EQUITY AND THE "FIBROSA" PROBLEM.

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"And therefore Equity must see that a Proportionable Satisfaction be made in this Case."—*The Earl of Oxford's Case.*

Professor Lévy-Ullmann, towards the end of his book entitled "The English Legal Tradition" has written these words :—"The 'root idea' of Equity had always been, wrote Sir William Holdsworth, 'to enable hard cases to be avoided.' But to-day it is in Equity that we may look for them. The vital thought has flown. The root is dead, the stalk dry, the leaves withered, the fruit rotten. *Les oiseaux s'envolent, et les fleurs tombent.*" This passage describes with colorful variety of metaphor a phenomenon which has been noted by others. It cannot be said to be illustrated by the famous *Fibrosa Case*[1], because it happened that in that case complete justice was done within the framework of the common law action for money had and received.[2] But it was recognised that the rule laid down in that case might, if it stood unqualified, work very serious injustice, and this leads one to wonder whether it is not possible for equity, without statutory compulsion or guidance, to do what is necessary for justice and show to Professor Lévy-Ullmann that his picture is a little too gloomy. The English statute has not been enacted in Victoria.

In the *Fibrosa Case* Lord Atkin[3] said :—

"That the result of the law may cause hardship . . . is incontrovertible. One party may have almost completed expensive work. He can get no compensation. The other party may have paid the whole price, and, if he has received but a slender part of the consideration, he can get no compensation." The Lord Chancellor[4], referring to the same possibilities of serious hardship, said :—"These results follow from the fact that the English *common law* does not undertake to apportion a prepaid sum in such circumstances . . . It must be for the legislature to decide whether provision should be made for an *equitable* apportionment." (The italics are, of course, mine).

This language of the Lord Chancellor is very striking. It directly suggests that here, where the common law cannot come at justice, should be a field for equity. And the suggestion is made the more striking because His Lordship, in the course of the passage quoted, refers to and contrasts the provisions of section 40 of the *Partnership Act* 1890 (section 44 of the Victorian Act), which contains quite elaborate provisions for the apportionment of premiums when a partnership is prematurely dissolved. It is to be remembered that these provisions are by way of codification, and that the rules which they incorporate were worked out by Courts of equity long before the Partnership Act. The exception of dissolution by death seems, by the way, rather curious, and the cases of *Hirst v. Tolson*[5], *Whincup v. Hughes*[6] and *Ferns v. Carr*[7], an illuminating

1. [1943] A.C. 32.
2. See per Ld. Roche at 76.
3. at 54.
4. at 49.
5. 2 Mac. & G. 134.
6. L.R. 6 C.P. 78.
7. 28 Ch. D. 409.

trilogy, might be used to illustrate the enfeeblement of equity. But, however this may be, why should not equity, without statutory direction, take in hand the situations which arise when a contract is " frustrated " ?

The story of the so-called Rule in *Chandler v. Webster*[8] (which seems first to have been enunciated by Channell J. in *Blakely v. Muller*,[9] and which was emphatically approved by Lord Halsbury in *Civil Service Society v. General Navigation Coy.*)[10] seems indeed one of the most interesting chapters of English legal history. In England the chapter may be said to have ended with the passing of the *Law Reform (Frustrated Contracts) Act* 1943.[11] The story begins with the statement of a common law rule which is capable of working injustice. That rule is overthrown, and its place is taken by another common law rule which is also capable of working injustice. And then the legislature steps in, and directs the Courts to do equity. One cannot help feeling that that is the whole substance of the matter. And one is tempted to enquire whether the jurisdiction could not, in the absence of a statute, be assumed as an inheritance from the Court of Chancery.

