivery and to pay the contractual price.[8]

The significance of the rule that the contract continues in existence is well illustrated by the case where a party has repudiated his obligations.

> In that case he[9] keeps the contract alive for the benefit of the other party as well as his own: he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.[10]

The case of *Avery v Bowden* illustrates the way in which supervening circumstances may operate to relieve the party in default from all liability.[11]

> The defendant chartered the plaintiff's ship at a Russian port and agreed to load her with a cargo within forty-five days. Before this period had elapsed he repeatedly advised the plaintiff to go away as it would be impossible to provide him with a cargo. The plaintiff, however, remained at the port in the hope that the defendant would fulfil his promise, but the refusal to load was maintained, and then, before the forty-five days had elapsed, the Crimean war broke out between England and Russia.

On the assumption that the refusal to load amounted to a complete repudiation of liability by the defendant, the plaintiff might have treated the contract as discharged; but his decision to ignore this repudiation resulted, as events turned out, in the defendant being provided with a good defence to an action for breach. He would have committed an illegal act if he had loaded a cargo at a hostile port after the declaration of war. Similarly, in *Fercometal SARL v Mediterranean Shipping Co, SA The Simona*[12] the contract was a charterparty which called for a ship to go to Durban and carry a cargo of steel coils to Bilbao. The charterparty contained a cancellation clause under which the charterer could cancel if the vessel was not ready to load on or before 9 July. On 2 July the ship owners asked if they might have an extension of the cancellation date because they wished to load another cargo first. The charterers responded to this by purporting to cancel the charterparty. This they were clearly not entitled to do since there is clear authority that one cannot exercise the cancellation clause in advance, even if it is very likely or morally certain that the ship will not be ready to load in time. So the purported cancellation by the charterers was undoubtedly a repudiation of the contract. However, the ship owners chose to carry on with the contract and in fact the ship arrived in Durban on 8 July and gave notice of readiness to load on that day. In fact, the ship was not ready to load, on either 8 July or 9 July. The charterers had loaded the cargo on another ship and the ship owners brought an action for dead freight. The House of Lords held that the ship owners' action failed. By refusing to accept the charterers' repudiation

8 *R V Ward Ltd v Bignall* [1967] 1 QB 534, [1967] 2 All ER 449. The position that arises if, instead of merely continuing to tender performance, the innocent party fully completes his side of the contract in defiance of a repudiation, thereby increasing the loss flowing from the breach, was considered by the House of Lords in *White and Carter (Councils) Ltd v McGregor* [1962] AC 413, [1961] 3 All ER 1178; discussed at pp 685 ff, below.

9 Ie the innocent party.

10 *Frost v Knight* (1872) LR 7 Exch 111 at 112, per Cockburn CJ; see also *Johnstone v Milling* (1886) 16 QBD 460 at 467, per Lord Esher.

11 (1855) 5 E & B 714.

12 [1989] AC 788, [1988] 2 All ER 742.

and trying to carry on with performance, the ship owners had given the charterers a second chance to cancel, which they were entitled to take, as the ship was not in fact ready to load on the contract date. Having kept the contract alive, the ship owners had kept all of it alive, including the charterers' right to cancel if the ship was not ready to load in time.

On the other hand, a refusal to treat a breach of contract as a discharge may operate to the disadvantage of the defendant.

Supposing that, in the case of a contract for the sale of goods to be delivered in May, the seller announced in February that he will not make delivery, but the buyer refuses to accept this repudiation and ultimately sues for breach at the contractual date for performance. The measure of damages will depend upon the market price of the goods, not at the date of the repudiation but at the time appointed for performance. If, therefore, the market price of the goods is higher in May than it was in February the amount payable by the seller as damages will be correspondingly higher.[13]

It is obvious that a party who elects to disregard a repudiation by his co-contractor cannot recover damages at law for breach of contract: if the contract is still in being it has not yet been broken. As Asquith LJ remarked in one case: 'An unaccepted repudiation is a thing writ in water and of no value to anybody: it affords no legal rights of any sort or kind.'[14] But this is not true where the equitable remedy of specific performance is sought. If the circumstances justify it, equity is prepared to protect the innocent party even though he cannot plead the breach of contract upon which the common law remedy of damages depends. In one case, for instance:

> By a written contract signed on 19 February, the vendor agreed to sell a plot of land to the purchaser, completion to be on 19 August. A few minutes later the vendor repudiated the contract. The purchaser elected to affirm the contract and on 2 August, some six weeks before the agreed date for completion, he sued for a decree of specific performance. The court granted the decree.[15]

This did not mean that the purchaser could call for the land to be conveyed to him before 19 August, but that on that date he would be at liberty, without taking out a new writ, to apply for a consequential direction requiring the vendor to execute a conveyance.

In principle an election by the innocent party to treat the contract as still in force depends on the innocent party knowing of his rights. However an innocent party, who has not in fact made an election, may behave in such a way that the court will hold that he is estopped from denying that he has made an election.[16]

13 *Roper v Johnson* (1873) LR 8 CP 167; *Michael v Hart* [1902] 1 KB 482; *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] AC 91, [1978] 1 All ER 515; *Lusograin Commercio Internacional De Cereas Ltd v Bunge AG* [1986] 2 Lloyd's Rep 654.

14 *Howard v Pickford Tool Co* [1951] 1 KB 417 at 421.

15 *Hasham v Zenab* [1960] AC 316; REM 76 LQR 200.

16 *Cerealmangimi SpA v Alfred C Toepfer, The Eurometal* [1981] 3 All ER 533 (where the innocent party appears to have known of all the relevant facts but not that they entitled him to terminate); *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils, The Post Chaser* [1982] 1 All ER 19. Clearly the guilty party could not allege waiver where he had no reason to believe that the innocent party knew of his rights. As to position where the innocent party has the means of knowing his rights see *Bremer Handelgesellschaft MbH v Vanden Avenue-Izegem PVBA* [1978] 2 Lloyd's Rep 109 and *Bremer Handelgesellschaft MbH v C Mackprang Jr* [1979] 1 Lloyd's Rep 221; *Procter & Gamble Philippine Manufacturing Corpn v Peter Cremer GmbH & Co, The Manila* [1988] 3 All ER 843.

2 THE INNOCENT PARTY TREATS THE CONTRACT AS AT AN END

A party who treats a contract as discharged is often said to *rescind* the contract. To describe the legal position in such a manner, however, must inevitably mislead and confuse the unwary. In its primary and more correct sense, as we have already seen,[17] rescission means the retrospective cancellation of a contract *ab initio*, as for instance where one of the parties has been guilty of fraudulent misrepresentation. In such a case the contract is destroyed as if it had never existed, but its discharge by breach never impinges upon rights and obligations that have already matured. It would be better therefore in this context to talk of *termination* or *discharge* rather than of *rescission*.[18]

This has recently been the subject of a full and authoritative statement by the House of Lords in *Johnson v Agnew*.[19]

> By a contract in writing the vendors agreed to sell a house and some grazing land to the purchaser. The properties were separately mortgaged and the purchase price agreed was sufficient to pay off these mortgages and also a bank loan which the vendors had secured to buy another property. The purchaser failed to complete on the agreed completion date, and a fortnight later the vendors issued a notice making time of the essence,[20] and fixing 21 January 1974 as the final completion date. The purchaser failed to complete on this day and it is clear that the vendors were thereupon entitled to bring the contract to an end. They chose instead to sue for specific performance, which was obtained on 27 June 1974. Before the order was entered, however, both the mortgagees of the house and the mortgagees of the grazing land had exercised their rights to possession and had sold the properties.[1] The vendors thereupon applied to the court for leave to proceed by way of an action for damages.

The House of Lords held that by choosing to sue for specific performance the vendors had not made a final election and that it was open to the Court to allow the vendors to sue for damages if it appeared equitable to do so Lord Wilberforce said:[2]

> It is important to dissipate a fertile source of confusion and to make clear that although sometimes the vendor is referred to ... as 'rescinding' the contract, this so-called 'rescission' is quite different from rescission *ab initio*, such as may arise for example, in cases of mistake, fraud or lack of consent. In those cases the contract is treated in law as never having come into existence ... In the case of an accepted repudiatory breach the contract has come into existence but has been put an end to, or discharged. Whatever contrary indications may be disinterred from old authorities, it is now quite clear, under the general law of contract, that acceptance of a repudiatory breach does not bring about 'rescission *ab initio*'.[3]

17 P 311, above.

18 See Albery 91 LQR 337, discussing *Horsler v Zorro* [1975] Ch 302, [1975] 1 All ER 584. In his instructive article in 53 Aust LJ 687 Mr Justice McGarvie criticises the use of the word *termination* in the ninth edition of this work and prefers the term discharge. It may perhaps be answered that though it is clear that *rescission* is the wrong word, what is the right word is unclear.

19 [1980] AC 367, [1979] 1 All ER 883. Woodman 42 MLR 696.

20 See p 613, below.

1 For substantially less than the purchasers had agreed to pay.

2 Ibid at 392-393 and 889, respectively.

3 See also *Buckland v Farmer and Moody* [1978] 3 All ER 929, [1979] 1 WLR 221 and *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, [1980] 1 All ER 556.

If the innocent party elects to treat the contract as discharged, he must make his decision known to the party in default. Once he has done this, his election is final and cannot be retracted.[4] The effect is to terminate the contract for the future as from the moment when the acceptance is communicated to the party in default. The breach does not operate retrospectively. The previous existence of the contract is still relevant with regard to the past acts and defaults of the parties. Thus the party in default is liable in damages both for any earlier breaches and also for the breach that has led to the discharge of the contract, but he is excused from further performance.[5] But this does not mean, in the case of an anticipatory breach, that the obligations which would have matured after the election are to be completely disregarded. They may still be relevant to the assessment of damages. This is exemplified by *Moschi v Lep Air Services Ltd*[6] on the following facts:

> The defendant company agreed to pay £40,000 to the plaintiffs in seven weekly instalments. X, the managing director of the defendants, personally guaranteed the payment of this debt. At the end of three weeks, the payments were so seriously in arrear as to amount to a repudiation of the contract by the defendants. On 22 December, the plaintiffs accepted this repudiation and then sued the guarantor, X, for the recovery of £40,000, less what had already been paid.

One of the defences raised by the guarantor was that he was not liable in respect of instalments falling due after 22 December. This defence was rejected by the House of Lords.[7]

This decision is in line with the earlier decision of the Court of Appeal in the case of *The Mihalis Angelos*.[8]

> By clause 11 of a charterparty, the owners stated that their ship was 'expected ready to load at Haiphong under this charter about July 1st, 1965'. Clause 11 provided that, if the ship was not ready to load on or before 20 July 1965, the charterers should have the option of cancelling the contract. On 17 July, the charterers repudiated the contract and the owners

4 *Scarf v Jardine* (1882) 7 App Cas 345 at 361, per Lord Blackburn. Such is the general principle wherever there is a choice between two remedies. The election must be made without unreasonable delay; *Allen v Robles* [1969] 3 All ER 154, [1969] 1 WLR 1193. As to whether the innocent party can extend the time for decision by reserving his position, see *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1985] 3 All ER 777, [1988] 1 WLR 1362 (affirmed on other grounds [1985] AC 191, [1984] 3 All ER 229). Difficult questions may arise as to whether or not the innocent party has in fact elected to treat the contract as discharged. See *Vitol SA v Norelf Ltd, The Santa Clara* [1994] 4 All ER 109; reversed by the Court of Appeal [1995] 3 All ER 971; reversed in turn by the House of Lords [1996] 3 All ER 193. Note that at the end of the day the House of Lords held that question whether the innocent party had elected to terminate the contract was a question of fact within the exclusive jurisdiction of the arbitrator.

5 *Mussen v Van Diemen's Land Co* [1938] Ch 253 at 268, [1938] 1 All ER 210 at 216, per Farwell J; *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 ChD 339 at 365, per Bowen LJ; *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 63, per Lord Wright; *R V Ward Ltd v Bignall* [1967] 1 QB 534 at 548, [1967] 2 All ER 449 at 455, per Diplock LJ.

6 [1973] AC 331, [1972] 2 All ER 393.

7 See also *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 2 All ER 29, [1980] 1 WLR 1129.

8 [1971] 1 QB 164, [1970] 3 All ER 125.

> accepted the repudiation. The majority of the Court of Appeal held that the option to cancel the contract was not exercisable before 20 July even though on the 17th it was certain that the ship would not arrive before 20 July. The charterers were thus guilty of an 'anticipatory breach'.[9]

One question that arose was whether the owners could recover substantial damages in respect of the wrongful repudiation on the ground that its acceptance by them had put an end to the contract, together with the right of cancellation. The arbitrators took the view that though the contract was terminated in the sense that its performance was no longer binding upon the owners, yet 'it (or its ghost)' survived for the purpose of measuring the damages. The Court of Appeal accepted this view and granted the owners only nominal damages. In the case of an anticipatory breach, the innocent party is entitled to recover the true value of the contractual rights which he has lost. If these 'were capable by the terms of the contract of being rendered either less valuable or valueless in certain events, and if it can be shown that those events were, at the date of acceptance of repudiation, predestined to happen, then in my view the damages which he can recover are not more than the true value, if any, of the rights which he has lost, having regard to those predestined events'.[10] So, since the charterers would certainly have lawfully cancelled on 20 July, the owners have suffered no loss.

H THE EFFECT OF DISCHARGING THE CONTRACT FOR A BAD REASON, WHEN A GOOD REASON ALSO EXISTS

The discharge of a contract, based upon a reason that is in fact inadequate, may nevertheless 'be supported if there are at the time facts in existence which would have provided a good reason'.[11] For instance, a seller of goods deliverable by instalments makes a short delivery, whereupon the buyer claims that the contract is discharged. This, however, may be unwarranted, since an intention on the part of the seller to repudiate his obligations is not inferable from the circumstances that led to the short delivery. If it is then discovered that the goods already delivered do not comply with their contractual description, this fundamental breach suffices to justify the discharge of the contract.[12]

It would seem that this principle requires some qualification in the light of the decision of the Court of Appeal in *Panchaud Frères SA v Establissements General Grain Co.*[13]

9 Or, rather, they would have been if owners had not themselves been in breach of condition; see pp 168 ff, above.

10 [1971] 1 QB 164 at 210, [1970] 3 All ER 125 at 142, per Megaw LJ.

11 *Universal Cargo Carriers Corpn v Citati* [1957] 2 QB 401 at 447, [1957] 2 All ER 70 at 89, per Devlin J.

12 Cf *Denmark Productions Ltd v Bosobel Productions Ltd* [1969] 1 QB 699 at 722, per Salmon LJ; at 732, per Winn LJ; *The Mihalis Angelos* [1971] 1 QB 164 at 195-196, 200 and 204. This principle has often been applied in actions by servants for wrongful dismissal but it does not apply to the statutory action for unfair dismissal. *W Devis & Sons Ltd v Atkins* [1977] AC 931, [1977] 2 All ER 321.

13 [1970] 1 Lloyd's Rep 53; see also *Carvill v Irish Industrial Bank Ltd* [1968] IR 325; *Cyril Leonards & Co v Simo Securities Trust Ltd* [1971] 3 All ER 1313, [1972] 1 WLR 80; Denning *The Discipline of Law* pp 210-214.

> The plaintiff contracted to sell to the defendant 5,300 metric tons Brazilian yellow maize cif Antwerp, shipment to be June/July 1965. The bill of landing was dated 31 July 1965, but amongst the other shipping documents was a certificate of quality which stated that the goods were loaded 10 August to 12 August 1965. This would have entitled the defendant to reject the shipping documents but they were received without objection (presumably, though this is not explicitly stated in the report, because the inconsistency was not detected). When the ship arrived the defendant rejected the goods on another ground ultimately held insufficient and only three years later sought to justify rejection on the ground that the goods had been shipped out of time.

The Court of Appeal held that it was too late for the defendant to rely on this ground since in the words of Winn LJ:[14]

> There may be an inchoate doctrine stemming from the manifest convenience of consistency in pragmatic affairs, negativing any liberty to blow hot and cold in commercial conduct.[15]

I SOME POSSIBLE SPECIAL CASES

We must now consider some cases where it has sometimes been thought that these rules do not apply in the ordinary way.

1 WRONGFUL DISMISSAL OF SERVANTS

It is often said that the wrongful dismissal of a servant employed under a contract of personal services provides an exception to the rule that a party may elect to keep a repudiated contract alive and that despite the unjustifiable repudiation of his obligations by the employer, the employee, though ready and willing to serve for the agreed period, has no option but to treat the contract as discharged.[16] On the other hand it has been doubted whether this is correct.[17] It is true that as a rule specific performance will not be ordered of a contract of personal service[18] and that since a servant cannot ordinarily perform his contract of employment if his master wrongfully excludes him from the workplace, in practice he must sue either for damages for breach of contract, in which case he must do what he reasonably can to mitigate his loss

14 [1970] 1 Lloyd's Rep at 59.

15 See also *The Vladimir Ilich* [1975] 1 Lloyd's Rep 322. A helpful discussion of what *Panchaud Freres* decided can be found in *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 4 All ER 514; Carter 14 JCL 239.

16 See eg *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 QB 699, [1968] 3 All ER 513 at 524, per Salmon LJ; at 737 and 538, respectively, per Harman LJ; *contra*, at 731-732 and 528, respectively, per Winn LJ. See Freedland 32 MLR 314.

17 See eg *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 2 All ER 216, [1971] 1 WLR 361 at 370, per Salmon LJ, and at 229 and 376, respectively, per Sachs LJ.

