

Cambridge University Press

978-1-107-45589-4 - Impossibility of Performance: A Treatise on the Law of Supervening
Impossibility of Performance of Contract, Failure of Consideration, and Frustration

Roy Granville Mcelroy

Frontmatter

[More information](#)

IMPOSSIBILITY OF PERFORMANCE

Cambridge University Press

978-1-107-45589-4 - Impossibility of Performance: A Treatise on the Law of Supervening
Impossibility of Performance of Contract, Failure of Consideration, and Frustration

Roy Granville Mcelroy

Frontmatter

[More information](#)

Cambridge University Press

978-1-107-45589-4 - Impossibility of Performance: A Treatise on the Law of Supervening
Impossibility of Performance of Contract, Failure of Consideration, and Frustration

Roy Granville McElroy

Frontmatter

[More information](#)

IMPOSSIBILITY OF PERFORMANCE

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

BY
ROY GRANVILLE McELROY
Ph.D. (Cantab.), LL.D. (N.Z.)

Edited with additional Chapters by
GLANVILLE L. WILLIAMS
LL.B., M.A., Ph.D
*Fellow of St John's College, Cambridge, and of the Middle Temple,
Barrister-at-Law; Assistant Lecturer in Law at the
University of Cambridge*

CAMBRIDGE
AT THE UNIVERSITY PRESS
1941

Cambridge University Press

978-1-107-45589-4 - Impossibility of Performance: A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration, and Frustration

Roy Granville McElroy

Frontmatter

[More information](#)

CAMBRIDGE
UNIVERSITY PRESS

32 Avenue of the Americas, New York NY 10013-2473, USA

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781107455894

© Cambridge University Press 1941

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 1941

First paperback edition 2014

A catalogue record for this publication is available from the British Library

ISBN 978-1-107-45589-4 Paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication, and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Cambridge University Press

978-1-107-45589-4 - Impossibility of Performance: A Treatise on the Law of Supervening
Impossibility of Performance of Contract, Failure of Consideration, and Frustration

Roy Granville Mcelroy

Frontmatter

[More information](#)

To
MY MOTHER

Cambridge University Press

978-1-107-45589-4 - Impossibility of Performance: A Treatise on the Law of Supervening
Impossibility of Performance of Contract, Failure of Consideration, and Frustration

Roy Granville Mcelroy

Frontmatter

[More information](#)

Cambridge University Press

978-1-107-45589-4 - Impossibility of Performance: A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration, and Frustration

Roy Granville McElroy

Frontmatter

[More information](#)

vii

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-

Cambridge University Press

978-1-107-45589-4 - Impossibility of Performance: A Treatise on the Law of Supervening
Impossibility of Performance of Contract, Failure of Consideration, and Frustration

Roy Granville McElroy

Frontmatter

[More information](#)

viii

AUTHOR'S PREFACE

siderable 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

Cambridge University Press

978-1-107-45589-4 - Impossibility of Performance: A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration, and Frustration

Roy Granville McElroy

Frontmatter

[More information](#)

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

Cambridge University Press

978-1-107-45589-4 - Impossibility of Performance: A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration, and Frustration

Roy Granville McElroy

Frontmatter

[More information](#)

X

EDITOR'S PREFACE

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

June 1941

CONTENTS

INDEX OF STATUTES	<i>page</i> xiii
INDEX OF CASES	xv
INTRODUCTION BY THE EDITOR	xxvii

Part One

IMPOSSIBILITY OF PERFORMANCE

<i>Chap.</i> I. THE SANCTITY OF CONTRACT	1
II. EXCEPTIONS TO ‘ABSOLUTE’ PROMISES	17
III. LIMITS OF THE PRINCIPLE OF <i>TAYLOR</i> V. <i>CALDWELL</i>	61

Part Two

FAILURE OF CONSIDERATION

IV. THE DEVELOPMENT OF THE DOCTRINE OF FAILURE OF CONSIDERATION AS AN EX- CUSE IN CASES OF IMPOSSIBILITY	75
V. THE NATURE OF THE DOCTRINE OF FAILURE OF CONSIDERATION	83

Part Three

INORDINATE DELAY

VI. THE DEVELOPMENT OF THE DOCTRINE OF FRUSTRATION TO THE END OF THE NINETEENTH CENTURY	121
VII. THE WAR CASES	150
VIII. THE NATURE OF THE DOCTRINE OF FRUSTRATION	170
IX. IMPLICATION IN CASES OF FRUSTRATION	197

Cambridge University Press
978-1-107-45589-4 - Impossibility of Performance: A Treatise on the Law of Supervening
Impossibility of Performance of Contract, Failure of Consideration, and Frustration
Roy Granville Mcelroy
Frontmatter
[More information](#)

xii

CONTENTS

Part Four

GENERAL PROPOSITIONS

<i>Chap. X.</i> GENERAL PROPOSITIONS RELATING TO IMPOSSIBILITY, FAILURE OF CONSIDER- ATION, AND FRUSTRATION	<i>page</i> 235
GENERAL INDEX	251

