these uncertain spectres must continue to trouble English law for years to come. The remarks of Slesses L.J.[11] put the authority of *Loach's* case beyond doubt but the extent of the doctrine involved is far from clear. Similarly, none of the judges have any hesitation in applying the wide rule of continuing negligence but little direct guidance is to be found for prescribing its exact limits. However, it is suggested that the following principle is in accordance with the views of all the judgments, *viz.*: Any breach of a duty of care which can be shown to be a factor directly contributing to damage suffered by a person to whom the duty is owed is negligence and responsibility for it will be deemed to continue up to the moment when the damage occurs when it may provide foundation either for the action of negligence or for the defence of contributory negligence unless it can be shown that the person alleging the breach has also been responsible for some act or omission so culpable that, as a matter of fact, it is the real factor in causing the damage and can be said to supersede or exculpate the alleged negligence.

E. N. BERGERE.

11. *ibid.* at 129.

FRUSTRATION

Aerial Advertising Company v. Batchelor's Peas [1938] 2 All. E.R. 788

IN this case the plaintiff entered into a contract for reward to advertise the defendant's goods by flying over various towns trailing a large streamer bearing the words "Eat Batchelor's Peas." Schedules of times and places were agreed, but since exact compliance with these obviously depended on climatic conditions, it was agreed that the pilot should telephone the defendant each day to get its approval of what he proposed to do, and send a report of what he had done. This he did until November 10, 1937. He did not telephone on November 11, but made a flight over the crowded main square of Salford during the two minutes' silence, to the disgust and indignation of thousands of people assembled. As a result letters and telephone calls poured in upon the hapless defendant, vigorously denouncing its conduct and announcing that its goods would be boycotted; and though it hastily inserted apologies in the local newspapers, the plaintiff alleged that the widespread public feeling and highly damaging press publicity had caused serious injury to its business, its goodwill, and the reputation of its dried peas. The plaintiff sued the defendant for £170/7/11 in respect of part of the advertising done under the contract, and the defendant counterclaimed for damages for breach and for a declaration that it was no longer bound by the contract.

The plaintiff contended that the contract could still be performed in some months' time when the incident was forgotten, and in a different locality—in Wales, or the South of England. The defendant protested that all it wished to do was to undo the harm which had been done, to dissociate its name altogether for the future

from all forms of aerial advertising, and that it would not be the same contract if performance were to take place at a later date in a less populous area. Atkinson J. came to the conclusion that it was "commercially wholly unreasonable to carry on with the contract, and that the defendant is released from further performance."

The grounds upon which that declaration was made are by no means clear. Both the Headnote and the Editorial Note kept to the case as a decision on frustration; if that is correct, the doctrine seems to have received a significant extension. Salmond and Winfield[1] point out that frustration is a generic expression used to include both impossibility of performance and failure of the ulterior purpose underlying the contract. An agreement is void if its performance is either impossible in itself or impossible by law; that is clearly not the position in this case. The purpose of the contract was held to have been frustrated, not because further performance was in fact impossible, but because to carry out the bargain would be futile and injurious to the defendant.

Anson[2] makes a somewhat different classification, but the effect is the same. He too lays down the general principle that impossibility which arises subsequently to the formulation of a contract does not excuse from performance[3]; the rational basis of the exceptions which have been engrafted on to that rule has been explained by Lord Loreburn[4]: "A Court can and ought to examine the contract and the circumstances in which it was made not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract." It appears doubtful whether upon any sound construction of this contract such a limiting clause can readily be implied; and if it can, it would appear to constitute a new class of exception. Anson[5] groups the cases in which the law reads the condition of *rebus sic stantibus* into a contract under five heads:

1. Where performance becomes impossible through a change of law.
2. Where performance becomes impossible through the destruction of a specific thing essential to the performance of the contract.[6]
3. Where performance of a contract for personal services is rendered impossible by the death or incapacitating illness of the promisor.
4. Where performance becomes impossible because a particular state of things, the existence or continuance of which formed the basis of the contract, ceases to exist or continue.[7]
5. Where through supervening circumstances performance

1. *Law of Contract*, p. 290.
2. *Law of Contract*, p. 368 (17th edition).
3. *Paradine v. Jane*, Aleyn 26.
4. *Tamplin v. Anglo-Mexican Co.* [1916] 2 A.C. at 403.
5. *op cit.* p. 371.
6. *Taylor v. Caldwell*, 3 B. & S. 826; *Appleby v. Myers*, L.R. 2, C.P. 651.
7. The Coronation Cases, e.g., *Krell v. Henry* [1903], 2 K.B. 740.

becomes impossible within the time, or in the manner, contemplated by the parties. This is the only head under which the present case could possibly be brought. Two points, however, appear to indicate the contrary: In all the cases cited by Anson, and those collected by Halsbury under this topic,[8] the "supervening circumstances" causing frustration of the contract have been beyond the control of the parties: outbreak of war,[9] executive acts of the government[10] etc. Secondly, all these are, strictly, cases of discharge *by agreement*, in virtue of a term implied into the contract by law, which it is assumed that the parties intended to constitute a part of their bargain. There is a fundamental distinction between discharge by agreement, and discharge by breach; and, in this case, there are not two separable elements; the act which constituted the breach of contract, and the circumstances which made the agreement commercially unreasonable to perform appear to be identical. Further, Atkinson J. assessed damages for the defendant for the loss to its reputation and trade caused by the misperformance of the contract; but when a contract is discharged by supervening impossibility, no such right to damages arises, because no blame is attributable to either party in the failure of their bargain.

Salmond and Winfield[11] insist that the doctrine of frustration is entirely inapplicable to contracts which are discharged by the wrongful act of either party, *i.e.*, to agreements whose frustration is caused by a breach of contract. Anson[12] classifies cases of discharge by reason of impossibility created by the act of one party to the contract under the head of Discharge of Contract by Breach, and that, it is submitted, is the category to which the present case should be assigned. The breach was really one which went to the root of the contract, and which accordingly gave rise to a double remedy in the injured party: the right to rescind the contract at his option, and to claim damages for the loss caused him by the breach. Insofar as Atkinson J. divided the cause into two parts, determining first the question of breach and the remedy therefore, and then passing on to decide whether the contract had been frustrated, its performance having become commercially wholly unreasonable, it is submitted that he went beyond the well-established limits of the doctrine[13]; if he merely decided (and it is not in the least clear which view is correct) that the breach was sufficiently serious to give the defendant a right to put an end to the whole agreement, then there is no justification for the reference, in the headnote and editorial comment, to frustration.

R. J. HAMER.

8. Halsbury, Vol. 7, para. 296.
9. *Geipel v. Smith*, L.R. 7 Q.B.
10. *Metrop. Water Board v. Dick, Kerr* [1918] A.C. 118; *Horlock v. Beal* [1916] 1 A.C. 486.
11. *op. cit.*, p. 314.
12. *op. cit.*, p. 367.
13. McCardie J. in his review of the doctrine in *Blackburn Bobbin Co. v. Allen* [1918], 1 K.B. 540, clearly seems to consider that it is confined, in the main, to questions of illegality or public policy, and to supervening impossibility due to Act of God, or to actual prohibition or intervention by the Government; and that the principle of *Krell v. Henry*, with respect to the continued existence of a state of facts collaterally only affecting the contract, should not be unduly extended.