18 The rule that a servant cannot obtain specific performance is deducted from the undoubtedly sensible rule that the master cannot get specific performance. This may have made excellent sense in the eighteenth century but in a modern industrial context it no longer appears inevitable. Historically the law would appear to be moving slowly but perceptibly toward a remedy by way of reinstatement. See Williams 38 MLR 299.

by obtaining other employment,[19] or on a *quantum meruit* for the value of the work that he has already done.[20] In *Hill v C A Parsons & Co Ltd*[1] the Court of Appeal granted a declaration that the contract of service still subsisted.

The decision in *Thomas Marshall (Exports) Ltd v Guinle*[2] took the view that contracts of service are not an exceptional case and are subject to the general rule that repudiation does not terminate the contract until accepted.

> The defendant had been engaged as managing director of the plaintiff company under a ten-year service agreement. After six years he purported to resign and began to compete with the plaintiff through companies he had formed himself. Such competition was in clear breach of express terms of the service agreement but the defendant argued that the service agreement was no longer in force because of his wrongful repudiation.

After an elaborate examination of the authorities which he found 'in a far from satisfactory state',[3] Megarry V-C rejected this argument and granted an injunction restraining the defendant from such competition.

The same view was taken by the majority of the Court of Appeal (Shaw LJ dissenting) in *Gunton v London Borough of Richmond upon Thames.*[4] In this case the plaintiff was employed by the defendant Council under a contract which could be terminated either by a month's notice or by disciplinary procedures. He was dismissed by the giving of a month's notice after the carrying out of disciplinary procedures which contained technical irregularities. It was agreed that this dismissal was in breach of contract in that once the disciplinary procedures were invoked the plaintiff was entitled to one month's notice to run from the completion of correctly conducted contractual disciplinary procedures. The plaintiff sought a declaration that the letter of dismissal was ineffective lawfully to terminate his employment. Though they doubted whether it would make much practical difference, the majority of the court held that the plaintiff was so entitled. Shaw LJ thought this conclusion 'has no reality in relation to a contract of service where the repudiation takes the form of an express and direct termination of the contract in contravention of its terms'.[5] But it may be noted that an employee may have good reasons for wanting to keep the contract technically alive, for example, in order to complete a qualifying period of service for pension rights or for statutory entitlement to redundancy rights, maternity leave, etc.

2 LEASES

In *Total Oil (Great Britain) Ltd v Thompson Garages (Biggin Hill) Ltd*[6] the Court of Appeal held that the general rule did not apply to a contract contained in a lease. The facts were as follows:

> A lease of a garage for fourteen years, granted by the plaintiffs, an oil company, to the defendants, contained a tying covenant by which the

19 Pp 682 ff, below.
20 *Planché v Colburn* (1831) 5 C & P 58.
1 [1972] Ch 305, [1971] 3 All ER 1345.
2 [1979] Ch 227, [1978] 3 All ER 193; Benedictus 95 LQR 14; Thomson 42 MLR 91.
3 Ibid at 239 and 202, respectively.
4 [1980] 3 All ER 577, [1981] Ch 448; Thomson 97 LQR 8.
5 Ibid at 582 and 459, respectively.
6 [1972] 1 QB 318, [1971] 3 All ER 1226.

> defendants agreed to sell only motor fuel supplied by the plaintiffs. Payment for each load supplied was to be cash on delivery. On two occasions, the cheques given by the defendants were not honoured, whereupon the plaintiffs refused to supply more fuel unless they first received a banker's draft for each load ordered prior to its dispatch from their depot. This alteration of an essential term amounted to a repudiation of the contract, and the defendants accepted it as a discharge from liability to observe the tying covenant.

In the present action an injunction was sought restraining the defendants from selling fuel other than that supplied by the plaintiffs. The Court of Appeal held that the plaintiffs were entitled to this relief.

There was no obvious authority upon which the court could rely. Lord Denning MR, however, stressed that the tying covenant was inseparable from the lease. Together, they formed one composite legal transaction. He then invoked the doctrine of frustration, and recalled that in *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd*[7] two of the Law Lords were of opinion that frustration does not bring a lease to an end.[8] He then said: 'Nor, I think, does repudiation and acceptance.'[9] Edmund Davies LJ and Stephenson LJ agreed with his reasoning.

Thus the lease and its covenants still stood, and so long as the plaintiffs remained in breach of their obligations they could not enforce the tying covenant. But in the opinion of the court, they had a *locus poenitentiae*, and since they had now agreed to resume the practice of cash on delivery, they were entitled to the injunction which they claimed.

In so far as this decision rests on the non-applicability of the doctrine of frustration to leases, it would appear to have been overtaken by the more recent decision of the House of Lords in *National Carriers Ltd v Panalpina (Northern) Ltd*[10] that the doctrine can apply to leases.

It is noteworthy that in this case the tenant did not purport to terminate the lease and the decision might perhaps be supported on the ground that he could not elect to terminate part of the transaction but must choose between terminating the lease and keeping the whole transaction alive. Obviously this would be an unattractive choice to the tenant but the distinction is important in the converse case of repudiation by a tenant to which the Court of Appeal's reasoning is equally applicable.

It is interesting to note that different reasoning was adopted by the Supreme Court of Canada in *Highway Properties Ltd v Kelly, Douglas & Co Ltd.*[11]

> The plaintiff was the developer of a shopping centre and let premises in the centre to the defendant for fifteen years for use as a supermarket. The defendant covenanted to open for business within thirty days of completion 'and to carry on its business on the said premises continuously'. This covenant was of great importance to the plaintiff since the viability of such shopping centres as a whole depends on a number of major shops acting as magnets for customers. The willingness of other shopkeepers to take tenancies of the smaller units is often dependent on the presence of such

7 [1945] AC 221. See p 643, below.
8 Lord Russell of Killowen and Lord Goddard.
9 [1972] 1 QB 318 at 324; [1971] 3 All ER 1226 at 1229.
10 [1981] AC 675; [1981] 1 All ER 161; see p 645, below.
11 (1971) 17 DLR (3d) 710.

major stores within the complex. The defendant opened for business but after five months abandoned the premises and removed its stock. The plaintiff elected to retake possession of the premises with a view to re-letting. Eventually the premises were re-let in a partitioned form to three new tenants at a lower rent but the value of business at the shopping centre fell off with the closing of the supermarket and many other tenants left their premises.

The defendant argued that the plaintiff's remedies were determined by the law of land rather than the law of contract and that while it would have been open to the plaintiffs to leave the premises vacant and sue the defendant for rent, they had by terminating the lease brought their right to rent to an end. The defendant further argued that the plaintiffs could not recover damages under the ordinary principles of the law of contract for consequential loss. This argument was rejected. Laskin J, speaking for the court said:[12]

> It is ... untenable to persist in denying resort to the full armoury of remedies ordinarily available to redress repudiation of covenants, merely because the covenants may be associated with an estate in land.

3 PARTNERSHIPS

In *Hurst v Bryk*[13] Mr Hurst was a solicitor who was a partner in a firm called Malkin Janner which did business in Covent Garden. Relationships between the partners became so bad that it became clear that the partnership would have to come to an end. Unfortunately, the process of winding up the partnership itself ran into difficulties. On 4 October 1990 all of the partners except Mr Hurst entered into an agreement to dissolve the partnership on 31 October 1990. Mr Hurst took the view that the partnership could only be terminated at such short notice by unanimous agreement and that since he did not agree the agreement of 4 October 1990 amounted to a repudiatory breach of the partnership agreement by the other partners which he was entitled to treat as terminating the partnership. This view was upheld by the trial judge and the Court of Appeal and accepted before the House of Lords.

The live issue before the House of Lords was the effect of an accepted repudiation on the obligations of the partners. It had been assumed before the lower courts that this was governed by the principles of general contract law discussed in the preceding section. Lord Millett in a speech with which the other members of the House concurred doubted whether this was so since this was certainly not expressly stated in the Partnership Act 1890 or reflected in the previous case law.[14]

The importance of this lay in whether Mr Hurst was relieved from an onerous obligation which the partnership had assumed by taking a lease of office accommodation at the top of the market which could not be

12 Ibid at 721. This reasoning was cited with approval in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, [1981] 1 All ER 161, [1981] 2 WLR 45 where the *Total Oil* case was not cited.

13 [2000] 2 All ER 193.

14 There is a discretionary power to decree a dissolution under s 35(b) of the Act where one party 'wilfully or persistently commits a breach of the partnership agreement'.

economically assigned or sublet. Lord Millett held that by whatever means the partnership came to an end it did not free Mr Hurst from his obligation to the landlord nor from his obligation to contribute to the accruing liabilities to the firm. It was possible that Mr Hurst might have a claim to damages against his partners but he had not argued his case in this way. Such a claim would have involved showing that the damages flowed from the wrongful decision of the other partners to terminate the partnership prematurely.

J CONTRACTUAL PROVISIONS FOR TERMINATION[15]

We have so far considered the application of basic rules, which apply in the absence of contrary agreement. In practice the parties often do make provisions which substantially alter the impact of these ordinary rules. So in commercial contracts for the sale of goods, it is not unusual to find non-rejection clauses, under which the buyer is not to reject non-conforming goods but to look only to his remedy in damages.[16]

It is common in many kinds of contract to find provisions which extend one party's right of termination outside the areas of repudiation and fundamental breach. We may divide such provisions into two sub-groups.

1 TERMINATION FOR 'MINOR' BREACH

The common law rules can operate indulgently to some classes of contract-breakers, especially, slow payers. In practice, those who make a habit of paying slowly seldom make repudiatory statements. More commonly their delays are accompanied by protestations of good will and a wide range of more or less plausible excuses. Creditors often find it prudent therefore to insert contractual counter-measures. This is particularly so in contracts which call for a series of periodic payments where it is common to have an 'acceleration clause', making all the payments due on failure of timely payments of any or a 'withdrawal clause', enabling one party to bring the contract to an end if the other party does not pay promptly. So in *Mardorf Peach & Co Ltd v Attica Sea Carriers Corpn of Liberia, The Laconia*[17] the plaintiff shipowners had time chartered a ship to the defendants. The charterparty provided for payment of hire 'in cash semi-monthly in advance' into a named bank account and also provided that failing 'punctual and regular payment of the hire' the owners should be entitled to withdraw the vessel. The seventh and final instalment was due on Sunday April 12 1970, when the banks were, of course, closed. The hire was paid over the counter of the owners' bank for the credit of their account on Monday afternoon. The House of Lords upheld the owners' claim to be entitled to withdraw the vessel for failure of punctual payment.[18] The House did not consider that in a commercial contract using a well-known

15 Carter 3 JCL 90; Cornwell 3 JCL 126.

16 Such a clause is probably a species (relatively harmless) of exemption clause. See pp 171 ff. above.

17 [1977] AC 850, [1977] 1 All ER 545.

18 The owners might, of course, have waived their right but they had taken prompt steps to return the money and their bank had no authority to accept late payment.

standard form, there was any need to develop doctrines limiting the strict application of such contractual provisions.[19]

2 TERMINATION 'WITHOUT CAUSE'

It is not unusual for contracts to contain provisions entitling one party to terminate without the other party having done anything wrong. At first sight this seems strange, but there are many situations where it makes excellent sense. For instance, the common law says that if a contract is made on Monday and cancelled on Tuesday before any work has been done, the contractor is entitled to his loss of profit on the transaction. This does not correspond with many businessmen's expectations. Contracts often contain provisions permitting cancellation without charge where the contract is wholly executory. Even where work has been done, it is not unusual to find provisions for cancellation in return for payment of compensation.[20] The most common examples are in the field of government contracts, where the need to be able to cancel weapon projects, or motorway schemes makes such provisions easily understandable.

The most obvious example, however, is in long-term contracts of indefinite duration, such as contracts of employment. Here it is common to make express provision for termination by notice and usually easy to infer that the contract is terminable by notice, even in the absence of express provision.[1] In this context a difficult case is *Staffordshire Area Health Authority v South Staffordshire Waterworks Co.*[2]

> In 1908 the predecessors in title of the plaintiffs owned a hospital which took its water from its own well. Under a private Act of 1909, the defendants were empowered to pump water from a well a mile away, subject to providing the hospital with any water which it needed, if the supply from the hospital's well was reduced. The rate was to be that which it would have cost the hospital to get the water from their own well and disputes were to be subject to arbitration. By 1918 there was a deficiency which was supplied by the defendants and in 1927 the hospital decided to abandon their well. In 1929 a contract was then concluded under which 'at all times hereafter' the hospital was to receive 5,000 gallons of water a day free and all the additional water it required at the rate of 7d (2.9p) per thousand gallons. By 1975 the

19 See also *China National Foreign Trade Transportation Corpn v Evlogia Shipping Co SA of Panama, The Mihalis Xilas* [1979] 2 All ER 1044, [1979] 1 WLR 1018 where the same principle was applied in case of underpayment and *Awilco, A/S v Fulvia SpA di Navigazione, The Chikuma* [1981] 1 All ER 652, [1981] 1 WLR 314 where the money was paid into the owners' bank on the due date but in a form which would have led to the owners suffering an interest penalty if they had withdrawn it on that day. It is now common for such withdrawal clauses to be qualified by anti-technicality clauses requiring a short period of notice and thereby giving the charterer a second chance to pay. See *Afovos Shipping Co SA v Pagnan* [1983] 1 All ER 449, [1983] 1 WLR 195; *Italmare Shipping Co v Ocean Tanker Co Inc (No 2)* [1982] 3 All ER 273. As to whether any relief is possible against the consequences of this rule see pp 694 ff. below.

20 These provisions often cover only cost of work done plus a profit element and do not cover profit on work that has not been done.

1 See p 552, above; Carnegie 85 LQR 392.

2 [1978] 3 All ER 769, [1978] 1 WLR 1387. See also *Tower Hamlets London Borough Council v British Gas Corpn* [1984] CLY 393.

normal rate was 45p per 1,000 gallons and the Water Company claimed to be entitled to terminate the agreement by giving six months' notice.

The Court of Appeal upheld this argument though for different reasons. Lord Denning MR invoked the doctrine of frustration and his judgment will be considered later.[3] Goff and Cumming-Bruce LJJ held that despite the words 'at all times hereafter' the contract was terminable by reasonable notice. This decision is not lacking in boldness, when it is remembered that the original agreement was to provide water substantially below the market rate, and that it represented a compromise of the respective rights of the parties under the previous statutory provision. It is difficult to believe that any court in 1930 or 1940 would have held the agreement terminable by reasonable notice and not easy to explain when it had achieved this condition.

K STIPULATIONS AS TO TIME[4]

Many contracts contain express provision as to the time by which performance is to be completed. In most if not all, others, it would be reasonable to infer that performance was to be within a reasonable time. What is the effect of late performance? This obviously presents problems similar to other failures in performance—in some cases a day late will be a disaster; in others, a month's delay will do no harm.

The treatment of the question has not however been identical, partly because of differences of terminology and partly because equity has played a much more active role than in relation to other problems of performance and breach. The problem has traditionally been put by asking whether time is of the essence of the contract.

The principle at common law was that, in the absence of a contrary intention, time was essential, even though it has not been expressly made so by the parties. Performance, therefore, must be completed upon the precise date specified, otherwise the contract might be brought to an end.[5] A good illustration is afforded by the rule that, unless a contrary intention is clearly shown, a time fixed for delivery in a contract for the sale of goods must be exactly observed.[6]

On the other hand courts of equity, which have had to consider the matter in connection with suits for specific performance, have always taken a less rigid view.[7] Their view was that time was not necessarily essential, and if they could do so without injustice they would decree specific performance notwithstanding the failure of the plaintiff to observe the time fixed for completion.[8] This was especially so in the case of contracts for the sale of land. But the maxim that in equity the time fixed for completion is not of the essence of the contract does not mean that stipulations as to time may always be disregarded. Lord Parker made this clear in a well-known passage:

3 See p 640, below.
4 Stoljar 71 LQR 527.
5 *Parkin v Thorold* (1852) 16 Beav 59.
6 *Bowes v Shand* (1877) 2 App Cas 455 (sale of rice); *Reuter Hufeland & Co v Sala & Co* (1879) 4 CPD 239 (sale of pepper); *Sharp v Christmas* (1892) 8 TLR 587 (sale of Potatoes); *Hartley v Hymans* [1920] 3 KB 475 at 484.
7 71 LQR 556.
8 *Stickney v Keeble* [1915] AC 386 at 415, per Lord Parker; *Williams v Greatrex* [1956] 3 All ER 705, [1957] 1 WLR 31.