INDEX OF STATUTES

- (1845) 8 & 9 Vict. c. 106 (Real Property Act), 108
(1893) 56 & 57 Vict. c. 71 (Sale of Goods Act)
 s. 5 (2), 27
 s. 7, 26, 27, 83, 100
 ss. 17, 18, 19, 114
 s. 20, 27, 100, 114
 s. 28, 80
 s. 30, 94
 s. 31 (2), 91
 s. 61 (2), 27, 114
(1894) 57 & 58 Vict. c. 60 (Merchant Shipping Act), 85
(1924) 14 & 15 Geo. V, c. 22 (Carriage of Goods by Sea Act), 16
(1925) 15 & 16 Geo. V, c. 20 (Law of Property Act)
 s. 47 (1), 112
 s. 146 (5) (a), 109
 s. 149, 108
(1934) 24 & 25 Geo. V, c. 41 (Law Reform (Miscellaneous Provisions) Act), 19
(1939) 2 & 3 Geo. VI, c. 72 (Landlord and Tenant (War Damage) Act), 9,
 111–12
(1939) 2 & 3 Geo. VI, c. 102 (Liability for War Damage (Miscellaneous
 Provisions) Act), 9
(1939) 2 & 3 Geo. VI, c. 38 (Ministry of Supply Act), xxxix

Cambridge University Press

978-1-107-45589-4 - Impossibility of Performance: A Treatise on the Law of Supervening
Impossibility of Performance of Contract, Failure of Consideration, and Frustration

Roy Granville Mcelroy

Frontmatter

[More information](#)

Cambridge University Press

978-1-107-45589-4 - Impossibility of Performance: A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration, and Frustration

Roy Granville McElroy

Frontmatter

[More information](#)

xv

INDEX OF CASES

- Abbot of Westminster v. Clerke* (1536–7), 5
Acetylene Corp. of G.B. v. Canada Carbide Co. (1921), 190, 191, 192, 211, 217
Adams v. Adams (1941), xxxix, 101, 102
Adams v. Royal Mail Steam Co. (1858), 15
Adamson v. Newcastle S.S. Freight Ins. Ass. (1879), 29
Admiral Shipping Co. Ltd. v. Weidner, Hopkins & Co. (1917), 102, 141, 142, 143
Aerial Advertising Co. v. Batchelors Peas Ltd. (Manchester) (1938), 91
Akhurst v. Jackson (1818), 93
Aktieselskabet Olivebank v. Danck Svovlsyre Fabrik (1919), 237
Akt. Yettersfors Munksunk v. Dixon & Son (1921), 197, 217
Alexander v. Aktieselskabet Dampskibet Hansa (1920), 14
Allison v. Bristol Marine Insurance Co. (1876), 94
Anderson v. Commercial Union Ins. Co. (1885), 248
Andrews v. Needham (1598), 50
Anglo-Northern Trading Co. v. Emyln Jones (1917–18), 103, 107, 141, 143, 174, 185
Re Anglo-Russian Merchant Traders and John Batt & Co.'s Arbitration (1917), 7, 36, 39, 201
Anon. (1292), 77
Anon. (1294), 77
Anon. (1353), 77
Anson v. Towgood (1820), 112
Appleby v. Myers (1867), 12
Ardon S.S. Co. v. Weir (1905), 15
Argos, Cargo ex (1873), 248
Re Arthur, Arthur v. Wynne (1880), 22, 236
Ashmore v. Cox (1899), 29, 31, 67
Aspdin v. Austin (1844), 63, 129, 134, 200, 201, 202, 204, 219
Assicurazioni v. Bessie Morris (1892), 56
Associated Portland Cement Co. v. Cory (1915), 70
Associated Portland Cement Manufacturers (1900) Ltd. v. Houlder Bros. (1917), 249
Atchinson v. Baker (1796), 20
Atkinson v. Ritchie (1809), 44, 59, 123
Austin, Baldwin & Co. v. Turner (1920), 38
Austin Friars v. Strack (1905), 19
Austin v. Moyle (1605), 49

Bacon v. Simpson (1837), 113
Re Badische Co. Ltd., Bayer Co., etc. (1921), 24, 28, 41
Bailey v. De Crespigny (1869), 34, 35, 62
Baker v. Holtzapffel (1811), 108
Banck v. Bromley (1920), 215
Bank Line v. Capel (1919), 103, 105, 128, 131, 133, 134, 141, 142, 143, 145, 151, 166, 167, 168, 169, 174, 185, 186, 187, 189, 190, 198, 201, 202, 205, 206, 212, 219, 220, 221, 222, 223, 224, 235

Cambridge University Press

978-1-107-45589-4 - Impossibility of Performance: A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration, and Frustration