Speaking quite generally, the matter of taking accounts and making all necessary inquiries and adjustments consequential on the discharge of contracts presents very familiar ground to equity. The typical case is the case where one party to a contract claims rescission on the ground of fraud. A so-called decree of rescission in such a case, although the common form uses the expression " ought to be set aside," is really no more than a declaration that the contract has been discharged by the election of the defrauded party—see per Lord Atkinson in *Abram Steamship Coy. v. Westville Steamship Coy.*[12] What was said by Isaacs J. in *Fuller's Theatres v. Musgrove*[13] was written before the *Abram Case*. The jurisdiction to make such a decree was not, of course, confined to cases of fraud. The relief could be obtained on the ground of innocent misrepresentation or mistake. In any such case the Court of equity, after (in substance) declaring the contract to be void or to have been effectively avoided as the case may be, proceeds to make all orders necessary to do justice between the parties by producing, as nearly as may be, *restitutio in integrum*. Commonly a number of adjustments will be required, because, although in these cases the contract is declared void *ab initio*, it is common to find that acts have been done under it. A purchaser may have been in possession of property, he may have made improvements to it, it may have deteriorated with or without his fault, and so on. One party may have incurred potential liabilities against which he must be indemnified : see, e.g. *Newbigging v. Adam.*[14] A good example of the kind of decree made in such cases will be found in *Brown v. Smitt.*[15] That was a case of fraud. A more complicated decree in a case of mistake will be found in *Cooper v. Phibbs.*[16]

8. [1904] 1 K.B. 493.
9. [1903] 2 K.B. at 762 (n).
10. [1903] 2 K.B., at p.764.
11. 6 & 7 Geo. 6, c. 40.
12. [1923] A.C., at 781.
13. 31 C.L.R., at 542.
14. 34 Ch. D. 582 ; 13 A.C., at 310, 324.
15. 34 C.L.R., at 173-4.
16. L.R. 2 H.L., at 173-4.

Where the contract is not destroyed *ab initio*, but is brought to an end while still partly executory, as where it is " discharged by breach " on the election of the party not in default, *restitutio in integrum* would seem, strictly speaking, to be an inappropriate term to apply to any adjustments which justice may require. But here again equity is on familiar ground, and the term *restitutio in integrum* is sometimes, not unnaturally, used to describe what is done.[17] The jurisdiction invoked seems generally to have been the jurisdiction to relieve against penalties or forfeitures. Relief is given on whatever terms seem just. It was exercised in a series of interesting Victorian cases arising about the time of the " depression," when there was a heavy fall in land values and many purchasers of land failed to perform long-term contracts. It will be sufficient to refer to *Ward v. Ellerton*,[18] *Berry v. Mahony*[19] and *Real Estate Securities Ltd. v. Kew Golf Links Estate Pty. Ltd.*[20] There would not seem to be any real difficulty about the assumption of jurisdiction in equity wherever the discharge of a partially executory contract creates a situation in which justice requires that things shall be done which the common law cannot do. The problem which arises, if technically different, is in substance the same as where a contract is rescinded for fraud: often it is only by recourse to equity that complete justice—or the nearest possible human approximation to it—can be achieved.

When frustation takes place after moneys have been paid and things done in pursuance of the contract, the same problem again arises, and it is not easy to see why equity should not deal with it. The problem seems to have been dealt with " equitably " by the Roman law, and to be dealt with " equitably " by the Scots law.[21] It is to be emphasised that the doctrine of frustration, as we now know it, is an entirely modern development. Whether its application be technically referred to the " implied term " or to the " disappearance of substratum," it does seem true to say, as Lord Wright said in the *Joseph Constantine Steamship Case*,[22] that " The Court is exercising its powers, when it decides that a contract is frustrated, in order to achieve a result which is just and reasonable." Latham C.J. in the *Neon Sign Case*[23] quotes this passage, and quotes Lord Wright as saying elsewhere :—" The Court, in the absence of expressed intentions of the parties, determines what is just." So regarded, the whole doctrine looks far more like a modern invention of equity than a modern invention of the common law. If it is regarded as a modern invention of equity, then obviously equity can go further and completely do " what is just " without requiring the authority of a statute. If it is regarded as a modern invention of the common law, why cannot equity be equally modern and inventive and aid the common law to do " what is just " ? It would not seem more difficult to regard the doctrine as an extension of the " accident " jurisdiction of equity than to regard it as an extension of *Taylor v. Caldwell*.[24] The jurisdiction to relieve against

