Landmark Cases in the Law of Contract

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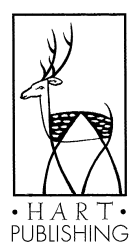

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Hochster v De La Tour (1853)

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A. INTRODUCTION

HOCHSTER v DE LA TOUR[1] is one of the most important, and controversial, cases in 19th century contract law. Sir Guenter Treitel would even place it in the top three.[2] The legal proposition it established was both simple and radical: where one of the parties to a contract told the other party that he was not going to perform it, the other party could be excused from performance and sue immediately for breach of contract, in spite of the fact that no performance was yet due. By recognising this doctrine of 'anticipatory breach', the Court of Queen's Bench developed the common law in a way that, despite its intuitive attraction, has proved difficult to explain theoretically.[3] Most obviously, it is difficult to see how a party could be in breach of contract when the terms of the contract did not yet require anything of him.

The first part of this essay explores the common law position immediately before *Hochster*, revealing that the ideas underpinning the decision had been previously articulated, although they had not quite been drawn together in the way that the Queen's Bench was to do. The second part focuses on the case itself, explaining what was most likely to have influenced the court to decide as it did. The final part of the essay examines the influence and legacy of the decision.

[1] *Hochster v De La Tour* (1853) 2 E & B 678, 118 ER 922 (QB).

[2] GH Treitel, *Landmarks of Twentieth Century Contract Law* (Oxford, Oxford University Press, 2002) 2.

[3] See, eg J Dawson, 'Metaphors and Anticipatory Breach of Contract' (1981) 40 *Cambridge Law Journal* 83; Q Liu, 'Claiming damages upon an anticipatory breach: why should an acceptance be necessary?' (2005) 25 *Legal Studies* 559; M Mustill, 'Anticipatory Breach of Contract: The Common Law at Work' in *Butterworths Lectures 1989–90* (London, Butterworths, 1990) 1; JC Smith, 'Anticipatory Breach of Contract' in E Lomnicka and C Morse (eds), *Contemporary Issues in Commercial Law* (London, Sweet & Maxwell, 1997) 175. For a comparative perspective see D Carey Miller, 'Judicia Bonae Fidei: A New Development in Contract?' (1980) 97 *South African Law Journal* 531; J Gulotta, 'Anticipatory Breach—A Comparative Analysis' (1975–76) 50 *Tulane Law Review* 927.

B. THE COMMON LAW IN 1853

Hochster's case was not the first in which the courts had had to consider the legal consequences of parties jeopardising the future successful performance of a contract. Indeed, since at least the 17th century, the courts had been developing rules and principles to identify when an innocent party could bring an action despite the contract remaining unperformed on his part. As John William Smith was to write, in the year before *Hochster* was decided,

> Few questions are of so frequent occurrence, or of so much practical importance, and at the same time so difficult to solve.[4]

The following two sections focus on situations where the defendant was liable despite performance apparently not yet being due.

1. The Defendant Disables Himself From Performance

One situation in which questions arose about an action for breach before performance was due was where the parties had become engaged to be married. Each was seen as making an enforceable contractual promise,[5] the breach of which gave rise to damages.[6] Clearly there was a breach if, on the agreed wedding day, one of the parties refused to go through with it. But what if, before the agreed wedding day, the defendant married someone else? In *Harrison v Cage*[7] the Court of King's Bench held that there was an immediate breach, the defendant having disabled herself from performance by the 'pre-contract'.[8]

This idea of disabling oneself by marrying another person was expanded and developed in two important 19th century cases—*Short v Stone*[9] and *Caines v Smith*.[10] The issue in both cases was that the defendants had promised to marry the respective claimants within a reasonable time of a request by the claimant. In both cases the defendants had married other people; and their former fiancé(e)s had, understandably, not requested that they carry out their prior engagement. This absence of a request gave rise to two distinct legal arguments. First, it was said that the claimant's request was a condition precedent to the defendant's liability. Secondly, it was argued that, because no request had yet been made, it could not be assumed that the contract would be broken when it was made: by that time, for instance, the defendant's current spouse might have died, leaving the defendant free to marry again.

[4] JW Smith, *A Selection of Leading Cases on Various Branches of the Law*, 2nd edn (London, A Maxwell, 1852) vol 2, 8.

[5] This is no longer the case: see the Law Reform (Miscellaneous Provisions) Act 1970 s 1.

[6] *Holcroft v Dickenson* (1672) Carter 233, 124 ER 933 (CP) (breach by fiancé); *Harrison v Cage* (1698) 1 Lord Raym 386, 91 ER 1156 (KB) (breach by fiancée).

[7] *Harrison v Cage* (1698) 1 Lord Raym 386, 91 ER 1156 (KB).

[8] *Ibid* 387, 1156.

[9] *Short v Stone* (1846) 8 QB 358, 115 ER 911.

[10] *Caines v Smith* (1847) 15 M & W 189, 153 ER 816 (Ex).

Both arguments failed. In *Short v Stone* the answer to both of them was held to lie in focusing on the feelings and intentions of the parties at the time of entering into the contract.[11] That intention was 'to marry in the state in which the parties respectively are at that time'.[12] It was, therefore, irrelevant that the defendant might become available again: by marrying someone else, the defendant had breached a promise to stay single. And, by committing that breach, the defendant also

> must be taken to dispense with the contract so far that the other may have an action against him without a request to marry.[13]

The real force of the analysis on this second point lay not so much in its giving effect to the intentions of the parties—we may doubt that the parties had given any thought to it—but rather in the way that it excused the claimant from going through with a pointless (and, in the circumstances, tasteless) performance. Thus, as Coleridge J commented,[14]

> The promise to marry within a reasonable time after request must mean after request within a time when it might reasonably be made. If the defendant disables himself from fulfilling such a request, then, in the first place, he dispenses with the request, because it has become impossible to make the request effectually, and, secondly, he has broken his own contract, because he is no longer able to fulfil that.

A concern to avoid wasteful, pointless performance was also to be found in other cases, including, later, *Hochster v De La Tour*.

Whilst the reasoning in *Caines v Smith*[15] echoed *Short v Stone* on the issue of dispensing with the request, the analysis of the breach point was different. Alderson B said:

> Why should we presume that the wife will die before the lapse of a reasonable time, or in the lifetime of her husband? We ought rather to presume the continuance of the present state of things; and while that continues, it is clear that the defendant is disabled from performing his contract.[16]

Although the reasoning of Alderson B led, on the facts, to the same conclusion as the Court of Queen's Bench in *Short v Stone*, the difference was potentially highly significant. It would seem that if the defendant's spouse had died, the court could not 'presume the continuance of the present state of things'. If that presumption could not be made it would be difficult, on the analysis of Alderson B, to identify a breach. For the Court of Queen's Bench, by contrast, the breach consisted not in remaining married to someone else, but in having changed status after the contract was made.

[11] *Short* (n 9 above) 8 QB 358, 369; 115 ER 911, 915.
[12] *Short* (n 9 above) 8 QB 358, 369; 115 ER 911, 915.
[13] *Short* (n 9 above) 8 QB 358, 369; 115 ER 911, 915
[14] *Short* (n 9 above) 8 QB 358, 370; 115 ER 911, 915.
[15] *Caines v Smith* (1847) 15 M & W 189, 153 ER 816 (Ex).
[16] *Ibid* 15 M & W 189, 190; 153 ER 816, 817 (Ex).

Behind this difference in analytical approach lay a deeper, as yet unarticulated question: Was the defendant in these cases to be seen as breaching a present obligation (such as the obligation to remain single), or as breaching in advance an obligation not yet strictly due? The obvious difficulty with the latter approach was that it brought forward the time of performance, to a point in time earlier than that to which the defendant had agreed. As one later commentator pointed out, this was 'to enlarge the scope' of the defendant's obligation.[17] So the better option seemed to be to analyse the position in terms of breaching a present obligation. But this option was not free from difficulty. In *Short v Stone* the court had drawn on the parties' presumed intentions in order to find a present, ongoing obligation to remain single. It was, in effect, an implied term. But in other factual situations it might be problematic to imply such a term; and even if it could be implied, there might be difficulties over its precise content.

These uncertainties about the scope and basis of the doctrine, however, tended to remain beneath the surface, and the rule was applied outside the marriage context. For instance, in *Bowdell v Parsons*[18] Lord Ellenborough CJ held that a breach of contract was sufficiently alleged against a seller of hay who, it was stated, had delivered the hay to other buyers: 'by the defendant's selling and disposing of the rest of the hay to other persons, he disqualified himself from delivering it to the plaintiff'.[19] Similarly, in *Amory v Brodrick*[20] it was held that the assignor of a bond breached his contract with the assignee to avow, ratify and confirm any actions brought by the assignee, when he released the debtor under the bond from his obligations. The Court of King's Bench held that, by executing the release, he had 'wholly disabled himself from avowing, &c'.[21]

One particularly emphatic illustration was provided by *Ford v Tiley*,[22] in which the defendant had promised to grant a lease of a public house to the claimant 'with all possible speed after he should become possessed of or in possession of'[23] it. At the time of the agreement the premises were tenanted under a lease which expired at midsummer 1827; but in June 1825 the defendant granted a further lease to the same tenants for 23 years. The claimant sued immediately, only to be met with the objection that the action was premature. Bayley J made it clear that this objection was incorrect[24]:

[17] S Williston, *The Law of Contracts* (New York, Baker, Voorhis & Co, 1921) vol 3, §1319 (at 2371).
[18] *Bowdell v Parsons* (1808) 10 East 359, 103 ER 811 (KB).
[19] *Ibid* 10 East 359, 361; 103 ER 811, 812 (KB).
[20] *Amory v Brodrick* (1822) 5 B & Ald 712, 106 ER 1351 (KB).
[21] *Ibid* 5 B & Ald 712, 716; 106 ER 1351, 1353 (Holroyd J) (KB).
[22] *Ford v Tiley* (1827) 6 B & C 325, 108 ER 472; (1827) 5 LJ (OS) KB 169 (reporting the retrial) (KB).
[23] *Ibid* .
[24] *Ford v Tiley* (n 22 above) 6 B & C 325, 327 (KB). A different view of *Ford v Tiley* is given in Mustill, 'Anticipatory Breach of Contract: The Common Law at Work', *Butterworths Lectures 1989–90* (London, Butterworths, 1990) 1, 20–22. It is submitted, however, that this view is unconvincing. In particular, it is difficult to understand the criticism of Bayley J's judgment as 'not even mentioning' the timing point (at 21), when Bayley J did expressly deal with it in the passage quoted below.