Roy Granville McElroy

Frontmatter

[More information](#)

xvi

INDEX OF CASES

- Barber v. Pott* (1859), 94
Barker v. Hodgson (1812), 44, 70
Barkworth v. Young (1856), 248
Barret v. Dutton (1815), 15
Barwick v. English f.S. Bank (1867), 239
Bass v. Miller (1847), 10
Baxter v. Burfield (1747), 87
Beale v. Thompson (1804), 152
Becker, Gray & Co. v. London Assce. Corp. (1918), 131, 144
Begbie v. Phosphate Sewage Co. (1875–6), 88
Bensuede v. Thames and Mersey, etc. Co. (1897), 128
Berthoud v. Schweder & Co. (1915), 24, 31
Bettini v. Gye (1876), 96
Biggerstaff v. Rowatt's Wharf Ltd. (1896), 94
Bingham v. B. (1748), 118
Blackburn Bobbin Co. v. Allen (1918), xxx, 24, 28, 29, 68, 70, 165, 170, 203, 204
Blight v. Page (1801), 125, 127
Blythe v. Richards, Turpin & Co. (1916), 195
Boast v. Firth (1868), 17
Bolckow, Vaughan & Co., v. Compañía Minera de Sierra Menara (1916), 195
Bolesworth v. Davis (1886), 109
Boone v. Eyre (1777), 78, 122, 124
Bottoms v. York Corporation (1892), 10
Bouzourou v. Ottoman Bank (1930), 19
Bovine Ltd. v. Dent (1904), 237
Bower v. Cooper (1843), 115
Bradley v. Benjamin (1877), 238
Braemont v. Weir (1910), 179
Brandt v. Morris (1917), 39
Brecknock v. Pritchard (1796), 10
Brewster v. Kitchell (Kitchin) (1697–8), 33, 34
Bright v. Cowper (1611), 96
Brightman & Co. v. Bunge (1924), 248
Brogden v. Marriott (1836), 13, 239
Broome v. Pardess Co-op. Society of Orange Growers (1939), 199
Brown v. Mayor of London (1862), 33, 237
Brown v. Quilter (1764), 108
Brown v. Royal Insurance Co. (1859), 11, 248
Brown v. Turner, Brightman & Co. (1912), 105, 23,
Browning v. Crumlin Collieries (1926), 85
Bruce v. B. (1814), 94, 117
Budgett v. Binnington (1891), 14, 15
Bullock v. Domitt (1796), 9
Burton v. Pinkerton (1867), 19
Bush v. Whitehaven Town and Harbour Trustees (1888), xxxvii, 49, 147, 149,
B 172, 187, 190, 192, 207, 208, 221
Bute, Marquis of v. Thompson (1844), 51, 248

Canham v. Barry (1855), 13
Cantiere Navale Triestina v. Russian Soviet Naphtha Export Agency (1925), 47
Capel v. Soulidi (1916), 29

Cambridge University Press

978-1-107-45589-4 - Impossibility of Performance: A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration, and Frustration

Roy Granville Mcelroy

Frontmatter

[More information](#)

INDEX OF CASES

xvii

- Cargo ex Argos* (1873), 248
Carter v. Carter (1733), 90
Cartwright v. Forman (1866), 54, 55
Cass v. Rudele (1692), 112
Chandler v. Webster (1904), xxx, xxxviii, 62, 80, 112, 151
Chandler Bros. Ltd. v. Boswell (1936), 243
Chanter v. Hopkins (1839), 117
Chanter v. Leese (1839), 93, 117
Chapman v. Shepherd (1867), 117
Chapman v. Speller (1850), 113
Charlesworth v. Holt (1873), 101, 102
Charlesworth v. Watson (1906), 54
Chinese Mining and Engineering Co. v. Sale (1917), xxxiv, 156, 186
Churchward v. The Queen (1866), 63, 134, 200, 202, 204, 218
Claddagh S.S. Co. v. Steven (1919), 94
Clapham S.S. Co. v. Vulcan (1917), 41
Clare v. Lamb (1875), 118
Clark v. Glasgow Ass. Co. (1854), 9
Cleadon Trust Ltd. v. Davis (1940), 96
Cleary v. McAndrew & Co. (1863), 235
Clifford v. Watts (1870), 29, 51, 52, 53, 55
Coatsworth v. Johnson (1885), 109, 110
Coles v. Bristowe (1868), 114, 117
Coles v. Trecothick (1804), 116
Re Comptoir Commercial Anversois and Power (1920), 70, 134, 165, 170, 197, 201, 203, 216, 220, 246
Constantine S.S. Line v. Imperial Smelting Corp. (1941), xxix, 4, 140, 231, 236
Conyers v. Hamond (1681), 117
Cooke v. Munstone (1805), 84
Cooper v. Simmons (1862), 22, 87
Coppee and others v. Blagden, Waugh & Co. (1921), 189, 210
Corney v. Barrellier and Francastel (1923), 183
Cort v. Ambergate etc. Rly. Co. (1851), 235
Cory v. Bolckow, Vaughan & Co. (1921), 191
Countess of Warwick S.S. Co. v. Nickel Société Anonyme (1918), 103, 141, 143, 185
Court Line Ltd. v. Dant and Russell Inc. (1939), 174, 197, 246
Coverdale v. Grant (1884), 15
Cuckson v. Stones (1858), 17, 85
Cunningham v. Dunn (1878), 15, 46
Curley v. Barrellier and Francastel (1923), 183
Cutter v. Powell (1795), 83
- Da Costa v. Davis* (1798), 247
Dahl v. Nelson (1881), 14, 62, 131, 133, 144, 145, 146, 158, 172, 193, 196, 206, 207, 223, 224, 230
Daimler v. Continental Tyre Co. (1916), 43
Re Dale and Plant Ltd. (1890), 236
Davidson v. Gwynne (1810), 122, 124
Davies v. Cooper (1840), 115
Davis v. Cary (1850), 34
Devaux v. Conolly (1849), 94

