

FRUSTRATION
AND
FORCE MAJEURE

by

G. H. TREITEL, Q.C., D.C.L., F.B.A.
*Honorary Benchler of Gray's Inn;
Fellow of All Souls College, Oxford;
Visiting Professor of English Law*

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CH Treitel
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PREFACE

The main concern of this book is with the rules which govern the discharge of contracts by supervening events in English law, but it also has a comparative dimension. In particular, it explores the differences between English and American law in dealing with the problems of such discharge. This comparative aspect is of particular interest since in this subject there has been no fundamental parting of the ways between the two systems, as there has been, for example, in the common law relating to third party beneficiaries. The differences have been more subtle, the solutions provided by American law being often more flexible, or more widely available, than those provided by English law. The existence of such differences in systems which have started from common principles necessarily leads to the question whether English law might not have something to learn from transatlantic developments; and once that question had been put it became natural to extend a similar enquiry to certain solutions and concepts developed in European civil law systems. That enquiry is, of more than academic importance now that some of these concepts can be said to be infiltrating into English law as a result of the implementation by the United Kingdom of EC Directives which are in part based on such concepts. Some of this legislation is discussed in the text, which also considers relevant provisions of the Vienna Convention on the International Sale of Goods, even though at the time of writing this has not been ratified by the United Kingdom. Account is also taken of material from a number of Commonwealth jurisdictions. While the book thus contains comparative elements, it does not claim to be a full-scale comparative study; on the present topic such a study could scarcely have been undertaken in a book of reasonable length. Its main focus is on English law and it refers to other systems only insofar as they can provide suggestions which deserve consideration (though not necessarily acceptance) in the further development of English law.

Some comment should be made on the title of the book. On a narrow view, it might be thought that it deals with "*force majeure*" only in Chapter 12, which discusses express provisions for supervening events. But such provisions have become so prevalent that reference to them is made in many other Chapters, and in this sense "*force majeure*" constitutes a recurring sub-theme to the main theme of frustration.

It is a pleasure to thank a number of institutions without whose help this book could not have been written. A seminar taught at Southern Methodist University School of Law gave me the opportunity to explore in some depth the principal differences between English and American law on the subject. The chance to continue with this work was provided by an invitation from the Ernst von Caemmerer Gedächtnisstiftung, which resulted in a visit to the University of Marburg and in the production of a short book in German. I am particularly grateful for permission of the Stiftung and of Nomos Verlagsgesellschaft, the publishers of that book, to make use of the results of

TABLE OF RESTATEMENT REFERENCES

1980 American Law Institute's Restatement of the Law, 2d, Contracts—cont.	PARA.	1980 American Law Institute's Restatement of the Law, 2d, Contracts—cont.	PARA.
para. 270(6)	5-002	para. 272, Illustrations 1-4	15-036
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CHAPTER I

INTRODUCTION

I. TWO CONFLICTING PRINCIPLES

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This book is concerned with a conflict between two principles. The first is the principle of *sanctity of contract*; sometimes expressed in the Latin maxim *pacta sunt servanda*. This principle insists on the literal performance of contracts in spite of the fact that events occurring after the contract was made have interfered with the performance of one party, or reduced its value to the other; it is based on the view that one of the principal purposes of contract as a legal and commercial institution is precisely to allocate the risks of such events. It takes the position that those risks, having been so allocated by the parties, should, as a general rule, not be re-allocated in a different manner by the courts. On the other hand, the principle of *sanctity of contract*, like many legal principles, is not considered to express an absolute value. It is qualified by a counter-principle that parties who enter into contracts, often do so on the basis of certain shared, but unexpressed, assumptions. This counter-principle is also sometimes expressed in a Latin phrase, *rebus sic stantibus*. Its effect is in certain cases to discharge contractual obligations because circumstances have changed since the conclusion of the contract so as to destroy a basic assumption which the parties had made when they entered into the contract.

II. NO THEORY OF IMPOSSIBILITY

In discussing the conflict between sanctity of contract and discharge by supervening events, two further principles of the common law of contract must be kept in mind. The first is that most common law systems have not followed the general civil law principle that there can be no contract to do

¹For a different statutory approach, see Indian Contract Act 1872, s.56 ("An agreement to do an act impossible in itself is void"); criticized by Pollock, *Principles of Contract* (13th ed.), p. 229.