> by the lease of June 1825, the defendant has given up his right to have the possession, and has put it out of his power, so long as the lease of June 1825 subsists, to grant the lease he stipulated to grant. It is very true, the defendant may obtain surrender of that lease before midsummer 1827, and then he will be in a condition to grant the lease he stipulated to grant; but the obtaining such a surrender is not to be expected, and the authorities are, that where a party has disabled himself from making an estate he has stipulated to make at a future day, by making an inconsistent conveyance of that estate, he is considered as guilty of a breach of his stipulation, and is liable to be sued before such day arrives.

Although the theoretical problems hinted at in the marriage cases caused little difficulty in practice, they did not completely go away. Thus, in *Lovelock v Franklyn*,[25] where the agreement was for the transfer of the defendant's interest in a house if the claimant paid him 140*l* within seven years, it was held that the defendant's transferring his entire interest to a third party was an immediate breach. That was clearly correct, since the defendant had promised to perform at any point in the seven-year period, and he had now incapacitated himself from doing so. But Lord Denman CJ was at pains to distinguish the case from a situation where the defendant's obligation was to sell or lease a property on a fixed date in the future. There, he suggested, there would be no breach if the defendant disposed of the property before the date fixed for performance, because 'the party had the means of rehabilitating himself before the time of performance arrived'.[26] These dicta could not be reconciled with the ratio of *Ford v Tiley*.[27] Nor did they sit easily alongside Denman CJ's analysis in *Short v Stone*,[28] delivered three days earlier. Perhaps the point was that, whilst an obligation to remain single could be implied on the facts of *Short*, no obligation to remain owner could be implied in an agreement to transfer property at a future date. But that explanation does not get us very far: why is no implication to be made in the latter case? Possibly it is because property—particularly land—might be legitimately alienated by way of mortgage, or other security, and the parties must be presumed to have accepted that possibility. At any rate, it seems unrealistic to assume that a purchaser promising a fixed price for property will be indifferent to its being passed around before delivery; apart from anything else, such intervening ownership might affect its value. Whatever the true reason that Lord Denman had in mind, these cases illustrated that, although its precise basis could have been clearer, the self-disablement principle provided a powerful tool for releasing innocent parties from pointless performance and allowing them to sue immediately, both within and beyond the marriage context.

[25] *Lovelock v Franklyn* (1846) 8 QB 371, 115 ER 916.
[26] *Ibid* 8 QB 371, 378; 115 ER 916, 918–19.
[27] *Ford v Tiley* (n 22 above).
[28] *Short v Stone* (n 9 above).

2. The Defendant Prevents the Claimant from Performing

A second situation where the courts allowed an action before the claimant appeared to be strictly entitled to it, was where the defendant had prevented the claimant from performing. In other words, if the defendant had stopped the claimant from fulfilling the condition precedent to the defendant's liability, the courts did not insist on that condition being satisfied.

The early cases took a strict approach to prevention. For instance, in *Blandford v Andrews*[29] the claimant sought to enforce an agreement under which the defendant had undertaken to procure a marriage between the claimant and Bridget Palmer before the Feast of St Bartholomew. The defendant claimed that he was excused from performance by reason of the claimant's actions in going to Bridget and telling her that she was a whore, and that if she married him he would tie her to a post. The Court of Queen's Bench, however, held that the claimant had not prevented performance, since

> these words, spoken before the day, at one time only, are not such an impediment but that the marriage might have taken effect.[30]

A similarly strict idea of prevention could be seen in *Fraunces's Case*,[31] which concerned the construction of a will under which John Fraunces was to lose his estate if he 'prevented' the executors from removing certain movables. The court unanimously held that denial by words was not enough,

> but there ought to be some act done; as after request made by the executor to shut the door against them, or lay his hands upon them.[32]

Coke CJ referred to a case concerning the master of St Catharine's, who had let three houses on condition that the leases were forfeited if the lessee harboured a lewd woman there for more than six months. In an action by the master for forfeiture, the tenant had replied that the master commanded the woman to stay there. This reply was held bad in law, since the

> master had no colour to put the lewd woman into possession; for which cause the lessee might well put her out.[33]

A further plea, that the master had turned the lessee out and installed the woman by force was, however, held to be good in law.

Clearly, merely being unco-operative was not to be confused with preventing fulfilment of a condition. But even this strict doctrine had some potential application to less unusual contractual circumstances. For instance, where a

[29] *Blandford v Andrews* (1599) Cro Eliz 694, 78 ER 930 (QB).
[30] *Ibid*.
[31] *Fraunces's Case* (1609) 8 Co Rep 89b, 77 ER 609 (CP).
[32] *Ibid* 8 Co Rep 89b, 91a; 77 ER 609, 613 (CP).
[33] *Fraunces's Case* (n 31 above) 8 Co Rep 89b, 92a; 77 ER 609, 614 (CP).

contractual payment was to be made on receipt of property, and the defendant refused to accept the property, it was held that 'a tender and refusal would amount to performance'.[34] But even here, the courts proceeded cautiously, subjecting the pleading of the tender to highly critical scrutiny.[35]

Ultimately it was to take a characteristically untechnical analysis from Lord Mansfield CJ to give the doctrine real commercial effectiveness. In *Jones v Barkley*[36] there was an agreement for the defendant to pay £611 to the claimants if the claimants would assign their interest in certain stock to a third party and also execute a release of all claims that they might have against that third party. The claimants prepared a draft of the release for the defendant's approval, but he refused to read it, saying that he did not intend to pay. The claimants then brought what the report describes as 'a special action on the case, for non-performance of an agreement',[37] to which the defendant pleaded that the claimants had never assigned the interest or executed the release. The claimants demurred and their demurrer was upheld by the Court of King's Bench.

As can be seen from the facts described above, *Jones v Barkley* did not fit easily into the existing doctrine of prevention. There was clearly no question of physical force. Moreover, both the assignment and the release could have been executed by the claimants had they so wished, since there was nothing to suggest that the third party beneficiary of the arrangement would have refused to accept them. Counsel for the claimants met this difficulty by arguing that the claimants' actions were 'equivalent to . . . performance of their part of the agreement'.[38] He went on to elaborate, saying that[39]

> [w]herever a man, by doing a previous act, would acquire a right to any debt or duty, by a tender to do the previous act, if the other party refuses to permit him to do it, he acquires the right as completely as if it had been actually done; and, if the tender is defective, owing to the conduct of the other party, such incomplete tender will be sufficient; because it is a general principle, that he who prevents a thing from being done, shall not avail himself of the non-performance, which he has occasioned.

No authority was cited in support of this general principle.

Lord Mansfield CJ, however, was not to be deterred by a lack of authority. 'If ever there was a clear case', he said, 'I think the present is'.[40] 'Take it on the reason of the thing' he continued:

> The party must shew he was ready; but, if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go farther, and do a nugatory act. Here, the draft was shown to the defendant for his approbation of the

[34] *Blackwell v Nash* (1721) 1 Str 535, 93 ER 684 (KB).
[35] *Lancashire v Killingworth* (1701) 1 Lord Raym 686, 91 ER 1357(KB).
[36] *Jones v Barkley* (1781) 2 Dougl 684, 99 ER 434 (KB).
[37] *Ibid.*
[38] *Jones v Barkley* (n 36 above) 2 Dougl 684, 685–6; 99 ER 434 (KB).
[39] *Jones v Barkley* (n 36 above) 2 Dougl 684, 686; 99 ER 434, 435 (KB).
[40] *Jones v Barkley* (n 36 above) 2 Dougl 684, 694; 99 ER 434, 439 (KB).

> form, but he would not read it, and, upon a different ground, namely, that he means not to pay the money, discharges the plaintiffs from executing it.[41]

Willes and Ashhurst JJ concurred, as did Buller J, who added that *Blandford v Andrews* was distinguishable, since there

> the defendant had agreed to use his endeavours, and, notwithstanding what had been done by the plaintiff, he might have prevailed on the woman, before the time elapsed, to marry him.[42]

The most obvious innovation in *Jones v Barkley* was the looser approach to prevention. Although the defendant's co-operation was unnecessary for the fulfilment of the condition, the defendant was to be regarded as having stopped the claimant 'on the ground of an intention not to perform on his part'. This was not really prevention; rather, it was a good reason for the claimant to be excused from further performance. As Lord Mansfield had suggested, such a rule was sensible, because otherwise the claimant would be forced to persevere with a performance that he knew was not wanted. But as well as this consideration of economic efficiency, there was the mysterious 'general principle' referred to by counsel. This was almost certainly a borrowing from Roman law, in particular Justinian's *Digest* 50.17.1.161, which stated that

> [i]n iure civile receptum est, quotiens per eum, cuius interest condicionem non impleri, fiat quo minus impleatur, perinde haberi, ac si impleta condicio fuisset. quod ad libertatem et legata et ad heredum institutiones perducitur. quibus exemplis stipulationes committuntur, cum per promissorem factum esset, quo minus stipulator condicioni pareret.[43]

Lord Mansfield, whose expertise in Roman law was well known, may well have recognised the allusion. At any rate, the combination of civilian-inspired principle and commercial pragmatism had prompted an important advance in the common law.

The looser approach to prevention which *Jones v Barkley* authorised was still good law at the time of the decision in *Hochster v De La Tour*. For instance, it was relied upon in *Laird v Pim*,[44] where purchasers of land had gone into possession before conveyance, but then refused to complete. It was held that there was no need for the vendors to prove title and execute a conveyance before bringing their action for damages. Similarly, in *Cort v The Ambergate,*

[41] *Jones v Barkley* (n 36 above) 2 Dougl 684, 694; 99 ER 434, 440 (KB).

[42] *Jones v Barkley* (n 36 above) 2 Dougl 684, 694–5; 99 ER 434, 440 (KB).

[43] 'It is established in the civil law that whenever anyone in whose interest it is for a condition to be fulfilled arranged for it not to be fulfilled, the position is regarded as being the same as if the condition had been fulfilled. This is applied to liberty and legacies and institutions of heirs. And stipulations are also entered into on this basis when the promisor prevented the stipulator from obeying the condition'. A Watson (ed), *The Digest of Justinian* (Philadelphia, PA, University of Pennsylvania Press, 1985) II, 50.17.1.161.

[44] *Laird v Pim* (1841) 7 M & W 474, 151 ER 852 (Ex).

Nottingham and Boston and Eastern Junction Railway Company[45] the contract was for the supply of 3900 tons of cast-iron railway chairs, but after delivery of about half of that quantity the defendant indicated that it would not be prepared to take any more. The defendant argued that the claimants had failed to perform the condition of manufacturing and offering the remaining 2000 tons of chairs, and that the defendant had done nothing to prevent them from fulfilling that condition. The court was quick to point out that prevention did not require physical restraint, making the following interventions in argument[46]:

> Coleridge J. Suppose a man said, 'If you come for such a purpose, I will blow your brains out'. That would be no physical prevention.
>
> Lord Campbell C.J. Such a threat might be used ten days before the act was to be done.

