MR. JUSTICE BLACKBURN'S FRUSTRATION CASES

By E. K. TEH *

> 'Justice obstructed lay, and reason fooled;'— Marvell, *The First Anniversary of the Government under His Highness the Lord Protector.*

In this study of the frustration cases decided by Blackburn J. (later Lord Blackburn) it is proposed, first, to examine in the perspective of the whole doctrine of frustration the areas to which he contributed; secondly, to examine the methods which he adopted in deciding the cases; thirdly, to assess his contribution to the doctrine; and, fourthly, to examine how the modern doctrine has departed from the principles to be deduced from the cases he decided.

Blackburn J.'s Frustration Cases in Perspective

In *Ford* v. *Cotesworth* (1868)[1] the defendants chartered the plaintiffs' vessel the 'Craigie Lea' from Liverpool to Lima or Valparaiso. The charterparty merely provided that the vessel should proceed there, or as near as she could safely get, and there deliver the cargo in the usual and customary manner, and so end the voyage. The vessel duly arrived at Callao, the port of Lima. There was war between Peru and Spain. The vessel was discharging when news arrived of the approach of the Spanish fleet. The customs authorities suspended all landing of the goods, in order that they might remove those already in the custom-house out of reach of the apprehended bombardment. The vessel consequently lay with her cargo for seven days, when she was ordered away to be out of the danger of bombardment. Later she returned, and her discharge was finally completed. The question was whether the plaintiffs were entitled to recover for the detention during the seven days. The Court of Queen's Bench answered the question in the negative. The Court of Exchequer Chamber affirmed the decision. At first instance Blackburn J. delivered the judgment of the court which consisted of Cockburn C.J., Lush J. and himself. Blackburn J. said that the contract implied by the law, in the absence of any stipulation, was that each party should use reasonable diligence in performing his part of the delivery at the port of discharge. The merchant was guilty of no breach

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1 (1868) L.R. 4 Q.B. 127 (affirmed (1870) L.R. 5 Q.B. 544).

when the landing of the cargo was rendered impossible by a cause over which he had no control. The plaintiffs, therefore, could not recover. Blackburn J., however, re-stated this principle:

> We think it firmly established, both by decided cases and on principle, that where a party has either expressly or impliedly undertaken, without any qualification to do anything, and does not do it, he must make compensation in damages, though the performance was rendered impracticable by some unforeseen cause over which he had no control.[2]

To this principle the doctrine of frustration provides certain exceptions. They are a group of apparently disparate cases. In *Joseph Constantine Steamship Line, Ltd.* v. *Imperial Smelting Corporation, Ltd.*[3] Lord Wright listed the five principal cases (they will be numbered here):

> ... I must briefly explain my conception of what is meant in this context by impossibility of performance, which is the phrase used by Blackburn J. In more recent days the phrase more commonly used is 'frustration of the contract' or more shortly 'frustration'. But 'frustration of the contract' is an elliptical expression. The fuller and more accurate phrase is 'frustration of the adventure or of the commercial or practical purpose of the contract'. This change in language corresponds to a wider conception of impossibility, which has extended the rule beyond [1] contracts which depend on the existence, at the relevant time, of a specific object, as in the instances given by Blackburn J., to [2] cases where the essential object does indeed exist, but its condition has by some casualty been so changed as to be not available for the purposes of the contract either at the contract date, or if no date is fixed, within any time consistent with the commercial or practical adventure. For the purposes of the contract the object is as good as lost. [3] Another case, often described as frustration, is where by State interference or similar overriding intervention the performance of the contract has been interrupted for so long a time as to make it unreasonable for the parties to be required to go on with it. [4] Yet another illustration is where the actual object still exists and is available, but the object of the contract as contemplated by both parties was its employment for a particular purpose, which has become impossible, as in the coronation cases. In these and similar cases, where there is not in the strict sense impossibility by some casual happening, there has been so vital a change in the circumstances as to defeat the contract. What Willes J. described as substantial performance is no longer possible. The common object of the parties is frustrated. The contract has perished, quoad any rights or liabilities subsequent to the change. [5] The same is true where there has been a vital change of the law, either statutory or common law, operating on the circumstances, as, for instance, where the outbreak of war destroys a contract legally made before war, but which, when war breaks out, could not be performed without trading with the enemy.[4]

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2 *Ibid.*, p. 134.

3 [1942] A.C. 154.

4 *Ibid.*, pp. 182-183. One case which may be mentioned is that of a seaman's contract which is frustrated by increased danger: *Liston* v. *Owners of Steamship Carpathian* [1915] 2 K.B. 42. This case is analogous to case (4).

In each case the essential question is, Can the contract be performed? This question unifies the apparently disparate cases. Case (1) is where performance is impossible. Case (2) is where there is uncertainty whether performance is possible. Cases (3) and (4) are cases where performance is possible but will be different from what is contemplated by the parties. Case (5) is where performance is illegal.

Blackburn J. made an important contribution to cases (1) and (2). Case (3) deals with resumption after interruption. The interruption may take the form of the dismantling of construction work: *Metropolitan Water Board* v. *Dick, Kerr & Co.*,[5] or government prohibition: *Federal Steam Navigation Co., Ltd.* v. *Sir Raylton Dixon & Co., Ltd.*[6]; *Woodfield Steam Shipping Co., Ltd.* v. *Thompson & Sons, Ltd.*,[7] or suspension pursuant to the contract: *Acetylene Corporation of Great Britain* v. *Canada Carbide Co.*[8]; *Peebles & Son* v. *Becker & Co.*[9] The cases on suspension mark the limit of the doctrine. One step beyond them will take one to *Davis Contractors, Ltd.* v. *Fareham Urban District Council*[10] which is on the other side of the boundary line. Case (3) was the sole contribution of the implied term theory. (The expression 'implied term theory' is used here to denote the implied term theory as understood today). Case (3) can be appreciated only in the light of that theory. In *Peebles & Son* v. *Becker & Co.* Greer J. stated the principles:

> (1) When it is contended that on a given state of facts a contract has been frustrated so as to free the parties from further performance, the question to be decided is whether a term is to be implied in the contract to the effect that in the events that have happened the contract is to be no longer binding; . . . .
>
> (2) The question is one of law and not of fact. . . .
>
> (3) Such a term is not to be implied merely because it is reasonable: but only if the Court is satisfied that both parties must have intended that it should be a term in the contract: . . . .
>
> (4) In considering whether both parties must have intended that the term should be implied, the parties must be treated as ordinary reasonable men in the circumstances in which they made the contract, directing their minds to the question as to what events should be deemed to release them both from the contract . . . .
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> (5) A suspension clause providing for suspension of contractual liabilities in certain events does not prevent the implication of a term dissolving the contract if the suspension lasts for an indefinite time. A suspension clause is ancillary to the main contract and ought not to be interpreted as operating for an indefinite time: . . .[11]

The important point is that 'the parties must be treated as ordinary

5 [1918] A.C. 119.
6 (1919) 1 Ll. L. Rep. 63 (Lord Birkenhead L.C.).
7 (1919) 1 Ll. L. Rep. 126 (Lord Sterndale M.R.).
8 (1921) 8 Ll. L. Rep. 456.
9 (1922) 10 Ll. L. Rep. 773.
10 [1956] A.C. 696.
11 (1922) 10 Ll. L. Rep. 773, pp. 773-774.

reasonable men'. Case (4) has not been extended beyond the Coronation cases. Case (5) was once considered to be outside the doctrine: see McCardie J.'s judgment in *Blackburn Bobbin Co., Ltd.* v. *Allen & Sons, Ltd.*[12] Case (5) is a special case where the intention of the parties cannot prevent frustration. The two recent theories of frustration — construction of the contract and dissolution by the law — have contributed no new heads of frustration.