> But this maxim never had any application to cases in which the stipulation as to time could not be disregarded without injustice to the parties, when, for example, the parties, for reasons best known to themselves, had stipulated that the time fixed should be essential, or where there was something in the nature of the property or the surrounding circumstances which would render it inequitable to treat it as a non-essential term of the contract. It should be observed, too, that it was only for the purposes of granting specific performance that equity in this class of case interfered with the remedy at law. A vendor who ... had by his conduct lost the right to specific performance had no equity to restrain proceedings at law based on the non-observance of the stipulation as to time.[9]

In short, time is of the essence of the contract if such is the real intention of the parties and an intention to this effect may be expressly stated or may be inferred from the nature of the contract or from its attendant circumstances. By way of summary it may be said that time is essential firstly, if the parties expressly stipulate in the contract that it shall be so,[10] secondly, if in a case where one party has been guilty of undue delay, he is notified by the other that unless performance is completed within a reasonable time the contract will be regarded as at an end;[11] and lastly, if the nature of the surrounding circumstances or of the subject matter makes it imperative that the agreed date should be precisely observed. Under this last head it has been held that a date fixed for completion is essential if contained in a contract for the sale of property which fluctuates in value with the passage of time, such as a public house,[12] business premises,[13] a reversionary interest[14] or shares of a speculative nature liable to considerable fluctuation in value.[15]

The topic was exhaustively reconsidered by the House of Lords in *United Scientific Holdings Ltd v Burnley Borough Council*[16] where it was forcefully stated that it was no longer appropriate to analyse the problem in terms of what the rules of common law and equity were before 1873.[17]

> The landlords had granted the tenants a 99-year lease of premises from 31 August 1962. The rent was fixed for the first ten years and there was provision for periodic rent reviews thereafter and machinery was laid down in the lease, which contemplated that the landlord would take steps to activate the machinery in the tenth year of each ten-year period if he wished to raise the rent. The landlord took no steps until 12 October 1972, ie after the end of the first ten years had been completed. The tenant argued that time was of the essence and that as the landlord had not acted in time, he had lost the chance to increase the rent. This argument had succeeded in several Court of Appeal decisions over the

9 *Stickney v Keeble* [1915] AC 386 at 416.
10 *Hudson v Temple* (1860) 29 Beav 536.
11 *Stickney v Keeble* [1915] AC 386; *Parkin v Thorold* (1852) 16 Beav 59; *Hartley v Hymans* [1920] 3 KB 475 at 595-596; *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616, [1950] 1 All ER 420; *Aziz v Sammy* [1967] 1 AC 255.
12 *Lock v Bell* [1931] 1 Ch 35.
13 *Harold Wood Brick Co v Ferris* [1935] 2 KB 198.
14 *Newman v Rogers* (1793) 4 Bro CC 391.
15 *Hare v Nicoll* [1966] 2 QB 130, [1966] 1 All ER 285.
16 [1978] AC 904, [1977] 2 All ER 62 and see *Bunge Corpn v Tradax SA* [1981] 2 All ER 513, [1981] 1 WLR 711.
17 It does not follow, of course, that it is possible to explain the modern law without reference to its history.

previous few years, but it was decisively rejected by the House of Lords, who held that the nature of the contract was such that there was a presumption that time was not of the essence.[18]

The Law of Property Act 1925[19] re-enacting section 25 of the Judicature Act 1873, provides as follows:

> Stipulations in a contract, as to time or otherwise, which according to rules of equity are not deemed to be or to have become of the essence of the contract, are also construed and have effect at law in accordance with the same rules.

It has been suggested that this provision means that, if, say, in the contract for the sale of land, time is not of the essence in equity, then late completion would not give rise to damages at common law. This view was decisively rejected in *Raineri v Miles*[20] where the House of Lords held (Viscount Dilhorne dissenting) that it meant that in such a case late performance does not give rise to a right to terminate but does give rise to a right to damages.

Where time is not of the essence late performance will be a ground for termination where it causes 'frustrating delay'.[1]

A very important practical problem arises where time is not originally of the essence and one party is guilty of delay. The innocent party appears to have two options at this point. He can either wait until the delay is so long as to be a frustrating delay, as set out in the previous paragraph, or he can seek to give a notice making time of the essence. If he gives the notice then it will only be necessary to give a reasonable time for further chance of performance rather than wait the longer period which will be needed for a frustrating delay. There is a certain untidiness here and it is not entirely clear why the innocent party is given these two rather different remedies. A second problem is at what stage the innocent party can give the notice calling on the other party to perform within a further reasonable time. In *British and Commonwealth Holdings plc v Quadrex Holdings Inc*[2] the Court of Appeal assumed that the guilty party must not merely be late but be unreasonably late before the notice can be given. However, in practice, a very short period indeed was treated as satisfying this requirement on the facts of the particular case which was one involving trading in the shares of a volatile private company where normally time would have been of the essence except that the parties had not provided expressly for any completion date. In *Behzadi v Shaftsbury Hotels Ltd*[3] the Court of Appeal held that the innocent party could serve a notice making time of the essence as soon as there was any delay. It seems to follow from this that where time is not initially of the essence the alert and well advised innocent party can greatly accelerate his possibility of terminating the contract by giving a very prompt notice calling on the guilty party to perform within a reasonable time.

18 It will be noted that the landlord did not break the contract by not applying in time for an increase but the tenant's argument was that his obligation to pay the increased rent was conditional on the landlord acting in time.

19 S 41.

20 [1981] AC 1050, [1980] 2 All ER 145.

1 *Universal Cargo Carriers Corpn v Citati* [1957] 2 QB 401, [1957] 2 All ER 70. Many difficulties surround this rule. Stannard 46 MLR 738.

2 [1989] QB 842, [1989] 3 All ER 492.

3 [1991] 2 All ER 477.

1. TENDER OF PERFORMANCE

If A, one party to a contract, cannot complete performance without the concurrence of the other party B, it is obvious that an offer by him to perform and a rejection of that offer by B entitles him to a discharge from further liability. His readiness to perform has been nullified solely by the conduct of the other party. The rule, therefore, is that a tender of performance is equivalent to performance. In *Startup v Macdonald*:[4]

> The plaintiffs agreed to sell ten tons of oil to the defendant and to deliver it to him 'within the last fourteen days of March', payment in cash to be made at the expiration of that time. Delivery was tendered at 8.30 pm on 31 March, a Saturday, but the defendant refused to accept or to pay for the goods owing to the lateness of the hour.

It was held that the tender of the oil was in the circumstances equivalent to performance and that the plaintiffs were entitled to recover damages for non-acceptance. The law is stated with such lucidity by Rolfe B, that the following passage from his judgment deserves emphasis:

> In every contract by which a party binds himself to deliver goods or pay money to another, he in fact engages to do an act which he cannot completely perform without the concurrence of the party to whom the delivery or the payment is to be made. Without acceptance on the part of him who is to receive, the act of him who is to deliver or to pay can amount only to a tender. But the law considers a party who has entered into a contract to deliver goods or pay money to another as having, substantially, performed it if he has tendered the goods or the money ... provided only that the tender has been made under such circumstances that the party to whom it has been made has had a reasonable opportunity of examining the goods, or the money, tendered, in order to ascertain that the thing tendered really was what it purported to be. Indeed, without such an opportunity an offer to deliver or pay does not amount to a tender. Now to apply this principle to the present case. The contract was to deliver the oil before the end of March. The plaintiffs did in pursuance of that contract tender the oil to the defendant at a time which, according to the express finding of the jury, left him full opportunity to examine, weigh and receive it before the end of March. If he had then accepted it ... the contract would have been literally performed; and the neglect of the defendant to perform his part of the contract ... cannot in my opinion in any manner affect the rights of the plaintiffs ... They fulfilled all they had contracted to do.[5]

The effect, however, of a tender varies according as the subject matter is goods or money.

If A actually produces goods of the correct quantity and quality to B, the rejection of his offer entirely discharges him from further liability and entitles him to recover damages for breach of contract.[6]

If A produces to B the exact amount of money that he is contractually bound to pay, it is true that he need make no further tender, but nevertheless his obligation to pay the debt remains. If he is sued for breach he merely pays the money into court, whereupon the costs of the action must be borne by B.[7]

4 (1843) 6 Man & G 593.
5 Ibid at 610–611.
6 *Startup v Macdonald*, above.
7 *Griffiths v School Board of Ystradyfodwg* (1890) 24 QBD 307.

In order to constitute a valid tender of money, 'there must be an actual production of the money, or a dispensation of such production'[8] and also payment must be offered in what is called 'legal tender', ie in the current coin of the realm or in Bank of England notes according to the rules established by law. These rules prescribe that Bank of England notes are good tender for any amount;[9] gold coins for any amount; coins of cupro-nickel or silver exceeding ten new pence in value for any amount up to ten pounds; coins of cupro-nickel or silver of not more than ten new pence in value up to five pounds only; coins of bronze for any amount up to twenty new pence only.[10] The debtor must not ask for change but must tender the precise amount due, unless he is content to leave the surplus with the creditor.[11]

8 *Finch v Brook* (1834) 1 Bing NC 253 at 256, per Tindal J; *Farquharson v Pearl Assurance Co* [1937] 3 All ER 124.
9 Currency and Bank Notes Act 1954, s 1.
10 Coinage Act 1971, s 2.
11 *Robinson v Cook* (1815) 6 Taunt 336.

Chapter 19

Discharge by agreement[1]

SUMMARY

1 Bilateral discharge 621
2 Unilateral discharge 627

What has been created by agreement may be extinguished by agreement. An agreement by the parties to an existing contract to extinguish the rights and obligations that have been created is itself a binding contract, provided that it is either made under seal or supported by consideration.

Consideration raises no difficulty if the contract to be extinguished is still executory, for in such a case each party agrees to release his rights under the contract in consideration of a similar release by the other. The discharge in such a case is bilateral, for each party surrenders something of value. The position is different where the contract to be extinguished, which we will call in future the original contract, is wholly executed on one side, as for instance where a seller has delivered the goods but the buyer has not paid the price. Here the seller has performed his part, and if he were merely to agree that the original contract should be discharged, ie that the buyer should be released from his obligation of payment, he would receive nothing of value in exchange. The buyer would have neither suffered a detriment himself nor have conferred an advantage upon the seller, but would be in the position of a donee. This, in other words, is a unilateral discharge, and it is ineffective unless it is made under seal or unless some valuable consideration is given by the buyer. Unilateral discharge in return for consideration is often called accord and satisfaction. The accord is the agreement for the discharge of the original contract; the satisfaction is the consideration conferred upon the party who has performed his obligations.

Discharge by deed, which is equally effective in both cases, requires no discussion, but we will now deal separately with bilateral and unilateral discharge effected by a simple contract.

Of course this discussion assumes that the parties are agreed.[2] In most cases this will be clear but difficult cases may arise where it is argued that the contract has been implicitly abandoned by conduct. This point has arisen in a number of recent cases where it has been argued that the parties have tacitly abandoned an agreement to arbitrate by prolonged inaction. In the leading

1 The process of discharging or modifying the contract by agreement presents many problems both as to stating the law and as to deciding what it should be. For a valuable analysis see Atiyah, Trebilcock and Penny 22 Osgoode Hall LJ 173. See also Carter 18 JCL 185; Waddams 19 JCL 199; Hunter 18 JCL 205; Furmston 18 JCL 216.

2 See *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8, [2001] 1 All ER 961 discussed above, pp 92 ff.

case *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal, The Hannah Blumenthal*[3] this possibility was recognised by the House of Lords. In delivering the principal speech Lord Brandon identified two ways in which implicit abandonment might be shown:

> The first way is by showing that the conduct of each party, as evinced to the other party and acted on by him, leads necessarily to the inference of an implied agreement between them to abandon the contract. The second method is by showing that the conduct of B, as evinced towards A, has been such as to lead A reasonably to believe that B has abandoned the contract, even though it has not in fact been B's intention to do so, and that A has significantly altered his position in reliance on that belief.[4]

In most of the cases the parties have done nothing more than appoint an arbitrator and then allow the matter to rest for several years. In the case of litigation the defendant would be able to apply to the court to have the action struck out for want of prosecution but the House of Lords held in *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn*[5] that neither the arbitrator nor the court had inherent jurisdiction to terminate an arbitration for want of prosecution. In *André et Cie SA v Machine Transocean Ltd, The Splendid Sun*[6] an arbitration agreement was held to have been implicitly abandoned by inaction and this decision was approved in the *Hannah Blumenthal*. On the other hand other courts in cases not easily distinguishable on the facts have refused to hold that mutual inaction amounts to abandonment.[7] It is clear that there are difficulties in analysing inaction by one side as an offer and inaction by the other side as an acceptance. On the other hand, if the parties appoint arbitrators and then do nothing for five, ten, fifteen, twenty years, there must come a point at which the only inference can be that the parties have abandoned the arbitration. The correct question must be not can the facts be slotted into the mechanical concepts of offer and acceptance but has each party led the other party reasonably to believe that the arbitration has been

3 [1983] 1 AC 854, [1983] 1 All ER 34.

4 Ibid at 914 and 47, respectively.

5 [1981] AC 909, 962, [1981] 1 All ER 289. This was based on a doctrine accepted by the majority that in an arbitration both parties are under reciprocal obligations to keep the process moving so that it is the fault of both parties if the arbitration grinds to a halt. It seems clear that as a matter of arbitral law this decision was unfortunate and it is not surprising therefore that many ways have been sought to get round it of which mutual abandonment is but one. See the Freshfields Arbitration Lecture for 1989, 'The Problem of Delay in Arbitration', by Lord Justice Bingham, reproduced in 'Arbitration' August 1990 164. The departmental advisory committee on English arbitration law chaired by Lord Justice Mustill produced a report recommending that the arbitrator should be given by statute power to strike out the claim where there has been delay to such an extent that a fair hearing of the dispute is no longer possible, and this was done by s 102 of the Courts and Legal Services Act 1990, which introduced a new s 13A into the Arbitration Act 1950 and came into force on 1 January 1992. For fuller discussion, see Furmston, Norisada and Poole, *Contract Formation and Letters of Intent* pp 38-49.

6 [1981] QB 694, [1981] 2 All ER 993.

7 *Allied Marine Transport Ltd v Vale do Rio, Doce Navegacao SA, The Leonidas D* [1985] 2 All ER 796, [1985] 1 WLR 925; *Food Corpn of India v Antclizo Shipping Corpn, The Antclizo* [1988] 2 All ER 513, [1988] 1 WLR 630 was taken on appeal to the House of Lords in the hope of resolving the issue but the House of Lords held that it could not review the concurrent findings of the trial judge and the Court of Appeal that the particular arbitration agreement has not been abandoned. See also *Pearl Mill Co Ltd v Ivy Tannery Co Ltd* [1919] 1 KB 78, [1918-1919] All ER Rep 702.

abandoned? Even this question will not be easy to answer but it seems clear that the answer will sometimes be in the affirmative.

1 Bilateral discharge

This form of discharge is available to the parties whether their contract is either wholly or partially executory. In the case of a contract for the sale of goods, for instance, it is available not only where there has been no payment and no delivery, but also where there has been partial though not complete delivery of the goods. It is immaterial that the contract is contained in a deed. There was, indeed, a technical rule at common law that a contract under seal could not be dissolved, either wholly or partially, except by another contract under seal;[8] but courts of equity took an opposite view and held that a simple contract which extinguished or varied the deed was a good defence to an action on the deed. This has become the rule in all courts since 1873, for the Judicature Act of that year provided that 'in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail'.[9] Thus in *Berry v Berry*:[10]

> A husband covenanted in a deed of separation to pay his wife £18 a month. Eight years later, by a written contract not under seal, he agreed to pay her £9 a month and 30 per cent of his earnings if they exceeded £350 a year.

It was held that this simple contract was a good defence to an action brought by the wife to recover the sum fixed by the deed of separation.

Form of discharge where executory contract unenforceable unless evidenced in writing

A problem, however, that requires discussion arises where the executory contract is one which is rendered unenforceable by action unless supported by adequate written evidence as prescribed by statute.[11] In such a case the question is whether the discharging contract must also conform to the statutory requirement. If, for example, a contract for the sale of land contains the written evidence required by the Law of Property Act 1925,[12] must an agreement to discharge it also comply with the Act? It was laid down by the House of Lords in the leading case of *Morris v Baron & Co*[13] that the solution of this problem depends upon the extent to which the parties intended to alter their existing contractual relations. Their intention in this respect must be collected from the terms of the discharging contract. There are three possibilities.[14]

8 *West v Blakeway* (1841) 2 Man & G 729.
9 Re-enacted in the Judicature Act 1925, s 44.
10 [1929] 2 KB 316.
11 Examples of such statutes are the Statute of Frauds s 4 (contract of guarantee); Law of Property Act 1925, s 40(1) (contract for the sale or other disposition of land); this statute is now repealed but the illustration is retained since it figures in many of the leading cases: see *United Dominions Corpn (Jamaica) Ltd v Shoucair* [1969] 1 AC 340; [1968] 2 All ER 904.
12 S 40(1).
13 [1918] AC 1.
14 Stoljar 35 Can Bar Rev 485.

i Partial discharge

Firstly, the intention revealed by the second agreement may be merely to vary or modify the terms of the prior contract without altering them in substance. It has long been established that such a partial discharge is ineffective unless it is contained in a contract that also provides the written evidence required by the relevant statute. An oral variation leaves the written contract intact and enforceable. What the parties are taken to intend is not that the first contract shall be extinguished, but that it shall continue as varied. Yet effect cannot be given to their intention, since there is no written evidence of the contract as now varied. A statute such as the Statute of Frauds or the Law of Property Act 1925 requires that the whole, not part, of the contract, shall be evidenced by writing.[15]

ii Discharge simpliciter

Secondly, the parties may intend to extinguish the original contract in its entirety and to put an end to their contractual relations. In this case the original contract is rescinded even though the discharging contract is not evidenced as required in the case of the original contract. Thus, an oral agreement to abrogate a written contract for sale of land is effective.[16] The requirements of the Law of Property Act are directed to the creation of an enforceable contract, not to its extinction.

iii Original contract extinguished but replaced by fresh agreement

Thirdly, the intention of the parties may be to extinguish the former written contract, but to substitute for it a new and self-contained agreement. The result of such a bargain is that the prior written contract is rescinded, but the substituted agreement, if made orally, is unenforceable for want of written evidence.[17]

A difficult question of construction that may arise in this context is to discover what the parties intended to accomplish by their later oral agreement. Did they intend to extinguish the original contract altogether and to substitute a new contract in its place, or did they intend merely to vary the original contract? If the first of these hypotheses is correct, then the later contract effectively extinguishes the original contract but is itself unenforceable. If, on the other hand, the object of the parties was to modify their existing rights and obligations, the later contract is entirely destitute of effect. In order to decide this question the terms of the oral agreement must be examined; and if it is found that they are so far inconsistent with the original contract as to destroy its substance, though perhaps the shadow remains, the inference is that the parties intended to abrogate their former contract by the substitution of a new and self-contained agreement.