The theme was continued in the court's judgment:

> It is contended that 'prevent' here must mean an obstruction by physical force; and, in answer to a question from the Court, we were told it would not be a preventing of the delivery of goods if the purchaser were to write, in a letter to the person who ought to supply them, 'Should you come to my house to deliver them, I will blow your brains out'. But may I not reasonably say that I was prevented from completing a contract by being desired not to complete it?[47]

However, although the principle laid down in *Jones v Barkley* was firmly established by the 1850s, it was not entirely unproblematic. One difficulty concerned its scope: How much missing performance would the principle presume in the claimant's favour? In *Smith v Wilson*[48] the contract was for the shipment of goods from London to Montevideo and a return voyage with another cargo. The ship began its voyage, but was seized and returned to London; once it had been restored to its owner (the claimant) he approached the freighter (the defendant) for instructions, but the defendant refused and renounced the charter-party. The claimant sued for the freight due on both voyages, relying on *Jones v Barkley* to show that he had been prevented from performance of a condition. Lord Ellenborough CJ, however, held that *Jones* did not apply[49]:

> [T]he difference between the two cases is this; in the one, by doing an act in the power of the party to have done, he would have acquired a full and instant right to the duty demanded; in the other, by doing the act tendered to the full extent to which the party tendering was able to perform it, he would still have only taken certain steps of remote and uncertain effect towards the attainment of the object and completion of the event necessary to be obtained and completed, in order to vest a right to the duty demanded in the party demanding it.

[45] *Cort v The Ambergate, Nottingham and Boston and Eastern Junction Railway Company* (1851) 17 QB 127, 117 ER 1229.
[46] *Ibid* 17 QB 127, 139; 117 ER 1229, 1234.
[47] *Cort v The Ambergate* (n 45 above) 17 QB 127, 145; 117 ER 1229, 1236.
[48] *Smith v Wilson* (1807) 8 East 437, 103 ER 410 (KB).
[49] *Ibid* 8 East 437, 444; 103 ER 410, 413–14 (KB).

This was not a completely convincing analysis. Assuming that the contract was not discharged by the delay,[50] the freighter was surely in breach of contract in refusing to give the necessary instructions about delivery. In these circumstances it would be wasteful to require further performance before bringing an action, just as it would have been in *Jones v Barkley*. The problem with *Smith v Wilson* was, it is submitted, a different one. It related not to the scope of the decision in *Jones v Barkley*, but to its effect.

What the claim in *Smith v Wilson* highlighted was a potential ambiguity in *Jones*. *Jones* had made it clear that where a defendant renounced his contract, the claimant was not required to fulfil unperformed conditions before suing. The claimant was excused, or, to put it as counsel had done in that case, 'the [claimant] acquires the right as completely as if it had been actually done'.[51] The potential ambiguity about *Jones* was whether it permitted the claimant merely to sue for damages, or whether it went further, and allowed the claimant to sue on the fiction that he had actually performed. If the latter were the correct interpretation, the claimant would be able to recover the contract price despite not having incurred the expenses of performance. This, essentially, is what the claimant in *Smith v Wilson* was trying to do.

There are several reasons why the Court of King's Bench in *Jones* was unlikely to be endorsing the idea that the claimant would sue on the fictional basis that he had performed the condition. Perhaps the strongest reason is that the claimant was not claiming the contract price: the claim was for damages.[52] Furthermore, the general principle about an innocent party acquiring a right 'as completely as if it had actually been done' was only articulated by counsel. The fact that none of the judges adopted it may indicate that they wished to be more cautious. Finally, one powerful theme in the judgments concerned the avoidance of waste; it is hardly likely that the judges intended their decision to give rise to the equally wasteful result that a defendant must pay for a performance that he has never received.

There was, therefore, no general principle that a claimant who was prevented from performing a condition precedent had all the rights available to a claimant who had fulfilled such conditions. There was, however, some support for a special rule, applicable mainly to employment, and known as the doctrine of constructive service. Under this doctrine, where an employee was wrongfully dismissed part way through the period by reference to which his salary was paid, and he offered to work the remainder of the period, he was to be treated, as a matter of law, as if he had served the whole period. Thus, in *Gandell v Pontigny*[53] a clerk who was paid quarterly was dismissed part way through a quarter; he offered to continue, but his employer refused. The clerk brought an

[50] Eg *Jackson v Union Marine Insurance Co* (1874) LR 10 CP 125.

[51] *Jones v Barkley* (n 36 above) 2 Dougl 684, 686; 99 ER 434, 435 (KB).

[52] This may have been lost sight of at the retrial: F Dawson, 'Metaphors and Anticipatory Breach of Contract' (1981) 40 *Cambridge Law Journal* 83, 91–5.

[53] *Gandell v Pontigny* (1816) 4 Camp 375, 171 ER 119 (NP).

action in *indebitatus assumpsit*, to which it was objected that no action for work and labour could lie for work and labour that had not been done. Lord Ellenborough, however, disagreed:

> If the plaintiff was discharged without a sufficient cause, I think this action is maintainable. Having served a part of the quarter and being willing to serve the residue, in contemplation of law he may be considered to have served the whole.

Although the doctrine was not confined to employment cases,[54] its precise scope was not clear, nor were its origins. Smith, arguing for its limitation to employment, attributed it to (unspecified) 'decisions on the law of settlement'.[55] Addison, on the other hand, pointed to the Roman law support for a wider doctrine in the general wording of Justinian's *Digest* (D.50.17.1.161),[56] which had probably been influential in *Jones v Barkley*.

This uncertainty about the doctrine's scope and basis may well have contributed to judicial doubts about it as the 19th century wore on. In *Archard v Hornor*[57] Lord Tenterden CJ held that a claimant bringing an *indebitatus assumpsit* claim could recover only for the time actually served. *Gandell v Pontigny* was not referred to and, indeed, would have been distinguishable since there was no offer to continue work in *Archard*. Later cases, however, regarded Lord Tenterden's one sentence analysis as unavoidably conflicting with *Gandell v Pontigny*, and expressed a strong preference for Lord Tenterden's view. They did not, however, go quite so far as to abolish the doctrine of constructive service. In *Smith v Hayward*,[58] for example, it was said to be unnecessary to decide the point because the action had been brought before the end of the period during which the employee was claiming to have constructively served. In *Fewings v Tisdal*,[59] similarly, the claimant formulated his claim so as to avoid the question.

As a result of this judicial caution, constructive service could not be deleted from the books. For instance, in the first edition of his *Leading Cases* Smith included a tentative account of the doctrine in his note on *Cutter v Powell*.[60] The hesitancy was judicially noted, and approved,[61] but the doctrine lingered on. Smith continued to deal with it in his second edition,[62] published in the year before *Hochster v De La Tour*.

The continuation of the doctrine of constructive service was, it is submitted, unfortunate. Viewed purely on its own terms it was unconvincing: here was a

[54] Eg *Collins v Price* (1828) 5 Bing 132, 130 ER 1011 (CP) (school fees).

[55] Smith, *A Selection of Leading Cases on Various Branches of the Law* (n 4 above) vol 2, 20.

[56] See n 43 above. Cave (ed), *Addison on the Law of Contracts*, 6th edn (London, Stevens and Sons, 1869) 372.

[57] *Archard v Hornor* (1828) 3 C & P 349, 172 ER 451 (NP).

[58] *Smith v Hayward* (1837) 7 Ad & E 544, 112 ER 575 (QB).

[59] *Fewings v Tisdal* (1847) 1 Ex 295, 154 ER 125.

[60] JW Smith, *A Selection of Leading Cases on Various Branches of the Law* (London, A Maxwell, 1837).

[61] *Goodman v Pocock* (1850) 15 QB 576, 582; 117 ER 577, 579 (Patteson J).

[62] Smith, *A Selection of Leading Cases on Various Branches of the Law* (n 4 above) vol 2, 20–21.

claimant recovering on a count for work and labour that he had not done. Such a fictitious basis of recovery might have been justifiable if it was the only way to do justice between the parties, but the doctrine had the potential to cause injustice. As the courts had acknowledged, to avail himself of the doctrine, the employee had to remain ready to resume work until the end of the stipulated period.[63] In other words, he had to remain idle; and if he took other work he lost his claim. An employee who could easily obtain alternative employment had no legal obligation, and no incentive, to do so: the fact that he could have avoided losing wages was legally irrelevant.

The position where the employee sued for damages for breach of contract was very different. There subsequent offers of employment by either a third party or the defendant himself were relevant to mitigation of damage: if the claimant had increased his loss through 'his own misconduct and folly',[64] that increase was not recoverable. Furthermore, evidence of actual offers was not necessary. As Erle J explained in *Beckham v Drake*,[65]

> [t]he measure of damages . . . is obtained by considering what is the usual rate of wages for the employment here contracted for, and what time would be lost before a similar employment could be obtained. The law considers that employment in any ordinary branch of industry can be obtained by a person competent for the place, and that the usual rate of wages for such employment can be proved, and that when a promise for continuing employment is broken by the master, it is the duty of the servant to use diligence to find another employment.

A year later, in *Goodman v Pocock*,[66] the same judge drew on the contrast between the doctrine of constructive service and the rules on mitigation of damages in contract to explain his dissatisfaction with the former[67]:

> I think the true measure of damages is the loss sustained at the time of dismissal. The servant, after dismissal, may and ought to make the best of his time; and he may have an opportunity of turning it to advantage.

In short, the contractual rules were seen as being both an accurate method of assessing compensation ('the true measure') and as appropriately reflecting how the innocent party should respond to the breach ('may and ought to make the best of his time'). The constructive service doctrine, he felt, did neither.

3. The Overall Position

The law relating to contractual liabilities arising before performance was apparently due was, therefore, well developed by the time that *Hochster v De La Tour*

[63] *Smith v Hayward* (n 58 above).
[64] *Speck v Phillips* (1839) 5 M & W 279, 283; 151 ER 119, 120 (Alderson B) (Ex).
[65] *Beckham v Drake* (1849) 2 HLC 579, 606–7; 9 ER 1213, 1223.
[66] *Goodman* (n 61 above).
[67] *Goodman* (n 61 above) 15 QB 576, 583–4; 117 ER 577, 580 (QB).

came to be decided. But that is not to say that the decision in *Hochster* was inevitable. Whilst it was recognised that liability could arise in particular situations, none of those situations obviously fitted the factual matrix in *Hochster*. As we shall see, the defendant merely told the claimant that his contractually promised services would not be required. The defendant had not disabled himself from performance, nor had he obviously prevented the claimant from fulfilling a condition precedent to the defendant's liability. Certainly he had indicated that he would not perform the contract, but in the prevention cases the time for performance had always elapsed before the action was brought. If *Hochster* was to be fitted into the prevention category, some concept of anticipatory prevention would have to be recognised. On the other hand, allowing a claimant to terminate as soon as the defendant indicated that he would not perform would give considerable scope for the principle of mitigation: the claimant could—and, as a matter of law would be presumed to—take all reasonable steps to find employment elsewhere. So far as the interplay of broad principles was concerned, the outcome in *Hochster* was finely balanced.