Blackburn J.'s Methods

Blackburn J. dealt with the problem of frustration in three ways, *viz.* (i) the event excused non-performance; (ii) the event gave either party the right to terminate the contract; and (iii) the event amounted to non-fulfilment of an implied condition precedent of the contract and the contract was discharged. The third was adopted from Bramwell B. and was later rejected.

Blackburn J. never consciously said that the event automatically terminated the contract. This point was appreciated in the nineteenth century. Thus, Chitty's *Law of Contracts*, 13th ed. (1896), dealt with frustration in Ch. XXII, s.6, under the heading 'Excuses for Non-Performance'. Sub-s. (a) dealt with Impossibility, sub-s. (b) Act of the Law and sub-s. (c) Act of God.

But the point has been lost. In *Harbutt's 'Plasticine', Ltd.* v. *Wayne Tank and Pump Co., Ltd.*,[13] Lord Denning M.R. gave a modern interpretation of Blackburn J.'s first frustration case in the context of fundamental breach. Lord Denning said:

> In considering the consequences of a fundamental breach, it is necessary to draw a distinction between a fundamental breach which still leaves the contract open to be performed, and a fundamental breach which itself brings the contract to an end.
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> (i) *The first group*
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> In cases where the contract is still open to be performed, the effect of a fundamental breach is this: it gives the innocent party, when he gets to know of it, an option either to *affirm* the contract or to disaffirm it. If he elects to *affirm* it, then it remains in being *for the future* on both sides. Each has a right to sue for damages for *past or future* breaches. If he elects to disaffirm it (namely, accepts the fundamental breach as determining the contract), then it is at an end from that moment. It does not continue into the future. All that is left is the right to sue for past breaches or for the fundamental breach, but there is no right to sue for *future* breaches.
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> (ii) *The second group*
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> In cases where the fundamental breach itself brings the contract to an end, there is no room for any option in the innocent party. The present case is typical of this group. The fire was so disastrous that it destroyed the mill itself. If the fire had been accidental, it

12 [1918] 1 K.B. 540, p. 543 (affirmed [1918] 2 K.B. 467).
13 [1970] 1 Q.B. 447.

> would certainly have meant that the contract was frustrated and brought to an end by a supervening event; just as in the leading case in 1863 when the Surrey Music Hall was burnt down: see *Taylor* v. *Caldwell* (1863) 3 B. & S. 826. At the time of the fire at this mill, the cause of it was not known. It might have been no one's fault. In that case the contract would plainly have been frustrated. It would have been automatically at an end, so far as the future was concerned, with no option on either side. Does it make any difference because, after many years, the cause of the fire has been found? It has been found to be the fault of the defendants. I cannot think that this makes any difference. The contract came to an end when the mill was burnt down. It came to an end by a frustrating event, without either side having an election to continue it. It is not to be revived simply because it has been found to be the fault of one of the parties. All that happens is that the innocent party can sue the guilty party for the breach.[14]

Lord Denning went on to say that as the contract had come to an end the defendants could not rely on an exemption clause in the contract.

Blackburn J.'s frustration cases were decided between 1863 and 1876. They will be dealt with under the methods by which they were decided.

The Event Excuses Non-Performance

In *Taylor* v. *Caldwell* (1863)[15] the plaintiffs and the defendants entered into a contract by which the defendants agreed to give the plaintiffs the use of The Surrey Gardens and Music Hall on four days for the purpose of giving a series of concerts and entertainments. After the making of the contract, and before the first day on which a concert was to be given, the hall was destroyed by fire. The parties had made no express stipulation with reference to such a disaster. The plaintiffs sued the defendants for making default. The court held that the defendants were not liable. Blackburn J. delivered the judgment of the court which consisted of Cockburn C.J., Wightman and Crompton JJ. and himself. Blackburn J. said:

> . . . there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes im-

14 *Ibid.*, pp. 464-465. Lord Denning's interpretation of *Taylor* v. *Caldwell* has the support of Atkin J.'s judgment in *Associated Portland Cement Manufacturers (1900), Ltd.* v. *Houlder Brothers & Co., Ltd.* (1917) 86 L.J.K.B. 1495 ('It was a contract to take the goods on a named ship, and when that ship was lost on May 26 the contract was dissolved; . . .').

15 (1863) 3 B. & S. 826; 122 E.R. 309.

> possible from the perishing of the thing without default of the contractor.[16]
>
> The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.[17]
>
> We think, therefore, that the Music Hall having ceased to exist, without fault of either party, both parties are excused, the plaintiffs from taking the gardens and paying the money, the defendants from performing their promise to give the use of the Hall and Gardens and other things.[18]

These passages show that Blackburn J. decided the case on the ground that the destruction of the hall excused the parties from performing the contract. The only passage in the judgment which speaks of extinction is one referring to the civil law:

> This also is the rule in the Civil law, and it is worth noticing that Pothier, in his celebrated Traité du Contrat de Vente (see Part. 4, § 307 &c.; and Part. 2, ch. 1, sect. 1, art. 4, § 1), treats this as merely an example of the more general rule that every obligation de certo corpore is extinguished when the thing ceases to exist. See Blackburn on the Contract of Sale, p. 173.[19]

Pausing here for a moment, one may compare the solution which Blackburn J. adopted in *Taylor* v. *Caldwell* with that which he as Lord Blackburn was to adopt in cases of anticipatory breach and fundamental breach. In *Mersey Steel and Iron Co., Ltd.* v. *Naylor, Benzon & Co.* (1884)[20] the respondents bought from the appellant company 5,000 tons of steel of the company's make, to be delivered 1,000 tons monthly, commencing January 1881. Payment was to be made within three days after receipt of shipping documents. In January the company delivered part only of that month's instalment, and in the beginning of February made a further delivery. On 2nd February, shortly before payment of these deliveries became due, a petition was presented to wind up the company. The respondents *bona fide*, under the erroneous advice of their solicitor that they could not without leave of the court safely pay pending the petition, objected to make the payments then due unless the company obtained the sanction of the court, which they asked the company to obtain. On 10th February the company informed the respondents that they considered the refusal to pay as a breach of contract, releasing the company from any further obligations. On 15th February an order was made to wind up the company by the court. The liquidator made no further deliveries, and brought an action in the name of the company for the price of the steel delivered. The respondents counter-