what is impossible* (*impossibilium nulla obligatio*). This civil law position has been repeatedly rejected in English law. As long ago as 1706 Holt C.J. said that "when a man will for a valuable consideration undertake to do an impossible thing, though it cannot be performed, yet he shall answer in damages."¹ In modern cases, statements are similarly to be found to the effect that English law has no difficulty in recognising that parties can effectively enter into a contract "requiring one of them to do the impossible."² The statements which assert the nullity in civil law systems of obligations to do the impossible, and those asserting the (possible) validity of such obligations in common law systems, refer for the most part to cases of antecedent impossibility. They are, therefore, not our prime concern in this book, which deals with cases of supervening impossibility. There are indeed many cases in which such (supervening) impossibility is regarded by the common law as a ground of discharge.³ But it is by no means invariably so. Regarded the common law sees no greater difficulty in holding a party liable where his performance has become impossible, than in holding him liable where his performance existed *ab initio*. The explanation for this difference between civil and common law lies in the approach of the two groups of systems to remedies. In civil law systems, enforced performance is assumed to be the primary remedy,⁴ and is obviously inappropriate when the performance in question is, or has become, impossible. This may be so even when the impossibility results from what to a common lawyer would appear to be a plain breach: in such cases civil law will often reach the same result as the common law, making the party who is responsible for the impossibility liable for compensation; but it feels a conceptual difficulty about the actual enforceability of the impossible obligation. In the common law, where the primary remedy for breach of contract is by means of a money judgment, no similar difficulties are felt. Performance of an obligation to pay money is never considered to be impossible, so that an action for an agreed sum (which is conceptually a kind of specific enforcement) cannot be resisted on this ground. And impossibility in performing an obligation of some other content (whether to transfer a thing, or to render a service) is no conclusive

¹ German Civil Code (BGB), § 306; Swiss Code of Obligations, Art. 30 I; Zweigert and Kötz, (vs. Weir), *Introduction to Comparative Law* (2nd ed.), p. 525.

² *Dig.* 50.17.185.

³ *Thornburn v. Whitler* (1706) 2 Ld. Raym. 1164, 1165. Cf. *Port. v. 2-009* at n. 61.

⁴ *Barrow v. Phillips* (1887) 2 Lloyd's Rep. 215, 218; *Port. v. 2-009* at n. 61.

⁵ *Barrow v. Phillips* (1887) 2 Lloyd's Rep. 215, 218; *Port. v. 2-009* at n. 61.

⁶ *Barrow v. Phillips* (1887) 2 Lloyd's Rep. 215, 218; *Port. v. 2-009* at n. 61.

⁷ *Barrow v. Phillips* (1887) 2 Lloyd's Rep. 215, 218; *Port. v. 2-009* at n. 61.

⁸ *Barrow v. Phillips* (1887) 2 Lloyd's Rep. 215, 218; *Port. v. 2-009* at n. 61.

⁹ *Barrow v. Phillips* (1887) 2 Lloyd's Rep. 215, 218; *Port. v. 2-009* at n. 61.

¹⁰ *Barrow v. Phillips* (1887) 2 Lloyd's Rep. 215, 218; *Port. v. 2-009* at n. 61.

¹¹ *Barrow v. Phillips* (1887) 2 Lloyd's Rep. 215, 218; *Port. v. 2-009* at n. 61.

¹² *Barrow v. Phillips* (1887) 2 Lloyd's Rep. 215, 218; *Port. v. 2-009* at n. 61.

¹³ *Barrow v. Phillips* (1887) 2 Lloyd's Rep. 215, 218; *Port. v. 2-009* at n. 61.

¹⁴ *Barrow v. Phillips* (1887) 2 Lloyd's Rep. 215, 218; *Port. v. 2-009* at n. 61.

¹⁵ *Barrow v. Phillips* (1887) 2 Lloyd's Rep. 215, 218; *Port. v. 2-009* at n. 61.

objection to an award of damages for failing to render the performance in question. The closest English law analogy to the civil law rule that impossibility leads to nullity of an obligation is to be found in the rule of equity that "the court does not compel a person to do what is impossible."¹ Such a refusal does not, of course, preclude an award of damages. Looked at in this way, the divergence between civil and common law in cases of impossibility is less striking than may at first sight appear, for in some cases in which an obligation is regarded by civil lawyers as void for impossibility the party who had promised to do the impossible thing may be liable in damages, e.g. because he was at fault in concluding the contract when he knew or should have known, of the impossibility (though sometimes such liability is restricted to compensate the other party for his reliance loss),² or because the terms of the contract are considered to include a guarantee that performance was (or would be) possible,³ or because one party was responsible for the impossibility.⁴ The first of these bases of liability can scarcely apply to cases of supervening impossibility (which are our concern), but the second and third may well apply to such cases.

III. STRICT CONTRACTUAL LIABILITY

The second point relates to the standard of liability, and here it is important to emphasise that, at common law, liability for breach of contract is often strict liability: that is, a party may be in breach even though his failure or inability to perform is not due to any want of care or diligence on his part.⁵ The mere fact that supervening events, occurring without his fault, have interfered with or even prevented performance is therefore not sufficient to bring the doctrine of discharge into operation. This point is most readily illustrated by the case of a seller of generic goods who is cut off by supervening events from the only source of supply to which he could reasonably have been expected to resort.⁶ It is of course not shipping from the designated country of origin because it turns out that no shipping space is available there during the time specified in the contract for

¹ *Port. v. 2-009* at n. 61.