There was also a question about authority. In *Phillpotts v Evans*,[68] which concerned a sale of wheat, the buyer had told the seller that he no longer wanted the goods and would not accept them if tendered. The wheat was, at that point, already on its way to the buyer and, when it arrived, the buyer did as he had intimated, and rejected it. The sole question was whether damages should be assessed by reference to the market price at the date of the defendant's notice, or the market price at the date of the seller's tender of the goods. The Court of Exchequer held that the correct date was the date of tender, with Parke B offering a trenchant analysis of why the date of notice was irrelevant:

> If [counsel for the defendant] could have established that the plaintiffs, after the notice given to them, could have maintained the action without waiting for the time when the wheat was to be delivered, then perhaps the proper measure of damages would be according to the price at the time of the notice. But I think no action would then have lain for the breach of contract, but that the plaintiffs were bound to wait until the time arrived for delivery of the wheat, to see whether the defendant would then receive it. The defendant might then have chosen to take it, and would have been guilty of no breach of contract; for all that he stipulates for is, that he will be ready and willing to receive the goods, and pay for them, at the time when by the contract he ought to do so. His contract was not broken by his previous declaration that he would not accept them; it was a mere nullity, and it was perfectly in his power to accept them nevertheless; and, vice versa, the plaintiffs could not sue him before.[69]

Parke B reasserted this view in *Ripley v M'Clure*,[70] a case in which the defendant had expressed the intention not to receive a cargo as he was contractually bound to do.

[68] *Phillpotts v Evans* (1839) 5 M & W 475, 151 ER 200 (Ex).
[69] *Ibid* 5 M & W 475, 477; 151 ER 200202 (Ex).
[70] *Ripley v M'Clure* (1849) 4 Ex 345, 154 ER 1245; (1850) 5 Ex 140, 155 ER 60.

> [I]f the jury had been told that a refusal before the arrival of the cargo was a breach [said Parke B], that would have been incorrect. We think that point rightly decided in *Phillpotts v Evans*[71].

The task facing counsel for the claimant in *Hochster v De La Tour* was, therefore, somewhat daunting. Not only was there the obvious obstacle of contrary authority to be overcome; there was also the problem that the facts did not quite fit into any of the recognised categories for liability. A court finding for the claimant would have to be persuaded to be both independent-minded and creative.

C. *HOCHSTER v DE LA TOUR*

1. The Facts

Albert Hochster and Edgar de la Tour first met in April 1852, in Egypt.[72] Hochster was acting as courier for a man named Maskill; de la Tour was a 'private gentleman' on his travels. De la Tour made arrangements with Maskill to join his party and, for the rest of the trip, Hochster acted as de la Tour's valet. De la Tour was evidently in financial difficulties at this time, because he borrowed various sums of money from Hochster, which were repaid on the parties' return to England.

In May 1852 de la Tour wrote to Hochster, stating that he intended to make another journey, this time to Switzerland, and wished Hochster to act as his courier. He called on Hochster and the parties agreed terms of 10*l* per month, commencing on 1 June 1852. Although the defendant later sought to deny that any contract had been made, arguing that 'what the plaintiff had construed into a contract was merely what had occurred in conversation',[73] the jury held that there was a binding contract at this point. At the same meeting de la Tour asked Hochster to obtain a passport for him. To this end the parties went together to Coutts, the bankers, to obtain the necessary letter, and Hochster then went on to the Foreign Office, where he paid for the passport with his own money.

'Some time after', according to Hochster's version of events,

> the defendant wrote again to the plaintiff, stating that his friends had told him that it would be very foolish to spend 300l in three months, and that the plaintiff's charge of 10l per month was preposterous, and that he should not require his services[74].

[71] *Ibid* 4 Ex 345, 359; 154 ER 1245, 1251.

[72] *Hockster v De Latour*, *The Times* (25 April 1853) 7 (report of trial before Erle J). The detailed facts given here are taken from the report's summary of the claimant's evidence.

[73] *Ibid*.

[74] *Hockster v De Latour* (n 72 above).

The defendant, Hochster added, had refused to pay any compensation. Other accounts give a less abrupt version of de la Tour's final letter. The summary in *The Times* when the case was being argued in the Queen's Bench states that[75]

> After communicating with his friends the defendant thought it prudent to break his contract, and wrote a letter to the plaintiff, in which he said, his friends were amazed that he, with an income of only 500*l* a year, should have entered upon an enterprise which would entail an expense of 300*l* in three months, and concluded by telling the plaintiff that he should not require his services, but, that he would endeavour to recommend him to another party.

The *Weekly Reporter*'s version also indicates that, in his letter, de la Tour said that

> he wished to know what sum there was due to the plaintiff in obtaining a passport for himself, which the plaintiff had done at the defendant's request[76].

We may never know exactly what the letter said. The claimant may have been over-sensitive to it, reading de la Tour's friends' criticisms as directed at him, when they were in effect being directed at de la Tour himself. Certainly de la Tour seems to have been financially inept—the money problems he experienced in Egypt were proof of that, let alone his failure to budget for his trip to Switzerland—and it may be unfair to regard him as arrogant. Perhaps what really provoked Hochster's sense of being badly treated was that he was dealt with as if he were a mere servant or tradesman, whose services could be dispensed with at will. He may have felt that his professional status as a courier called for different treatment.[77]

At any rate, one thing was clear: the engagement was off. Hochster brought his action for breach of contract on 22 May, and was not long out of work. He secured an appointment to accompany Lord Ashburton on a tour of the Continent commencing on 4 July 1852 at the same basic rate of 10*l* per month.

2. Counsel's Arguments

The trial of *Hochster v De La Tour* took place before Erle J and a jury on 22 April 1853. As soon as the claimant had finished giving evidence, counsel for the defendant took the point that there was no cause of action since 'one side alone could not make a breach of contract before the time arrived for its fulfilment'.[78] What was required, he argued, was a continuing refusal to perform

[75] *Hochster v De Latour*, *The Times* (11 June 1853) 7 (QB).

[76] *Hochster v De Latour* (1853) 1 WR 469 (QB).

[77] Such distinguished men as Adam Smith, Thomas Hobbes and John Locke had acted as guides for wealthy aristocrats making grand tours. Hibbert, *The Grand Tour* (London, Thames Methuen, 1987) 20–23.

[78] *Hockster v De Latour* (n 72 above).

extending to the time that performance was actually due. Erle J recognised the force of this submission, saying

> he should decide against him, but would give him leave to move on account of the strong authority which [counsel] had produced[79].

Judgment for the claimant was entered, with damages being assessed by the jury at 20*l*. A rule arresting this judgment was later granted and, on 10 June 1853, Hannen appeared for the claimant, to show cause against that rule.

Hannen began by anticipating his opponents' reliance on *Phillpotts v Evans*[80] and *Ripley v M'Clure*.[81] The analysis in those cases, he argued, should not be read as applying to all situations of a refusal to perform; rather, it should be read as applying only to those refusals which were capable of being retracted before performance was due. What made a refusal incapable of being retracted was, essentially, that it had been acted upon[82]:

> If one party to an executory contract gave the other notice that he refused to go on with the bargain, in order that the other side might act upon that refusal in such a manner as to incapacitate himself from fulfilling it, and he did so act, the refusal could never be retracted.

He cited *Cort v The Ambergate, Nottingham and Boston and Eastern Junction Railway Company*[83] in support of that proposition.

Hannen then went on to address the point about the timing of the action. Again, he argued that the apparently universal language used by Parke B in *Phillpotts v Evans* and *Ripley v M'Clure* could not be supported in its widest sense, for it was clear that when a party disabled himself from performance—as, for instance, in the cases concerning marriage—the claimant was not required to wait until the time when performance was due. At this point Lord Campbell CJ interrupted, to ask[84]:

> It probably will not be disputed that an act on the part of the defendant incapacitating himself from going on with the contract would be a breach. But how does the defendant's refusal in May incapacitate him from travelling in June? It was possible that he might do so.

Hannen's reply, as reported by Ellis and Blackburn was as follows[85]:

> It was; but the plaintiff, who, as long as the engagement subsisted, was bound to keep himself disengaged and make preparations so as to be ready and willing to travel with the defendant on the 1st June, was informed by the defendant that he would not go on with the contract, in order that the plaintiff might act upon that information; and the plaintiff then was entitled to engage himself to another, as he did.

[79] *Hockster v De Latour* (n 72 above).
[80] *Phillpotts v Evans* (n 68 above).
[81] *Ripley v M'Clure* (n 70 above).
[82] *Hochster v De La Tour* (1853) 2 E & B 678, 683; 118 ER 922, 924 (QB).
[83] *Cort v The Ambergate* (n 45 above).
[84] *Hochster* (n 82 above) 2 E & B 678, 684 (QB).
[85] *Hochster* (n 82 above) 2 E & B 678, 684 (QB).

The Law Journal reporters summarised it slightly differently[86]:

> Where the contract is such as to require preparation for its performance, and the conduct of one party before the day is such as reasonably to lead the other party to think there is no use in making such preparation, such conduct must be considered the same in effect as if the party had disabled himself from performance. There should be readiness and willingness to perform down to the time of actual performance; and if before that there is such retraction as to warrant the other party in acting upon it, that is sufficient to support an action.

As reported by Ellis and Blackburn, that was pretty much the end of counsel's substantive argument. However, the report in *The Jurist* indicates that Hannen made a further point about the existing remedies available. Referring to Smith's discussion of the doctrine of constructive service in his note to *Cutter v Powell*, Hannen observed[87]:

> [I]t is said, that a servant who is wrongfully dismissed may recover the whole of his wages in an action of indebitatus assumpsit, if the action is brought after the expiration of the term for which he was hired. But in many cases that count would not include the special damage arising from the expenditure of money which the party had incurred in preparing to complete the contract

Hannen's argument was a sophisticated and original exposition of the law. He circumvented the difficulty of Parke B's remarks in *Phillpotts v Evans* and *Ripley v M'Clure* by reading them narrowly—in a way that was not obvious from the judgments themselves—and limiting them to situations where the refusal could not be retracted. The central idea in his submissions was that if the defendant induced the claimant to rely on his statement about non-performance, the statement could not subsequently be disowned. The language Hannen was using—particularly as reported in the Law Journal reports—was very close to an assertion of estoppel.