Cambridge University Press

978-1-107-45589-4 - Impossibility of Performance: A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration, and Frustration

Roy Granville Mcelroy

Frontmatter

[More information](#)

xviii

INDEX OF CASES

- Dillingham v. Harrison* (1917), 195
Distington Hematite Iron Co. v. Possehl & Co. (1916), 41
Dixon (Peter) & Sons Ltd. v. Henderson, Craig & Co. (1919), 29, 195
Dodd v. Churton (1897), 49
Dominion Coal Co. v. Lord Curzon Co. (1922), 156, 186
Dominion Coal Co. v. Maskinonge Co. (1922), 156, 167, 186
Doughty v. Neal (1669), 13
Duncan, Fox v. Schremft and Boncke (1915), 42
- Edridge v. Hawker & Co.* (1881), 49
Ehrensberger v. Anderson (1848), 84
Elizabeth, The (1819), 152
Elliott Steam Tug Co. v. Duncan (1918), 156
Elliott Steam Tug Co. v. Payne (1920), 249
Elliott Steam Tug Co. v. Shipping Controller (1922), 156
Emanuel v. La Compagnie Fermière de l'Etablissement Thermal de Vichy (1889)
 65, 217
Embiricos v. Reid (1914), 128, 413
Ertel Bieber v. Rio Tinto (1918), 41, 42, 43, 177
Esposito v. Bowden (1857), 40, 42
European and Australian Royal Mail Co. Ltd. v. Royal Steam Packet Co.
 (1861), 57
- Farrer v. Nightingal* (1798), 113
Federal Steam Nav. Co. v. Dixon (1919), 187, 197
Federated Coal Co. v. The King (1922), 156
Fenwick v. Schmalz (1868), 15
Ferry v. Williams (1817), 235
Fibrosa Soc. Anon. v. Fairbairn, Ltd., 211
Finlay and Liverpool Steamship Co. (1870), 40
Fisher, Renwick & Co. v. Tyne Shipbuilding Co. (1920), 188
Fletcher v. Krell (1872), 238
Ford v. Cotesworth (1870), 7, 15, 46
Ford & Sons (Oldham) Ltd. v. Leetham & Sons Ltd. (1915), 195
Forster v. Christie (1809), 44
Fortune v. Lingham (1810), 117
Foster v. Driscoll (1929), 45
Freeman v. Taylor (1831), 123, 136
Freeth v. Burr, 91
French Marine v. Compagnie Napolitaine (1921), 104
Fried, Krupp etc. v. Orconera Co. (1919), 41
Friends, The (1801), 152
Frost v. Aylesbury Dairy Co. (1905), 7
Fullerton v. Mittelholzer (1845), 93
Fuller v. Smith (1824), 117
- Geipel v. Smith* (1872), 62, 124, 127, 128, 129, 130, 131, 135, 136, 145, 146,
 148, 158, 159, 160, 162, 169, 176, 182, 183, 193
Gibbons v. Chambers (885), 109
Gilbey v. Cossey (1912), 110

Cambridge University Press

978-1-107-45589-4 - Impossibility of Performance: A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration, and Frustration

Roy Granville Mcelroy

Frontmatter

[More information](#)

INDEX OF CASES

xix

- Giles v. Edwards* (1797), 84
Re Gilling, Proctor v. Watkins (1905), 102
Glaholm v. Hays (1841), 96
Glasse v. Woolgar (1897), 110
Gompertz v. Bartlett (1853), 117
Grant, Smith & Co. v. Seattle etc. Co. (1920), 5
Graves v. Cohen (1930), 86
Greenway Bros. Ltd. v. Jones (S. F.) & Co. (1915), 195
Greeves v. West India & Pacific S.S. Co. Ltd. (1870), 93
Grey (Edward) & Co. v. Tolme & Runge (1915), 100, 248
Griffiths v. Rigby (1856), 55
D/S. A/S. Gulnes v. Imperial Chemical Industries Ltd. (1938), 32
Gurney v. Womersley (1854), 117
- H— v. H—* (1938), xxx
Hadley v. Clarke (1799), 125, 127, 128, 193
Hall v. Conder (1857), 117
Hall v. Wright (1859), 19, 20, 21
Halsey v. Lowenfeld (1916), 43
Hamlyn v. Wood (1891), 38, 63, 65, 134, 163, 164, 165, 199, 200, 201, 202, 217
Hancock v. B.S.A. Tools Ltd. (1939), 85
Hanson v. Boothman (1810), 54, 55
Hare v. Groves (1796), 108
Harford v. Purrier (1816), 112
Harnor v. Groves (1885), 94
Harrison v. Lord North (1667), 108
Harrison Sons & Co. Ltd. v. Jules Cavroy (1922), 45
Harrowing v. Dupré (1902), 48
Hawkins v. Malby (1867), 117
Hayward v. Bennett (1846), 49
Hayward Bros. Ltd. v. Daniel (1904), 27
Heilgers & Co. v. Cambrian Steam Navigation Co. Ltd. (1917), 100, 106, 186
Hick v. Raymond (1893), 7, 15, 16
Hills v. Sughrue (1846), 29
Hirji Mulji v. Cheong Yue Steamship Co. (1926), 63, 187, 221, 222, 224, 225, 226, 231, 249
Hitchcock v. Giddings (1819), 118
Holme v. Guppy (1838), 49
Holroyd v. Marshall (1862), 114
Holtzapffel v. Baker (1811), 108, 111
Honck v. Muller (1881), 94
Horlock v. Beal (1916), 85, 90, 151, 152, 154, 155, 157, 176, 202
Hotel and General Advertising Co. v. Wickenden (1899), 22, 237
Hotham v. East India Co. (1787), 235
Howe v. Botwood (1913), 9
Howell v. Coupland (1876), 24, 27, 28, 29, 30, 240
Hulton (E.) & Co. Ltd. v. Chadwick and Taylor Ltd. (1918–19), xxx, 195, 241
Hunt v. Silk (1804), 113
Hyde v. Dean of Windsor (1597), 5
Hyman v. Hyman (1929), 101, 222