16 (1863) 3 B. & S. 826, pp. 833-834.
17 *Ibid.*, p. 839.
18 *Ibid.*, p. 840.
19 *Ibid.*, p. 837.
20 (1884) 9 App. Cas. 434.

claimed for damages for non-delivery. The House of Lords gave judgment for the respondents on the ground that they had not acted so as to show an intention to repudiate the contract, or to fail in its performance on their part. The Earl of Selborne L.C. said that you must look at the actual circumstances of the case in order to see whether one party to the contract was relieved from its future performance by the conduct of the other; you must examine what that contract was, so as to see whether it amounted to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind. Lord Watson said that it would be impossible for their Lordships to sustain the appeal unless they were prepared to hold that any departure whatever from the terms of the contract by one of the parties must be sufficient to entitle the other to set it aside. Lord Bramwell said that whether, if the respondents had positively refused to pay for the steel already delivered, it would have given any justification to the company or the liquidator for refusing to go on with the contract, it was not necessary for him to say. Lord FitzGerald simply said he concurred. Lord Blackburn first dealt with anticipatory breach:

> As to the first point, I myself have no doubt that *Withers* v. *Reynolds* correctly lays down the law to this extent, that where there is a contract which is to be performed in future, if one of the parties has said to the other in effect, 'If you go on and perform your side of the contract I will not perform mine' (in *Withers* v. *Reynolds* it was, 'You may bring your straw, but I will not pay you upon delivery as under the contract I ought to do. I will always keep one bundle of straw in hand so as to have a check upon you'), that in effect amounts to saying, 'I will not perform the contract'. In that case the other party may say, 'You have given me distinct notice that you will not perform the contract. I will not wait until you have broken it, but I will treat you as having put an end to the contract, and if necessary I will sue you for damages, but at all events I will not go on with the contract.' That was settled in *Hochster* v. *De La Tour* in the Queen's Bench and has never been doubted since; because there is a breach of the contract although the time indicated in the contract has not arrived.
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> That is the law as laid down in *Withers* v. *Reynolds*. That is, I will not say the only ground of defence, but a sufficient ground of defence.[21]

Lord Blackburn then dealt with fundamental breach:

> The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something (it is so laid down in the notes to *Pordage* v. *Cole*), if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, 'I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct'.[22]

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21 *Ibid.*, pp. 442-443.
22 *Ibid.*, pp. 443-444.

Thus, in both cases acceptance of the breach does not terminate the contract, but merely provides a defence for non-performance. Of course, rights which arise from the partial execution of the contract are not divested. On Lord Blackburn's formulation there is a unity between the three — acceptance of anticipatory breach, acceptance of fundamental breach and frustration by destruction of subject-matter. In all three the question is essentially the same, Is there liability for non-performance? Compare Chitty's *Law of Contracts*, 13th ed., Ch. XXII, s.6. Sub-s. (f) dealt with Renunciation. The law is now different.

In *Appleby* v. *Myers* (1867)[23] Blackburn J. repeated his view that the destruction of the subject matter excused the parties from performing the contract. This was a decision of the Court of Exchequer Chamber. The plaintiffs contracted to erect certain machinery on the defendant's premises at specific prices for particular portions and to keep it in repair for two years. The price was to be paid upon the completion of the whole. After some portions of the work had been finished and others were in the course of completion, the premises with all the machinery and materials were destroyed by an accidental fire. The plaintiffs sued for those portions of the work which had been completed. The court held that the plaintiffs could not recover, whether the materials used had become the property of the defendant or not. Blackburn J. delivered the judgment of the court which consisted of Martin and Bramwell BB., Shee and Lush JJ. and himself. Blackburn J. said:

> We think that where, as in the present case, the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties; excusing both from further performance of the contract, but giving a cause of action to neither.[24]

Blackburn J. said that the court thought that the materials had not become the property of the defendant. But, even on the supposition that the materials had become the property of the defendant, the plaintiffs had entered into a contract to be paid when the whole was complete, and not till then. Blackburn J. continued:

> As it is, they are, according to the principle laid down in *Taylor* v. *Caldwell*, excused from completing the work; but they are not therefore entitled to any compensation for what they have done, but which has, without any fault of the defendant, perished.[25]

There are two versions of Blackburn J.'s judgment in the next case under this head, *Howell* v. *Coupland* (1874).[26] Blackburn J. was one of the judges who decided this case at first instance. The contract was for the sale of 200 tons of potatoes, growing on land belonging to the defendant in Whaplode, to be delivered during September and October

23 (1867) L.R. 2 C.P. 651.
24 *Ibid.*, p. 659.
25 *Ibid.*, p. 660.
26 (1874) 30 L.T. 677 (original version); (1874) L.R. 9 Q.B. 462 (revised version) (affirmed (1876) 1 Q.B.D. 258).

1872. At the time the contract was made, in March, the defendant had about sixty-eight acres ready for potatoes. Enough of the defendant's land at Whaplode was sown with potatoes to produce 200 tons. But owing to a blight which occurred in August the land produced only eighty tons of potatoes, there being no default or negligence on the part of the defendant. The defendant delivered the eighty tons. The plaintiff sued for non-delivery of the remainder. The court gave judgment for the defendant.

Before examining Blackburn J.'s judgment let us see how the other judges decided the case. At first instance Quain J. said that the defendant was excused. So did Archibald J. In the Court of Appeal Lord Coleridge C.J. said that there should be a condition implied that before the time for the performance of the contract the potatoes should be, or should have been, in existence, and should still be existing when the time came for the performance; as they had been destroyed by causes over which the defendant had no control he was excused. Mellish L.J. said that it was an agreement to sell specific things; therefore neither party was liable if the performance became impossible. Baggallay J.A. said that the contract was confined to particular land. Cleasby B. said that the defendant was excused upon the terms of the contract itself.

Blackburn J. in his judgment referred to *Taylor* v. *Caldwell* and *Appleby* v. *Myers* and re-stated the law. The original version reads:

> Now in (*sic*) the case of *Taylor* v. *Caldwell*, which was followed by that of *Appleby* v. *Myers* (L. Rep. 2 C.P. 661), decides that where the parties must from the first have known that the contract could not be fulfilled unless when the time for the fulfilment of it arrived some particular specified thing continued to exist, then in the absence of any warranty that the thing shall exist, the contract is not be (*sic*) construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible, from the perishing of the thing, without default on the part of the contractor.[27]

The revised version reads:

> The principle of *Taylor* v. *Caldwell*, which was followed in *Appleby* v. *Myers* in the Exchequer Chamber, at all events, decides that where there is a contract with respect to a particular thing, and that thing cannot be delivered owing to it perishing without any default in the seller, the delivery is excused.[28]

But the interesting part of Blackburn J.'s judgment is the conclusion. The original version reads:

> Had the contract been to deliver a certain quantity of potatoes merely, it would not be a contract relating to a specific thing, and the decision in *Taylor* v. *Caldwell* would not be applicable. In such a case, notwithstanding the perishing of the crop, the defendant would still be liable to damages for breach of his contract —

27 (1874) 30 L.T. 677, p. 679.
28 (1874) L.R. 9 Q.B. 462, p. 465.