> A written contract may be rescinded by parol either expressly or by the parties entering into a parol contract entirely inconsistent with the written one, or, if not entirely inconsistent with it, inconsistent with it to an extent that goes to the very root of it.[18]

15 *Morris v Baron & Co* [1918] AC 1 at 31; *British and Beningtons Ltd v N W Cachar Tea Co* [1923] AC 48 at 62, in both cases per Lord Atkinson.

16 *Goman v Salisbury* (1684) 1 Vern 240; *Morris v Baron & Co*, above, at 18, per Lord Haldane; at 26, per Lord Dunedin.

17 *Morris v Baron & Co* [1918] AC 1.

18 *British and Beningtons Ltd v N W Cachar Tea Co* [1923] AC 48 at 62, Per Lord Atkinson.

To justify the conclusion in favour of abrogation, however, the inconsistency must relate to something fundamental.

> What is of course essential is that there should have been made manifest the intention in any event of a complete extinction of the first and formal contract, and not merely the desire of an alteration, however sweeping, in terms which still leave it subsisting.[19]

The manner in which the courts deal with this problem may be illustrated by two contrasting cases.

In *Morris v Baron & Co.*[20] the facts were as follows:

> Morris agreed to sell goods to Baron & Co. He delivered only part of the goods, valued at £888 4s, and six months later began proceedings to recover this sum. The company counter-claimed for £934 17s 3d as damages for non-delivery of the whole of the goods. Before this action came to trial, the parties compromised the dispute. They made an oral contract under which the action was to be withdrawn: the company was to have another three months within which to pay the sum due under the contract; it was to have the option either to accept or to refuse the undelivered goods; it was to be allowed £30 to meet the expenses incurred owing to the failure of Morris to make complete delivery.

Ten months later, the £888 4s was still unpaid and Morris brought a second action to recover this sum. The company admitted liability, but again counter-claimed for damages in respect of the undelivered goods. The action failed for two reasons.

Firstly, Morris could not claim under the original contract. It had been extinguished. Its terms were so fundamentally inconsistent with the provisions of the compromise as to justify the inference that the parties intended to replace it by an entirely new contract.[1]

Secondly, neither Morris nor Baron & Co could base any claim on the compromise, which itself amounted to a contract for the sale of goods.[2] Since it was made orally, it was unenforceable under section 4 of the Sale of Goods Act 1893, which still applied to such a contract at the time when *Morris v Baron & Co* was decided.[3] It operated to extinguish the original contract, but it could not be actively enforced.

On the other hand, *United Dominions Corpn (Jamaica) Ltd v Shoucair*[4] was a case in which the facts disclosed an intention to retain, not to abrogate, the original contract:

> A loan, secured by a mortgage and carrying interest at 9%, was made in Jamaica by the appellants to the respondent. Owing to a rise in the local bank rate, the respondent at the request of the appellants agreed in writing to alter the rate of interest to 11%. This written agreement was unenforceable since it did not comply with the Jamaican Moneylenders Act which

19 *Morris v Baron & Co* [1918] AC 1 at 19, per Lord Haldane.
20 [1918] AC 1.
1 See especially Lord Atkinson at 35.
2 Ibid at 10, per Lord Finlay; at 29, per Lord Dunedin; at 34, per Lord Atkinson; at 36, per Lord Parmoor.
3 P 225, above. The repeal of this section of the Sale of Goods Act has greatly reduced the area of this question of construction.
4 [1969] 1 AC 340, [1968] 2 All ER 904.

corresponds to section 6 of the English Act of 1927. The Jamaican Act does not apply to loans bearing interest at 9% or less and therefore it did not affect the mortgage. The appellants, realising that they could not enforce the agreement of variation, sued for the recovery of interest at 9% due under the mortgage.

The Privy Council gave judgment for the appellants. The parties intended by their written agreement to keep the mortgage alive, but to amend its provision relating to the rate of interest. But the mortgage remained intact, since it could not be affected by an amendment that infringed the statute. 'If the new agreement reveals an intention to rescind the old, the old goes; and if it does not, the old remains in force and unamended.'[5]

Waiver of a contractual term by one party at the request of the other

Such, then, is the law where the variation is made for the mutual advantage of both parties. A different and a slightly more complex situation may arise where the alteration of the contractual terms is designed to suit the convenience of one only of the parties. One party may accede, perhaps reluctantly, to the request of the other, and promise that he will not insist upon performance according to the strict letter of the contract. This is an indulgence that is a common feature of commercial life. In the case of a contract for the sale of goods, for instance, approval may be given to the request either of the seller or the buyer that the date of delivery be postponed for a short time. An arrangement of this kind for a substituted mode of performance is generally described as either a waiver or a forbearance by the party who grants the indulgence.[6]

The efficacy of such a waiver is open to the technical objection that it is unsupported by consideration. If, for instance, the seller agrees at the request of the buyer to postpone delivery until 1 July, but ultimately refuses to deliver on the latter date, it is arguable that according to strict doctrine he has a complete answer to an action for breach of contract. The buyer is theoretically in a difficult position. He was not ready and willing to accept delivery at the contract date, so that he himself is guilty of a breach; and he gave no consideration for the promise by the seller to extend the time for delivery. If a similar concession is made orally in the case of a guarantee, there is the further difficulty that the requirements of the Statute of Frauds have not been satisfied. The natural instinct of judges, however, is to uphold reasonable arrangements for the relaxation of contractual terms and to refuse to be unduly distracted by strict doctrine. Even at common law they have been at pains to implement the intention of the parties; but in the efforts to do this they have not only ignored the question of consideration, but have propounded a supposed distinction between variation and waiver which has no substance and which has merely served to confuse matters. There is support for two common law propositions.

Firstly, a waiver cannot be repudiated by the party for whose benefit it has been granted, so that if A abstains at B's request from insisting upon performance according to the exact terms of the contract, B is compelled to treat this indulgence as effective. Thus, if in the case of a written contract for the sale

5 Ibid at 348 and 907, respectively.

6 For a fuller discussion of this subject, see Cheshire and Fifoot 63 LQR 283 at 289-301; Dugdale and Yates 39 MLR 680; Adams 36 Conv (NS) 245; Reiter 27 U Toronto LJ 439.

of goods to be delivered on 1 June the seller at the request of the buyer extend the time for acceptance until 1 July, the buyer, if he defaults on the latter date, cannot escape liability by averring that the seller did not deliver according to the original contract and that the parol variation is ineffective.[7]

Secondly, there is considerable authority for the rule that even the party who grants the indulgence cannot go back on his agreement.[8] Thus, in the example just given, the seller is not allowed to withhold delivery on 1 July on the ground that the buyer himself committed a breach by failure to accept the goods at the contract date.

These common law decisions, though dictated by a laudable desire to sustain reasonable arrangements between businessmen, affect to make everything turn upon a supposed distinction between the variation and the waiver of a contractual term. If the subject matter of the arrangement is a written contract falling under the Statute of Frauds or the Law of Property Act, it is said that a variation must be evidenced by writing, but that a waiver may be parol. Yet the enigma is to formulate some test by which to distinguish the one from the other. The search will be in vain. When we are told, for instance, that an agreed alteration of the date at which delivery is due constitutes a variation, but that a forbearance by one party at the request of the other to call for delivery until a month later than the contract date is a waiver,[9] it becomes apparent that the dichotomy is visionary and one from which reason recoils. The truth is that every alteration of the kind with which we are concerned is a variation of the contract, but that it is called a waiver when the court is willing to give effect to the intention of the parties. The unfortunate result is the virtual impossibility of anticipating what view the court will take.

In this state of confusion it is not unnatural that recourse should be had to equity. The equitable doctrine has been stated in these words by Bowen LJ:

> If persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a court of equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were in before.[10]

In short, a voluntary concession granted by one party, upon the faith of which the other may have shaped his conduct, remains effective until it is made clear by notice or otherwise that it is to be withdrawn and the strict position under the contract restored. The concession raises an equity against the party who consented to it. If, for instance, in the case of a written contract for the sale of goods the buyer at the request of the sellers orally consents to the postponement of delivery, he cannot peremptorily hold the sellers to the original contract. No repudiation of his waiver will be effective except a clear intimation to them that he proposes to resume his strict rights. Normally he will do this by giving

7 *Hickman v Haynes* (1875) LR 10 CP 598; *Ogle v Earl of Vane* (1868) LR 3 QB 272; *Leven & Co v Goldberg* [1922] 1 KB 688.

8 *Leather-Cloth Co v Hieronimus* (1875) LR 10 QB 140; *Tyers v Rosedale and Ferryhill Iron Co* (1875) LR 10 Exch 195; *Panoutsos v Raymond Hadley Corpn. of New York* [1917] 2 KB 473; *Hartley v Hymans* [1920] 3 KB 475.

9 See eg *Besseler, Waechter, Glover & Co v South Derwent Coal Co Ltd* [1938] 1 KB 408 at 416, [1937] 4 All ER 552 at 556.

10 *Birmingham and District Land Co v London and North Western Rly Co* (1888) 40 ChD 268 at 286.

express notice of his intention, but this method is not essential and anything will suffice which makes it abundantly clear that the concession is withdrawn. Within a reasonable time thereafter the original position will be restored. The rights of the seller under such a waiver have been stated by Denning LJ:

> If the defendant, as he did, led the plaintiffs to believe that he would not insist on the stipulation as to time, and that, if they carried out the work, he would accept it, and they did it, he could not afterwards set up the stipulation as to the time against them. Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made, in effect, a promise not to insist on his strict legal rights. That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it.[11]

The operation of this doctrine of waiver is well illustrated by *Charles Richards Ltd v Oppenheim*[12] where the facts were as follows:

> Early in 1947 the defendant ordered from the plaintiffs a Rolls Royce chassis, and in July the plaintiffs agreed that a body should be built for it within 'six or at most seven months'. The body was not completed seven months later, but the defendant agreed to wait another three months. At the end of this extended period the body was still not built. The defendant then gave a final notice that if the work were not finished within a further period of four weeks he would cancel the order. The body was not finished within this period and the defendant cancelled the order. The completed body was tendered to the defendant three months later, but he refused to accept it.

This was a case where the time of delivery was of the essence of the contract. The defendant's agreement, however, that delivery should be postponed for three months constituted a waiver of his right in this respect, and if the body had been completed within the extended time he would have been estopped from denying that the contract had been performed. But by granting a further and final indulgence of four weeks' delay he had given reasonable notice that time was once more to be of the essence of the matter, and, since the car was not ready within this final period, the plaintiffs were in breach of their contract. The Court of Appeal, therefore, gave judgment for the defendant.

Again, if the rent book relating to premises, let originally on a weekly tenancy, contains the words 'one month's notice each party', but this is later crossed out and replaced by a statement, initialled by the landlord, which runs 'one month's notice from tenant; two years' notice from landlord', the new promise made by the landlord is without consideration. But if the tenant acts on the faith of the promise by remaining in possession and continuing to pay rent he is entitled to receive two years' notice.[13]

These cases clearly have much in common with the doctrine of promissory estoppel which we have already considered at length.[14] Indeed on one view they are examples of it. On the other hand there is authority for the view that though

11 *Charles Richards Ltd v Oppenheim* [1950] 1 KB 616 at 623, [1950] 1 All ER 420 at 423.
12 [1950] 1 KB 616, [1950] 1 All ER 420.
13 *Wallis v Semark* [1951] 2 TLR 222. For an earlier authority to the same effect, see *Bruner v Moore* [1904] 1 Ch 305.
14 Pp 109 ff, above.

on many sets of facts, waiver and estoppel produce the same result, yet the doctrines remain distinct. An instructive case is *Brikom Investments Ltd v Carr*.[15]

> The landlords of four blocks of flats offered to sell 99-year leases to their sitting tenants. The leases contained undertakings by the landlords to maintain the structure of the buildings and by the tenants to contribute to the cost. At the time of the negotiations, the roofs were in need of repair and the landlords made oral representations to the tenants' association and individual tenants that they would repair the roofs at their own expense and in some cases confirmed this in writing before the leases were signed. Subsequently the landlords effected the repairs and claimed contributions from the defendants, who included both original lessees and assignees therefrom.

The Court of Appeal held for the lessees for a variety of reasons. As regards the original lessees, it was held that there was a binding collateral contract where the tenants had entered into leases in reliance on the landlord's promise to repair.[16] Alternatively Lord Denning MR thought that the doctrine of promissory estoppel applied whereas Roskill and Cumming-Bruce LJJ thought that the case was one of waiver. All three judges agreed, however, that these respective doctrines operated to protect not only the original lessees but also their assignees.

It must be confessed that the topic of waiver is not a clear one and awaits an authoritative modern statement. One of the difficulties is that the doctrine has many facets and is applied in many different situations. Two important distinctions may usefully be kept in mind. The first is between remedies and rights. Certain remedies need to be exercised promptly and it may be relatively easy to infer their waiver.[17] An example is the innocent party's right to terminate for repudiation or fundamental breach.[18] A second distinction turns on whether the waiver comes before or after the departure from the strict terms of the contract. If the waiver precedes the departure, it may have played a part in causing it and justice may more readily be held to demand that there be no retraction.

2 Unilateral discharge

A contract, which has been performed by A but has not been performed by the other party B, may be the subject of unilateral discharge. In the majority of cases B has committed a breach of the contract in the sense that he is not ready and willing to perform his obligation, as for instance where he is unable to pay for goods that have been delivered to him under a contract of sale. In such a case A may agree to release B from his obligation. A release given by deed is effective. A release expressed in an agreement not under seal, however, as we have already seen, is *nudum pactum* unless A receives some valuable consideration in return for the right that he abandons.[19] Since B has received

15 [1979] QB 467, [1979] 2 All ER 753.
16 Cf *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129, [1958] 2 All ER 733.
17 See eg *Aquis Estates Ltd Minton* [1975] 3 All ER 1043, [1975] 1 WLR 1452.
18 And see discussion at pp 604 ff, above.
19 Pp 102 ff, above.

all that he is entitled to receive under the contract, he cannot aver, as he can in the case of bilateral discharge, that by the mere acceptance of the release he furnishes consideration to A.

The agreement, if supported by the necessary consideration, is called accord and satisfaction. This has been judicially defined as follows:

> Accord and satisfaction is the purchase of a release from an obligation, whether arising under contract or tort, by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative.[20]

If, for instance, £50 is due for goods sold and delivered, a promise by the seller to accept a cash payment of £45 in discharge of the buyer's obligation is not a good accord and satisfaction, since the buyer is relieved of a liability to pay £5 without giving or promising anything in return.[1] A promise by the buyer, however, to confer upon the seller some independent benefit, actual or contingent, may constitute sufficient consideration for the acceptance of the smaller sum.[2] Thus in 1602 it was said that 'the gift of a horse, hawk or a robe' would suffice, since it would not have been accepted by the creditor had it not been more beneficial to him than the money.[3] This reasoning even persuaded the divisional court in *Goddard v O'Brien*[4] to hold that the payment of a smaller sum by cheque instead of in cash was an independent benefit sufficient to rank as consideration; but the Court of Appeal has now refused to follow this decision.[5] Yet, the general rule remains that the acceptance by a creditor of something different from that to which he is entitled may discharge the debtor from liability.

Thus a promise by the debtor to pay a smaller sum at a date earlier than that on which it is contractually due,[6] or to pay a larger sum at a later date, is a good accord and satisfaction if accepted by the creditor. Again, if A claims from B a sum that is not finally determined, as for example where he demands £50 on a *quantum meruit* for services rendered or demands £50 by way of damages for libel, his promise to release B in consideration of the payment of a lesser sum than that claimed is a good accord and satisfaction. In other words the payment of a lesser sum is satisfaction if the sum claimed is unliquidated, but not if it is liquidated.[7]

The essential fact is, then, that an accord without satisfaction is ineffective. This statement, however, is ambiguous. Is the discharge effective as soon as the debtor has promised to give the satisfaction, or only when the promise has been implemented? In other words, is it sufficient if the consideration is executory? The correct answer is given by Scrutton LJ in these words:

> Formerly it was necessary that the consideration should be executed: 'I release you from your obligation in consideration of £50 now paid by you to me.' Later

20 *British Russian Gazette Ltd v Associated Newspapers Ltd* [1933] 2 KB 616 at 643-644; the definition was adopted from *Salmond and Winfield on Contracts* p 328.
1 *Foakes v Beer* (1884) 9 App Cas 605, p 105, above.
2 Ibid at 613, per Lord Selborne.
3 *Pinnel's Case* (1602) 5 Co Rep 117a.
4 (1882) 9 QBD 37.
5 *D & C Builders Ltd v Rees* [1966] 2 QB 617, [1965] 3 All ER 837, p 106, above.
6 Co Litt 212b.
7 *Wilkinson v Byers* (1834) 1 Ad & El 106. See also *Ferguson v Davies* [1997] 1 All ER 315, discussed above, p 91.

> it was conceded that the consideration might be executory: 'I release you from your obligation in consideration of your promise to pay me £50 and give me a letter of withdrawal.' The consideration on each side might be an executory promise, the two mutual promises making an agreement enforceable in law, a contract. Comyns puts it in his Digest, and the passage was approved by Parke B in *Good v Cheesman*[8] and by the Court of King's Bench in *Cartwright v Cooke*:[9] 'An accord, with mutual promises to perform, is good, though the thing be not performed at the time of action: for the party has a remedy to compel the performance,' that is to say, a cross-action on the contract of accord.[10]

The modern rule is, then, that if what the creditor has accepted in satisfaction is merely his debtor's promise to give consideration, and not the performance of that promise, the original cause of action is discharged from the date when the agreement is made.[11]

This, however, raises a question of construction in each case, for it has to be decided as a fact whether it was the making of the promise itself or the performance of the promise that the creditor consented to take by way of satisfaction.