² *Port. v. 2-009* at n. 61.

³ *Port. v. 2-009* at n. 61.

⁴ *Port. v. 2-009* at n. 61.

⁵ *Port. v. 2-009* at n. 61.

⁶ *Port. v. 2-009* at n. 61.

⁷ *Port. v. 2-009* at n. 61.

⁸ *Port. v. 2-009* at n. 61.

⁹ *Port. v. 2-009* at n. 61.

¹⁰ *Port. v. 2-009* at n. 61.

¹¹ *Port. v. 2-009* at n. 61.

¹² *Port. v. 2-009* at n. 61.

¹³ *Port. v. 2-009* at n. 61.

¹⁴ *Port. v. 2-009* at n. 61.

¹⁵ *Port. v. 2-009* at n. 61.

¹⁶ *Port. v. 2-009* at n. 61.

shipment.¹⁵ In such cases, the contract is not discharged; lack of fault is not a sufficient (though it is a necessary) condition for the operation of the doctrine of discharge. It does not follow that such contracts can never be discharged by supervening events. Thus the case in which goods cannot be shipped because shipping space is unavailable may be contrasted with one in which the port of shipment designated in the contract is destroyed by an earthquake; there can be little doubt that in the latter case the contract would be discharged. The distinction between the two situations can be explained by saying that the seller undertakes to obtain shipping space, but that neither party undertakes that the port will continue to exist. The latter point is simply an assumption made by both parties, on which performance of the contract depends. Even the undertaking to obtain shipping space does not extend to all imaginable situations: it has, for example, been held that the doctrine of discharge could apply where most of the shipping space which was expected to be available for transporting the goods from the country of origin to that of the contractual destination had been requisitioned during the First World War, thus wholly disrupting the seaborne trade between those countries for a period of some years.¹⁶ The crucial factor here was that of delay: the contract expressly provided for suspension where performance was "hindered," and it was held that conditions returned to normal. A similar point can be made in relation to the failure of a charterer to provide a cargo. His liability for such failure is strict,¹⁷ but if he provides the cargo the contract may be discharged as a result of delay in loading caused by events beyond his control, such as strikes at the port of loading.¹⁸ Again it can be said that the charterer undertakes that there will be a cargo, but not that manpower will be available to load it. Another way of stating the distinction is to say that a contracting party takes the risk of some events of the kind here considered (the availability of the goods, or of shipping space) but not for others (prolonged disruption of communications due to war, delays caused by strikes); thus it has been said that the outcome depends on whether the party claiming to be discharged has (or has not) taken "the risk of the contingency's occurrence."¹⁹ But this type of statement is, with respect, unhelpful. It can refer either to risk allocation by the agreement, or to risk allocation by law. On the former view, it adds nothing to the formulation put forward above, under which the result

¹⁵ *Levin Emanuel & Son Ltd. v. Sammut* [1952] 2 Lloyd's Rep. 629.

¹⁶ *Acetylene Co. of G. B. v. Canadian Carbide Co.* (1922) 8 Lloyd's Rep. 456; and see *post*, § 5-036.

¹⁷ *Sociedad Financiera etc. v. Aguirre et al.* (The *Adia*) [1961] A.C. 135 (overruled on another point in *E. L. Olenderoff & Co. GmbH v. Tondra Export SA (The Johanna Olenderoff)* [1974] A.C. 479); *Kawasaki Steel Corp. v. Suddell SPA (The Zabin Maru)* [1977] 2 Lloyd's Rep. 532; cf. *Hills v. Sugrue* (1849) 15 M. & W. 252 (where the shipowner undertook to supply the cargo and this undertaking was described as p. 261 as "absolute").

¹⁸ *Pioneer Shipping v. B.T.P. Torridge (The Nyma)* [1952] A.C. 724.

¹⁹ cf. *Transatlantic Financing Corp. v. U.S.* 363 F. 2d 312, 316 (1966); and see *post*, § 3-008 at n. 41.

depends on the undertakings of the parties with respect to the event. On the latter view, it simply restates the problem of drawing the borderline between strict liability and discharge, without carrying any further the process of determining where and how that line should be drawn.