> because the thing to be delivered was not a quantity to be taken out of a specified thing, according to the rule we are now laying down. Where the contract is of this latter kind, I think it must be taken to be a condition of the contract *that it is to be off* if the thing perishes without default before the time of performance arrives; and as the money was not to be paid till delivery, there is no pretence for saying that the property in the potatoes passed to the plaintiff from the time of the contract. The rule must, therefore, be made absolute to enter the verdict for the defendant (emphasis supplied).[29]

The revised version reads:

> Had the contract been simply for so many tons of potatoes of a particular quality, then, although each party might have had in his mind when he made the contract this particular crop of potatoes, if they had all perished, the defendant would still have been bound to deliver the quantity contracted for; for it would not have been within the rule of a contract as to a specific thing. But the contract was for 200 tons of a particular crop in particular fields, and therefore there was an implied term in the contract *that each party should be free* if the crop perished. The property and risk had clearly not been transferred under the terms of this contract, so that the consequence of the failure of the crop is, *that the bargain is off so far as the 120 tons are concerned* (emphasis supplied).[30]

In the original version Blackburn J. said that the implied term in the contract was 'that it is to be off'. In the revised version Blackburn J. said that the implied term was 'that each party should be free' and emphasized that the consequence of the failure of the crop was 'that the bargain is off so far as the 120 tons are concerned'. The original version suggested that the frustrating event automatically terminated the contract. In the revised version Blackburn J. corrected the slip. It is easy to understand the slip. If the result of frustration is the same *as if* the contract is terminated, one can easily make a slip by saying that the contract *is* terminated.

The Event Gives Either Party the Right to Terminate the Contract

Blackburn J. had made and corrected a similar slip two years earlier in a case where there are, again, two versions of his judgment. The case is *Geipel* v. *Smith* (1872).[31] By a charterparty the defendants agreed that their vessel the 'Martindale' should proceed to a spout and there load a cargo of coals and then should proceed to Hamburg, 'restraint of princes' (among other things) excepted. While the contract was still executory, war broke out between France and Germany, and an effective blockade of Hamburg was effected by the French. The court held that the blockade was a restraint of princes and that the defendants were justified in refusing to carry out the contract.

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29 (1874) 30 L.T. 677, p. 679.
30 (1874) L.R. 9 Q.B. 462, p. 466.
31 (1872) 26 L.T. 361 (original version); (1872) L.R. 7 Q.B. 404 (revised version).

Blackburn J. in his judgment said that he was unable to see how the blockade could be regarded otherwise than as a restraint of princes. But he went on to deal with this question. If while the blockade existed there was a restraint of princes, were not the defendants bound to carry out their contract the moment the blockade was raised? The original version reads:

> If the blockade had existed only for an hour or two, or for a very short time, I do not think it would put an end to the contract; but I cannot agree with Mr. Cohen's contention that, however long the blockade might have existed, even if it had lasted as long as the blockade of Toulon, some eight or nine years, I think, or as long as some of the blockades in the War of Independence between the United Provinces and Spain; that after that enormous time the owners of the ship and cargo should be obliged to have them ready in order that the contract might then be carried out. It seems to me monstrous and inconvenient to hold such a position, the consequence being to frustrate the very object of the contract, which is one for the prompt transport of the shipper's goods, and the remunerative employment of the shipowner's vessels. Such a state of affairs, in my opinion, not only produces a delay in the fulfilment of the contract, *but puts an end to it altogether* (emphasis supplied).[32]

This was the slip. The slip was corrected in the revised version, which reads:

> But I cannot agree that however long the blockade existed, which might be during all the time the war lasted, and therefore might have been for years, the ship and cargo must be kept ready to sail as soon as wind and weather permitted after the blockade was raised. It would be most inconvenient to give such a construction to the contract, and would be to frustrate the very object of such a contract, viz., the speedy transport of the shipper's goods, and the remunerative employment of the ship-owner's vessel. I take the effect of such a state of things as an effective blockade of the port of discharge is not merely to excuse delay in the carrying out of the contract, *but that, after a reasonable time, it relieves the parties, the contract being altogether executory, from the performance of it* (emphasis supplied).[33]

In the revision of a later passage Blackburn J. made clear what he meant. The passage in the original version reads:

> Whilst the contract is still executory, the object of both the parties to it depends very greatly upon time. The goods owner — it is hard to say when his period can be said to have come; but he is entitled to get his cargo within a reasonable time, that being a matter to be determined by a jury. It would be monstrous to hold that the time might last, in case a blockade should take place, for ten or ten (*sic*) twelve years. A cargo would inevitably deteriorate in that time. A cargo of coals would deteriorate; so would a cargo of corn, and still more one of fruit. On the other hand there would

32 (1872) 26 L.T. 361, p. 366.
33 (1872) L.R. 7 Q.B. 404, p. 412.

> be the obvious hardship on the shipowner of making him keep his ship lying up in dock, waiting till the news should come of the blockade having been raised, his ship meanwhile rotting. The intention of each party was to carry on a commercial undertaking within a reasonable time; and if the restraint of princes lasts beyond a reasonable time, it seems to me that a shipowner is entitled to sail away, and treat the contract as at an end.[34]

The revised version reads:

> Here there was an executory contract, and the object both parties had in view depended very greatly on time. The goodsowner stipulates to get his coals delivered within a reasonable time, and it would be monstrous to say that, in the event of a blockade, he was bound to provide a cargo and keep it on board all the time, until, at the very least, all commercial profit would be at an end. On the other hand, it would be an equal hardship on the shipowner were he bound to keep his ship in the dock until it perhaps rotted. The object of each of them was the carrying out of a commercial speculation within a reasonable time; and if restraint of princes intervened and lasted so long as to make this impossible, *each had a right to say, 'Our contract cannot be carried out; and, therefore, the shipowner had a right to sail away, and the charterer to sell his cargo or refrain from procuring one, and treat the contract as at an end* (emphasis supplied).[35]

In other words, the frustrating event gives either party the right to terminate the contract. There is no automatic termination.

Lastly, Blackburn J. considered whether the defendants might risk exercising a right to terminate the contract before waiting to see if such a right would accrue. Read in isolation there is no important difference between the two versions of the passage. The difference becomes apparent only when the two versions of the passage are read in their context. In the original version of the judgment the delay put an end to the contract altogether. This was a slip. In the revised version of the judgment the delay gave either party the right to terminate the contract. The original version of the passage reads:

> Then comes the 7th plea, which says, in effect, that the blockade lasted so long that the defendants were not able to receive a cargo, or carry out the contract without running the blockade. This is the meaning of the plea, whether the fact, as therein asserted, be true or false. Mr. Cohen says that this plea does not answer the declaration, though it would affect the question of damages. It seems to me that as the events turned out, the plea would not be a bad one on general demurrer, but constitutes an entire defence to the action. For I take it that where a contract is still executory, the defendant may say, 'I am not going to do what I bound myself to do, because I know that you, the plaintiff, will never be ready and willing to perform your part of the contract'. That I take it, it would be quite competent for the defendant to say and do, if it turned out in the end that he was right in his opinion. If the

34 (1872) 26 L.T. 361, pp. 366-367.
35 (1872) L.R. 7 Q.B. 404, p. 413.