> Suppose for instance, that a buyer is unable to pay £50 which is due for goods delivered and that the seller agrees to discharge him from obligation of immediate payment in consideration of receiving a bill of exchange from a third party, X, for £55 payable four months hence.

If the seller were to sue for the £50 before receipt of the bill of exchange, the question would arise whether he had committed a breach of the agreement. This would depend upon whether the agreement constituted a good accord and satisfaction, and this in turn would depend upon the true bargain between the parties. Did they mean that the discharge should be complete when X promised to give the bill or only when he actually gave it?

The question of construction that arises in such a case is well illustrated by *British Russian Gazette Ltd v Associated Newspapers Ltd*,[12] where the facts relevant to the present matter were as follows:

> Mr Talbot agreed to compromise two actions of libel, which had been commenced by him and by the *British Russian Gazette*, in respect of certain articles in the *Daily Mail*. His promise was expressed in a letter couched in these terms: 'I accept the sum of one thousand guineas on account of costs and expenses in full discharge and settlement of my claims ... and I will forthwith instruct my solicitors to serve notice of discontinuance; or to take other steps ... to end the proceedings now pending.' Before payment of the thousand guineas had been made, Talbot disregarded this compromise and proceeded with the action.

If this letter meant that Talbot agreed to discharge the defendants from their obligation in consideration of their promise to make the payment, his continuance of the libel action constituted a breach of a good accord and

8 (1831) 2 B & Ad 328 at 335.
9 (1832) 3 B & Ad 701 at 703.
10 *British Russian Gazette Ltd v Associated Newspapers Ltd* [1933] 2 KB 616 at 644.
11 *Morris v Baron & Co* [1918] AC 1 at 35, per Lord Atkinson; *Elton Cop Dyeing Co v Broadbent & Son Ltd* (1919) 89 LJKB 186; *British Russian Gazette Ltd v Associated Newspapers Ltd* [1933] 2 KB 616.
12 [1933] 2 KB 616.

satisfaction. His argument, of course, was that there was no binding discharge until actual payment, but this did not prevail with the Court of Appeal. It was held that the letter recorded an agreement in which the consideration was a promise for a promise: 'In consideration of your promise to pay me a thousand guineas, I promise to discontinue proceedings.' The defendants were, therefore, entitled to enforce the accord by way of counter-claim.

There is one exception to the rule that a unilateral discharge requires consideration. It is enacted that if the holder of a bill of exchange or of a promissory note either unconditionally renounces his rights in writing or delivers the instrument to the person liable, the effect is to discharge the obligation of the acceptor or promisor even though no consideration is received.[13]

13 Bills of Exchange Act 1882, ss 62 and 89.

Chapter 20

Discharge under the doctrine of frustration[1]

SUMMARY

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2 **Operation of the doctrine** 635
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1 Nature and rationale of the doctrine

After the parties have made their agreement, unforeseen contingencies may occur which prevent the attainment of the purpose that they had in mind. The question is whether this discharges them from further liability.

In the seventeenth century the judges in *Paradine v Jane*[2] laid down what is sometimes called the rule as to absolute contracts. It amounts to this: When *the law* casts a duty upon a man which, through no fault of his, he is unable to perform, he is excused for non-performance; but if he binds himself *by contract* absolutely to do a thing, he cannot escape liability for damages for proof that as events turned out performance is futile or even impossible. The alleged justification for this somewhat harsh principle is that a party to a contract can always guard against unforeseen contingencies by express stipulation; but if he voluntarily undertakes an absolute and unconditional obligation he cannot complain merely because events turn out to his disadvantage. It has accordingly been held, for instance, that if a builder agrees to construct a house by a certain date and fails to do so because a strike occurs[3] or because the soil contains a latent defect which suspends operations[4] he is none the less liable. Again, if a shipowner agrees that he will load his ship with guano at a certain place in West Africa, he is liable in damages notwithstanding that no guano is obtainable.[5]

In practice parties very often insert in their contracts provisions designed to deal with unforeseen difficulties. Such *force majeure* or hardship clauses are particularly common where the contract is of a kind where the parties can foresee that such problems are likely to occur but cannot foresee their nature or extent as in building or engineering contracts. Such clauses often

1 Treitel *Frustration and force majeure*. McKendrick (ed) *Force majeure and frustration* (2nd edn); Phang 21 Anglo-American LR 278.
2 (1647) Aleyn 26. Simpson 91 LQR 247 at 269-273.
3 *Budgett & Co v Binnington & Co* [1891] 1 QB 35.
4 *Bottoms v York Corpn* (1892) 2 Hudson's BC (4th edn) 208.
5 *Hills v Sughrue* (1846) 15 M & W 253.

present problems of construction and application,[6] the details of which, however, fall outside the scope of this book.

Nevertheless, starting with the case of *Taylor v Caldwell*[7] in 1863, a substantive and particular doctrine has gradually been evolved by the courts which mitigates the rigour of the rule in *Paradine v Jane* by providing that if the further fulfilment of the contract is brought to an abrupt stop by some irresistible and extraneous cause for which neither party is responsible, the contract shall terminate forthwith and the parties be discharged.[8]

The most obvious cause which brings this doctrine into operation, and the one which provided the issue in the parent case of *Taylor v Caldwell*, is the physical destruction of the subject matter of the contract before performance falls due. Another, equally obvious, is a subsequent change in the law which renders performance illegal. A less obvious cause, but nevertheless one that has occasioned a multitude of decisions, is what is called the 'frustration of the common venture'. Owing to an event that has supervened since the making of the contract, the parties are frustrated in the sense that the substantial object that they had in view is no longer attainable. Literal performance may still be possible, but nevertheless it will not fulfil the original and common design of the parties. What the courts have held in such a case is that, if some catastrophic event occurs for which neither party is responsible and if the result of that event is to destroy the very basis of the contract, so that the venture to which the parties now find themselves committed is radically different from that originally contemplated, then the contract is forthwith discharged.[9] Mere hardship or inconvenience to one of the parties is not sufficient to justify discharge. 'There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.'[10] Two simple illustrations may be given of circumstances which have been held sufficiently catastrophic to change the significance of the obligation.

> In *Krell v Henry*,[11] the plaintiff agreed to let a room to the defendant for the day upon which Edward VII was to be crowned. Both parties understood that the purpose of the letting was to view the coronation procession, but this did not appear in the agreement itself. The procession was postponed owing to the illness of the king.

6 See eg *Superior Overseas Development Corpn and Phillips Petroleum (UK) Co Ltd v British Gas Corpn* [1982] 1 Lloyd's Rep 262.

7 (1863) 3 B & S 826.

8 *Denny, Mott and Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265 at 272, 274, [1944] 1 All ER 678 at 681, 683.

9 *Sir Lindsay Parkinson & Co Ltd v Works and Public Buildings Comrs* [1949] 2 KB 632 at 665, [1950] 1 All ER 208 at 227, per Asquith LJ; *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221 at 228, [1945] 1 All ER 252 at 255, per Lord Simon; *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 at 728-729, per Lord Radcliffe.

10 *Davis Contractors Ltd v Fareham UDC*, [1956] AC 696 at 728-729, per Lord Radcliffe. But Parliament can by statute give the courts power to vary agreements because of changed circumstances as it has done in the case of maintenance agreements: Matrimonial Causes Act 1973, s 35.

11 [1903] 2 KB 740. The decision has not escaped judicial criticism: see *Larrinaga & Co v Société Franco-Americaine des Phosphates de Medulia* (1922) 29 Com Cas 1 at 7, per Lord Finlay; *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524 at 529, per Lord Wright.

The Court of Appeal took the view that the procession was the foundation of the contract and that the effect of its cancellation was to discharge the parties from the further performance of their obligations. It was no longer possible to achieve the substantial purpose of the contract. A similar result was reached in *Tatem Ltd v Gamboa*.[12] In that case:

> In June 1937, at the height of the Spanish Civil War, a ship was chartered by the plaintiffs to the Republican Government for a period of thirty days from 1 July, for the express purpose of evacuating civilians from the North Spanish ports to French Bay ports. The hire was at the rate of £250 a day until actual redelivery of the ship. This rate was about three times that prevailing in the market for equivalent ships not trading with Spanish ports. After one successful voyage, the ship was seized by Nationalists on 14 July and detained in Bilbao until 7 September, when she was released and ultimately redelivered to the plaintiffs on 11 September. The hire had been paid in advance up to 31 July, but the Republican Government refused to pay for the period from 1 August to 11 September, on the ground that the common venture of the parties had been frustrated by the seizure of the ship.

Goddard J held that the seizure had destroyed the foundation of the contract and that the Republican Government was not liable. He said:

> If the foundation of the contract goes, either by the destruction of the subject-matter or by reason of such long interruption or delay that the performance is really in effect that of a different contract, and the parties have not provided what in that event is to happen, the performance of the contract is to be regarded as frustrated.[13]

Theories as to the basis of the doctrine

The precise legal theory upon which this doctrine of frustration is based has aroused much controversy. No fewer than five theories have been advanced at one time or another;[14] but the essential question is whether the courts strive to give effect to the supposed intention of the parties or whether they act independently and impose the solution that seems reasonable and just.

The former method was preferred by Blackburn J in *Taylor v Caldwell*[15] in 1863, when he made the first breach in the long-established rule as to absolute contracts. In that case, A had agreed to give B the use of a music hall on certain specified days for the purpose of holding concerts. The hall was accidentally destroyed by fire six days before the contract date, and B claimed damages for breach of the agreement. Blackburn J held the contract to be discharged, but he found it necessary to walk with circumspection in order to reconcile reason and justice with the established rule as to absolute contracts. His reasoning was that a contract is not to be construed as absolute if the parties must from the beginning have known that its fulfilment depended upon the continued existence of some particular thing, and therefore must have realised that this continuing existence was the foundation of the bargain. In such a case, he

12 [1939] 1 KB 132, [1938] 3 All ER 135.

13 Ibid at 139 and 144, respectively.

14 McNair and Watts *Legal Effects of War* (4th edn) pp 156 ff; and see his articles in 35 LQR 84, 56 LQR 173. See *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, [1981] 1 All ER 161, esp at 165-166 and 686-687 respectively, per Lord Hailsham of St Marylebone LC.

15 (1863) 3 B & S 826.

said, the contract 'is subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor'.[16] In short, he attributed a conventional character to an obviously reasonable, if not inevitable, solution. Thus arose the theory of the implied term. No express term for the discharge of the contract was made by the parties, but had they anticipated and considered the catastrophic event that in fact happened, they would have said, 'if that happens it is all over between us'.[17] In implying such a term it has been said that 'the law is only doing what the parties really (though subconsciously) meant to do themselves'.[18]

This theory, though it still has its unrepentant adherents,[19] has been heavily attacked in recent years and has substantially been replaced by the more realistic view that the court imposes upon the parties the just and reasonable solution that the new situation demands. Perhaps the most careful analysis of this theory has been made by Lord Wright, and the following two passages from his speech in a leading case illustrate his view that the doctrine of frustration has been invented by the courts in order to supplement the defects of the actual contract. In the first passage he said:

> Where, as generally happens, and actually happened in the present case, one party claims that there has been frustration and the other party contests it, the court decides the issue and decides it *ex post facto* on the actual circumstances of the case. The data for decision are, on the one hand the terms and construction of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred. It is the court which has to decide what is the true position between the parties.[20]

The second passage is as follows:

> The event is something which happens in the world of fact, and has to be found as a fact by the judge. Its effect on the contract depends on the meaning of the contract, which is matter of law. Whether there is frustration or not in any case depends on the view taken of the event and of its relation to the express contract by 'informed and experienced minds'.[1]

It is perhaps fair to say that this is now the more generally accepted view. To attempt to guess the arrangements that the parties would have made at the time of the contract, had they contemplated the event that has now unexpectedly happened, is to attempt the impossible. Instead, the courts refuse to apply the doctrine of frustration unless they consider that to hold the parties to further

16 Ibid at 883-884.

17 *F A Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397 at 404, per Lord Loreburn.

18 *Hirji Mulji v Cheong Yue Steamship Co Ltd* [1926] AC 497 at 504.

19 *Port Line Ltd v Ben Line Steamers Ltd* [1958] 2 QB 146 at 162, per Diplock J; and see *British Movietonews Ltd v London and District Cinemas Ltd* [1952] AC 166 at 183, per Lord Simon; and at 187, per Lord Simonds); *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corpn Ltd* [1942] AC 154 at 163, per Lord Simon.

20 *Denny, Mott and Dickson Ltd v James Fraser & Co Ltd* [1944] AC 265 at 274-275, [1944] 1 All ER 678 at 683. In an extra-judicial utterance Lord Wright was more outspoken: 'The truth is', he said, 'that the court or jury as a judge of fact decides the question in accordance with what seems to be just and reasonable in its eyes. The judge finds in himself the criterion of what is reasonable. The court is in this sense making a contract for the parties, though it is almost blasphemy to say so': *Legal Essays and Addresses* p 259.

1 Ibid at 276 and 683, respectively.

performance would, in the light of the changed circumstances, alter the fundamental nature of the contract.[2] In an illuminating passage, Lord Radcliffe has said:

> By this time it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself. So perhaps it would be simpler to say at the outset that frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni.*[3] It was not this that I promised to do.[4]

There has been much discussion as to whether frustration presents a question of fact or law. One answer suggested by Devlin J[5] is that:

> While the application of the doctrine of frustration is a matter of law; the assessment of a period of delay sufficient to constitute frustration is a question of fact.

More recently the House of Lords has held[6] that if an arbitrator correctly directs himself on the applicable general principles, his decision will only be open to review if it is one that no reasonable arbitrator could reach.

It would appear that there are in fact three questions. First, what are the general rules about the doctrine of frustration. This is clearly a question of law. Secondly, what are the primary facts. This is equally clearly a question of fact. Thirdly, how is the first to be applied to the second. This is a question of degree or judgement which does not fall naturally as a matter of abstract logic into either category and the practical question is the extent to which the trier of fact's views are open to challenge.[7]

2 Operation of the doctrine

It is not possible to tabulate or to classify the circumstances to which the doctrine of frustration applies, but we will illustrate its operation by a reference to a few of the cases in which it has been invoked.[8]

2 *Tsakiroglou & Co Ltd v Noblee and Thorl GmbH* [1962] AC 93 at 115, per Lord Simonds.

3 In a letter to *The Times*, 20 December 1980, Sir John Megaw points out that these words are drawn from the *Aeneid* Book 4, lines 338 and 339, where they form part of Aeneas's shabby excuses for his planned desertion of Queen Dido.

4 *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 at 728-729, see also at 719-720, per Lord Reid. *Ocean Tramp Tankers Corpn V/O Sovfracht, The Eugenia* [1964] 2 QB 226 at 238-239, [1964] 1 All ER 161 at 166, per Lord Denning. In *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, [1981] 1 All ER 161 Lord Radcliffe's statement was treated as the preferred view by Lord Hailsham of St Marylebone LC and Lord Roskill.

5 *Universal Cargo Carriers Corpn v Citati* [1957] 2 QB 401 at 435, [1957] 2 All ER 70 at 83.

6 *Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema* [1982] AC 724, [1981] 2 All ER 1030, disapproving *The Angelia* [1973] 2 All ER 144, [1973] 1 WLR 210.

7 See *Jackson v Union Marine Insurance Co Ltd* (1874) LR 10 CP 125; *Tsakiroglou & Co Ltd v Noblee and Thorl GmbH* [1962] AC 93, [1961] 2 All ER 179; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, [1981] 1 All ER 161.

8 For a more detailed statement, see McNair and Watts *Legal Effects of War* (4th edn) pp 177 ff; Webber *Effect of War on Contracts* (2nd edn) pp 394 ff.

Upon proof that the continuing availability of a physical thing or a given person is essential to the attainment of the fundamental object which the parties had in view, the contract is discharged if, owing to some extraneous cause such thing or person is no longer available. *Taylor v Caldwell*[9] sufficiently illustrates the case of a physical thing, but the rule laid down in that decision applies with equal force if it is a fundamental requirement that a person should remain available. Thus, a contract to perform services which can be rendered only by the promisor personally necessarily contemplates that his state of health, which at present is sufficiently good for the fulfilment of his obligations, will continue substantially unchanged, and if this ceases to be so owing to his death or illness, the court decrees that both parties shall be discharged from further liability.[10] A similar decree may be made if in time of war one of the parties is interned[11] or is called-up for military service,[12] provided that the interruption in performance is likely to be so long as to defeat the purpose of the contract. Contracts liable to discharge on this ground include an agreement to act as the agent of a music hall artiste,[13] to perform at a concert,[14] not to remove a child from school without a term's notice,[15] and a contract of apprenticeship.[16]

Another cause of frustration is the non-occurrence of some event which must reasonably be regarded as the basis of the contract. This is well illustrated by the coronation cases, especially by *Krell v Henry*,[17] but it is not necessary to expand the account already given of that decision.[18] It should be observed, however, that discharge will not be decreed if the event cannot reasonably be regarded as the real basis of the contract. The same judges who decided *Krell v Henry* had already refused in *Herne Bay Steamboat Co v Hutton*[19] to regard a somewhat similar contract as frustrated. In that case an agreement was made that the plaintiff's ship should be 'at the disposal of' the defendant on 28 June to take passengers from Herne Bay 'for the purpose of viewing the naval review and for a day's cruise round the fleet'. The review was later cancelled, but the fleet remained at Spithead on 28 June. It was held that the contract was not discharged. The case is not easy to distinguish from *Krell v Henry*, but perhaps the explanation is that the holding of the review was not the sole adventure

9 (1863) 3 B & S 826. Compare *Baily v De Crespigny* (1869) LR 4 QB 180; (a covenant by a lessor not to allow the erection of any building upon a paddock fronting the demised premises was discharged when a railway company compulsorily acquired and built a station on the paddock).