Having articulated the central principle of justifiable reliance, Hannen then skilfully rearranged the case law to illuminate it. *Cort*'s case, which had appeared to be an authority against the claimant, could now be presented as supporting the claimant, since there the claimant had indeed relied on the defendant's representation. The requirement of prevention—which was the true basis of the decision in *Cort*, and which would not have favoured the claimant if applied strictly in *Hochster*—was pushed into the background. Similarly, the cases on the defendant disabling himself from performance, which seemed not to help the claimant in *Hochster* (because the defendant had not disabled himself), could be repositioned to support the claimant. Here the claimant had been induced by the defendant's representation to disable himself from performing, so the situation was analogous to the defendant's disability cases; and the 'defendant's disability' cases showed that actions would lie before performance was due.

[86] *Hochster* (1853) 22 LJ(QB) 455, 456–7.
[87] *Hochster* (1853) 17 Jur 972, 973 (QB).

The discussion of constructive service was also important, despite its neglect by Ellis and Blackburn. What Hannen had to say about the precise application of the doctrine was perhaps not very compelling on the facts of *Hochster*: expenditure incurred at the defendant's request, for his benefit, surely would be recoverable in *indebitatus assumpsit*. More importantly, Hannen was reminding the court of the alternative remedy that was still available to claimants who did not take steps to mitigate their loss. Offering full payment to those who remained idle whilst denying any remedy to those who promptly took steps to improve their position was not obviously attractive. In effect, Hannen was reminding the judges of the claimant's meritorious conduct whilst avoiding a crude plea for sympathy.

Hannen's submissions, so far as we can judge from printed summaries, were an effective and impressive performance. Crompton J was quick to pick up Hannen's hint about mitigation, commenting that he was[88]

> inclined to think that the [claimant] may . . . say: 'Since you have announced that you will not go on with the contract, I will consent that it shall be at an end from this time; but I will hold you liable for the damage I have sustained; and I will proceed to make that damage as little as possible by making the best use I can of my liberty'.

Lord Campbell CJ also made clear his approval, saying that Hannen's opponents 'have to answer a very able argument'.[89] As it turned out, Hannen's submissions were a turning point in his career: Lord Campbell's praise secured him a part in the *Shrewsbury Peerage Case* (1857–58), after which 'his rise was rapid both in London and on circuit'.[90]

Hugh Hill QC and Deighton, for the defendant, began their argument by reasserting the more orthodox interpretations of *Cort*, *Phillpotts* and *Ripley*. *Cort*, they argued, was distinguishable, since there the action had been brought after performance was due. *Phillpotts* and *Ripley* showed that the declaration of an intention not to perform was not in itself a breach of contract. But they were quickly diverted from this exposition of the authorities by interventions from the Bench. Crompton J asked whether the claimant could not

> on notice that the defendant will not employ him, look out for other employment, so as to diminish the loss?[91]

Lord Campbell CJ expressed a similar concern: 'So that you say the plaintiff, to preserve any remedy at all, was bound to remain idle'.[92] Erle J identified a further undesirable consequence of upholding the defendant's submissions[93]:

[88] *Hochster* (n 82 above) 2 E & B 678, 685 (QB).
[89] *Hochster* (n 82 above) 2 E & B 678, 685.
[90] Polden, 'Hannen, James Baron Hannen (1821–1894)' *Oxford Dictionary of National Biography* (2004–06).
[91] *Hochster* (n 82 above) 2 E & B 678, 686.
[92] *Hochster* (n 82 above) 2 E & B 678, 686.
[93] *Hochster* (n 82 above) 2 E & B 678, 686.

> Suppose the defendant, after the plaintiff's engagement with Lord Ashburton, had retracted his refusal and required the plaintiff to travel with him on 1st June, and the plaintiff had refused to do so, and gone with Lord Ashburton instead? Do you say that the now defendant could in that case have sued the now plaintiff for a breach of contract?

Counsel did their best, replying that a declaration of intention not to perform should be seen as an offer to rescind the agreement, which the claimant could choose either to accept or reject. But it was clear that, by this point in the hearing, the court was more concerned with the practical consequences of the defendant's position than with the technical legal analysis.

3. The Judgment

The unanimous judgment of the Court of Queen's Bench was delivered a fortnight later by Lord Campbell CJ. Lord Campbell began by setting out what he described as the defendant's 'very powerful'[94] contention that the claimant could not bring an action until his employment was due to begin. However, Lord Campbell continued, this proposition could not be universally true: in cases of promises to marry in the future, the action lay as soon as one of the parties married someone else. The explanation for the marriage cases could not be that performance was impossible—it was not impossible, since the defendant's spouse might die before the defendant was due to marry the claimant.[95] Rather, there was a breach of an immediate obligation[96]:

> [W]here there is a contract to do an act on a future day, there is a relation constituted between the parties in the meantime by the contract, and that they impliedly promise that in the meantime neither will do any thing to the prejudice of the other inconsistent with that relation. As an example, a man and woman engaged to marry are affianced to one another during the period between the time of the engagement and the celebration of the marriage. In this very case, of traveller and courier, from the day of the hiring till the day when the employment was to begin, they were engaged to each other; and it seems to be a breach of an implied contract if either of them renounces the engagement.

The judgment then proceeded to consider whether, as a matter of principle, the claimant should have to remain bound to perform after the defendant's declaration. 'It is surely much more rational' said Lord Campbell,[97]

> and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered

[94] *Hochster* (n 82 above) 2 E & B 678, 688.
[95] *Hochster* (n 82 above) 2 E & B 678, 688.
[96] *Hochster* (n 82 above) 2 E & B 678, 689.
[97] *Hochster* (n 82 above) 2 E & B 678, 690.

> from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract.

Broader considerations of justice were also seen as supporting the claimant's case[98]:

> The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured: and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer.

Finally, the judgment addressed the potential difficulties relating to the assessment of damages. These difficulties, it suggested, should not be exaggerated. Damages were to be assessed by the jury, who could take all contingencies into account in arriving at an appropriate sum. It followed that the verdict for the claimant given at the trial was correct.

The most remarkable thing about this judgment was how little it had in common with the argument of counsel for the successful claimant. Thus, whilst counsel had attempted to re-interpret the language used by Parke B in *Phillpotts v Evans* and *Ripley v M'Clure* so as to distinguish those remarks, the court was impatient of such subtleties. If Parke B had meant to say that a refusal in advance of performance being due could never be a breach, he was wrong; it was as simple as that.[99] More fundamentally, the court did not adopt counsel's argument about the importance of the claimant's detrimental reliance on the defendant's statement. For the court, it was not a question of the declaration becoming unretractable; rather, the declaration was itself a breach of the implied term not to do anything to the prejudice of the other party pending performance. In the judges' view, the claimant's decision to act on the statement merely made it 'reasonable' to give him the 'option' to sue immediately. If the claimant decided to wait and see if the defendant would perform, and the defendant failed to do so, the claimant would not lose his remedy.

Such boldness was particularly surprising from a court where the judges often disagreed with each other. Indeed, the frequency of disagreement started to demoralise Lord Campbell CJ, who wrote in his diary later the same year that he found his work so 'irksome' that he

> would as soon be beaten well all the time with a cudgel as preside in Queen's Bench with . . . on one side and . . . on the other.[100]

[98] *Hochster* (n 82 above) 2 E & B 678, 691.

[99] *Hochster* (n 82 above) 2 E & B 678, 692–3. See also the same criticisms of those two cases, made by a similarly constituted Court of Queen's Bench, in *Cort v The Ambergate, Nottingham and Boston and Eastern Junction Railway Company* (1851) 17 QB 127, 147.

[100] Hardcastle (ed), J Campbell, *Life of John, Lord Campbell* (London, John Murray, 1881) 2.317–2.318 (Diary entry from 24 December 1853).

He later said of Erle J, that '[w]ith him I had differed oftener than with any other judge'.[101] No one reading the judgment in *Hochster v de la Tour* could have suspected these conflicts. What, then, could have prompted a unanimous Court of Queen's Bench to go so much further, and on such a broader basis, than counsel had been prepared to argue? The answer, it is submitted, is to be found in an examination of the individual judges involved, and the fundamental political questions raised by the facts of the case.

Lord Campbell CJ, who presided in the Court of Queen's Bench, had been Chief Justice since 1850. Before his appointment to that position he had a long and distinguished career as a barrister, politician and author. His literary work—particularly his *Lives of the Chief Justices* (1849)[102]—offers us revealing insights into how he believed the Chief Justice should best fulfil his duties. As one contemporary reviewer recognised, 'the hero, and deservedly the hero of Lord Campbell's biographies'[103] was Lord Mansfield. Commenting on Mansfield's appointment in 1756, Campbell wrote:

> Although he did not then delineate in the abstract the beau ideal of a perfect judge, he afterwards proved to the world by his own practice that it had been long familiar to his mind.[104]

Campbell had a particularly high regard for Lord Mansfield's development of commercial law, which he described as follows[105]:

> As respected commerce, there were no vicious rules to be overturned,—he had only to consider what was just, expedient and sanctioned by the experience of nations further advanced in the science of jurisprudence. His plan seems to have been to avail himself, as often as opportunity admitted, of his ample stores of knowledge, acquired from his study of the Roman civil law, and of the juridical writers produced in modern times by France, Germany, Holland and Italy,—not only in doing justice to the parties litigating before him, but in settling with precision and upon sound principles a general rule, afterwards to be quoted and recognised as governing similar cases.

The importance of 'settling with precision and upon sound principles a general rule' could be seen equally in Campbell's own articulation of the implied term in *Hochster v De La Tour*.[106] However, the facts of *Hochster* did not give any scope to draw on Continental jurisprudence—for which Lord Campbell was to express his admiration elsewhere[107]—since Pothier followed the approach of Justinian's *Digest* (D50.17.1.161) in stating that a contracting party prevented

[101] *Ibid* 2.383.

[102] John Lord Campbell, *Lives of the Chief Justices of England* (London, John Murray, 1849).

[103] N Senior, 'Lord Campbell's *Chief Justices*' 93:189 *Edinburgh Review* (Jan 1851) 97, 129. For the attribution of this anonymous review to Senior see Levy, *Nassau W Senior* (Newton Abbott, David & Charles, 1970) 313–14.

[104] Campbell, *Lives of the Chief Justices of England* (n 102) II.393.

[105] Campbell, *Lives of the Chief Justices of England* (n 102) II.404.

[106] See quotation at n 96 above.

[107] Swain, 'The Will Theory of Contract in the Nineteenth Century: Its Influence and Limitations' in Lewis, Brand and Mitchell (eds), *Law in the City* (Dublin, Four Courts Press, 2007) 163, 165.

from fulfilling a condition was to be placed in the same position as if he had fulfilled it.[108] There was no civil law doctrine equivalent to anticipatory breach.[109]

Campbell's assessment of Mansfield's attitude to precedent also casts light on his approach to *Hochster v De La Tour*[110]:

> PRECEDENT and PRINCIPLE often had a hard struggle which should lay hold of Lord Mansfield; and he used to say that he ought to be drawn placed between them, like Garrick between TRAGEDY and COMEDY. Though he might err, like all other mortals, where there was no fixed rule of law which could not be shaken without danger, he was guided by a manly sense of what was proper, and he showed that he considered 'law a rational science, founded upon the basis of moral rectitude, but modified by habit and authority'.