> defendant says, 'I am so confident that the blockade will never be raised within a reasonable time that I will chance the matter; I will take the risk of my opinion turning out correct'; then if the chances turn out against him, and the blockade is raised within a reasonable time, the plaintiff will have a good cause of action against him, he, the plaintiff, being then ready and willing to put his cargo on board. But in the present case it has happened that the defendants were right in their opinion, the blockade not having been raised within a reasonable time; and it having turned out that they were right in the judgment they formed, there never came a time when the plaintiffs would have the smallest benefit from the contract. Different considerations would influence our judgment in a case where the contract was executed, but whilst a contract is still executory I think time is of the essence of the contract.[36]

The revised version reads:

> The seventh plea says, 'It was impossible for us to fulfil the contract within a reasonable time, without running the blockade'; and on the plea it must be taken that the blockade lasted beyond a reasonable time. Mr. Cohen says the plea only shows facts which go to reduce the damages to a nominal sum, but affords no answer to the declaration, which says that the defendants refused to sail at all; but this plea, it seems to me, does not only show that the plaintiffs have suffered no damage, but affords a defence to the action, inasmuch as the contract was still executory, and the defendants say, 'We are not going to let our ship sail to the port of loading at all, because you, the plaintiffs, never will be ready and willing to perform your part of the contract'. But then it is said, *it is possible the blockade might be raised within a reasonable time.* No doubt it was possible. But it must be taken on this record that it was not raised within a reasonable time; so *if the defendants chose to run the risk, and in the event turn out right, they are in the same position as if they had waited the reasonable time and had then sailed away.* Possibly, had they turned out wrong, the plaintiffs would have been entitled to say, 'We were ready and willing to put a cargo on board, you chose to take your chance, and have turned out wrong, therefore we have a cause of action against you'. But the defendants here were right, and there never was a time when the plaintiffs could say, 'We are ready and willing and able to perform our contract'. Very different considerations arise where the cargo is already on board, or, as in *Hadley* v. *Clarke*, already on the voyage before the obstacle intervenes. But whilst the contract still remains altogether executory, I think time is so far of the essence of the contract as that matter provided against which arises to cause unavoidable but unreasonable delay is sufficient excuse for refusing to perform it (emphasis supplied).[37]

Lord Sumner was to quote the lines emphasized in support of the principle that it was the event that frustrated. But in the revised version which Lord Sumner quoted it is clear that Blackburn J. was considering whether the defendants might exercise their right in anticipation, not whether the contract would be automatically terminated.

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36 (1872) 26 L.T. 361, p. 367.
37 (1872) L.R. 7 Q.B. 404, pp. 413-414.

The other judgments in *Geipel* v. *Smith* should be briefly mentioned. Cockburn C.J. said that assuming that either party was bound to wait a reasonable time to ascertain whether the obstacle would be removed, in point of fact it was not so removed, and the defendants were therefore justified in not attempting to perform their contract. Lush J. said he had nothing to add to the judgments delivered by Cockburn C.J. and Blackburn J. Mellor J. concurred in the judgment.

The Event Amounts to Non-Fulfilment of an Implied Condition Precedent of the Contract and the Contract is Discharged

Jackson v. *Union Marine Insurance Co., Ltd.* (1874)[38] arose out of a policy of insurance. In November 1871, the plaintiff, a shipowner, entered into a charterparty by which the ship was to proceed with all possible dispatch (dangers and accidents of navigation excepted) from Liverpool to Newport, and there load a cargo of iron rails for San Francisco. The plaintiff effected an insurance on the chartered freight with the defendants. On 2nd January 1872 the ship sailed from Liverpool. But the next day she went aground in Carnarvon Bay. On 15th February the charterers threw up the charter and chartered another ship to carry the rails to San Francisco. The plaintiff's ship was got off by 18th February and repaired. The repairs were not completed till the end of August. The plaintiff brought an action on the policy of insurance on the chartered freight. The jury found that 'the time necessary to get the ship off and repairing her so as to be a cargo-carrying ship was so long as to put an end in a commercial sense to the commercial speculation entered into by the shipowner and charterers'. The Court of Exchequer Chamber, by a majority, held that the charterers were, by reason of the delay, not bound to load the ship and that there was therefore a loss of the chartered freight by perils of the sea. Bramwell B. delivered the judgment of the majority, which included Blackburn J. Bramwell B. said:

> The question turns on the construction and effect of the charter. By it the vessel is to sail to Newport with all possible dispatch, perils of the seas excepted. It is said this constitutes the only agreement as to time, and provided all possible dispatch is used, it matters not when she arrives at Newport. I am of a different opinion. If this charterparty be read as a charter for a definite voyage or adventure, then it follows that there is *necessarily* an implied condition that the ship shall arrive at Newport in time for it. Thus, if a ship was chartered to go from Newport to St. Michael's in terms in time for the fruit season, and take coals out and bring fruit home, it would follow, notwithstanding the opinion expressed in *Touteng* v. *Hubbard*, on which I will remark afterwards, that, if she did not get to Newport in time to get to St. Michael's for the fruit season, the charterer would not be bound to load at Newport, though she had used all possible dispatch to get there, and though there was an exception of perils of the seas.
>
> The two stipulations, to use all possible dispatch, and to arrive in time for the voyage, are not repugnant; nor is either superfluous

38 (1874) L.R. 10 C.P. 125.

> or useless. The shipowner, in the case put, expressly agrees to use all possible dispatch: that is not a condition precedent; the sole remedy for and right consequent on the breach of it is an action. He also impliedly agrees that the ship shall arrive in time for the voyage: that *is* a condition precedent as well as an agreement; and its non-performance not only gives the charterer a cause of action, but also releases him. Of course, if these stipulations, owing to excepted perils are not performed, there is no cause of action, but there is the same release of the charterer. The same reasoning would apply if the terms were, to 'use all possible dispatch, and further, and as a condition precedent, to be ready at the port of loading on June 1st'.[39]

Bramwell B. then said the same result was arrived at by what was the same argument differently put. He said:

> Now, let us suppose the charter contains, as here, that the ship shall arrive with all possible dispatch, — I ask again, is that so inconsistent with or repugnant to a further condition that at all events she shall arrive within a reasonable time? or is that so needless a condition that it is not to be implied? I say certainly not. I must repeat the foregoing reasoning. Let us suppose them both expressed, and it will be seen they are not inconsistent nor needless. Thus, I will use all possible dispatch to get the ship to Newport, but at all events she shall arrive in a reasonable time for the adventure contemplated. I hold, therefore, that the implied condition of a reasonable time exists in this charter. Now, what is the effect of the exception of perils of the seas, and of delay being caused thereby?[40]
>
> The words are there. What is their effect? I think this: they excuse the shipowner, but give him no right. The charterer has no cause of action, but is released from the charter. When I say *he* is, I think *both* are. The condition precedent has not been performed, but by default of neither.[41]
>
> There is, then, a condition precedent that the vessel shall arrive in a reasonable time. On failure of this, the contract is at an end and the charterers discharged, though they have no cause of action, as the failure arose from an excepted peril.[42]

In other words, on failure of the condition precedent the parties are automatically discharged.

