IMPOSSIBILITY OF PERFORMANCE
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A TREATISE ON
THE LAW OF SUPERVENING IMPOSSIBILITY OF
PERFORMANCE OF CONTRACT, FAILURE
OF CONSIDERATION, AND
FRUSTRATION

BY
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CAMBRIDGE
AT THE UNIVERSITY PRESS
1941
To

MY MOTHER
AUTHOR'S PREFACE

Some years ago the learned Editor of the Law Quarterly Review (Vol. 52, p. 7), in commenting on the judgment of the Privy Council in Maritime National Fish Ltd. v. Ocean Trawlers, [1935] A.C. 524, observed: ‘No branch of the law of contract is so difficult to explain or so uncertain in its effects as that dealing with frustration.’ This book is an attempt to elucidate some aspects of this difficult subject.

The basis of the book is a manuscript written at Cambridge in 1934. Since this manuscript was written there have been several notable contributions to the discussion on the topic, but my views thereon remain substantially unchanged. After writing it I returned to New Zealand to engage in legal practice and became unable to prepare it for publication. Accordingly I invited Dr Glanville Williams to undertake this task. In shortening and revising the text, recasting the chapters and bringing up to date the references to authorities, as well as in his care in all the burdensome details associated with seeing the book through the Press, Dr Williams has had a very onerous task, and I count myself fortunate in having as editor a lawyer with so high a reputation for exact scholarship. In addition to his editorial work he has written some extra parts of the book, which he has distinguished by footnotes in the text. Apart from this additional matter responsibility for the views expressed must be mine alone, although in revising my text Dr Williams has suggested many alterations, which I feel have greatly enhanced the value of the work as a whole.

It remains for me to acknowledge the particular debt I owe to Professor H. C. Gutteridge, K.C., Fellow of Trinity Hall, Cambridge. From him I had the utmost kindness at all times, and I find it difficult adequately to express my gratitude for the help and advice he has so generously afforded me from the day when first I commenced to write the book. Recently he has in addition devoted much time, at what must have been con-
Author's Preface

Considerable personal inconvenience, to furthering the publication of the manuscript, and has again read the whole of the book in proof.

I must not omit an expression of thanks to Mr C. J. Hamson, Fellow of Trinity College, Cambridge, as well for the valuable advice and stimulating criticism which he freely gave at the time of writing the original manuscript as for his enthusiastic interest at every subsequent stage.

Finally, I wish to thank the Syndics of the University Press for undertaking the publication of the book, and the trustees of the Yorke Fund for a generous contribution towards the expenses of publication.

The scope of the work is indicated in the Introduction written by Dr Williams.

R. G. McELROY

Auckland, N.Z.

June 1940
EDITOR'S PREFACE

As the author has indicated, my task was to bring the work up to date from the year 1934; and this I have done without, in unimportant matters, distinguishing my alterations and additions. But the author also entrusted me with a free hand to arrange the book and to make any other additions that I thought proper, and I have taken advantage of this permission. My principal additions to the scope of the book are indicated by footnotes to the text, and will be found at pp. xxvii–xxxix, 6–10 (line 2), 24–8 (line 8), 32, 48–60, 76–81, 83–94, 96–118, 235–50. In most cases the additions have been passed by the author, but the difficulty of communication has prevented him from seeing all of them; and in any case the responsibility for any errors that may be found in my additions must remain with me.

The book is confined to the question of discharge of an obligation for impossibility of performance, failure of consideration, or frustration. It does not consider the consequential question of quasi-contractual recovery by one or other party where the contract becomes thus discharged. The Report of the Law Revision Committee on Chandler v. Webster (Cmd. 6009 of 1939) makes it probable that the law on this latter question will shortly be cast into the legislative melting-pot, and in that event the present rules may become matters of legal history. Both the present rules and the proposals for reform are discussed in two pairs of articles in legal periodicals, which articles also amplify some of the arguments advanced in the following pages on the question of discharge. The first pair, entitled 'The Coronation Cases, I and II', and written jointly by the author and the editor, has appeared in the Modern Law Review, Vol. iv, p. 241 and Vol. v, p. 1. Article I of this pair deals with the rule in Krell v. Henry, and argues in detail for the point of view summarised post, p. 88. It also considers how far the rule in Paradine v. Jane, as to the lessee's contract to pay rent (see post, pp. 107–12), is consistent with principle and satisfactory in practice. Article II
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discusses the rule in Chandler v. Webster, [1904] 1 K.B. 493 (denial of recovery in quasi-contract of money paid under a contract that becomes impossible of performance on the other side), and has something to say of the proposals of the Law Revision Committee. The second pair, entitled ‘Partial Performance of Entire Contracts, I and II’, and written by the editor, has been accepted for publication in the Law Quarterly Review. Article I (which is due to appear in the number for July, 1941) deals with the recovery in quasi-contract of the value of the plaintiff’s partial performance of an entire contract, which through impossibility or for some other reason has not been completely performed. Article II deals with the cases where the plaintiff may recover the whole contract consideration although his performance has been only partial; and it returns to a consideration of the proposals of the Law Revision Committee, in so far as they bear upon its subject-matter.