The central role of rationality here is mirrored in the court's analysis in *Hochster*, as is the readiness not to be constrained by authority. For Campbell, it was clear that what made Mansfield a great judge was that, whilst others were content to follow authority as 'a matter of faith',[111] Mansfield's decisions were dictated by his acute perception of what 'reason' required.

What 'reason' required on the facts of *Hochster v De La Tour* was not immediately obvious. Legal logic (which might not be the same as 'reason') seemed to suggest that one could not be in breach of a contract before one was due to perform it. But the facts of *Hochster* engaged with wider issues of rationality. Fundamentally, they raised the question about what the law should do where one contracting party was told in advance that his services would not be required. Did the law require him to wait around in case the other party changed his mind? If the law did require the claimant to wait, it was positively discouraging him from exercising his right to work elsewhere. And at the time of the decision in *Hochster*, a person's right to work was seen as absolutely fundamental.

The centrality of freedom of labour had been famously established by Adam Smith in *The Wealth of Nations*.[112] Indeed, 'the propensity to truck, barter, and exchange one thing for another'[113] was seen by Smith as the foundation of the entire economic system. In his view, it was essential to the success of the system that the freedom to contract should be uninhibited: a free and competitive market was the only way to maximize efficiency.[114] Smith's ideas were tremendously influential and formed the basis of the school of classical economics, which flourished throughout the early 19th century.[115]

[108] J Pothier, *Treatise on the Law of Obligations*, D Evans (trans) (Philadelphia, PA, Robert Small, 1826) vol 1, 107–9 [212].

[109] Zimmermann, *The Law of Obligations* (Oxford, Oxford University Press, 1996) 815–16 fn 228.

[110] Campbell, *Lives of the Chief Justices of England* (n 102) II.417.

[111] Campbell, *Lives of the Chief Justices of England* (n 102) II.439.

[112] A Smith, *An Inquiry Into the Nature and Causes of The Wealth of Nations* (Edinburgh, 1776); subsequent references are to the Dent edition (London, 1910).

[113] *Ibid* Book I, ch II, 12.

[114] A helpful summary of Smith's thought is given in PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, Oxford University Press, 1979) 294–303.

[115] *Ibid* 304–5.

It is hardly possible that the judges who decided *Hochster* could have been unaware of this economic thinking.[116] Indeed, there is evidence to show that they were aware. Erle J, for instance, had developed and articulated the doctrine of mitigation in a series of judgments which emphasised and incentivised the optimal use of labour.[117] Later, in his capacity as Chairman of the Trades Union Commissioners, he was to claim that the law gave the fullest protection to freedom of labour and capital[118]:

> *Every person has a right under the law, as between him and his fellow subjects, to full freedom in disposing of his own labour or his own capital according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others.*

Even if the interference were not in itself unlawful, it would, in Erle's view, still give rise to liability if it interfered with the claimant's right.[119]

Lord Campbell's familiarity with classical economic ideas would have come directly from his political experience, and from his involvement in law reform. He had been a Member of the House of Commons throughout the 1830s, when the influence of economists had been at its height.[120] Furthermore, Campbell was a committed Whig,[121] as were many of the economist MPs,[122] so he may well have shared, as well as heard, their views. One particularly striking parallel with *Hochster v De La Tour* was the reform of the poor laws, which was debated in Parliament throughout the 1830s and 1840s. The problem with the existing poor laws was perceived as being that they were not administered in a way that encouraged self-reliance.[123] As Nassau Senior, the moving spirit of the reforms, put it, the prevailing system 'must diminish industry by making subsistence independent of exertion'.[124] He described the aim of the 1834 Poor Law Amendment Act as being

> [t]o raise the labouring classes, that is to say, the bulk of the community, from the idleness, improvidence, and degradation, into which the ill-administration of the laws for their relief has thrust them.[125]

[116] 'It is scarcely possible that any educated man growing to maturity between (say) 1800 and 1850 could not have read a good deal of the new political economy and radical political utilitarianism': Atiyah, *The Rise and Fall of Freedom of Contract* (n 114 above) 293.

[117] *Beckham v Drake* (1849) 2 HLC 579, 606–7; 9 ER 1213, 1223; *Goodman v Pocock* (n 61 above) 15 QB 576, 583–4; 117 ER 577, 580; *Emmens v Elderton* (1853) 4 HLC 624, 656; 10 ER 606, 618. He was also a party to the decision in the lower court in *Elderton v Emmens* (1848) 6 CB 160, 136 ER 1213, see especially at 178, 1219–20.

[118] W Erle, *The Law Relating to Trade Unions* (London, Macmillan 1869) 12.

[119] *Ibid*.

[120] F Fetter, 'The Influence of Economists in Parliament on British Legislation from Ricardo to John Stuart Mill' (1975) 83 *Journal of Political Economy* 1051.

[121] He was, for instance, a member of Brooks's Club, which he described, in a letter to his father, as 'the stronghold of the Whigs': Hardcastle (ed), *Life of John, Lord Campbell* (n 100 above) 1.409.

[122] Fetter, 'The Influence of Economists in Parliament (n 120) 1053.

[123] For a more detailed account, see Levy, *Nassau W Senior* (n 103 above) 80–90.

[124] Levy, *Nassau W Senior* (n 103 above) 80.

[125] Levy, *Nassau W Senior* (n 103 above) 90.

The reform of the poor laws powerfully illustrated how a system of self-consistent legal rules, designed with the best of motives, could be exposed by economic analysis as unfit for its purpose. Senior took a similar approach, though with less immediate success, to his critique of property law. In his evidence to the Real Property Commission (1828), chaired by Lord (then Mr) Campbell, he advocated radical simplification of the conveyancing system, so as to facilitate the transfer of land. He returned to the point in his review of Campbell's *Lives of the Chief Justices*, where he described the English system of conveyancing as 'a disgrace to a civilised nation',[126] and Coke's exposition of it as

> a memorial of his utter unfitness to discover or even to understand the real purposes for which laws ought to be made.[127]

Campbell could not have been unaware of what Senior, 'one of the most influential of the classical economists',[128] thought that those real purposes were.

The judgment in *Hochster v De La Tour* should, therefore, be seen not as merely an important innovation in the law of contract. Clearly it was innovative, but it also reflected a very distinctive attitude to the role of the appellate judge (as personified by Lord Mansfield), and a readiness to shape common law rules by reference to extra-legal notions of rationality and efficiency. It deserves its landmark status for all three reasons.

D. THE EFFECTS OF *HOCHSTER v DE LA TOUR*

The doctrine of anticipatory breach, as created by *Hochster v De La Tour*, remains good law today, and has been approved by the House of Lords several times.[129] But that is not to say that it has been seamlessly incorporated into the fabric of the common law. On the contrary, challenges to the scope, basis, and even the existence of the doctrine have emerged in the case law. In this Part those challenges are outlined, and the responses to them evaluated.

1. The Nature of Repudiation

In *Hochster v De La Tour* itself there could be no dispute that the defendant had renounced the contract. But other factual situations were less clear, and the courts showed a consistent reluctance to recognise less explicit conduct as a

[126] Senior, 'Lord Campbell's *Chief Justices*' (n 103 above) 105.
[127] Senior, 'Lord Campbell's *Chief Justices*' (n 103 above) 104.
[128] Atiyah, *The Rise and Fall of Freedom of Contract* (n 114 above) 317.
[129] *Martin v Stout* [1925] AC 359 (HL); *Moschi v LEP Air Services Ltd* [1973] AC 331 (HL); *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277 (HL).

renunciation. For instance, in *In re Agra Bank*[130] it was held that a bank did not renounce its contractual obligation to pay under a letter of credit by stopping payment generally. Page Wood VC said that he found it

> quite impossible to bring this case within the principle of the cases . . . especially the courier's case, *Hochster v De La Tour*, which went as far as any.[131]

Similarly, inviting one's creditors to a meeting, showing them a bleak financial statement of one's situation and asking for more time to pay did not show an intention to abandon the contract.[132] Even a letter setting out in detail all the party's failed attempts to obtain the funding necessary to complete the contract was not enough, because it went on to say that the party would continue trying.[133] As Megaw LJ put it, 'the expression of this "hope, however forlorn" is quite inconsistent with a final refusal'.[134] It was also essential to place the defendant's statement in its factual and legal context: a refusal to provide a cargo for a ship, for example, might appear to be a renunciation of the charterer's obligations, but if the refusal was made on the first of several days provided by the contract for loading, that appearance was deceptive.[135] In essence, there was a fine line between pessimism and renunciation; and if the party receiving a gloomy communication read too much into it, and terminated the contract, he himself would be liable for breach. Only the clearest renunciation could be acted on with confidence.[136]

Where a party made an assertion about his legal position, the courts were confronted with a further difficulty. On the one hand, a genuine attempt to ascertain one's own rights or duties seemed to be the opposite of a refusal to perform legal obligations. But, on the other hand, if one party asserted that he was not required to perform because some condition was not satisfied, and, as a matter of law, that assertion was incorrect, the party was effectively refusing to perform his contract. The courts' resolution of the problem has not been consistent.[137] Support for the view that the party's mistaken assessment of his legal rights was irrelevant could be found in *Danube and Black Sea Railway and Kustendjie Harbour Company (Limited) v Xenos*,[138] where the defendant's erroneous belief that his agent had exceeded his authority in making the contract was given no weight. In *Woodar Investment Development Ltd v Wimpey*

[130] *In re Agra Bank* (1867) LR 5 Eq 160.
[131] *Ibid* 164.
[132] *In re Phoenix Bessemer Steel Company* (1876) 4 Ch D 108 (Ch & CA).
[133] *Anchor Line Ltd v Keith Rowell Ltd, The Hazelmoor* [1980] 2 Lloyd's Rep 351 (CA).
[134] *Ibid* 354.
[135] *Avery v Bowden* (1855) 5 E & B 714, 119 ER 647 (QB); (1856) 6 E & B 953, 119 ER 1119 (Ex Ch).
[136] *Spettabile Consorzio Veneziano di Armamento e Navigazione v Northumberland Shipbuilding Company Limited* (1919) 121 LT 628 (CA).
[137] JC Smith, 'Anticipatory Breach of Contract' in E Lomnicka and C Morse (eds), *Contemporary Issues in Commercial Law: Essays in Honour of AG Guest* (London, Sweet & Maxwell, 1997) 175, 176.
[138] *Danube and Black Sea Railway and Kustendjie Harbour Company (Limited) v Xenos* (1861) 11 CB(NS) 152, 142 ER 753 (CP); (1863) 13 CB(NS) 825, 143 ER 325 (Exch Ch).