IV. CONTRACTUAL LIABILITY BASED ON FAULT

The preceding discussion concerns the borderline between strict liability and discharge; but it is also necessary to refer to the relationship between the doctrine of discharge and cases in which contractual liability is based on fault. These are cases in which a party who has undertaken to perform a service or to achieve some result is not liable if he has exercised reasonable care in rendering the service, or if he has used due diligence to bring about the result. If that party complies with that standard, but the result specified or expected by the other party is not achieved, then the former party is not in breach. This is often the position where professional services are rendered, e.g. by a surgeon who conducts an operation or by a lawyer who represents his client in litigation.²⁰ Similar reasoning may apply where the achievement of the result is prevented by some supervening event. For example, a contract may require a party to use due diligence to obtain the consent of a third party, necessary to its performance or to the use intended to be made by the other party of its subject-matter. This would be the position where the contract required a party to obtain an export or import licence,²¹ or to obtain planning permission or some other form of official consent. Refusal of such consent may be, or result from, a supervening event, such as a change in the policy of the planning or licensing authority.²² If the party who was required by the contract to make the reasonable efforts does make them and nevertheless fails to obtain the requisite consent, he is under no liability. But the reason for this is not that the supervening event has discharged him from his duty of diligence; it is rather that he has performed that duty.²³ The point is of practical significance since the legal consequences of discharge by supervening events for which a party is not responsible, and of discharge by performance, differ significantly: in particular, the legislation which specifies the effects of discharge by impossibility and frustration²⁴ do not apply to discharge by performance. Again the possibility exists that in cases of the kind just described the contract may be discharged by supervening events. This is true, not only in the obvious case where the effect of such an

²⁰ e.g. *Clark v. Kirby-Smith* [1964] Ch. 506; *Eyre v. Mearns* [1986] 1 All E.R. 488; *Tracy v. Maurice* [1986] Q.B. 644.

²¹ *Post* § 8-011.

²² e.g. *Maritime National Fish Ltd. v. Ocean Transporters Ltd.* [1953] A.C. 524.

²³ See the discussion of *A. V. Pount & Co. Ltd. v. M. W. Hardy Inc.* [1956] A.C. 583 in *Benjamin's Sale of Goods* (4th ed.), § 18-163, and *post*, § 8-016.

²⁴ The Law Reform (Frustrated Contracts) Act 1943 applies "where a contract... has become impossible of performance or been otherwise frustrated" and so would not cover the situation discussed in the text at n. 24 *supra*.

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CHAPTER 1 — INTRODUCTION

event is to prevent the party who is under an obligation of diligence from pursuing the course of conduct which he has undertaken to perform. ⁴⁸ If a party who had undertaken to render professional services dies, it is where a party where, though that course of conduct is not prevented, the event makes it impossible to achieve the object to be attained: e.g. where a contract obliged a seller to make reasonable efforts to obtain an export licence, and the export of such goods of the contract description was then absolutely prohibited. In such a case the seller would not be bound even to make reasonable efforts for it is settled that he is under no liability if he can show that the licence would certainly have been refused, even if he had made such efforts. ⁴⁹

V. SUPERVENING AND ANTECEDENT EVENTS: FRUSTRATION AND MISTAKE

Our concern in this book is with the effect on contracts of supervening events, i.e. with events which occur after the conclusion of the contract. The effect of antecedent events, i.e. those which had already taken place at the time of contracting, is governed by principles which may in some respects be related to those which apply to supervening events, ⁵⁰ but it is submitted that the two sets of principles are nevertheless distinct. The distinction, in English terminology, can be summed up by saying that antecedent events may make the contract void for mistake, while supervening events may discharge it by frustration. For example, in a number of the coronation cases, to be discussed in Chapter 7, contracts were discharged when, after they had been made, the processions were cancelled. ⁵¹ In one of these cases, however, the processions had (unknown to the parties) already been cancelled when the contract was made, and the contract was held to be void for mistake ⁵²; this shows that mistake can consist of a belief as to the future, so long as it is already false at the time of contracting. One can, in relation to these cases, also make the point that the line between antecedent and supervening events is not always easy to draw. It is, for example, not wholly clear on which side of the line a case would have fallen if the contract had been made after the King had fallen ill, but before his illness had been diagnosed or found to be sufficiently serious to warrant the postponement of the Coronation. A somewhat similar point arose in *A maligned Investment*

of Property Co. Ltd. v. John Walker & Sons Ltd., ⁵³ where a contract was made for the sale of a London warehouse which the purchaser (as the vendor knew) intended to redevelop. Before the contract was made, a government official had decided that the warehouse ought to be listed as a building of special architectural or historic interest. But the actual listing only took place after the conclusion of the contract: its effect was to make it very much harder to obtain permission to redevelop, and (according to the purchaser's evidence) to reduce the value of the property by some £1,500,000 below the contract price of £1,710,000. The Court of Appeal held that the purchaser was not entitled to relief on the ground either of mistake or of frustration. The point here to be emphasised is that these two doctrines were considered as *separate* grounds for relief, and that it is implicit in this approach that the distinction between their respective factual bases would have been a fine one, and to make legal consequences depend on such fine factual distinctions might be thought undesirable.