Cambridge University Press

978-1-107-45589-4 - Impossibility of Performance: A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration, and Frustration

Roy Granville Mcelroy

Frontmatter

[More information](#)

XX

INDEX OF CASES

Innholders' Co. v. Wainwright (1917), 109*International Correspondence Schools Ltd. v. Ayres* (1912), 235*Instone & Co. v. Speeding, Marshall & Co.* (1915), 195*Izon v. Gorton* (1839), 107, 108*Jackson v. Eastbourne Local Board* (1886), 10*Jackson v. Lever* (1792), 116*Jackson v. Union Marine Insurance Co.* (1874), 8, 62, 91, 96, 124, 127, 128, 135, 136, 137, 139, 140, 141, 145, 146, 148, 152, 153, 154, 158, 159, 161, 162, 182, 183, 184, 193*Jacobs v. Crédit Lyonnais* (1884), 6, 47, 67, 69, 70*Jager v. Tolme and Runge* (1916), 100*James v. Morgan* (1909), 21*Jefferson v. Paskell* (1916), 20*Jeffrys v. Fairs* (1876), 51*Jervis v. Tomkinson* (1856), 51, 53, 54*Johnson v. J.* (1802), 113*Jones v. Ryde* (1814), 117*Jones v. St John's College* (1876), 11, 49, 237*Jones v. Shears* (1836), 55*K— v. Raschen* (1878), 85, 92, 238*Kearon v. Pearson* (1861), 15*Kempson v. Saunders* (1826), 117*Kennedy v. Panama etc. and Royal Mail Co. Ltd.* (1867), 97*Kenney v. Wexham* (1822), 116*King v. Michael Faraday and Partners Ltd.* (1939), 8*Kintrea v. Perston* (1856), 113*Kirk v. Eustace* (1937), 102*Kleinert v. Abosso Gold Mining Co. Ltd.* (1913), 235*Kleinwort, Sons & Co. v. Ungarische Industrie* (1939), xxx, 45, 48*Knowles v. Bovill* (1870), 88*Krell v. Henry* (1903), xxxii, 17, 31, 62, 65, 69, 71, 88, 89, 97, 99, 100, 105, 109, 111, 150, 153, 155, 158, 202, 217, 246*Kulukundis v. Norwich Union Fire Insurance Society* (1937), 23, 56, 58, 196, 242*Kursell v. Timber Operators Ltd.* (1927), 46, 197*Lambert v. Heath* (1846), 117*Larrinaga & Co. Ltd. v. Société Franco-Américaine* (1923), 70, 71, 134, 144, 161, 163, 165, 169, 196, 198, 201, 202, 203, 214, 219, 220, 221*Lavery v. Pursell* (1888), 110*Lawes v. Purser* (1856), 88, 117*Lawrence v. Twentiman* (1611), 18, 58*Learoyd v. Brook* (1891), 48*Lebaupin v. Richard Crispin & Co.* (1920), 25, 236*Leeds v. Cheetham* (1827), 108*Leeds and County Bank v. Walker* (1883), 117*Leiston Gas Co. v. Leiston Urban Council* (1916), 88, 178, 197, 201*Levenshulme U.D.C. v. Manchester Corporation* (1908), xxxii, 13

Cambridge University Press

978-1-107-45589-4 - Impossibility of Performance: A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration, and Frustration

Roy Granville Mcelroy

Frontmatter

[More information](#)