Construction UK Ltd,[139] however, the House of Lords favoured the opposite view, holding that there was no renunciation where the defendant insisted on his own erroneous interpretation of a crucial contractual term.

To some extent the uncertainties illustrated by the cases on repudiation are inherent in any rule that allows proof of intention by conduct. However, it is submitted that the approach to renunciation adopted by the House of Lords in *Woodar*'s *case* makes that uncertainty unnecessarily larger, and complicates what should be a simple rule. It is also difficult to reconcile with broader contractual principles, in particular the principle that liability for breach of contract is strict.

2. The Requirement of Acceptance

In *Hochster v De La Tour* the claimant had decided to act immediately on the defendant's renunciation, and to put an end to the contract. Shortly afterwards, in *Avery v Bowden*,[140] Lord Campbell CJ took the opportunity to confirm the decision in *Hochster*, and to make it clear that for liability to arise under the *Hochster* doctrine, it was essential for the claimant to have ended the contract. Thus, where, under a charterparty, the charterer refused to supply a cargo in conformity with the contract and told the captain that 'there was no use in his remaining there any longer',[141] no liability arose if the captain continued to insist upon having a cargo. In other words, there was no right to damages under *Hochster* if the innocent party affirmed the contract.

One question prompted by this rule concerned what the innocent party had to do to show that he was exercising his option to terminate. In *Hochster* itself, the claimant could be said to have acted to his own detriment—in the sense that he disabled himself from performance by making alternative, conflicting, arrangements with Lord Ashburton—and there was some support for the view that detrimental reliance was necessary. Thus, in *Danube and Black Sea Railway and Kustendjie Harbour Company (Limited) v Xenos*,[142] a charterer who had been told that the ship-owner would not perform his obligation made another contract with a different ship-owner. The Court of Common Pleas held that the claimant had exercised his option to terminate, but seemed unsure whether the alternative contract was crucial. Erle CJ, the only member of the court who had been involved in *Hochster v De La Tour*, seemed to think not.[143] Williams J, however, gave a rather different exposition of the law[144]:

[139] *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277 (HL).
[140] *Avery v Bowden* (1855) 5 E & B 714, 119 ER 647 (QB); (1856) 6 E & B 953, 119 ER 1119 (Ex Ch).
[141] *Avery v Bowden* (1855) 5 E & B 714, 728; 119 ER 647, 652–3; (1856) 6 E & B 953, 975; 119 ER 1119, 1127 (Cresswell J).
[142] *Danube and Black Sea Railway* (n 138 above) (CP).
[143] *Danube and Black Sea Railway* (n 138 above) 11 CB(NS) 152, 176; 142 ER 753, 763 (CP).
[144] *Danube and Black Sea Railway* (n 138 above) 11 CB(NS) 152, 178; 142 ER 753, 763–4 (CP).

> the cases . . . have fully established, that, if before the time for the performance of the contract arrives, one of the parties thereto not merely asserts that he cannot or will not perform it, but expressly repudiates and renounces it, the party to whom the promise is made may treat that as a breach of contract, at his option; at all events, where he has in consequence thereof acted so as to interfere with the performance of the contract on his part according to its original terms.

Byles J held a similar view. It was 'plain', he said[145]

> that if, in consequence of that renunciation of the contract by Xenos, the company were induced to incur liability and expense, and, still more, to make another contract for the transport of their goods by another vessel, the defendant must be held bound by it . . . indeed, the law does require that there shall be some act done by the other party to intimate his assent to the renunciation of the contract, beyond his saying so.

Keating J referred back to *Phillpotts v Evans*,[146], in which Parke B had said that a refusal to perform before the date for performance was not a breach.

> What distinguishes this case from *Phillpotts* [he explained,] is, that here there is the strongest evidence of the company having acted upon the refusal of Xenos to perform his contract.[147]

The case went on to the Exchequer Chamber,[148] but the judgment was, unfortunately, very short, and did not deal expressly with the question of detrimental reliance. The judges may, however, have been hinting at a preference for the view of Erle CJ when they said that

> [u]pon receiving notice from Xenos that he would not receive the cargo upon the terms agreed upon, the company had a right at once to treat that as a breach.[149]

'At once' might suggest that there was no need for detrimental reliance.

It is submitted that the view of Erle CJ was the more convincing. The need for detrimental reliance had indeed been emphasised in *Hochster v De La Tour*, but only in the claimant's arguments; the judgment, as we have seen, proceeded on a different, wider basis. A vital part of that basis was that the claimant should take all reasonable steps to mitigate his loss. But it was not necessary, in order to have a claim under the principle in *Hochster*, to show that those steps had been successful. On the contrary, if the steps had been unproductive, the award of damages would be larger. In other words, detrimental reliance clearly was relevant to the *Hochster* principle, but it was relevant only to mitigation of loss, not to whether liability arose at all.

The fact that liability under *Hochster* could only arise where the claimant exercised his right to end the contract also gave rise to two further questions. The first concerned a matter of substance: Was *Hochster* confined to situations where

[145] *Danube and Black Sea Railway* (n 138 above) 11 CB(NS) 152, 180–81; 142 ER 753, 764 (CP).
[146] *Phillpotts v Evans* (n 68 above).
[147] *Danube and Black Sea Railway* (n 138 above) 181, 765 (CP).
[148] *Danube and Black Sea Railway* (n 138 above) (Exch Ch).
[149] *Danube and Black Sea Railway* (n 138 above) 13 CB(NS) 825, 827; 143 ER 325, 326 (Exch Ch).

what the defendant expressed the intention to do would, if carried out, have given the claimant a right to terminate? The answer, given in *Johnstone v Milling*,[150] was 'Yes'. There it was said that the renunciation of the landlord's covenant to rebuild demised premises could not give rise to liability under *Hochster*, since an actual breach of that covenant would not entitle the tenant to terminate the lease. In *Afovos Shipping Co SA v Romano Pagnan and Pietro Pagnan, The Afovos*[151] Lord Diplock went further, holding that the doctrine of anticipatory breach required a threatened 'fundamental' breach,[152] as distinct from the threat to breach a term which the parties had merely agreed should give rise to a right to terminate. There has been no challenge to this rule, and it is submitted that the basic position, as set out in *Johnstone v Milling*, has considerable logical force: it would make little sense to allow a claimant to terminate the contract for a threatened breach if the actual breach itself would not have entitled him to terminate. But it is not clear that Lord Diplock's extension of the doctrine is equally convincing: if the parties choose to raise a term to the status of a condition, it seems sensible to attach to that term all of the consequences that attach to conditions arising by force of law.[153] If the parties were prepared to agree that a failure to satisfy the term should give the innocent party the right to terminate, it is difficult to see why a renunciation of that term should not give rise to the same rights.

The second question concerning termination was, on the face of it, merely about terminology. It arose because, whilst the courts accepted that there could be no liability under *Hochster* unless there was termination, it was not clear how this position should be encapsulated. One possibility was to say that the breach was not 'complete'[154] until acceptance by the other party. Another possibility, advanced by Bowen LJ in *Johnstone v Milling*,[155] was to say that the declaration of intention was not a breach at all[156]:

> It would seem on principle that the declaration of such intention by the promisor is not in itself and unless acted on by the promisee a breach of the contract; and that it only becomes a breach when it is converted by force of what follows it into a wrongful renunciation of the contract. Its real operation appears to be to give the promisee the right of electing either to treat the declaration as brutum fulmen, and holding fast to the contract to wait till the time for its performance has arrived, or to act upon it, and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. But such declaration only becomes a wrongful act if the promisee elects to treat it as such.

[150] *Johnstone v Milling* (1886) 16 QBD 460 (CA).
[151] *Afovos Shipping Co SA v Romano Pagnan and Pietro Pagnan, The Afovos* [1983] 1 WLR 195 (HL).
[152] *Ibid* 203.
[153] *Bettini v Gye* (1876) 1 QBD 183.
[154] *Avery v Bowden* (1855) 5 E & B 714, 722; 119 ER 647, 650 (Watson, Atherton and Mellish, counsel for the defendant).
[155] *Johnstone v Milling* (n 150 above).
[156] *Johnstone v Milling* (n 150 above) 472–3.

In the same case Lord Esher MR went further, being driven to explain the requirement for acceptance in terms of rescission. After referring to *Hochster*, he said[157]:

> the doctrine relied upon has been expressed in various terms more or less accurately; but I think that in all of them the effect of the language used with regard to the doctrine of anticipatory breach of contract is that a renunciation of the contract, or, in other words, a total refusal to perform it by one party before the time for performance arrives does not, by itself, amount to a breach of contract but may be so acted upon and adopted by the other party as a rescission of the contract so as to give an immediate right of action. When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not of course amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission.

This had gone beyond a mere search for appropriate terminology; it had become an exercise in reclassification.

Of course, it might not often matter exactly what terminology was used to get to the result. But sometimes it could matter. For instance, if an issue arose about jurisdiction, it could be crucial to know where the breach occurred: was it when a letter expressing the intention not to perform the contract was posted abroad, or when it was received in England? In *Cherry v Thompson*,[158] which predated *Johnstone v Milling*, it was held that the breach occurred on posting. And, although that analysis was difficult to reconcile with Bowen LJ's approach (unless one gave the acceptance some retroactive effect) and inconsistent with Lord Esher MR's (which denied a breach), it was followed in later cases.[159]

The root of the problem over terminology could be traced back to *Hochster v De La Tour*. There the court had made clear how important it was that the remedy depended on termination, but the reason given was not one of legal analysis. Rather, reason (or rationality) called for a rule which would liberate the claimant from the restrictions of his now useless contract, and allow him to make the best of his opportunities elsewhere. This reason had no obvious legal equivalent. Its closest legal counterpart was the doctrine of mitigation; but mitigation had no role unless there had already been a breach. Perhaps it would have been better if later courts had expressly recognised that *Hochster v De La Tour* created a new species of breach of contract, for which no action would lie unless the innocent party terminated. Certainly that would have been preferable

[157] *Johnstone v Milling* (n 150 above) 467.
[158] *Cherry v Thompson* (1872) LR 7 QB 573.
[159] *Holland v Bennett* [1902] 1 KB 867 (CA); *Mutzenbecher v La Aseguradora Espanola* [1906] 1 KB 254 (CA); *Martin v Stout* [1925] AC 359 (HL).

to the awkward attempts to force the doctrine into some existing category: such an approach was at best inelegant, and at worst potentially misleading.

3. The Basis of the Rule

The cases dealt with so far in this Part all acknowledged *Hochster v De La Tour* as good law, whilst trying to expound and develop its principles. But judicial approval of the decision was not universal, and in *Frost v Knight*[160] the Court of Exchequer advanced a series of criticisms of the decision which, in its view, showed that the case had been wrongly decided.