Nevertheless, the analogy between initial invalidity on the ground of mistake and discharge under the doctrine of frustration is imperfect for a number of reasons. One can point, in particular, to three distinctions between the two doctrines, and also make a point about their historical development.

The first distinction relates to the state of mind of the parties. The type of mistake with which frustration is said to be analogous is mistake which nullifies consent (also described as "common" mistake), i.e. a fundamental mistake of both parties as to the subject-matter of the contract. Inherent in the notion of "mistake" is the idea that the parties entertain an affirmative belief in the existence of a state of affairs when in fact that state of affairs does not exist, e.g. in the existence of the subject-matter, when in fact it has been destroyed. If the parties entertain no such belief, their state of mind cannot be described as mistake: the law relating to the effect of mistake on contracts distinguishes between indifference and mistake. ⁵⁴ In cases of mistake, it is also a requirement for relief that the mistake must induce the contract. The position is different in cases of actual or alleged discharge by frustration, where the parties often have no affirmative belief as to the event which may have taken them wholly by surprise. They need not believe that the event will not occur. It does not, indeed, logically follow from this distinction that parties should be denied relief in respect of antecedent obstacles to

⁴⁸ [1972] 1 W.L.R. 164; cf. also *Smith Coney & Bartlett v. Becker Gray & Co.* [1966] 2 Ch. 87, where both frustration and mistake were considered.

⁴⁹ *Gillman v. Gillman* (1946) 174 L.T. 279 (where the court was concerned with the type of mistake required to substantiate the plea of *non est factum*).

⁵⁰ This is inherent in the notion that the mistake "nullifies... consent" (*Idly, Law of Contract* [1932] A.C. 161, 217) and also in the definition of the requirement that the mistake must be "fundamental." In relation to a mistake as to quality, this, it is submitted, means that the mistake must relate to a quality by reference to which the parties have identified the subject-matter. Treitel, *The Law of Contract* (8th ed.), p. 253. The requirement of inducement appears more explicitly in relation to mistake which negates consent (or "mutual" mistake): see, e.g. *McKee v. European Assurance Soc.* (1869) 21 L.T. 102; *Fellows v. Gough* (1829) 1 Russ. & My. 83.

⁵¹ See *Re Anglo-Russian Merchant Traders and John Batt & Co. (London) Ltd.* [1917] 2 K.B. 679; *Benjamin's Sale of Goods* (4th ed.), § 18-154.

⁵² Cf. Pollock, *Principles of Contract* (13th ed.), p. 246; Anson, *Principles of the Law of Contract* (19th ed.), p. 350; this view is no longer found in more recent editions of Anson: see now 26th ed., p. 440, restricting the operation of the doctrine of discharge to "supervening" events. Cf. also Lord Haldane (dissenting) in *Bank Ltd v. Arthur Capel & Co.* [1919] A.C. 435, 445.

⁵³ *Perf. §§ 7-003 to 7-013.*

⁵⁴ *Giffith v. Brymer* (1903) 19 T.L.R. 434.

performance merely because they did not affirmatively believe that such obstacles did not exist.³⁵ But whatever the ground of such relief may be, it cannot be mistake,³⁶ and English law recognises no other ground for relief in such cases.³⁷ Nor, for reasons to be discussed below, should it do so.

The second distinction relates to the legal effects of the two doctrines. Mistake makes a contract void³⁸ *ab initio*, while frustration only discharges it with effect from the occurrence of the frustrating event.³⁹ It follows that no action can be brought to enforce any obligation alleged to have been imposed by a contract which is void for mistake, while such actions can be brought in respect of obligations which have arisen under a frustrated contract before the time of discharge.⁴⁰ The latter proposition has been modified by statute in respect of money payable before discharge,⁴¹ but this modification is subject to significant exceptions⁴² and in any event does not extend to a number of other applications of the principle that obligations accrued before discharge remain enforceable.⁴³ Moreover, insofar as the effects of discharge are now regulated by the provisions of the Law Reform (Frustrated Contracts) Act 1943, those provisions clearly apply only to supervening events: in the words of section 1(1) they apply, "where a contract ... has become impossible of performance or been otherwise frustrated and the parties thereto have for that reason been discharged from further performance of the contract." These words clearly contemplate discharge by supervening events, and the whole structure of the Act is based on the assumption that discharge occurs by reason of a change of

circumstances occurring after the conclusion of an effective contract.⁴⁴ Indeed, the point is so clear that no attempt has ever been made to apply the Act to cases of mistake as to circumstances in existence at the time of contracting.