INDEX OF CASES

xxi

- Re Lidington, Lidington v. Thomas* (1940), 102
Lipton Ltd. v. Ford (1917), 24
Liston v. S.S. Carpathian (1915), xxxvii, 19
Livock v. Pearson Bros. (1928), 199
Lloyd v. Crispe (1813), 13
Lloyd Royal Belge Soc. Anonyme v. Stathatos (1917), 141, 143
Lloyd v. Sheen (1905), 19
Loates v. Maple (1903), 92
Lodder v. Slowey (1904), 235
Lofft v. Dennis (1858), 108
Logan v. Le Mesurier (1847), 80
London American Co. v. Rio Tinto Co. (1919), 156
London and Northern Estates Co. v. Schlesinger (1916), 97, 107, 109
Lurcott v. Wakely (1911), 9
Luxor (Eastbourne) Ltd. v. Cooper (1941), 65, 237
- Macandrew v. Chapple* (1866), 124, 136
McDonald v. Workington Corporation (1893), 10
McIlquham v. Taylor (1895), 248
Mackay v. Dick (1881), 48, 235
McMaster v. Cox, McEuan & Co. (1921), 39
Manchester Bonded Warehouse Co. v. Carr (1880), 9, 111
Manchester Corporation v. Farnworth (1930), 52
Ex p. Manning (1727), 112
Maple Flock Co. Ltd. v. Universal Furniture Products (Wembley) Ltd. (1934), 91
Maritime National Fish Ltd. v. Ocean Trawlers Ltd. (1935), 237, 239
Marrison v. Bell (1939), 85
Marshall v. Broadhurst (1831), 21
Marshall v. Glanville (1917), 93, 176
Matthey v. Curling (1922), xxviii, 6, 9, 107
May v. May (1929), 101, 102
Measures Bros. Ltd. v. Measures (1910), 235
Mellers v. Duke of Devonshire (1852), 51
Melville v. De Wolf (1855), 152
Mersey Steel and Iron Co. Ltd. v. Naylor, Benzon & Co. (1884), 91, 244
Mertons v. Home Freeholds Co. (1921), 36, 237
Metropolitan Water Board v. Dick, Kerr & Co. (1918), xxxvi, 47, 106, 127, 128, 151, 152, 157, 165, 166, 167, 168, 172, 173, 176, 179, 183, 187, 190, 191, 192, 193, 201, 207, 210
Michalinos v. Dreyfus & Co. (1924), 249
Millar (Andrew) & Co. v. Taylor & Co. (1916), 176, 177
Milne v. Taylor (1850), 51
Minnevitich v. Café de Paris (Londres) Ltd. (1936), 89
Modern Transport Co. v. Duneric S.S. Co. (1917), 104, 106, 107
Moel Tryvan Ship Co. Ltd. v. Weir (1910), 29
Moorcock, The (1889), 37, 38, 63, 163, 164, 199, 200, 201, 202, 217
Moorgate Estates Ltd. v. Trower (1940), 13
Morris v. Smith (1783), 52, 53
Mortimer v. Capper (1782), 112, 115, 116
Moss v. Smith (1850), 196

Cambridge University Press

978-1-107-45589-4 - Impossibility of Performance: A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration, and Frustration

Roy Granville Mcelroy

Frontmatter

[More information](#)

xxii

INDEX OF CASES

- Naylor, Benzon & Co. v. Krainische Industrie Gesellschaft* (1918); 41.
New System Private Telephones (London) Ltd. v. Edward Hughes & Co. (1939), 249
Newton v. Nock (1880), 53
N.Z. Shipping Co. v. Société des Ateliers (1919), 49, 230, 235, 236
Nicholl v. Ashton (1901), 29, 31, 140, 153, 249
Nicholson v. Ricketts (1860), 94
Nokes v. Doncaster Amalgamated Collieries Ltd. (1940), 86
Nordman v. Rayner (1916), 93
Northey v. Trevillion (1902), 237
- Oakes v. Turquand* (1867), 97
O'Grady v. M. Saper Ltd. (1940), 85
Omnium d'Entreprises v. Sutherland (1919), 209, 217
Ottoman Bank v. Chakarian (1930), 18
Ottoman Bank v. Jébara (1928), 43
- Pacific Phosphate Co. v. Empire Transport Co.* (1920), 211, 214
Paine v. Hutchinson (1868), 117
Paine v. Mellor (1801), 112, 113, 116
Palace Shipping Co. v. Caine (1907), 19
Paradine v. Jane (1647), 4, 9, 10, 17, 20, 33, 63, 68, 107, 108, 109, 111, 126, 145
Paterson Steamship Ltd. v. Canadian Wheat Produce Ltd. (1934), 236
Peebles & Son v. Becker & Co. (1922), 191, 218
Penelope, The (1928), 180, 187, 228
Petrie v. Mac Fisheries Ltd. (1940), 85
Phillips v. Alhambra Palace Co. (1901), 87
Phillips v. Jones (1839), 51
Phillips v. London School Board (1898), 88
Platt v. Rowe (1909), 117
Plews v. Samuel (1904), 113
Pool Shipping Co. Ltd. v. London Coal Co. of Gibraltar Ltd. (1939), 242
Pope v. Roots (1774), 115, 116
Pordage v. Cole (1669), 78
Porteous v. Watney (1878), 14
Porter v. Tottenham U.C. (1915), 7
Postlethwaite v. Freeland (1880), 14.
Potter v. Burrell (1897), 14
Poussard v. Spiers and Pond (1876), 75, 81, 85, 91, 92, 137, 161, 162
Pringle v. Taylor (1809), 49
Pym v. Blackburn (1796), 9
- R. v. Peck* (1698), 87
Ralli v. Compañía Naviera Sota y Aznar (1920), 14, 44, 45, 46, 47, 68, 69
Randall v. Newson (1877), 7
Raymond v. Minton (1866), 48
Raynay v. Alexander (1605), 235
Rayner v. Preston (1881), 112
Redmond v. Dainton (1920), 9
Reigate v. Union Mfg. Co. (1918), 236

Cambridge University Press

978-1-107-45589-4 - Impossibility of Performance: A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration, and Frustration