But Bramwell B.'s judgment is not free from ambiguity. At times Bramwell B. used words which suggested that failure of the condition precedent did not result in the automatic discharge of the parties, but gave either party the right to terminate the contract. Thus, he said:

> The exception is an excuse for him who is to do the act, and operates to save him from an action and make his non-performance not a breach of contract, but does not operate to take away the right the other party would have had, if the non-performance had

39 *Ibid.*, pp. 142-143.
40 *Ibid.*, p. 144.
41 *Ibid.*, p. 144.
42 *Ibid.*, p. 145.

> been a breach of contract, to retire from the engagement: *and, if one party may, so may the other* (emphasis supplied).[43]
>
> The same result follows, then, whether the implied condition is treated as one that the vessel shall arrive in time for the adventure, or one that it shall arrive in a reasonable time, that time being, in time for the adventure contemplated, and in either case, as in the express cases supposed, and in the analogous cases put, non-arrival and incapacity by that time ends the contract; the principle being, that, though non-performance of a condition may be excused, it does not take away the right to rescind from him for whose benefit the condition was introduced.[44]

This passage must be read together with the words: 'and, if one party may, so may the other'. There was no need for Bramwell B. to repeat them.

Bramwell B.'s solution was adopted by Blackburn J. in his last frustration case, *Poussard* v. *Spiers* (1876).[45] This was an action for the dismissal of the plaintiff's wife, Madame Poussard, from a theatrical engagement. The defendants made a contract with Madame Poussard to engage her to play the principal female part in a new opera, Lecocq's '*Les Pres Saint Gervais*'. The first performance of the piece was announced for 28th November 1874. Madame Poussard was unfortunately taken ill. Though she struggled to attend the rehearsals she was obliged on 23rd November to leave the rehearsals, go home and go to bed, and call in medical attendance. On 25th November the defendants made a provisional arrangement with a Miss Lewis. Madame Poussard continued in bed and ill. She was unable to attend either the rehearsals or the first night of the performance. Miss Lewis' engagement became absolute. The piece proved a success. On 4th December Madame Poussard, having recovered, offered to take her place, but was refused. For this refusal the action was brought. The court gave judgment for the defendants. Blackburn J. delivered the judgment of the court which consisted of Quain and Field JJ. and himself. Blackburn J. said:

> The analogy is complete between this case and that of a charter-party in the ordinary terms, where the ship is to proceed in ballast (the act of God, &c., excepted) to a port and there load a cargo. If the delay is occasioned by excepted perils, the shipowner is excused. But if it is so great as to go to the root of the matter, it frees the charterer from his obligation to furnish a cargo: see per Bramwell, B., delivering the judgment of the majority of the Court of Exchequer Chamber in *Jackson* v. *Union Marine Insurance Co.*
>
> And we think that the question, whether the failure of a skilled and capable artiste to perform in a new piece through serious illness is so important as to go to the root of the consideration, must to some extent depend on the evidence; and is a mixed question of law and fact. Theoretically, the facts should be left to and found separately by the jury, it being for the judge or the Court to say

43 *Ibid.*, p. 145.
44 *Ibid.*, p. 145.
45 (1876) 1 Q.B.D. 410.

> whether they, being so found, shew a breach of a condition precedent or not.[46]

There was no mention of *Geipel* v. *Smith*. But this is not surprising. *Geipel* v. *Smith* was decided by the Court of Queen's Bench; *Jackson* v. *Union Marine Insurance Co., Ltd.* by the Court of Exchequer Chamber. Blackburn J. continued:

> But this course is often (if not generally) impracticable; and if we can see that the proper facts have been found, we should act on these without regard to the form of the questions.[47]
>
> We think, therefore, that the fifth question put to the jury, and answered by them in favour of the defendants, does find all the facts necessary to enable us to decide as a matter of law that the defendants are discharged.[48]

Blackburn J. did not speak of the exercise of a right to terminate the contract. The discharge of the parties must have been automatic.

But four years later Lord Blackburn (as he now was) had second thoughts about automatic discharge of the parties. In *Dahl* v. *Nelson, Donkin & Co.* (1880)[49] Lord Blackburn explained both *Geipel* v. *Smith* and *Jackson* v. *Union Marine Insurance Co., Ltd.* on the basis that the frustrating event gave either party the right to terminate the contract. *Dahl* v. *Nelson, Donkin & Co.* concerned a charterparty. The charterparty was for a ship to sail to 'London Surrey Commercial Docks, or as near thereto as she may safely get, and lie always afloat'. As the docks were full the ship could not be given a discharging berth. The dock manager refused her entrance into the docks. The charterer would not name any other docks to which the ship might be taken. The ship's master therefore took her to the Deptford Buoys. This was the nearest place to the Surrey Commercial Docks where the ship could lie in safety afloat. At the Deptford Buoys the ship's master had the cargo of timber discharged into lighters. The lighters carried the timber into the Surrey Commercial Docks. The shipowners sued the charterer for demurrage and landing charges. The House of Lords held that the delay in discharging the cargo was to be attributed to the charterer, who therefore became liable to demurrage and to the charges for unloading.

Lord Blackburn said it was quite true that the words of the contract were 'as she may safely get' and nothing was said expressly about getting without unreasonable delay. But he said:

> ... it was held in *Geipel* v. *Smith*, by the whole Court, and in *Jackson* v. *Union Marine Insurance Company*, by a majority in the Common Pleas, and in the same case in error by a majority of the Court of Exchequer Chamber, that a delay in carrying out a charterparty, caused by something for which neither party was

46 *Ibid.*, pp. 414-415.
47 *Ibid.*, p. 415.
48 *Ibid.*, p. 415.
49 (1880) 6 App. Cas. 38.

> responsible, if so great and long as to make it unreasonable to require the parties to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at an end.[50]

Lord Blackburn said that any cause which would excuse the ship from going into the dock if the contract was wholly executory, must be sufficient to excuse her, and so bring the alternative into operation when the cargo was on board. He continued:

> There was a dissenting minority in *Jackson* v. *Union Marine Insurance Company*, and some previous authorities are perhaps not quite consistent with the decision. It is no doubt competent to your Lordships to reconsider that case, and decide contrary to it. I think it was rightly decided, but I can only refer your Lordships to the judgment delivered by Baron *Bramwell* in that case, in the reasoning of which I then concurred and still concur, and to which I have nothing to add.[51]

These were Lord Blackburn's last words on frustration. It is true Lord Blackburn still concurred with Bramwell B.'s judgment. But the important point is that Lord Blackburn now interpreted it in such a way as to bring it in line with his own judgment in *Geipel* v. *Smith*.