10 *Boast v Firth* (1868) LR 4 CP 1. *Condor v Barron Knights Ltd* [1966] 1 WLR 87. Obviously, not every illness will bring the contract to an end. To draw the line it will be necessary to consider the extent of the illness and the nature and terms of the contract: *Marshall v Harland and Wolff Ltd* [1972] 2 All ER 715, [1972] 1 WLR 899; *Hebden v Forsey & Son* [1973] ICR 607; *Hart v A R Marshall & Sons (Bulwell) Ltd* [1978] 2 All ER 413, [1977] 1 WLR 1067.

11 *Unger v Preston Corpn* [1942] 1 All ER 200.

12 *Morgan v Manser* [1948] 1 KB 184, [1947] 2 All ER 666; *Marshall v Glanvill* [1917] 2 KB 87. Similarly if one of the parties is imprisoned: *Hare v Murphy Bros* [1974] 3 All ER 940, [1974] ICR 603. But see *Chakki v United Yeast Co Ltd* [1982] 2 All ER 446.

13 *Morgan v Manser*, above.

14 *Robinson v Davison* (1871) LR 6 Exch 269; *Poussard v Spiers and Pond* (1876) 1 QBD 410.

15 *Simeon v Watson* (1877) 46 LJQB 679.

16 *Boast v Firth* (1868) LR 4 CP 1. Cf *Mount v Oldham Corpn* [1973] QB 309, [1973] 1 All ER 26.

17 [1903] 2 KB 740.

18 P 632, above.

19 [1903] 2 KB 683.

contemplated. The cruise round the fleet, which formed an equally basic object of the contract, was still capable of attainment.

So fine a distinction reflects a difficulty that frequently occurs when the doctrine of frustration falls to be applied to a contract that is not in fact incapable of performance. The doctrine is certainly applicable if the object which is the foundation of the contract becomes unobtainable, but the judges are equally insistent that the motive of the parties is not a proper subject of inquiry. That the distinction, however, between motive and object is not always clear is apparent from the *Herne Bay* case.

> Suppose, for example, that a car is hired in Oxford to go to Epsom on a future date which in fact is known by both parties to be Derby day. If the Derby is subsequently abandoned, the question whether the contract is discharged or not depends upon whether the court regards the race as the foundation of the contract, or merely as the motive which induced the contract. Must the case be equated with *Krell v Henry* or with *Herne Bay Steamboat Co v Hutton*?

A common cause of frustration, especially in time of war, is interference by the government in the activities of one or both of the parties. For example, the acts contemplated by the contract may be prohibited for an indefinite duration, the labour or materials necessary for performance may be requisitioned, or premises upon which work is to be done may be temporarily seized for public use. In such cases the contract is discharged if to maintain it would be to impose upon the parties a contract fundamentally different from that which they made. A well-known example is *Metropolitan Water Board v Dick Kerr & Co.*[20] In that case:

> By a contract made in July 1914, the respondents agreed with the appellants to construct a reservoir within six years, subject to a proviso that the time should be extended if delay were caused by difficulties, impediments or obstructions howsoever occasioned. In February 1916, the Minister of Munitions ordered the respondents to cease work and to disperse and sell the plant.

It was held that the provision for extension of time did not cover such a substantial interference with the performance of the work as this, and that the contract was completely discharged. The interruption was likely to be so long that the contract, if resumed, would be radically different from that originally made.

Whether the outbreak of war or an interference by the government discharges a contract depends upon the actual circumstances of each case.[1] The principle itself is constant, but the difficulty of its application remains. Discharge must be decreed only if the result of what has happened is that, if the contract were to be resumed after the return of peace or the removal of the interference, the parties would find themselves dealing with each other under conditions completely different from those that obtained when they made their agreement.

20 [1918] AC 119

1 In *Finelvet AG v Vinava Shipping Co Ltd* [1983] 2 All ER 658 a time chartered ship was trapped in the Shatt-Al-Arab as a result of the Iran-Iraq war. The arbitrator held that the charterparty was frustrated not on 22 September 1980 when war broke out (since many informed commentators expected a speedy victory for Iraq) but on 24 November 1980, by which time informed opinion expected a protracted war. Mustill J held that the arbitrator had made no error of law in reaching this conclusion. See also *The Eugenia* [1983] 1 AC 736, [1982] 3 All ER 350, *The Wennang (No 2)* [1983] 1 Lloyd's Rep 400

The contract must be regarded as a whole and the question answered whether its purpose as gathered from its terms has been defeated.[2] The answer often turns upon the probable duration of the interference. Businessmen must not be left in indefinite suspense and as Lord Wright has said:

> If there is a reasonable probability from the nature of the interruption that it will be of indefinite duration, they ought to be free to turn their assets, their plant and equipment and their business operations into activities which are open to them, and to be free from commitments which are struck with sterility for an uncertain future period.[3]

The question whether the interruption will be of indefinite duration, rendering further performance of the contract impracticable, must be considered by the court in the light of the circumstances existing at the moment when it occurred. What view would a reasonable man have formed at that moment, without regard to the fuller information available to the court at the time of the trial? Would the reasonable inference have been that the interruption was indefinite in duration or merely transient?[4] The view that the effect of the interruption must be determined at its inception is clearly the orthodox one and it fits in with the rule, discussed below,[5] that frustration when it occurs operates automatically. However, the rule poses very considerable practical difficulties with some types of interruption. An illness may clear up quickly or it may linger on for months, a strike may be settled in a few days or continue for many weeks; a war may last for six days or thirty years. In such cases it appears permissible to wait for a short period to see how things turn out.[6]

That individual views may vary as to whether an interference is calculated to defeat the purpose of a contract is well illustrated by two cases. In *FA Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd*[7] there was a sharp conflict of judicial opinion in the House of Lords. The facts were these:

> A tanker was chartered for five years from December 1912 to December 1917, to be used by the charterers for the carriage of oil. In February 1915, she was requisitioned by the government and used as a troopship. The charterers were willing to pay the agreed freight to the owners, but the latter, desirous of receiving the much larger sum paid by the government, contended that the requisition had frustrated the commercial object of the venture and had therefore put an end to the contract.

The House of Lords by a bare majority rejected this contention. Of the majority Lord Parker took the view that there was nothing concrete capable of frustration, since the parties never contemplated a definite adventure. The owners were not concerned in the charterers doing any specific thing except paying freight as it fell due. Lord Loreburn, though admitting that the parties contemplated a continuing state of peace and did not envisage loss of control over the ship, denied that the interruption was of such a

2 *Denny, Mott and Dickson, Ltd v James B Fraser & Co Ltd* [1944] AC 265 at 273, [1944] 1 All ER 678 at 682; per Lord Macmillan.
3 [1944] AC 265 at 278, [1944] 1 All ER 678 at 685, per Lord Wright.
4 *Atlantic Maritime Co Inc v Gibbon* [1954] 1 QB 88, [1953] 2 All ER 1086.
5 See p 645, below.
6 *Pioneer Shipping Ltd BTP Tioxide Ltd, The Nema* [1981] 2 All ER 1030 at 1047 per Lord Roskill. See also *Chakki v United Yeast Co Ltd* [1982] 2 All ER 446 and cases cited in fn 1, p 637, above.
7 [1916] 2 AC 397.

character as to make it unreasonable to keep the contract alive. Judging the situation as at the date of the requisition, there might be many months during which the ship would be available for commercial purposes before the five years expired in December 1917.[8] On the other hand, Lords Haldane and Atkinson took the opposite view. Lord Haldane was of opinion that the entire basis of the contract so far as concerned its performance at any calculable date in the future was swept away. Lord Atkinson regarded the requisition as constituting such a substantial invasion of the freedom of both parties that the foundation of the contract had disappeared.

In the second case—*Tsakiroglou & Co Ltd v Noblee, and Thorl GmbH*[9]—the House of Lords had to consider the effect of the closing of the Suez Canal in 1956, an event which had already provoked a diversity of judicial opinion.

> On 4 October 1956, sellers agreed to sell to buyers Sudanese groundnuts for shipment cif Hamburg, and to ship them during November/December 1956.[10] On 7 October, they booked space in one of four vessels scheduled to call at Port Sudan in these two months. On 2 November, the Suez Canal was closed to traffic. The seller failed to make the shipment and, when sued for damages, claimed that the contract had been frustrated.

The nature and extent of the contractual obligations were clear. The seller under a cif contract must prepare an invoice of the goods, ship goods of the right description at the port of shipment, procure a contract of affreightment providing for delivery at the agreed destination, effect an adequate insurance of the cargo and send the shipping documents, ie the invoice, bill of lading and insurance policy, to the buyers.

So much being clear, the sole question to be decided was whether shipment via the Cape of Good Hope would constitute a fundamental alteration in the contractual obligations of the sellers. Would such a mode of performance be radically different from what they had agreed to perform?

The House of Lords unanimously repudiated the suggestion. The freight and perhaps the insurance would be more expensive, but extra expense does not *per se* justify a finding of frustration; the voyage to Hamburg would take four weeks longer than by the canal, but no delivery date was fixed by the contract. Since no particular route had been agreed to, the sellers were bound to choose one that was practicable in the circumstances. The argument, that every cif contract contains an implied term requiring the sellers to send the goods by the usual and customary route, found no favour with their Lordships, for even if such be the rule, what is usual must be estimated at the time when the obligation is performed, not when the contract is made.[11]

8 Ibid at 405.

9 [1962] AC 93, [1961] 2 All ER 179.

10 A cif contract is one under which the agreed price covers the cost of the goods, the premium for their insurance and the freight for their carriage. The buyer's obligation is to pay the price upon the delivery of the shipping documents, not upon the delivery of the goods.

11 As to the effect of closure of the Suez Canal on voyage charterparties, see the differing views in *Société Franco-Tunisienne D'Armement v Sidermar SPA* [1961] 2 QB 278, [1960] 2 All ER 529; *Ocean Tramp Tankers Corpn v V/O Soufracht, The Eugenia* [1964] 2 QB 226, [1964] 1 All ER 161; *Palmco Shipping Inc v Continental Ore Corpn* [1970] 2 Lloyd's Rep 21. Charterparties usually now contain a 'Suez Canal clause' which purports to determine the rights of the parties if the ship proceeds *via* the Cape instead of through the canal. The obscurity of the clause, however, has raised difficulties; see, for example, *Achille Lauro Fugnoacchino & Co v Total Societa Italiana per Azioni* [1969] 2 Lloyd's Rep 65.

In many cases of government interference the discharge of the contract may equally be justified on the ground that further performance has been made illegal. 'It is plain', said Lord Macmillan, 'that a contract to do what it has become illegal to do cannot be legally enforceable. There cannot be default in not doing what the law forbids to be done.'[12] Thus, a contract for the sale of goods to be shipped from abroad to an English port is terminated as to the future if supervening legislation prohibits the importation of goods of that description.[13] The result is the same if the goods are to be shipped to a foreign port, and while the contract is still executory war breaks out with the country of destination.[14] To continue the contract would involve trading with the enemy.[15]

Lord Denning MR reached an interesting and controversial decision in *Staffordshire Area Health Authority v South Staffordshire Waterworks Co*[16] the facts of which have already been stated.[17] In this case Lord Denning MR held that the contract had been frustrated by inflation 'outside the realm of their speculations altogether, or of any reasonable person sitting in their chairs'.[18] With respect, however, this view, which was not concurred in by the other members of the Court is either wrong or involves a massive change in the law as previously understood. There are thousands, if not millions, of contracts potentially within the scope of this principle, for example, long leases for 99 years or more at fixed ground rents or long-term policies of life insurance. Furthermore, the facts of the case would not appear to satisfy Lord Denning MR's own test since in 1929 hyper-inflation was a well-known phenomenon which had recently devastated the economies of several European countries.

Two further factors which affect the operation of the doctrine of frustration require particular notice.

Effect when parties expressly provide for the frustrating event

The first is relevant where a contingency for which the parties have expressly provided occurs in fact, but assumes a more fundamental and serious form than perhaps they contemplated. The question of construction that arises here is whether the express provision is intended to be a complete and exclusive solution of the matter in the sense that its object is to govern any form, fundamental or not, that the contingency may take. Unless it is intended to be of this all embracing character, it will not prevent the discharge of the obligation if in the result the effect of the

12 *Denny, Mott and Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265 at 272, [1944] 1 All ER 678 at 681.

13 *Denny Mott and Dickson Ltd v James B Fraser and Co Ltd*, above.

14 *Zinc Corpn Ltd v Hirsch* [1916] 1 KB 541.

15 It is clear law that a purchaser who cannot complete a contract because he has no money, cannot invoke the doctrine of frustration. *Universal Corpn v Five Ways Properties Ltd* [1979] 1 All ER 552.

16 [1978] 3 All ER 769, [1978] 1 WLR 1387.

17 P 612, above.

18 Ibid at 777, and 1395, respectively. It is clear law that frustration brings the contract to an end automatically (see p 645, below) but in this case Lord Denning MR held that the effect of inflation was to render the contract terminable by reasonable notice. Presumably this is because this was all that the Water Authority were claiming but it relieved him from the onerous task of deciding when the inflation rate became sufficiently great to frustrate the contract. Cf *Wates Ltd v Greater London Council* (1983) 25 BLR 1.

contingency is to frustrate the essential object of the contract. The leading case is *Jackson v Union Marine Insurance Co Ltd*.[19]

> A ship was chartered in November 1871, to proceed with all possible despatch, *dangers and accidents of navigation excepted*, from Liverpool to Newport and there to load a cargo of iron rails for carriage to San Francisco. She sailed on 2 January, but on the 3rd ran aground in Carnarvon Bay. She was got off by 18 February and was taken to Liverpool where she was still under repair in August. On 15 February the charterers repudiated the contract.

The question was whether the charterers were liable for not loading the ship, or whether the time likely to be required for repairs was so long as to excuse their failure to do so. The question put to the jury, which they answered in the affirmative, was 'whether such time was so long as to put an end in a commercial sense to the commercial speculation entered upon by the shipowner and the charterers'. On this finding it was held that the adventure contemplated by the parties was frustrated and the contract discharged. A voyage to San Francisco carried out after the repair of the ship would have been a totally different adventure from that originally envisaged. The express exception, read literally, no doubt covered the accident that had happened, and it would have precluded the charterers from recovering damages in respect of the delay; but it was not intended to cover an accident causing injury of so extensive a nature.

In a later case, a contract was made in 1913 by which shipowners undertook to provide charterers with certain vessels in each of the years 1914 to 1918, and it was agreed that if war broke out shipments might at the option of either party be suspended until the end of hostilities. After the start of the war, Rowlatt J held that the contract was discharged, not merely suspended. The suspension clause was not intended by the parties to cover a war of such a catastrophic nature and with such dislocating effects as in fact occurred.[20]

Party cannot rely upon self-induced frustration[1]

A second relevant factor is whether one of the parties has himself been responsible for the frustrating event. 'Reliance', said Lord Sumner, 'cannot be placed on a self-induced frustration.'[2] The point arose in a neat form in *Maritime National Fish Ltd v Ocean Trawlers Ltd*[3] where:

> The appellants chartered from the respondents a steam trawler which was useless for fishing unless it was fitted with an otter trawl. To the knowledge of both parties it was a statutory offence to use an otter trawl except under licence from the Canadian Minister of Fisheries. Later, the appellants, who had four other ships of their own, applied for five licences, but were

19 (1874) LR 10 CP 125; and see *Bank Line Ltd v A Capel & Co* [1919] AC 435; see also the remarks of Diplock J on the *Jackson* case in *Tsakiroglou & Co Ltd v Noblee and Thorl GmbH* [1960] 2 QB 318 at 330-331, [1959] 1 All ER 45 at 50; see also *Metropolitan Water Board v Dick Kerr & Co* [1918] AC 119.

20 *Pacific Phosphate Co Ltd v Empire Transport Co Ltd* (1920) 36 TLR 750.

1 Swanton 2 JCL 206.

2 *Bank Line Ltd v A Capel & Co* [1919] AC 435 at 452. The requirement was emphatically restated and applied by the House of Lords in *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal, The Hannah Blumenthal* [1983] 1 AC 854, [1982] 1 All ER 34.

3 [1935] AC 524. See also *Mertens v Home Freeholds Co* [1921] 2 KB 526.

granted only three. In naming the ships to which these licences should apply they excluded the trawler chartered from the respondents.

The appellants contended that they were not liable for the hire due under the charterparty, since performance had been frustrated by the refusal of the Minister to grant the full number of licences. The Privy Council, however, refused to regard this fact as sufficient to bring the case within the doctrine, for 'the essence of frustration is that it should not be due to the act or election of the party', and here it was the appellants themselves who had chosen to defeat the common object of the adventure. In this case it was arguable that in any event the refusal of the minister to grant licences was not a frustrating event since both parties knew that a licence was needed and the appellants might well have been thought to have taken their chance on whether or not they would get a licence. It also looks as if the decision to licence their own trawlers was self serving. Neither of these factors was present in *J Lauritzen AS v Wijsmuller BV, The Super Servant Two.*[4]

In this case the defendants agreed to carry the plaintiffs' drilling rig from Japan to a delivery location off Rotterdam using what was described in the contract as the 'transportation unit'. This was a highly specialised form of ocean transport and required a special kind of vessel. The defendants in fact had two such vessels, The Super Servant One and The Super Servant Two. Under the contract the transportation unit was defined as meaning either Super Servant One or Super Servant Two, that is the defendants were given the option of using either vessel.