Roy Granville Mcelroy

Frontmatter

[More information](#)

INDEX OF CASES

xxiii

- Reilly v. The King* (1934), 88
Ridgway v. Sneyd (1854), 51, 53
Ritchie v. Atkinson (1808), 123, 124
Robertson v. Skelton (1849), 112
Robinson v. Davison (1871), xxix, 18, 21, 23, 139
Robson v. Premier Oil and Pipe Line Co. (1915), 42, 43
Rogers v. Snow (1572), 78
Ropner v. Ronnebeck (1914), 179
Rowland v. Divall (1923), 117
Rugg v. Minett (1809), 26, 80, 100
Russell v. Bandiera (1862), 49
Russian Bank for Foreign Trade v. Excess Insurance Co. (1918), 35
Russkoe v. John Stirk & Sons Ltd. (1922), xxx, 27, 66
- Saner v. Bilton* (1878), 111
Sargant v. Paterson (1923), xxxi, 31, 47
Schostall v. Johnson (1919), 44, 93
Scott v. Del Sel (1922), 62, 217, 227
Scottish Navigation Co. Ltd. (1916) v. *Souter (W. A.) & Co.* (1917), 102, 141
 142, 143
Seligman v. Eagle Insurance Co. (1917), 43
Seligman Bros. v. Brown, Shipley & Co. (1916), 96
Ship's Case (1862), 97
Re Shipton, Anderson & Co. and Harrison Bros. (1915), 24, 139
Shirlaw v. Southern Foundries (1926) *Ltd.* (1939), 199
Shubrick v. Salmond (1765), 14
Sibery v. Conolly (1907), 19
Siboni v. Kirkman (1836), 21
Simeon v. Watson (1877), 21
Simmonds v. Swaine (1809), 247
Simpson v. Ingleby (1872), 53
Sims & Co. v. Midland Rly. Co. (1913), 7
Sjoerds v. Luscombe (1812), 44
Smith, Coney and Barrett v. Becker, Gray & Co. (1916), xxx, 248
Smith v. Dart (1884), 96
Smith v. Morris (1788), 53
Smith v. Myers (1871), 242
Southern Foundries (1926) *Ltd.* v. *Shirlaw* (1940), 235, 238
Sparrow v. Sowgate (1623), 21
Spence v. Chodwick (1847), 8, 70, 121
Splidt v. Heath (1809), 44
Stent v. Bailis (1724), 98, 112, 116
Stevens v. Webb (1835), 248
Stevenson v. Wilson (1907), 13
Stirling v. Maitland (1864), 236
Story v. Fulham Steel Works Co. (1907), 91
Strathcona (Lord) S.S. Co. v. Dominion Coal Co. Ltd. (1926), 186
Stray v. Russell (1859), 13, 117, 235
Strickland v. Turner (1852), 116
Stubbs v. Holywell Rly. Co. (1867), 21
Studholme v. Mandell (1697), 49
Swain v. Ayres (1888), 109

Cambridge University Press

978-1-107-45589-4 - Impossibility of Performance: A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration, and Frustration

Roy Granville McElroy

Frontmatter

[More information](#)

xxiv

INDEX OF CASES

- Tamplin v. Anglo-Mexican S.S. Co.* (1916), 106, 140, 142, 145, 151, 152, 154
155, 156, 157, 159, 161, 162, 163, 164, 165, 166, 167, 168, 170, 176, 184
185, 186, 201, 202, 206, 207, 219, 224
- Tapscott v. Balfour* (1872), 15
- Tarrabochia v. Hickie* (1856), 123, 124, 136
- Tasker v. Shepherd* (1861), 87
- Tatem (W. J.) Ltd. v. Gamboa* (1939), xxxvii, 107, 161, 186, 246
- Taylor v. Bowers* (1876), xxx
- Taylor v. Caldwell* (1863), xxix, xxx, xxxiii, xxxviii, 5, 9, 12, 17, 18, 19, 22,
23, 24, 25, 26, 27, 28, 29, 31, 32, 34, 35, 53, 54, 55, 56, 57, 59, 61, 62, 65,
66, 67, 75, 85, 89, 96, 99, 100, 109, 111, 129, 130, 131, 133, 135, 138, 139,
144, 150, 152, 153, 154, 155, 158, 160, 161, 162, 163, 165, 171, 196, 198,
200, 222, 223, 224, 225, 245, 246
- Taylor v. Hare* (1805), 88, 117
- Taylor (J. W.) & Co. v. Landauer & Co.* (1940), 36
- Templeman v. E. Cocquerel & Sons Ltd.* (1913), 85
- Tennants (Lancs) Ltd. v. Wilson* (1917), xxxiii, 29, 69, 170, 195, 242
- Terry v. Variety Theatres Controlling Co. Ltd.* (1928), 22
- Teutonia, The* (1872), 248
- Thiis v. Byres* (1876), 15
- Thorn v. Mayor of London* (1876), 12
- Re Thornett & Fehr and Yuills* (1921), 29
- Tingley v. Müller* (1917), 43
- Touteng v. Hubbard* (1802), 126, 193
- Towers v. Barrett* (1786), 84
- Trevalian v. Blanche* (1919), 178
- Trinidad Shipping Co. v. Alston* (1920), 48
- Turner v. Goldsmith* (1891), 31, 67
- U.S. Shipping Board v. Strik* (1926), 14
- Veidhart and Hall v. Rylands Bros.* (1917), 28
- Vita Food Products, Inc. v. Unus Shipping Co.* (1939), 44
- Re Wait* (1927), 114
- Wallis v. Pratt* (1911), 63
- Walsh v. Lonsdale* (1882), 109
- Walstab v. Spottiswoode* (1846), 117
- Walton Harvey Ltd. v. Walker & Homfrays Ltd.* (1931), xxx, 35, 245
- Walton v. Waterhouse* (1672), 9, 22
- Warner Engineering Co. Ltd. v. Brennan* (1913), 21
- Warren v. Whittingham* (1902), 85, 92
- Watkins v. Huntley* (1826), 116
- Watts, Watts & Co. Ltd. v. Mitsui & Co. Ltd.* (1917), 59, 173
- Waugh v. Morris* (1873), 248
- Wentworth v. Cock* (1839), 21
- Westminster Fire Office v. Glasgow Prev. Soc.* (1888), 108
- Weston v. Downes* (1778), 84
- Westropp v. Solomon* (1849), 117
- Wharton v. King* (1831), 247