The third point is of a more practical nature. It is said to be a requirement of invalidity, on the ground of mistake, that the mistake must be "fundamental,"⁴⁵ and the same expression is used to make the point that it is only a "fundamental" change of circumstances which brings the doctrine of discharge into play.⁴⁶ But the word "fundamental" is used in the law of contract with many shades of meaning; and the use of this single word to refer to tests of mistake and frustration should not obscure the fact that the standards of "fundamentality" required for their operation are distinct. One may concede that if the degree of difference between facts as they are and as they are supposed to be is sufficiently serious to amount to a fundamental mistake, then the same degree of difference between facts as they are at the time of contracting and as they subsequently turn out to be (by reason of a supervening event) will also be sufficiently serious to discharge the contract under the doctrine of frustration. But the converse is by no means necessarily true. Two illustrations may be given in support of this suggestion. First, we have already noted that in *Griffith v. Brymer*,⁴⁷ one of the coronation cases, a contract was held void for mistake on the ground that the Coronation had already been postponed when the parties, without being aware of this fact, entered into the contract. Since that decision, however, the scope of the doctrine of mistake as to the subject-matter has been restrictively interpreted in *Bell v. Lever Bros Ltd.*,⁴⁸ and it is an open question whether *Griffith v. Brymer* has survived that decision of the House of Lords.⁴⁹ Doubts were indeed at one time also expressed about *Krell v. Henry*,⁵⁰ where a contract which had been made before the Coronation was postponed was held to have been frustrated by the postponement, but these doubts have not prevailed.⁵¹ Secondly, we shall see that in the Suez cases (to be discussed in Chapter 4) it was held that contracts of sale and contracts of carriage were not frustrated by the closure of the canal, since the difference between carrying the goods via Suez and via the Cape was not sufficiently fundamental. Such cases do not rule out the possibility that a contract of carriage might be frustrated by the blocking of a contemplated route where

³⁵ See, for example, *Kinzer Construction Co. v. State* 125 N.Y.S. 46 (1910), discussed *post*, § 3-036.

³⁶ In the United States the American Law Institute's Restatement of the Law, 2d, Contracts (hereinafter Restatement 2d), Chapter 11, § 266 provides for relief in such cases of antecedent obstacles; such relief is evidently regarded as distinct from the relief for mistake provided for in Chapter 6 of the Restatement 2d; if it were not so regarded, a cross-reference to the latter Chapter which is made in Chapter 11 at p. 310 and in § 266 Comment *a* would have sufficed. In the *Kinzer* case, *supra* n. 35, the obstacle to performance was antecedent, but the authorities relied on as a ground of discharge were all cases of supervening impossibility. It is also noteworthy that U.C.C. § 2-615 (which provides for "Excuse by Failure of Presupposed Conditions") is stated to apply in cases of "unforeseen supervening circumstances" (Comment 1). By contrast, § 2-613 (which deals with the effect of "Casualty to Identified Goods") applies whether the goods were already destroyed at the time of contracting without the knowledge of the parties or whether they are destroyed subsequently ... (Comment 2).

³⁷ Contrast the *Kinzer* case *supra*, n. 35, with, *McDonald v. Corporation of Worthington* (1892) 9 T.L.R. 21, 239.

³⁸ *Associated Japanese Bank (International) Ltd. v. Credit du Nord SA* [1989] 1 W.L.R. 255, 268.

³⁹ *Post*, § 15-010. For cases in which the effect of the event is not clear as soon as it occurs, see *post*, Chapter 9.

⁴⁰ See the example given *post*, § 15-010.

⁴¹ Law Reform (Frustrated Contracts) Act 1943, s.1(2); *post*, § 15-044.

⁴² *Ibid.* s.2(3), *post*, §§ 15-067, *et seq.*

⁴³ See *post*, § 15-036.

⁴⁴ See the frequent use in the Act of the phrase "before the time of discharge": this clearly contemplates events occurring after the conclusion of an effective contract.

⁴⁵ See Treitel, *The Law of Contract* (8th ed.), pp. 249, *et seq.*

⁴⁶ *Griffith v. Brymer* is cited with apparent approval in *Fitzroy Spohla Akoya v. Fairbairn Lindsay Parkison Ltd. v. Commissioners of Works* [1949] 2 K.B. 632, 667, both approved in *Davis Contractors Ltd. v. Fareham U.D.C.* [1956] A.C. 696, 722, and see *ibid.*, p. 723.

⁴⁷ (1903) 19 T.L.R. 434, *ante* § 1-005.

⁴⁸ [1952] A.C. 161.

⁴⁹ *Griffith v. Brymer* is cited with apparent approval in *Fitzroy Spohla Akoya v. Fairbairn Lindsay Parkison Ltd.* [1949] A.C. 32, 82.

⁵⁰ [1903] 2 K.B. 740.