The rig was to be delivered between 20 June 1981 and 20 August 1981. On 29 January 1981 Super Servant Two sank. The defendants had in fact intended to use Super Servant Two to perform this contract though they had made no election which was binding on them to do so. They had entered into contracts with other parties which they could only perform using Super Servant One. It was agreed that if the contract had, from the start, contemplated the use of Super Servant Two and Super Servant Two only, the sinking of Super Servant Two would have frustrated the contract. The defendants argued that since their decision to use Super Servant One on other contracts was reasonable they were entitled to be discharged.

There was powerful support for this view since Treitel has argued[5] that

where a party has entered into a number of contracts, supervening events may deprive him of the power of performing them all, without depriving him of the power of performing some of them ... It is submitted that frustration should not be excluded by a party's 'election' where his only choice was which of two contracts to frustrate.

The Court of Appeal rejected this reasoning principally on the grounds that where frustration operates it operates automatically on the happening of the frustrating event. It was clear that the contract was not frustrated by the sinking of Super Servant Two since the defendants might have chosen to perform this contract and not perform some other contract. The contract would therefore have been frustrated, if at all, by the defendants' decision as to which contract to perform.

4 [1990] 1 Lloyd's Rep 1.

5 Treitel, *The Law of Contract* (7th edn), pp 700-701 cf (10th edn), pp 845-846.

On the other hand, the phrase 'self-induced frustration' does not imply that every degree of fault will preclude a party from claiming to be discharged.

> The possible varieties [of fault] are infinite, and can range from the criminality of the scuttler who opens the sea-cocks and sinks his ship, to the thoughtlessness of the prima donna who sits in a draught and loses her voice. I wish to guard against the supposition that every destruction of *corpus* for which a contractor can be said, to some extent or in some sense, to be responsible, necessarily involves that the resultant frustration is self-induced within the meaning of the phrase.[6]

This rule, that a party cannot claim to be discharged by a frustrating event for which he is himself responsible, does not require him to prove affirmatively that the event occurred without his fault. The onus of proving that the frustration was self-induced rests upon the party raising this allegation.[7] For instance:

> On the day before a chartered ship was due to load her cargo an explosion of such violence occurred in her auxiliary boiler that the performance of the charterparty became impossible. The cause of the explosion could not be definitely ascertained, but only one of three possible reasons would have imputed negligence to the shipowners.

It was held by the House of Lords that, since the charterers were unable to prove that the explosion was caused by the fault of the owners, the defence of frustration succeeded and the contract was discharged.[8] It should perhaps be noted that in many cases a self-induced frustrating event will be a breach of contract but this will not necessarily be so. In *Maritime National Fish Ltd v Ocean Trawlers Ltd*,[9] the applicants were not contractually bound to licence the chartered trawler but could not excuse failure to pay hire by relying on the absence of a licence.

Controversy whether doctrine of frustration applies to a lease

It has been a controversial question whether the doctrine of frustration can be applied to a lease of land. If, for instance, land which has been let for building purposes for 99 years is, within five years from the beginning of the tenancy, completely submerged in the sea or zoned as a permanent open space, can it be said that the fundamental purpose of the contract has been frustrated and that the term itself must automatically cease?[10]

It is, indeed, well settled by a number of decisions that if, during the continuance of the lease, the premises are requisitioned by the government[11] or destroyed by fire[12] or by enemy action,[13] the tenant remains liable on his covenants to pay rent and to repair the property. But these decisions, which assume that individual covenants by a landlord or tenant are absolute, do not preclude the possibility that an event may be regarded as frustrating the fundamental purpose of the contract and therefore as terminating the lease

6 *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corpn Ltd* [1942] AC 154 at 179, [1941] 2 All ER 165 at 175, per Lord Russell of Killowen.
7 Ibid at 179 and 175, respectively, per Lord Russell of Killowen.
8 Ibid.
9 P 641, above. See also *Hare v Murphy Bros* [1974] 3 All ER 940, [1974] ICR 603.
10 Yahuda 21 MLR 637.
11 *Whitehall Court Ltd v Ettlinger* [1920] 1 KB 680.
12 *Matthey v Curling* [1922] 2 AC 180. Ativah *Accidents, Compensation and the Law* p 318, points out that it is normal practice for landlords to insure against such loss.
13 See *Redmond v Dainton* [1920] 2 KB 256.

altogether. For many years the view was taken in the lower courts, that leases are outside the doctrine of frustration. This is based on the argument that a lease creates not merely a contract, but also an estate. Thus in *London and Northern Estates Co v Schlesinger*,[14] it was held that the lease of a flat was not terminated by the fact that the tenant had become an alien enemy and was therefore prohibited from residing on the premises. Lush J said:

> It is not correct to speak of this tenancy agreement as a contract and nothing more. A term of years was created by it and vested in the appellant, and I can see no reason for saying that, because this order disqualified him from personally residing in the flat, it affected the chattel interest which was vested in him by virtue of the agreement.[15]

Conflicting opinions were expressed in *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd.*[16]

> In May 1936, a building lease was made to the lessees for a term of 99 years. Before any buildings had been erected the war of 1939 broke out and restrictions imposed by the government made it impossible for the lessees to erect the shops that they had covenanted to erect. In an action brought against them for the recovery of rent they pleaded that the lease was frustrated.

It was held unanimously by the House of Lords that the doctrine of frustration, even if it were capable of application to a lease, did not apply in the instant circumstances. The compulsory suspension of building did not strike at the root of the transaction, for when it was imposed the lease still had more then ninety years to run, and therefore the interruption in performance was likely to last only for a small fraction of the term.

Lord Russell and Lord Goddard LCJ expressed the opinion that the doctrine of frustration cannot apply to a demise of real property while Lord Simon and Lord Wright took the opposite view. Lord Porter expressed no opinion on the question.

In the ninth edition of this work it was submitted however that if the question should come before the House of Lords, the view that a lease is capable of being frustrated should be preferred. It is no doubt true that in many cases the object of the parties is *in fact* to transfer an estate but it surely goes too far to say that this is so as a *matter of law*. In many cases the parties may contemplate that the risk of unforeseen disasters will pass to the lessee on the execution of the lease just as surely as if he had taken a conveyance of the fee simple but this will not always be so. If the lease is for a specific purpose which becomes impossible of achievement, there may be a strong case for holding the lease frustrated. Similar arguments may apply if the lease is of short duration and here it is relevant to observe that a contractual licence to use land is certainly capable of frustration,[17] and that the distinction between leases and licences is notoriously hard to draw.[18] These views derive considerable support from the decision of the Supreme Court of Canada in *Highway*

14 [1916] 1 KB 20.
15 Ibid at 24. This statement was approved by the Court of Appeal in *Whitehall Court Ltd v Ettlinger* [1920] 1 KB 680 at 686, 687, which decision was approved by Lord Atkinson in *Matthey v Curling* [1922] 2 AC 180 at 237.
16 [1945] AC 221, [1945] 1 All ER 252.
17 *Taylor v Caldwell* (1863) 3 B & S 826; *Krell v Henry* [1903] 2 KB 740.
18 Cheshire and Burn *Modern Real Property* (15th edn) pp 585 ff.

Properties Ltd v Kelly, Douglas & Co.[19] that for the purpose of applying the rules about breach 'it is no longer sensible to pretend that a commercial lease ... is simply a conveyance and not also a contract'.[20]

This is in fact the position that was adopted by the House of Lords in the decision in *National Carriers Ltd v Panalpina (Northern) Ltd.*[1] The facts of this case need not be recounted since the House of Lords were unanimously of the view that there was no arguable case of frustration on the facts but they clearly held (Lord Russell *dubitante*) that the doctrine of frustration could apply to a lease. The decisive argument was the essential unity of the law of contract and the belief that no type of contract should as a *matter of law* be excluded from the doctrine. On the other hand it was agreed that it would be relatively rare for the doctrine to be applied in practice. The difference was neatly put as being between 'never' and 'hardly ever'.

This reasoning must of necessity carry with it the cases of an agreement for a lease[2] and a contract for the sale of freehold land.[3] Both must be capable of frustration, though the nature of the contracts may well be such as to fix on one party or the other the risk of many disasters. For instance in a straightforward contract of house purchase, it is normally understood that the risk of the house being destroyed by fire passes at the moment of exchange of contracts and prudent purchasers insure on this basis.

3 Effect of the doctrine

Presuming that a contract is frustrated by the operation of the doctrine, it is now necessary to examine the legal consequences. The first point to appreciate is the moment at which the discharge becomes operative. The rule established at common law is that the occurrence of the frustrating event 'brings the contract to an end forthwith, without more and automatically'.[4] Lord Wright said:

> In my opinion the contract is automatically terminated as to the future, because at that date its further performance becomes impossible in fact in circumstances which involve no liability for damages for the failure on either party.[5]

It is worth noting that it is not a logical necessity that impossibility of performance should operate to discharge a contract. In many Continental systems it is viewed rather as a defence[6] and English law might have accommodated it in the same way. In most cases only one party's performance is impossible—the other's obligation consisting in payment. In such a situation the party who could not perform might plead impossibility of performance

19 (1971) 17 DLR (3d) 710. See p 609, above.
20 Ibid at 721, per Laskin J.
1 [1981] 1 All ER 161.
2 See *Rom Securities Ltd v Rogers (Holdings) Ltd* (1967) 205 Estates Gazette 427.
3 See *Hillingdon Estates Co v Stonefield Estates Ltd* [1952] Ch 627, [1952] 1 All ER 853. As to options to purchase land see *Denny, Mott and Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265, [1944] 1 All ER 678.
4 *Hirji Mulji v Cheong Yue Steamship Co* [1926] AC 497 at 505, per Lord Sumner.
5 *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 70, [1942] 2 All ER 122 at 140. But see the criticism of Williams *Law Reform (Frustrated Contracts) Act 1943* pp 41-42.
6 See Nicholas 48 Tulane L Rev 946 at 954-966.

and the other total failure of consideration.[7] English law has not taken this path in general and this has concealed the undoubted existence of cases where impossibility does excuse but does not discharge. Thus we have seen[8] that a prolonged illness may frustrate a contract of personal service while a shorter and less serious illness will not do so. The shorter illness however while not bringing the contract to an end, will usually excuse absence from work. Similarly a statute may operate to provide a defence for non-performance of the contract without discharging it.[9]

The contract is terminated as to the future only. Unlike one vitiated by mistake, it is not void *ab initio*. It starts life as a valid contract, but comes to an abrupt and automatic end the moment that the common adventure is frustrated. From this premise the common law drew inferences which, though sometimes harsh, were not illogical. The rule adopted by the judges until 1943 may thus be stated:

> Each party must fulfil his contractual obligations so far as they have fallen due before the frustrating event, but he is excused from performing those that fall due later.[10]

In *Krell v Henry*,[11] for instance, it was held that the plaintiff could not recover the agreed rent from the defendant, since it did not fall due until the last minute of 24 June, and before this moment had arrived the abandonment of the procession had been announced. In *Jackson v Union Marine Insurance Co*[12] the grounding of the ship under charter terminated the contract, with the result that the owners were not bound to provide an alternative vessel, nor were the charterers bound to pay freight.

This common law principle, since it meant that any loss arising from the termination of the contract must lie where it had fallen, might well cause hardship to one or other of the parties, as is shown by *Chandler v Webster*.[13] In that case:

> X agreed to let a room in Pall Mall to Y for the purpose of viewing the coronation procession of 1902. The price was £141 15s payable immediately. Y paid £100, but he still owed the balance when the contract was discharged on 24 June owing to the abandonment of the procession. It was held, not only that Y had no right to recover the sum of £100, but also that he remained liable for the balance of £41 15s.

If attention is confined to the contract the decision is logical enough. The obligation to pay the £141 had matured before the moment of frustration. The plaintiff's counsel, however, argued that he was entitled to disregard the contract and to recover in quasi-contract the £100 actually paid, on the ground of a total failure of consideration.[14] But the Court of Appeal held that, as the doctrine of frustration does not avoid a contract *ab initio* but ends

7 See Lord Porter in *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corpn Ltd* [1942] AC 154 at 203; Weir [1970] CLJ 189; for a similar analysis of initial impossibility, see Stoljar *Mistake and Misrepresentation* ch 3.

8 P 635, above.

9 See eg Remuneration, Charges and Grants Act 1975, s 1.

10 See the *Fibrosa* case [1943] AC 32 at 58, [1942] 2 All ER 122 at 134.

11 [1903] 2 KB 740; p 632, above.

12 (1874) LR 10 CP 125; p 641, above.

13 [1904] 1 KB 493.

14 It will be seen later (pp 732 ff) that there are certain circumstances where the law, in its dislike of unjust enrichment, allows a person to sustain an action for money had and received, and by this quasi-contractual remedy to recover a payment for which he has received nothing.

it only from the moment of frustration. It was inadmissible to predicate a *total* failure of consideration. The quasi-contractual remedy was therefore inapplicable. In the words of Collins MR:

> If the effect were that the contract were wiped out altogether, no doubt the result would be that money paid under it would have to be repaid as on a failure of consideration. But that is not the effect of the doctrine [of frustration]; it only releases a party from further performance of the contract. Therefore the doctrine of failure of consideration does not apply.[15]

If, as in *Chandler v Webster*, the money was due before the date of frustration, the loss lay upon the debtor; but it was borne by the creditor if, as in *Krell v Henry*, the obligation to pay did not mature until after the discharge of the contract.

It is not surprising, therefore, that the decision in *Chandler v Webster* should have caused general dissatisfaction. But, despite judicial criticism,[16] it was not until 1942 that the House of Lords succeeded, in the *Fibrosa* case,[17] in avoiding the consequences of the rule that the contract remained in full force up to the moment of frustration. The facts of the case were as follows:

> The respondents, an English company, agreed in July 1939, to sell and to deliver within three or four months certain machinery to a Polish company in Gdynia. The contract price was £4,800, of which £1,600 was payable in advance. Great Britain declared war on Germany on 3 September, and on 23 September the Germans occupied Gdynia. The contract was therefore frustrated. On 7 September the London agent of the Polish company requested the return of £1,000 which had been paid in July to the respondents. The request was refused on the ground that 'considerable work' had already been done on the machinery.

It was, of course, clear that when the money was paid it was due under an existing contract, so that it could not be recovered by an action based upon the contract. The House of Lords held, however, that it was recoverable in quasi-contract. They set themselves, with sufficient success, to defeat the assumption upon which the Court of Appeal in *Chandler v Webster* had proceeded, namely, that there could be no total failure of consideration unless the contract was void *ab initio*. Lord Simon surmounted the difficulty by distinguishing the meaning of consideration, as used in this quasi-contractual sense, from that normally given to it in contract. He said:

> In English law, an enforceable contract may be formed by an exchange of a promise for a promise, or by the exchange of a promise for an act—I am excluding contracts under seal—and thus, in the law relating to the formation of contract, the promise to do a thing may often be the consideration but when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise. The money was paid to secure performance and, if performance fails the inducement which brought about the payment is not fulfilled.[18]

15 [1904] 1 KB 493 at 499.

16 See the various criticisms summarised by Lord Wright in the *Fibrosa* case [1943] AC 32 at 71, [1942] 2 All ER 122 at 140.

17 *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, [1942] 2 All ER 122.

18 Ibid at 48 and 129. This reasoning, which is now only of historical interest because of the Act of 1943, below, has not escaped criticism: see Gow 3 ICLQ 303 at 311-312.

Others of their Lordships, such as Lord Atkin and Lord Macmillan, were content to repudiate *Chandler v Webster* as devoid of authority. The result at least was to overrule that decision and to enable the Polish company to succeed in quasi-contract.

The rule established by the *Fibrosa* case has thus diminished the injustice of the former law, but since it operates only in the event of a total failure of consideration, it does not remove every hardship. On the one hand, it does not permit the recovery of an advance payment if the consideration has only partly failed, ie if the payer has received some benefit, though perhaps a slender one, for his money.[19] On the other hand, the payee, in his turn, may suffer an injustice. Thus, while he may be compelled to repay the money on the ground that the payer has received no benefit, he may himself, in the partial performance of the contract, have incurred expenses for which he has no redress. In the words of Lord Simon:

> He may have incurred expenses in connexion with the partial carrying out of the contract which are equivalent, or more than equivalent, to the money which he prudently stipulated should be prepaid, but which he now has to return for reasons which are no fault of his. He may have to repay the money, though he has executed almost the whole of the contractual work, which will be left on his hands. These results follow from the fact that the English common law does not undertake to apportion a prepaid sum in such circumstance—contrast the provision, now contained in section 40 of the Partnership Act 1890 for apportioning a premium if a partnership is prematurely dissolved.[20]

The *Fibrosa* case, therefore, while it removed the worst consequences of the decision in *Chandler v Webster*, left other difficulties untouched. A further attempt to clarify the law has, however, been made by the Law Reform (Frustrated Contracts) Act 1943, which gives general effect to the recommendations of the Law Revision Committee.[1]

Law Reform (Frustrated Contracts) Act 1943

The preliminary fact to observe is that the Act is confined to a case where 'a contract governed by English law has *become impossible of performance or been otherwise frustrated*, and the parties thereto have for that reason been discharged from the further performance of the contract'.[2] In other words, the statutory provisions do not apply where a contract is discharged by breach or for any reason other than impossibility or frustration.

In general it may be said that the Act makes two fundamental changes in the law. First, it amplifies the decision in the *Fibrosa* case by permitting the recovery of money prepaid, even though at the date of frustration there has been no total failure of consideration. Secondly, it allows a party who has done something in performance of the contract prior to the frustrating event to claim compensation for any benefit thereby conferred upon the other. In this respect it modifies the common law rule laid down, for instance, in *Cutter v Powell*.[3] We will now consider the Act under these two general headings.

19 *Fibrosa Spolka Akcynja v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 54-55, [1942] 2 All ER 122 at 131, 132, per Lord Atkin; at 56 and 135, per Lord Russell.