Cambridge University Press

978-1-107-45589-4 - Impossibility of Performance: A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration, and Frustration

Roy Granville Mcelroy

Frontmatter

[More information](#)

INDEX OF CASES

xxv

- Whincup v. Hughes* (1871), 87, 94
White v. Nuts (1702), 112
Whitehead v. Lord (1852), 21
Wigan Coal and Iron Co. v. Eckersley (1910), 55
Wigley v. Blackwal (1600), 248
Wilkinson v. Lloyd (1845), 117
Wilkinson v. Torkington (1837), 110
Williams v. Lloyd (1629), 5
Wills v. Cunningham (1924), 29
Woodfield Steam Shipping Co. v. Thompson (1919), 188, 209
Worcester Coll. Oxford v. Oxford Canal Navigation (1911), 49
Worsley v. Wood (1796), 13, 95
Wright v. Colls (1849), 113
Wycombe Borough Electric Light and Power Co. Ltd. v. Chipping Wycombe Corpn. (1917), 60
Wynn v. Shropshire Union Rlys. and Canal Co. (1850), 33
Wyvill v. Bishop of Exeter (1811), 116

Young v. Cole (1837), 117

Ziger v. Shiffer and Hillman Co. Ltd. (1933), 246
Zinc Corp. v. Hirsch (1916), 41

Cambridge University Press

978-1-107-45589-4 - Impossibility of Performance: A Treatise on the Law of Supervening
Impossibility of Performance of Contract, Failure of Consideration, and Frustration

Roy Granville Mcelroy

Frontmatter

[More information](#)

Cambridge University Press

978-1-107-45589-4 - Impossibility of Performance: A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration, and Frustration

Roy Granville McElroy

Frontmatter

[More information](#)

xxvii

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 recaptured. 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.

Cambridge University Press

978-1-107-45589-4 - Impossibility of Performance: A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration, and Frustration

Roy Granville Mcelroy

Frontmatter

[More information](#)

(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 least¹ 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.² 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 money³) 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 impecunious defendant, for he, through no fault of his own, becomes saddled with liability to pay the costs of the action.

Cambridge University Press

978-1-107-45589-4 - Impossibility of Performance: A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration, and Frustration

Roy Granville Mcelroy

Frontmatter

[More information](#)

INTRODUCTION

xxix

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 grafted 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. 269. .² 3 B. & S. 826.

Cambridge University Press

978-1-107-45589-4 - Impossibility of Performance: A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration, and Frustration

Roy Granville McElroy

Frontmatter

[More information](#)

xxx

INTRODUCTION

(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 Homfrays Ltd.* (1931).¹ 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.² Here neither the compulsory acquisition itself nor any consequential failure to perform the contract is regarded as a breach.³

The exception applies even though the subject-matter be not specific, if the legislation affects all property of the class specified in the contract.⁴ But outside these cases a mere change in the law relating to the subject-matter of a contract does not affect the obligation.⁵

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.⁶ It seems that money paid could be recovered under the rule in *Taylor v. Bowers* (1876),⁷ notwithstanding *Chandler v. Webster* (1904).⁸ Moreover, the parties may contract out of discharge for impossibility;⁹ not so out of illegality.¹⁰ 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.

⁴ *E. Hulton & Co. Ltd. v. Chadwick* (1918), 34 T.L.R. 230 (affd. 122 L.T. 66), as interpreted by McCardie J. in *Blackburn Bobbin Co. v. Allen*, [1918]

1 K.B. at 549-50.

⁵ *Cp. H— v. H—*, [1938] 3 All E.R. 415, 159 L.T. 525, 54 T.L.R. 1000.

⁶ *Post*, p. 99. ⁷ 1 Q.B.D. 291. ⁸ [1904] 1 K.B. 493. ⁹ *Post*, p. 59.

¹⁰ *Per* Lord Atkin in *Russkoe v. John Stirk & Sons Ltd.* (1922), 10 L.L.L.R. 214 at 217. Not even out of foreign illegality: *per* du Parcq L.J. in *Kleinwort, 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.