Lord Watson said that *Geipel* v. *Smith* was a case where the contract of charterparty was discharged. Lord Selborne L.C. agreed with both Lord Blackburn and Lord Watson. Lord Watson was, with due respect, wrong about *Geipel* v. *Smith*.

Lord Blackburn's Contribution

Lord Blackburn developed the law up to this point. If performance is impossible (*e.g.* if the subject-matter is destroyed) non-performance is excused: *Taylor* v. *Caldwell*; *Appleby* v. *Myers*. If performance is partially impossible (*e.g.* if part of a crop is destroyed by blight) non-performance is excused to the extent performance is impossible: *Howell* v. *Coupland*. If there is uncertainty whether performance is possible (*e.g.* if there is delay) either party can terminate the contract after a reasonable time: *Geipel* v. *Smith*. Here is a perfectly simple doctrine of frustration. The emphasis is on the question of performance. But the law was not to remain in this state.

Confusion

First, the principal judgments in the Coronation cases gave a distorted meaning to the word 'performance'. In *Krell* v. *Henry*[52] Vaughan Williams L.J. said:

> Each case must be judged by its own circumstances. In each case one must ask oneself, first, what, having regard to all the circum-

50 *Ibid.*, pp. 52-53.
51 *Ibid.*, p. 53.
52 [1903] 2 K.B. 740.

> stances, was the foundation of the contract? Secondly, was the performance of the contract prevented? Thirdly, was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract? If all these questions are answered in the affirmative (as I think they should be in this case), I think both parties are discharged from further performance of the contract. I think that the coronation procession was the foundation of this contract, and that the non-happening of it prevented the performance of the contract; and, secondly, I think that the non-happening of the procession, to use the words of Sir James Hannen in *Baily* v. *De Crespigny*, was an event 'of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, and that they are not to be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happened'.[53]

Surely performance was possible! The licensor could let the licensee have the rooms. The reason why the licensee should be excused from paying the balance of the price agreed to be paid for the use of the rooms was that the performance would be different from what was contemplated by the parties. The licensee could have the rooms. But there would be no procession for him to watch.

Vaughan Williams L.J. was not alone in distorting the word 'performance'. In *Chandler* v. *Webster*[54] Collins M.R. said:

> Contracts in these cases arising out of the postponement of the coronation have formed the subject of several decisions; and it has been held that, in cases where the doctrine of *Taylor* v. *Caldwell* applies, that is to say, where the parties have made no express stipulation that money paid for viewing the procession shall be returned in the event of no procession taking place, and where, under the circumstances of the contract, no condition to that effect can be implied, *the result of the procession being prevented from taking place is that, the further performance of the contract having become impossible*, the person who has paid his money in pursuance of it, on the footing of the contract being subsequently performed in full, must, nevertheless, abide the loss of what he has paid; and the person to whom a sum would have become payable on performance of the contract must also abide the loss, and cannot impose on the other party the obligation of paying that sum; in the event which has happened, the fulfilment of the contract having become impossible both parties are relieved from further performance of it (emphasis supplied).[55]

Secondly, the doctrine of frustration was rendered unworkable by the concept of automatic termination. The concept was not new. In *Horlock* v. *Beal*[56] Lord Atkinson referred to the following case decided in 1855 (eight years before *Taylor* v. *Caldwell*):

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53 *Ibid.*, pp. 751-752.
54 [1904] 1 K.B. 493.
55 *Ibid.*, pp. 496-497.
56 [1916] 1 A.C. 486.

> In *Melville* v. *De Wolf*[57] the impossibility arose from an act of State as the primary cause. The plaintiff in the action was a seaman who had signed articles to serve on a voyage to the Pacific and back to a port in the United Kingdom for a term of three years at 7*l.* per month. The captain was sent home from Monte Video by a naval Court, constituted under the Mercantile Marine Act of 1850, to be tried for shooting one of the crew. The plaintiff was sent home by the same Court as a witness against him, and he attended the trial in this country in that capacity. When the trial was over the ship was in the Pacific, and it was practically impossible for him to return to her. The plaintiff claimed wages at the above rate up to the time the trial terminated. The defendant paid into Court a sum sufficient to cover the plaintiff's wages up to the time he left his ship. It was held that he was not entitled to any wages after he left his ship. Lord Campbell C.J., in delivering judgment, said: 'After he was sent home from Monte Video to England, he neither served under the articles actually, nor constructively: and, as from that time the relation of employer and employed could not be renewed within the scope of the original hiring, we think that the contract must then be considered as dissolved by the supreme authority of the State, which is binding on both parties'.[58]

But the concept of automatic termination was not universally adopted until the later cases resulting from the First World War. The decisive step was taken in 1916 by Viscount Haldane when he delivered his dissenting speech in *Tamplin Steamship Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.*[59] Viscount Haldane said:

> When people enter into a contract which is dependent for the possibility of its performance on the continued availability of a specific thing, and that availability comes to an end by reason of circumstances beyond the control of the parties, the contract is prima facie regarded as dissolved. The contingency which has arisen is treated, in the absence of a contrary intention made plain, as being one about which no bargain at all was made. The principle applies equally whether performance of the contract has not commenced or has in part taken place. There may be included in the terms of the contract itself a stipulation which provides for the merely partial or temporary suspension of certain of its obligations, should some event (such, for instance, as in the case of the charter-party under consideration, restraint of princes) so happen as to impede performance. In that case the question arises whether the event which has actually made the specific thing no longer available for performance is such that it can be regarded as being of a nature sufficiently limited to fall within the suspensory stipulation, and to admit of the contract being deemed to have provided for it and to have been intended to continue for other purposes. Although the words of the stipulation may be such that the mere letter would describe what has occurred, the occurrence itself may yet be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared

57 (1855) 4 E. & B. 844; 119 E.R. 313.
58 [1916] 1 A.C. 486, pp. 497-498.
59 [1916] 2 A.C. 397.

and the contract itself has vanished with that foundation.[60]

Metaphorically, the foundation disappeared. The contract, therefore, was automatically terminated. This theory was not generally adopted.

To justify automatic termination (something pretty bold for the court to say) the examination shifted from the performance to the surrounding circumstances. Let us examine the three principal theories of frustration — implied term, construction of the contract and dissolution by the law.