⁵¹ *Post*, §§ 7-010 to 7-013.

use of the only route remaining open *would* require the carrier to render a performance "fundamentally" different from that which he would have rendered, had he been able to use the contemplated route. Yet it is highly unlikely that the contract would be held void for mistake if the contemplated route had (without the knowledge of the parties) been already blocked when the contract was made. Such contrasting examples form the basis for the submission that a stricter standard of what is "fundamental" is applied at common law in cases of alleged mistake than in cases of alleged frustration.⁵⁰ It is submitted that this distinction can be justified on the practical ground that it is easier to discover present facts that to foresee the future, and correspondingly easier to discover existing obstacles to performance than to foresee or guard against obstacles which may arise in the future. It should therefore occasion no surprise that references to the doctrine of "absolute contracts"⁵¹ and to *Paradine v. Jane*⁵² (to be discussed in Chapter 2) continued to be made in cases of antecedent impossibility,⁵³ even after the basis of the modern doctrine of discharge by supervening impossibility was laid in *Taylor v. Caldwell*.⁵⁴ It follows *a fortiori* that factors which were not only in existence but also known to the parties at the time of contracting cannot be relied on as grounds of frustration.⁵⁵

1-008

The differences so far listed appear to support the judicially expressed view that mistake and frustration are "different juristic concepts" in that they are brought into operation by circumstances which differ significantly from each other (and differ not only in respect of the time at which the obstacle to performance arises), and in that they give rise to different legal effects. The same view is also supported by one curious aspect of the history of the matter. The origin of the doctrine of discharge by supervening events is generally traced back to the judgment of Blackburn J. in *Taylor v. Caldwell*,⁵⁷ in 1863. Only four years later, Blackburn J. delivered the judgment of the court in the leading mistake case of *Kennedy v. Panama Royal Mail Co.*,⁵⁸ but that judgment contains no reference to *Taylor v. Caldwell*, even though that case was cited by counsel in the *Kennedy* case.⁵⁹ Nor is there any reference to *Taylor v. Caldwell* in *Clifford v. Wells*,⁶⁰ a case which was also concerned with antecedent impossibility, even though in that case the result resembled *Taylor v. Caldwell* in that the impossibility did, on the true construction of the contract, provide the defendant with an excuse. Conversely, *Taylor v.*

Caldwell does not refer to cases of antecedent impossibility such as *Couturier v. Hastie*,⁶¹ which had been decided only seven years earlier. It is not necessary here to enter into the debate whether *Couturier v. Hastie* was indeed a case of mistake⁶² or one which turned on the construction of the contract.⁶³ The point here is simply that it was concerned with an antecedent obstacle to performance, and that it was not regarded in *Taylor v. Caldwell* as relevant to the development of the emerging doctrine of discharge by supervening events.

1-009

The preceding discussion is concerned with the different effects of antecedent and supervening obstacles under the common law doctrines of mistake and frustration. It remains to consider the effect, in the present context, of the equitable rules relating to mistake, and in particular the effect of the somewhat controversial equitable jurisdiction to set a contract aside where both parties have entered into it under a mistake,⁶⁴ even though that mistake is not "fundamental" in the narrow common law sense established in *Bell v. Lever Bros. Ltd.*⁶⁵ It is certainly arguable that the type of events which, if they occurred after the contract, would frustrate it. Indeed the definition of mistake for this purpose may actually be wider than that of a change of circumstances which is sufficiently serious or "fundamental" to bring the doctrine of frustration into play. It can also be said that the equitable jurisdiction resembles frustration in that it does not declare the contract void, but only voidable. But it is submitted that the differences between the equitable jurisdiction and frustration are far more significant than these points of superficial resemblance. In the first place, the equitable jurisdiction is discretionary,⁶⁶ while once a frustrating event is found to have occurred the contract is automatically brought to an end,⁶⁷ without any scope for judicial discretion. Secondly, the equitable jurisdiction is to set the contract aside *on terms*,⁶⁸ while frustration leads to total discharge.⁶⁹ It is true that, under the Law Reform (Frustrated Contracts) Act 1943, the court has certain discretionary powers to make adjustments in respect of expenses incurred⁷⁰ and valuable benefits conferred⁷¹ under frustrated contracts. But these powers have only a limited scope, and in cases to which they do not extend English courts have no analogous power to make adjustments at common law. Under the equitable jurisdiction in cases of mistake, the court

⁵⁰ Cf. *Jan Albert (HK) Ltd. v. Shu Kong Garment Factories Ltd.* [1993] H.K.L.R. 317.

⁵¹ *Post*, §§ 2-001 *et seq.*

⁵² (1647) *Alcyon* 26, *post* § 2-002.

⁵³ *E.g.* in *Clifford v. Wells* (1870) L.R. 5 C.P. 577, 586, and see *post* § 2-033.

⁵⁴ (1863) 3 B. & S. 826, *post* § 2-024.

⁵⁵ *McAlpine Humberock Ltd. v. McDermott International Inc.* (1992) 58 B.L.R. 1.