There is only one abbreviation used in the present book that calls for special mention. In quoting the Restatement, it has not been thought necessary to say each time that the reference is to the American Law Institute’s Restatement of the Law of Contracts.

My own thanks are due not only to Professor Gutteridge, for the help that the author has already acknowledged, but to my wife for preparing the index of cases.

G. L. W.

ST JOHN'S COLLEGE
CAMBRIDGE

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INTRODUCTION

BY THE EDITOR

Perhaps the most important service that this book sets out to render to the general theory of impossibility of performance is in the distinction that it draws (a distinction not satisfactorily drawn in the standard English works) between discharge for physical impossibility or for frustration on the one hand and discharge for failure of consideration on the other. At the present day these three modes of discharge have become almost inextricably confused. It seems that there was a time when they were properly distinguished, and the contention of this book is that the law will not be on a sound footing again until the old distinctions are re-captured. The basic assumption of the work is that it is not impossible even at this day to start about the task of unscrambling the eggs and stating the law in a consistent and intelligible way.

Briefly, the analysis is this. Suppose that \( A \) contracts with \( B \) to do an act in return for a money consideration, and his undertaking becomes permanently or temporarily impossible of performance. A question may then arise either as to the discharge of \( A \) or as to the discharge of \( B \). As to \( A \), he is in some cases discharged to the extent of the impossibility; and if his obligation is no more than temporarily impossible of performance, he is in some cases discharged from the whole obligation even after the temporary impossibility has ceased (‘frustration’). As to \( B \), he too is in some cases discharged from his obligation to pay. But this discharge cannot rest upon impossibility of performance, for in law there is no impossibility in the payment of money; in truth it rests upon the principle that the consideration for the promise has wholly or at least substantially failed.¹ Something more may here be said about each of these questions.

¹ Disregard of this point is apt to lead to false reasoning. A good example is the statement of Bankes L.J. in Matthey v. Curling, [1922] 2 A.C. 180 at 186: ‘It is not disputed that the occupation [of a leasehold house] by the military authorities did not prevent the payment of rent... It follows that the defendant [the lessee] has no defence to the claim.’ However obvious on the law of impossibility of performance, this is not at all obvious on the law of failure of consideration.
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(i) IMPOSSIBILITY OF PERFORMANCE

(a) Impossibility as an excuse for breach of contract

In certain cases, impossibility of performance is an excuse for breach of contract—that is, a complete excuse if the impossibility is permanent, and at least a temporary excuse if the impossibility is temporary. What are these cases? To begin with, a distinction must be drawn between contracts where on their true construction A’s undertaking is simply to use due care, and contracts where on their true construction A’s undertaking is ‘absolute’. In the first type, impossibility of performance (resulting from what a tort lawyer would call ‘inevitable accident’) is clearly a defence to an action for damages for breach of contract. In the second, generally speaking, it is not. This distinction is common sense, but the way in which it is worked in English law is not altogether common sense. To the uninitiated it might appear that the simple and just rule would be this, that every contract (except possibly a contract to pay money) should be read as a contract to use due care to perform, unless there are words in the contract itself to make it ‘absolute’, and in the latter event no exception to liability should be admitted except those, if any, expressed in the contract. On the cases, however, it is difficult to find any clear test of whether an obligation belongs to the one class or the other; and moreover the courts, even after determining that an obligation is ‘absolute’, are prepared to engraft somewhat arbitrary exceptions upon it by operation of law. These exceptions are as follows.