17. See *Clough v. L. & N.W. Railway Coy.* L.R. 7 Ex., at 37, and *Cornwall v. Henson* (1900) 2 Ch., at 304-5.
18. [1927] V.L.R. 494.
19. [1933] V.L.R. 314.
20. [1935] V.L.R. 114.
21. See the *Fibrosa Case*, [1943] A.C., at 59-60, per Ld. Macmillan.
22. [1942] A.C., at 186.
23. 67 C.L.R., at 187.
24. 3 B. & S. 827.

penalties has been said to be derived from the accident jurisdiction,[25] and, where equity has given relief on a partial failure of consideration, it has been said to do so because there has been an " unforeseen interruption " of the contract.[26]

Similar reflections are, I think, induced if we approach the *Fibrosa Case* from another angle. The remedy which that decision makes normally available is the action for money had and received, and the particular basis of the action is a total failure of consideration. In a " hardship " case of the former of the two classes envisaged by Lord Atkin, where money had been paid, it is perhaps not as clear as it might be that the pure doctrine of the common law would have allowed the action for money had and received. The whole theory of failure of consideration at common law and in equity does not seem to have received much specific attention, as is pointed out by Mr. McElroy in his book on *Impossibility of Performance*, where he deals with several aspects of it. (The book was published before the *Fibrosa Case*). The common law, where money had been paid under a contract, would not allow the action unless the contract were out of the way, and it would not recognise rescission unless both parties could be restored to the *status quo*. And it took a strict view of this requirement. The cases of *Blackburn v. Smith*,[27] *Hunt v. Silk*[28] and *Beed v. Blandford*[29] have never been overruled, and they are apparently regarded as good common law in Fry on Specific Performance.[30] Lord Atkin takes the case where " one party has almost completed expensive work." Where the other party has paid a small fraction of the value of that work, it is by no means clear that the common law of (say) a hundred years ago would have held the action for money had and received to be maintainable. In *Beed v. Blandford*[31] Alexander L.C.B. said :—" In order to sustain an action in this form, it is necessary that the parties should, by the plaintiff's recovering the verdict, be placed in the same situation in which they originally were before the contract was entered into." A slight and accidental prejudice to the defendant would not defeat the action : cf. *Standish v. Ross*.[32] But there seems much to be said for the view that the rule stated by Alexander L.C.B. was of general application in this class of case, and it would seem almost certain that it was in the mind of Collins M.R. when he said in *Chandler v. Webster*[33] :— " Time has elapsed, and the position of both parties may have been more or less altered, and it is impossible to adjust or ascertain the rights of the parties with exactitude."

In the equitable jurisdiction, of course, these things did not matter so much, because equity could take accounts and make inquiries and make allowances for this and that. So equity, generally speaking, was not troubled by the fact that matters could not be adjusted between the parties " with exactitude." Equity would give relief " whenever, by the exercise of its powers, it could do what was practically just, though

25. Ashburner, *Principles of Equity*, (2nd ed.), 262.
26. per Stuart V.-C. in *Freedland v. Stansfield*, 2 Sm. & G., at 484.
27. 2 Ex. 783.
28. 5 East 449.
29. 2 Y. & J. 278.
30. (6th ed.), 350-1.
31. (1828) 2 Y. & J., at 283.
32. 3 Ex., at 534.
33. [1904] 1 K.B., at 498

it could not restore the parties precisely to the state they were in before the contract" (per Lord Blackburn in *Erlanger v. New Sombrero Phosphate Coy.*[34])

Now, at this point, we reach the same question which we reached by the other approach. For, if, as one suspects, the modern view represents a wide extension of the action for money had and received, it may be said that the extension has an essentially equitable basis, that it takes as its starting point the general view and aim of equity in relation to discharged contracts. But the common law alone cannot completely achieve that aim. Then, having so started, should it not take equity with it along the road? Or, rather, should not equity insist on accompanying the law and using its machinery—adapting it, if necessary—so that the nearest possible human approximation to justice may be achieved? The Courts have both jurisdictions. Should not both develop together? What would Lord Mansfield have said about it all?

34. 3 A.C., at 1278-9.