⁵⁶ *Joseph Constantine S.S. Line v. Imperial Smelting Corp. Ltd.* [1942] A.C. 154, 184; cf. *Bell v. Lever Bros. Ltd.* [1932] A.C. 161, 237; *Fibrosa Spolka Akcyjna v. Fairbairn Lawson*

Combe Barbour Ltd. [1943] A.C. 32, 80.

⁵⁷ *Supra*, n. 54.

⁵⁸ (1867) L.R. 2 Q.B. 550.

⁵⁹ *Ibid.* at p. 581.

⁶⁰ (1870) L.R. 5 C.P. 577.

⁶¹ (1856) 5 H.L.C. 673.

⁶² *Barrow, Lane & Ballard Ltd. v. Phillips & Co. Ltd.* [1929] 1 K.B. 574, 582 ("failure of consideration and mistake").

⁶³ *Atyiah*, 73 L.Q.R. 487.

⁶⁴ See Treitel, *The Law of Contract* (8th ed.), pp. 276, 281-285 (where further references to the cases and other literature on the subject are given).

⁶⁵ [1932] A.C. 161; Treitel *op. cit.*, pp. 249-257.

⁶⁶ *Wills v. Fox* (1887) 37 Ch.D. 153.

⁶⁷ *Post* § 15-002.

⁶⁸ *Selle v. Butcher* [1950] 1 K.B. 671; *Crist v. Bailey* [1967] Ch. 532, esp. at p. 545.

⁶⁹ *Post* § 15-009.

⁷⁰ s.1(2) proviso, *post* § 15-059.

⁷¹ s.1(3), *post* § 15-051.

may even give a party the option of upholding the contract on terms which remove or at least reduce the prejudice suffered by the other party as a result of the mistake.⁷² There is no similar power, even under the 1943 Act, to make such an order in cases of frustration. Finally, it is possible that the exercise of the equitable jurisdiction in cases of mistake may be restricted to cases in which the party claiming relief was not at fault,⁷³ and in which it was "unconscientious" for the other party to insist on his rights under the contract after becoming aware of the mistake.⁷⁴ The former restriction may be compared with the rule that a party cannot rely on "self-induced" frustration⁷⁵, but the conscience of the party resisting discharge is never regarded as an issue in cases of frustration. The equitable principles of mistake, no less than those of common law, are therefore (though for different reasons) radically different from the concept of discharge by supervening events under the doctrine of frustration.

⁷² See the authorities cited in n. 68 *supra*.

⁷³ *Sole v. Butler* (1950) 1 K.B. 671, 693; *Harrison & Jones Ltd. v. Buntin & Lancaster Ltd.* [1953] 1 Q.B. 646, 654; *Laurence v. Leacourt Holdings Ltd.* [1978] 1 W.L.R. 1128; *The Lloydiana* [1983] 2 Lloyd's Rep. 313, 318; *Associated Japanese Bank International Ltd. v. Credit du Nord SA* [1989] 1 W.L.R. 255, 270.

⁷⁴ e.g. *Hitchcock v. Giddings* (1817) 4 Price 135; *Bellies v. Maynard* (1882) 46 L.T. 766; but see *Riverdale Properties Ltd. v. Paul* [1975] Ch. 138, 140-141.

⁷⁵ *Post*, § 14-001.

CHAPTER 2

DEVELOPMENT

I. THE DOCTRINE OF PARADINE V. JANE

(1) Introduction

*Paradine v. Jane*¹ is generally regarded as the authority for what has become known as the doctrine of absolute contracts. The case was frequently cited in later decisions in which the court held that supervening events had not discharged a party from the contractual obligation in suit, and it continued so to be cited even after *Taylor v. Caldwell*,² which is now generally considered to have established the doctrine of discharge by supervening events, a doctrine which has come in English law to be known as the doctrine of frustration.³ Account must also be taken of the fact that many of the actual decisions in which *Paradine v. Jane* was applied are still regarded as good law.⁴ In discussing that case, a number of questions therefore present themselves: what actually was decided? what subsequent applications were made of the decision? and how much of what was decided (in the case itself and in later applications of it) still survives? The ensuing discussion is confined to the first two of these questions; the third will be considered after we have discussed the impact of *Taylor v. Caldwell*.

(2) The decision itself

The facts in *Paradine v. Jane* were that a tenant of a farm under a 21-year lease had, about six years after the commencement of the lease, been dispossessed for just over two years by act of the King's enemies, so that he was prevented from taking profits of the land. It was held that he was nevertheless liable in debt for rent under the lease in respect of the period during which he was so

¹ (1647) Aleyn 26; Kiraly, *A Source Book of English Law*, p. 22.

² (1863) 3 B. & S. 826.

³ For the various meanings of "frustration," see *Post*, §§ 2-044 to 2-050.

⁴ See *post*, §§ 2-033 to 2-034, 11-002, 11-014 to 11-017.