(i) In the case of contracts of a ‘personal’ nature, the obligor is excused from performance (pro tanto or altogether) if he (or any other person whose action is requisite) falls sick or dies. The usual case is the contract for personal service, but this is not a good example of the exception because the servant’s obligation

1 See also, as to temporary impossibility, (b) below.
2 But of course it will be a defence to an action for specific performance, on account of the principle that equity does nothing in vain.
3 As will be seen, a contract to pay money is in law always regarded as ‘absolute’. In this particular case the impossibility, if it exists, will be reflected in the inability of the defendant to satisfy the judgment, when judgment is obtained. But this fact does not altogether take away the hardship to an inepecuous defendant, for he, through no fault of his own, becomes saddled with liability to pay the costs of the action.
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to comply with his master's commands (after he has arrived at the place of performance) is not an absolute obligation but simply one to use due care. If he falls ill or dies, it is obvious that no amount of care can enable him to serve; and consequently he is not liable for breach of contract. Nevertheless, although the undertaking to perform when the servant has arrived at the place of performance is no more than an undertaking to use care, the undertaking to arrive at the place of performance may conceivably be 'absolute'. To that extent one may properly speak of an exception for cases of illness or death. Again, even if a contract to play the piano at a concert be regarded as an 'absolute' undertaking to arrive at the place of performance, the death or illness of the pianist excuses performance by him: Robinson v. Davison (1871).\(^1\) The question whether such an undertaking is 'absolute' or not would be raised if the pianist were unable to perform through the breakdown of the train service. If such a circumstance be held to be a defence, the obligation of the pianist is evidently no more than an obligation to use care to perform. If it be held not to be a defence, the defence of illness or death is seen to be an anomalous exception granted by the law upon an 'absolute' undertaking.

(ii) Destruction of a specific thing or person necessary for performance. This exception is usually attributed to the decision in Taylor v. Caldwell (1863).\(^2\) It is well exemplified in the law of sale of goods. Normally, the seller of goods is deemed to contract 'absolutely' that the goods shall be provided; it is not simply a contract to use care. But this 'absolute' undertaking is subject to the exception that the seller is not liable if the subject-matter is specific and perishes without his fault. In very special cases the exception may be applied to non-specific things.

Again the exception appears to be somewhat arbitrary. If a seller were to sell goods and use language in the contract purporting to 'insure' the buyer against failure to deliver, it can hardly be supposed that the court would restrict his obligation by applying the rule in Taylor v. Caldwell. Yet when the contract amounts to an obligation to insure as a matter of judicial construction, although not in pointed words, the rule in Taylor v. Caldwell is applied.

\(^1\) L.R. 6 Ex. 260. \\(^2\) 3 B. & S. 826.
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(iii) Supervening legislation or executive action removing the subject-matter of the contract from the control of the parties. Sometimes this has the effect of causing specific subject-matter to ‘perish’ within the rule in Taylor v. Caldwell, as the demolition of the hotel in Walton Harvey Ltd. v. Walker and Homfray Ltd. (1931). But in other cases the specific subject-matter remains in existence, but is compulsorily acquired from its former owner, the contracting party. Examples are the compulsory acquisition of land and the requisition of goods. Here neither the compulsory acquisition itself nor any consequent failure to perform the contract is regarded as a breach.

The exception applies even though the subject-matter be not specific, if the legislation affects all property of the class specified in the contract. But outside these cases a mere change in the law relating to the subject-matter of a contract does not affect the obligation.

It may be noted that supervening illegality of the contract itself is not really a modification of the rules of impossibility. Not only may an illegal contract be possible of performance in fact, but the effect of illegality is not quite the same as the effect of impossibility. Illegal contracts taint collateral transactions: not so contracts discharged for impossibility. Illegality normally discharges both parties, whereas the effect of impossibility may be to discharge one party but not the other. It seems that money paid could be recovered under the rule in Taylor v. Bowers (1876), notwithstanding Chandler v. Webster (1904). Moreover, the parties may contract out of discharge for impossibility, not so out of illegality. Even though the defendant

1 [1931] 1 Ch. 274.
2 This may be regarded as a constructive perishing: post, p. 24.
3 But note that in some cases the other party may still be bound: post, p. 99.
6 Post, p. 99.
7 1 Q.B.D. 291.
9 Post, p. 59.
10 Per Lord Atkin in Rushoe v. John Stirk & Sons Ltd. (1922), 10 L.L.R. 214 at 217. Not even out of foreign illegality: per du Parcq L.J. in Kleinmoort, Sons & Co. v. Ungarische etc. Aktiengesellschaft, [1939] 3 All E.R. 38 at 45. But parties may contract that indemnity shall be paid if performance is prohibited: Smith, Coney and Barrett v. Becker, Gray & Co., [1916] 2 Ch. 86; Restatement, § 458, Comment d, and § 457, Illustration 2; but cp. post, p. 60.