(i) *Implied term*

In *Larrinaga & Co.* v. *Societe Franco-Americaine des Phosphates de Medulla, Paris*[61] McCardie J. said:

> I take it to be clear that there can be no frustration where the state of things which has arisen is covered by some clause in the contract between the parties.... This being so, the question is (in all cases where no express and relevant clause exists) one of implied condition....
>
> This being so, what is the condition to be implied in a contract which contains no clause actually covering the new state of things. In my humble view it is always the same. Put broadly, the condition is that a revolution of circumstance will dissolve the contract (by the operation of an implied condition) if the change of facts be such as to destroy the mutually contemplated basis of the bargain. ...This being so, I feel that the questions which usually arise at the present day do not include a question as to whether there is any implied condition in the contract that it may, under certain circumstances, be dissolved....
>
> The questions nowadays are, in normal circumstances, rather these. What was the presumed common intention of the parties? ...Upon what basis of circumstances did they mutually contract? Has there been such a serious revolution of circumstances as to destroy that mutually contemplated basis?[62]

One must look for 'a serious revolution of circumstances'.

(ii) *Construction of the contract*

In *British Movietonews, Ltd.* v. *London and District Cinemas, Ltd.*[63] Viscount Simon said:

> It is of the utmost importance that the action of a court, when it decides that in view of a supervening situation the rights and obligations under a contract have automatically ceased, should not be misunderstood. The suggestion that an 'uncontemplated turn of events' is enough to enable a court to substitute its notion of what is 'just and reasonable' for the contract as it stands, even though there is no 'frustrating event,' appears to be likely to lead to some misunderstanding. The parties to an executory contract

60 *Ibid.*, pp. 406-407.
61 (1922) 10 Ll. L. Rep. 327 (affirmed (1922) 11 Ll. L. Rep. 214; (1923) 14 Ll. L. Rep. 457).
62 *Ibid.*, p. 328.
63 [1952] A.C. 166.

> are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate — a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet it does not in itself affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point — not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation.[64]

One must look for 'a fundamentally different situation'.

(iii) *Dissolution by the law*

In *The Eugenia*[65] Lord Denning M.R. said:

> This means that once again we have had to consider the authorities on this vexed topic of frustration. But I think the position is now reasonably clear. It is simply this: if it should happen, in the course of carrying out a contract, that a fundamentally different situation arises for which the parties made no provision — so much so that it would not be just in the new situation to hold them bound to its terms — then the contract is at an end.[66]

On the surrounding circumstances — the fundamentally different situation — Lord Denning could say confidently:

> It has frequently been said that the doctrine of frustration only applies when the new situation is 'unforeseen' or 'unexpected' or 'uncontemplated,' as if that were an essential feature. But it is not so. The only thing that is essential is that the parties should have made no provision for it in their contract.[67]

But the important question is when the doctrine of frustration can apply. Here Lord Denning, with due respect, became hesitant:

> If they have not provided for it, then you have to compare the new situation with the situation for which they did provide. Then you must see how different it is. The fact that it has become more onerous or more expensive for one party than he thought is not sufficient to bring about a frustration. It must be more than merely more onerous or more expensive. It must be positively unjust to hold the parties bound.[68]

In each theory the essential question whether the contract can be performed has disappeared. Each theory is so vague as to be unworkable.

Confusion Justified

In *Hirji Mulji* v. *Cheong Yue Steamship Co., Ltd.*[69] two of Lord Blackburn's decisions were interpreted in such a way as to reconcile them

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64 *Ibid.*, p. 185.
65 [1964] 2 Q.B. 226.
66 *Ibid.*, p. 238.
67 *Ibid.*, p. 239.
68 *Ibid.*, p. 239.
69 [1926] A.C. 497.

with the concept of automatic termination. This was a decision of the Privy Council on appeal from the Supreme Court of Hong Kong. By a charterparty made in November 1916 the respondents agreed to place their steamship the 'Singaporean' at the disposal of the appellants at Singapore on 1st March 1917 and the appellants agreed to employ her for ten months. The charterparty contained a clause by which all disputes arising out of the contract were submitted to arbitration in Hong Kong. The ship was requisitioned by the government before 1st March 1917 and was not released until February 1919. The appellants refused to take delivery of her. An arbitrator awarded the respondents damages for breach of contract. The respondents brought an action upon the award. The Privy Council held that there had been in 1917 a frustration which forthwith brought to an end the whole contract, including the submission to arbitration. Lord Sumner said:

> Throughout the line of cases, now a long one, in which it has been held that certain events frustrate the commercial adventure contemplated by the parties when they made the contract, there runs an almost continuous series of expressions to the effect that such a frustration brings the contract to an end forthwith, without more and automatically. They are too numerous to be cited exhaustively, but there are few expressions to the contrary and none in recent cases.[70]

By way of illustration Lord Sumner referred to *Jackson* v. *Union Marine Insurance Co., Ltd.* at one end of the series and *Tamplin Steamship Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.* at the other. Lord Sumner then said that what the law provided must be a common relief from the common disappointment and an immediate termination of the obligations as regards future performance. He continued:

> Lord Blackburn (*Dahl* v. *Nelson, Donkin & Co.*) summarizes the effect of *Jackson*'s case in these words: 'A delay in carrying out a charterparty, caused by something for which neither party was responsible, if so great and long as to make it unreasonable to require the parties to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at an end.' It should be noted that, although at first sight this right to consider the contract as 'at an end' might seem, from this language, to be in the option of either party but not to arise till that option is exercised, this is not really the gist of the opinion. The passage gives the effect of two cases: *Geipel* v. *Smith* and *Jackson* v. *Union Marine Insurance Co.* In both cases there had been an actual refusal to perform after the event in question happened, in the former by the shipowner and in the latter by the charterer, and in each case the formal question was whether the refusal could be justified, but there is nothing in Lord Blackburn's language to support the view that the contract does not terminate till a party to it says so. Lord Blackburn himself had said when a party to the judgment in *Geipel* v. *Smith*: 'It is possible that the blockade might be raised within a reasonable time.... If the defendants chose to run the risk and, in the event, turn out right,

70 *Ibid.*, p. 505.

> they are in the same position as if they had waited the reasonable time and had then sailed away,' a passage which strongly supports the principle, that it is the event that frustrates, though time may be required in order to appreciate its effect on the contract, the event in such a case as the present being requisition for a time inconsistent with the objects of the adventure.[71]

Conclusion

The concept of automatic termination is now here to stay. Yet one can say: 'Very well, the contract, if frustrated, will be automatically terminated. But whether the contract is frustrated depends on the answer to the question, Can the contract be performed?' The doctrine of frustration cannot return to the simplicity of Lord Blackburn's formulation. An obvious reason is that new heads of frustration have been introduced. But leaving that aside, *Taylor* v. *Caldwell* has been given a modern interpretation in *Harbutt's 'Plasticine', Ltd.* v. *Wayne Tank and Pump Co., Ltd.*; and *Geipel* v. *Smith* in *Hirji Mulji* v. *Cheong Yue Steamship Co., Ltd.* In the interest of historical accuracy one should note how each modern interpretation differs from the original decision, but one must bow to the modern interpretation. The doctrine of frustration can no longer be simple. What is important is that if the doctrine is formulated in the way suggested it will at least be workable.

71 *Ibid.*, pp. 507-508.