20 Ibid at 49 and 129, respectively.

1 7th Interim Report (Cmd 6009 (1939)).

2 S 1(1). For a full account of the Act, see Williams *Law Reform (Frustrated Contracts) Act*.

3 (1795) 6 Term Reports 320; p 590, above.

A THE RIGHT TO RECOVER MONEY PAID

Section 1(2) enacts as follows:

> All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (in this Act referred to as 'the time of discharge') shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be so payable.

This confirms the reversal by the *Fibrosa* case of *Chandler v Webster*.[4] On 1 May, A agrees to hire a room from B for the purpose of viewing a procession on 26 June, and by the terms of the contract he is required to pay the agreed price on 7 May. On 23 June, the procession is abandoned, and therefore the contract is discharged at common law. If A has already fulfilled his obligation to pay the price, he has a statutory right of recovery; if he has not done so, he is statutorily free from liability.

The subsection then proceeds to offset this relief to the party on whom the contractual duty of payment rests by giving a limited protection to the payee in so far, but only in so far, as he has incurred expense in the course of fulfilling the contract. This protection is expressed in the following proviso:

> Provided that, if the party to whom the sums were so paid or so payable incurred expenses before the time of discharge in or for the purpose of the performance of the contract, the court may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or, as the case may be, to recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred.

The extent of the protection thus afforded to the payee may become clearer if the proviso is sub-divided. It then becomes apparent that:

(a) If the party to whom the sums have been paid has incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the court may in its discretion allow him to *retain* the whole or any part of such sums, not being an amount in excess of the expenses incurred.

(b) If the party to whom the sums were *payable* has incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the court may in its discretion allow him to *recover* the whole or any part of such sums, not being an amount in excess of the expenses incurred.[5]

It will thus be noticed that a party can receive no allowance for his expenditure unless it was incurred before the occurrence of the frustrating event.

This discretionary power of the court to make an allowance for expenses was beyond the power of the House of Lords in the *Fibrosa* case. But if the facts of that case were to recur and if, for example, machinery of a special nature, not realisable in the open market, had been substantially completed by the English company under the contract, the court would be able to order the repayment to the Polish company of a proportion only of the prepaid amount.

4 [1904] 1 KB 493; p 646, above.
5 S 1(2), proviso.

In *Gamerco SA v ICM/Fair Warning (Agency) Ltd*[6] the plaintiffs had agreed to promote a rock concert to be held at a stadium in Madrid on 4 July 1992. The plaintiffs had paid $412,000 on account and had contracted to pay a further $362,500. Both parties had incurred expenses, the plaintiffs of about $450,000 and the defendants of about $50,000.

There were safety concerns about the stadium because of the use of high alumina cement in its construction. On 1 July 1992 the relevant government body withdrew the permit for the use of the stadium and the parties became aware of this on 2 July 1992. It was not possible to find another stadium.

Garland J held that the contract was frustrated.[7] He held that section 1(2) gave the Court a very wide discretion as to the defendants' expenses. In the circumstances it was established that neither party derived any benefit from the expenses they had incurred or had conferred any benefit on the other party. Garland J ordered the defendants to repay the $412,000 that had been paid in advance and made no deduction from this sum in respect of the defendants' expenses.

B THE RIGHT TO RECOVER COMPENSATION FOR PARTIAL PERFORMANCE

It will be recalled that, in accordance with the doctrine of strict performance established at common law in such cases as *Cutter v Powell*, a man who fails to complete *in toto* his obligation under an entire contract can often recover nothing for what he may have done, even though the non-completion is due to an extraneous cause which, through no fault of his own, frustrates the common adventure or even renders further performance altogether impossible.[8] An outstanding example of the injustice that this doctrine may cause is afforded by *Appleby v Myers*.[9]

> The plaintiffs, in consideration of a promise to pay £459, agreed to erect machinery on the defendant's premises, and to keep it in order for two years from the date of completion. When the erection was nearly complete an accidental fire entirely destroyed the premises together with all that they contained.

An action brought to recover £419 for work done and materials supplied failed. Under the doctrine of frustration the effect of the destruction of the subject matter of the contract was that both parties were excused from the further performance of their obligations. The plaintiffs were not bound to erect new machinery; the defendant was not bound to pay for what had been done, since his obligation to pay had not matured at the time when the contract was discharged.

An attempt to deal with difficulties of this nature, however, has now been made by the Act. Section 1(3) enacts that:

6 [1995] 1 WLR 1226. Carter and Tolhurst 10 JCL 264

7 The contract was frustrated by the withdrawal of permission. The condition of the stadium would not have been a frustrating event since it was the same as at the time of the contract. If relevant, it would have been to an argument that the contract was void for common mistake. Cf *Griffiths v Brymer* (1903) 19 TLR 434.

8 P. 590, above.

9 (1867) LR 2 CP 651

> Where any party to the contract has, by reason of anything done by any other party thereto in, or for the purpose of, the performance of the contract, obtained a valuable benefit (other than a payment of money...) before the time of discharge, there shall be recoverable from him by the said other party such sum (if any) not exceeding the value of the said benefit to the party obtaining it as the court considers just having regard to all the circumstances of the case...

In estimating the amount of the sum to be recovered, the court must consider all the circumstances of the case, especially any expenses that the benefited party may have incurred in the performance of the contract before the time of discharge, and also whether the circumstances causing the frustration have affected the value of the benefit.[10]

The Act goes a long way towards removing the injustice of the common law rule. If, for instance, a builder agrees for a lump sum to erect a warehouse, and when he has completed a part of the work further construction is prohibited by the government owing to the outbreak of war, he may in the discretion of the court be awarded a sum commensurate with the value of the benefit conferred upon the other contracting party. It is not clear, however, whether this particular subsection does full justice, for it is only where 'a valuable benefit' has been 'obtained' by the other party that the court is empowered to give relief. If, for instance, the facts of *Appleby v Myers* were to recur, it could be argued that, since the completed work had been totally destroyed, no benefit would have been conferred on the defendant. The loss, for which neither party was to blame, would fall entirely on the builder and this view has been taken in a Newfoundland case.[11] On the other hand it has been suggested,[12] that, by a liberal interpretation of the subsection, a 'valuable benefit' might be said to have been 'obtained' by the owner by the mere fact that the work has been done on his land in accordance with the contract, even though it may be destroyed before it has brought him any sensible advantage.

This view can be reinforced by two further arguments, one technical, the other substantial. The technical argument is that the Act talks of obtaining a benefit '*before* the time of discharge'. This suggests that the time to ask the question benefit *vel non* is the moment before the frustrating event. At this moment the position of the customer is the same whether in the next moment the contract is to be frustrated by a government ban on building or the destruction of the premises. The substantial argument is that it is inconceivable in modern circumstances that such a contract could be undertaken without either the builder or the customer carrying insurance against fire and a just allocation of the loss must necessarily take this into account. A wide construction of 'benefit' would enable the court to do this. In this respect it should be noted that the 'benefit' is not an entitlement but simply a ceiling on liability.

Section 1 (3) was considered in a most elaborate and helpful judgment by Robert Goff J in *BP Exploration Co (Libya) Ltd v Hunt (No 2)*.[13] Both the facts and the legal arguments in this case are exceptionally complex and must be oversimplified for present purposes.

10 S 1(3)(a) and (b).
11 *Parsons Bros Ltd v Shea* (1965) 53 DLR (2d) 80.
12 Webber *Effect of War on Contracts* (2nd edn) p 687; *Glanville Williams* pp 48-51.
13 [1982] 1 All ER 925, [1979] 1 WLR 783; Baker [1979] CLJ 260. See Goff and Jones *The Law of Restitution* (3rd edn) pp 486 ff.

> The defendant, a wealthy Texan, owned an oil concession in Libya. It was likely but by no means certain that it contained oil, and uncertain where, if at all, the oil would turn out to be located. Vast sums would be involved in locating the oil and bringing it on stream but equally the potential profits were enormous. Hunt therefore entered into a contract with the plaintiffs under which the parties were to share the field, if it existed, but the plaintiffs were to take the risks. In essence, the plaintiffs were to bear the cost of exploration and exploitation and then to pay themselves back out of Hunt's share of the oil. The exploration was exceptionally successful; a very large field was discovered; oil wells were erected and pipeline laid, but the contract was then frustrated when the Libyan Government cancelled the concession.

At this stage BP had paid about $10 m to Hunt, had spent about $87 m on exploration etc and had recovered about $62 m. They brought a claim under section 1 (3). A central question was what valuable benefit had been conferred on Hunt. Robert Goff J held that the benefit did not consist in the services of exploration since the act of looking for the oil did not of itself confer benefit on Hunt, nor in the oil which was already his, under the terms of the concession, but in the increased value of the concession produced by discovering the oil. However, he thought that the injunction to take account of 'the effect, in relation to the said benefit, of the circumstances giving rise to the frustration' meant that the value had therefore to be assessed after the frustrating event, so that it would consist of the value of the oil already removed and of any claim for compensation against the Libyan Government: (It would seem to follow from this that *Appleby v Myers* should still be decided the same way today.) This calculation produced 'a valuable benefit' of about $85 m but the plaintiffs only recovered $35 m ($10 m + $87 m – $62 m), this being in effect their 'loss', taking into account that the parties own contractual provisions had allocated a substantial share of the risk to the plaintiffs. It will be seen that because of the precise timetable of events the amount which the judge considered the 'just sum' was less than the 'valuable benefit'. His construction of 'valuable benefit' did not therefore limit his ability to award the whole of the 'just sum'. Clearly if the contract has been frustrated by earlier expropriation this would not have been the case.

The judgment of Robert Goff J was affirmed by the Court of Appeal and the House of Lords[14] but the appeals were on progressively narrower grounds and left the Judge's analysis of section 1(3) substantially untouched.[15]

General provisions of the Act

It should be noted that the Act binds the Crown; that it applies to contracts whenever made, provided that the time of discharge occurs on or after 1 July 1943; and that it may be excluded by the parties in the sense that if their contract contains a provision to meet the event of frustration, the provision applies to the exclusion of the Act.[16]

14 [1983] 2 AC 352, [1982] 1 All ER 925.

15 In the House of Lords the defendant sought to rely on s 2(3) and argued that because under the contract the plaintiffs had taken the risk that there would be no oil, they had also taken the risk of expropriation. This argument was not successful.

16 S 2(1), (2), and (3).

Contracts excluded from the Act

The Act does not apply to the following classes of contract:[17]

(a) *A contract for the carriage of goods by sea or a charterparty (except a time charterparty or a charterparty by way of demise).* Two important common law rules governing these excepted contracts therefore remain in force.

The first is that, if the contract provides that the freight shall not become payable until the conclusion of the voyage, the shipowner is entitled to no remuneration if he is prevented from reaching the stipulated port of discharge by some frustrating event. If, for example, the agreed port is Hamburg and the shipowner puts into Antwerp owing to the outbreak of war with Germany, he cannot recover freight unless the shipper voluntarily accepts delivery at Antwerp.[18] The second rule is that freight paid in advance is regarded as a payment at the risk of the shipper and is not recoverable, either in whole or in part, if, owing to the frustration of the contract or to any other cause, the goods are not delivered.[19] It is customary, however, to insure against the risks engendered by these two rules.

(b) *A contract of insurance.* The doctrine of frustration is not normally applicable to a contract of insurance, for the customary understanding in this type of business and indeed the rule of law, is that, once the premium is paid and the risk assumed by the insurer, 'there shall be no apportionment or return of premium afterwards',[20] even though the subject matter of the risk may vanish before the period of cover has elapsed.[1] 'If I insure against sickness on January 1st and die on February 1st, my executors cannot get back 11/12th of the premium.'[2] So too, if a house which has been insured against fire is requisitioned by a government department before expiry of the policy, the assured is not entitled to recover any part of the premium.

(c) *The Act excepts from its provisions:*

> Any contract to which section 7 of the Sale of Goods Act 1893 applies, or any other contract for the sale or for the sale and delivery of specific goods, where the contract is frustrated by reason of the fact that the goods have perished.[3]

This subsection is clumsily drafted and is difficult to understand, but its effect appears to be as follows.[4]

It excludes two classes of contract.

(1) 'Any contract to which section 7 of the Sale of Goods Act 1893 applies.' Section 7 now of the Sale of Goods Act 1979 provided that:

> Where there is an agreement to sell specific goods and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided.

17 S 2(5).
18 *St Enoch Shipping Co v Phosphate Mining Co* [1916] 2 KB 624.
19 *Byrne v Schiller* (1871) LR 6 Exch 319. Of course, if the goods are lost owing to the shipowner's default the freight already paid is included in the damages.
20 *Tyrie v Fletcher* (1777) 2 Cowp 666 at 668, per Lord Mansfield.
1 *Webber* p 693.
2 Speech by the Attorney-General on the Committee stage of the Bill, 1943, cited *Webber* p 679, n 4.
3 S 2(5)(c).
4 For a full discussion, see *Williams* pp 81-90.

It will be observed that for this section to operate, four elements must be present:

(i) There must be an agreement to sell, not a sale. By section 2 of the Sale of Goods Act, the concept of 'contract of sale' is sub-divided into a 'sale' and an 'agreement to sell'. If the property in the goods is transferred to the buyer under the contract, there is a 'sale'; if the property is not immediately transferred by virtue of the contract, there is an 'agreement to sell'.

(ii) The risk must not have passed to the buyer. The general rule for the passing of the risk is stated in section 20 of the Sale of Goods Act.

> Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.

In other words, risk prima facie follows the property. In the case of an agreement to sell, therefore, since the property remains with the seller, so also does the risk, and this is what normally happens. The parties, however, may 'agree otherwise' and may thus arrange that while the seller remains the owner of the goods, the risk shall pass to the buyer.[5] If such is the arrangement, section 7 of the Sale of Goods Act does not apply.

(iii) The goods must be specific. By section 62 of the Sale of Goods Act, 'specific goods means goods identified and agreed upon at the time a contract of sale is made'. It is clear, therefore, that a contract for the sale of unascertained or generic goods cannot satisfy this definition, as where A agrees to sell to B 'a dozen bottles of 1919 port' or '500 quarters of wheat'. A will fulfil his contract by delivering any dozen of such bottles or any 500 quarters of wheat, and it is obvious that, as the subject matter of such contract has no individuality, it cannot perish. It seems, moreover, that goods will still be unascertained even if the source from which they are to come is specifically defined, provided that the actual goods to be delivered are not yet identified.[6] If, for example, A agrees to sell 'a dozen bottles of the 1919 port now in my cellar', the goods are not specific in the statutory sense. No particular dozen bottles have yet been set aside and earmarked for the contract. To this case also section 7 of the Sale of Goods Act is inapplicable.

(iv) The goods must have perished. The word 'perish' includes cases not only where the goods have been physically destroyed, but also where they are so damaged that they no longer answer to the description under which they were sold, as, for instance, where dates, carried on a ship which sinks but is later raised, are irretrievably contaminated with sewage.[7] But, unless the goods have perished within this extended meaning of the word, section 7 does not apply. If the contract is frustrated by some other event, as where the goods are requisitioned by the government after the agreement has been made, the section is excluded.[8]

5 The separation of property and risk may also be the result of a trade custom. Thus in *Bevington and Morris v Dale & Co Ltd* (1902) 7 Com Cas 112, A agreed to sell furs to B 'on approval'. The furs were delivered to B and then stolen from him. By the Sale of Goods Act: s 18, sub-s (4), the property had not yet passed to B and therefore by the normal operation of s 20, the risk would still be with A. But A proved a custom of the fur trade that goods were at the risk of persons ordering them 'on approval' and B was therefore held liable for the invoice price.

6 *Howell v Coupland* (1876) 1 QBD 258. *Aliter* if the contract is for all the port in my cellar: *Sainsbury Ltd v Street* [1972] 3 All ER 1127, [1972] 1 WLR 834.

7 *Asfar & Co v Blundell* [1896] 1 QB 123.

8 *Re Shipton, Anderson & Co and Harrison Bros & Co* [1915] 3 KB 676.

If the above four elements are all present, section 7 declares that the contract is 'avoided'. The result is that the seller cannot be sued by the buyer for breach of contract in failing to make delivery; though, as the risk remains with the seller, it is he who bears the loss of the goods.

(2) The second class of contract excluded from the Law Reform (Frustrated Contracts) Act 1943 is:

> Any other contract for the sale or for the sale and delivery of specific goods, where the contract is frustrated by reason of the fact that the goods have perished.

The problem here is to discover what type of contract is covered by these words and is not caught by section 7 of the Sale of Goods Act. In each case the goods must be 'specific' and in each case the cause of the frustration must be their perishing. The difference must therefore lie in the absence of the first or the second of the two elements discussed above. If there is a 'sale' or if, though there is only an agreement to sell, the risk, by custom or by the terms of the particular agreement, is to pass immediately to the buyer, the Act of 1943 does not apply. In these cases the risk is with the buyer and if, due to some catastrophe not due to the seller's fault, the goods perish before delivery, it is the buyer who must bear the loss.

From this summary it will be seen that, in the first type of contract of sale excluded from the Act of 1943, the risk has not passed to the buyer, while in the second type it has so passed. It thus seems that all contracts for the sale of specific goods are kept outside the operation of that Act, whether the risk has passed or not, provided only that the cause of frustration is the perishing of the goods. But if the goods are not specific or if the frustration is due to some other reason, such as requisitioning, the Act of 1943 applies.

These statutory provisions are a little bewildering, and it is difficult to see why an arbitrary distinction should have been made between different contracts for the sale of goods or, indeed, why it was thought necessary to exclude any such contract from the operation of the Act in a case where the doctrine of frustration is relevant. There seems no reason why the statutory provisions for the apportionment of loss should not have been permitted in the case of any contract for the sale of goods.