Frost v Knight involved facts which were obviously suited to the application of anticipatory breach: the parties had agreed to marry on the death of the defendant's father (who disapproved of the match); but, before that unhappy event, the defendant renounced the engagement. Kelly CB, who gave the leading judgment, was not unsympathetic to the claimant's situation,[161] but he was unconvinced that she could have a remedy for breach of contract. The fundamental difficulty, in his view, was that no contractual obligation had been breached[162]:

> to say that the contract is broken, is simply to utter an untruth. One contracts in 1870 to pay another 1000l on the 1st of January 1871. To say that the contract is broken before the year 1870 is at an end is undeniably and self-evidently untrue.

That, he continued, was as true of the facts of *Hochster v De La Tour* as it was of the case before him. Lord Campbell's judgment 'will be found', he said[163]

> when carefully considered, to amount to no more than an argument upon the reasonableness of affording some remedy to the plaintiff, where, by reason of the declaration of the defendant that he would not take him into his service when the 1st of June should arrive, he was obliged either to remain unemployed until the 1st of June, and lose the opportunity of obtaining another employment, or to accept any other engagement that might be offered to him and so disentitle himself to maintain an action, on the ground that he could not aver that he was ready and willing to perform his part of the agreement.

In short, the courts had introduced a 'fiction'[164] in order to create a remedy. Channell B expressed his agreement.[165]

When the case was heard by the Exchequer Chamber,[166] however, *Hochster v De La Tour* was restored. Cockburn CJ made it clear that

[160] *Frost v Knight* (1870) LR 5 Exch 322 (Ex).
[161] *Ibid* 336: 'the painful and embarrassing situation in which she has been placed by the declaration made to her by the defendant'.
[162] *Frost v Knight* (n 160 above) 327.
[163] *Frost v Knight* (n 160 above) 329.
[164] *Frost v Knight* (n 160 above) 331.
[165] *Frost v Knight* (n 160 above) 337.
[166] *Frost v Knight* (1872) LR 7 Exch 111 (Ex Ch).

> the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it.[167]

He also explained that this was not a mere matter of authority: the rule in *Hochster* operated 'for the common benefit of both parties'.[168]

But, although the Exchequer Chamber had disapproved the decision of the court below, the criticism that the *Hochster* principle rested on a 'fiction' did not disappear. Since the doctrine was now too well-established to be abandoned, the concern about fiction prompted judges to identify some other basis for the rule. The explanation that established itself was that the defendant's declaration allowed the claimant to treat his future breach as inevitable, and sue him for it in advance.[169] Thus, in *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos*[170] Mocatta J said that[171]

> the doctrine of anticipatory breach is an artificial one. It may be said to be one of the legal fictions which remains very much alive. At the date of a renunciation and its acceptance there is in truth no actual breach of contract, since the time for its performance has not yet arrived.

He went on to explain that this artificiality caused difficulties[172]:

> Once there is a renunciation and an acceptance of it, there is in the eyes of the law a breach and the contract is at an end, but the assumed and in law inevitable failure to perform is one at the date in the future when performance would have been required had there been no anticipatory breach. It is in relation to that assumed future breach of contract, which by law is anticipated, that damages have to be assessed.

When the case reached the Court of Appeal Lord Denning MR was quick to point out that Mocatta J had misunderstood the doctrine. 'The renunciation itself is the breach',[173] he said, and Megaw LJ agreed.[174] Edmund Davies LJ, on the other hand, seemed to accept the inevitable future breach argument when he said that the claimant's argument was mistaken because it required the court to 'anticipate not only a breach, but the *worst* breach'.[175] In *Afovos Shipping Co SA v Romano Pagnan and Pietro Pagnan, The Afovos*[176] Lord Diplock also seemed to support the inevitable future breach analysis, when he said that the effect of renunciation was that

[167] *Ibid* 113.
[168] *Frost v Knight* (n 166 above) 113.
[169] *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401 (QB).
[170] *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1971] 1 QB 164 (QB & CA).
[171] *Ibid* 182.
[172] *The Mihalis Angelos* (n 170 above) 182.
[173] *The Mihalis Angelos* (n 170 above) 196.
[174] *The Mihalis Angelos* (n 170 above) 209–10.
[175] *The Mihalis Angelos* (n 170 above) 201.
[176] *Afovos Shipping Co SA v Romano Pagnan and Pietro Pagnan, The Afovos* [1983] 1 WLR 195 (HL).

> the party not in default need not wait until the actual breach; he may elect to treat the secondary obligations of the other party as arising forthwith.[177]

It is submitted that this recourse to ideas of inevitable future breach was both unnecessary and unconvincing. It was unnecessary because the principle in *Hochster v De La Tour* did not rest on a fiction. It rested, as the court in *Hochster* had made clear, on an implied term that the parties would not act to each other's prejudice pending performance. Of course, one might disagree with the court's readiness to imply such a term,[178] but that is a different question. The inevitable future breach explanation was also unconvincing. Not only was it highly artificial, it also missed the point. In situations such as *Hochster v De La Tour*, for instance, the future breach was not inevitable: the defendant might change his mind after all. The point was that the claimant should not be obliged to wait around to see; he should be allowed (and encouraged) to seek alternative employment.

E. CONCLUSION

Albert Hochster went on to become an art dealer and importer, trading at 26 Gerrard Street in London[179]; the theft of two Dresden china ornaments from those premises prompted his only other recorded activity as a litigant.[180] Of Edgar de la Tour there is no trace. But the litigation that brought these two men to the Court of Queen's Bench has done anything but fade into obscurity, and it fully deserves its continuing landmark status. If anything, its importance has tended to be underestimated as a result of misplaced criticism and the pursuit of terminological orthodoxy. In particular, the criticisms and terminological obscurity introduced by later courts may have inhibited its use as a general principle. The ideas behind it could, for instance, cast light on the proposition that a party can foist unwanted contractual performance on another.[181] The principle of not acting to the other party's prejudice pending performance might suggest a broader general idea about good faith. In short, once the full significance of *Hochster v De La Tour* is appreciated, it can be seen not only as *the* landmark case in anticipatory breach, but also as having the potential to be a landmark for other areas of contract law as well.

[177] *Ibid*, 203.

[178] Contrast the view of Mustill, 'Anticipatory Breach of Contract: The Common Law at Work' (n 24 above), who (at 42) describes the implied term as 'fanciful' with Smith, 'Anticipatory Breach of Contract' (n 137 above) at 178: 'well within the modern doctrine of implied terms'.

[179] Exhibition Culture in London 1878–1908 website: www.exhibitionculture.arts.gla.ac.uk. The building is now Gerrards Corner restaurant.

[180] *R v Dixon*, The Times (6 August 1878) 10.

[181] *White & Carter (Councils) Ltd v McGregor* [1962] AC 413 (HL).

6

Taylor v Caldwell (1863)

CATHARINE MACMILLAN

A. INTRODUCTION

A LANDMARK CASE IS one which stands out from other less remarkable cases. Landmark status is generally accorded because the case marks the beginning or the end of a course of legal development. *Taylor v Caldwell*[1] is regarded as a landmark case because it marks the beginning of a legal development: the introduction of the doctrine of frustration into English contract law. This chapter explores the legal and historical background to the case to ascertain if it is a genuine landmark. A closer scrutiny reveals that while the legal significance of the case is exaggerated, the historical significance of the cases reveals an unknown irony: the case is a suitable landmark to the frustration of human endeavours. While the existence of the Surrey Music Hall was brief, it brought insanity, imprisonment, bankruptcy and death to its creators.

B. VICTORIAN PLEASURES

1. The Pleasure Gardens

The tale of the Surrey Music Hall reflects the development of entertainments and pleasures in Victorian London. There was a 'leisure revolution' in Victorian England,[2] brought about by decreased working hours and the increased free time spent in new, more pleasurable, fashions. It has been noted that 'the market constituted the chief generator of cultural activity in Victorian Britain'.[3] Cultural pursuits were dependent upon private finance and this dependency underpins the history of the Surrey Music Hall. The Music Hall arose from the

[1] *Taylor v Caldwell* (1863) 3 B & S 826, 122 ER 309; SC 32 LJQB 164; 8 LT 356; 11 WR 726 (Court of Queen's Bench). All further references are to the report at 3 B & S.

[2] See, eg, J Lowerson and J Myerscough, *Time to Spare in Victorian England* (Trowbridge/Esher, The Harvester Press, 1977); KT Hoppen, *The Mid-Victorian Generation 1846–1886* (Oxford, Clarendon Press, 1998) chs 10 and 11.

[3] Hoppen, *The Mid-Victorian Generation 1846–1886* (n 2 above) 374.

Surrey Zoological Gardens in Newington, Surrey, an area then just outside the metropolis of London. The Zoological Gardens began under the auspices of Edward Cross. In 1831 Cross brought his menagerie of animals from the Strand to the grounds of Walworth Manor House. These he converted into zoological gardens which contemporaries considered more impressive than those of Regent's Park. The principal attractions were the animals, the gardens, paintings of famous scenes and portrayals of dramatic events such as the eruption of Mount Vesuvius.[4] Dickens described the pleasures of a similar garden[5]:

> We love to wander among the illuminated groves, thinking of the patient and laborious researches which had been carried on there during the day, and witnessing their results in the suppers which were served up beneath the light of the lamps, and to the sound of music, at night. The temples and saloons and cosmoramas and fountains glittered and sparkled before our eyes; the beauty of the lady singers and the elegant deportment of the gentlemen, captivated our ears; a few hundred thousand of additional lamps dazzled our senses.

In 1847, after Cross's retirement, the lease for the property was acquired by Cross's assistant, William Tyler. Tyler purchased the lease with the aid of a mortgage and continued to operate the business in a largely profitable fashion until the mid-1850s, at which point the business of running the Zoological Gardens ran into difficulty. The takings were not so great as they had been and Tyler's mortgagee became concerned. A plan was devised to transform the gardens into a new endeavour. The Royal Surrey Gardens Company (Limited) was created to realise the plan to create a new series of extravagant amusements centred around a series of musical concerts. While the mid-Victorian Londoner's taste for pleasure gardens was waning, his taste for music in the form of promenade concerts was increasing.

2. Promenade Concerts

Promenade concerts originated as a form of entertainment popular in European capitals, notably Paris, Vienna and London, during the 1830s. The promenade concert was entertainment designed not for a limited number of cultured concert-goers but for ordinary people who wanted pleasant entertainment in attractive surroundings at a comparatively low price. The audience was not seated, but standing and able, if they chose, to move about. Partly as a result of the introduction of promenades, the number of concerts increased dramatically in European capitals. Although the London promenades were never to involve

[4] Similar events followed. Mount Vesuvius was replaced in 1839 with 'Iceland and Mount Hecla', followed by the 'City of Rome' (which occupied five acres of the gardens), the Temple of Ellora', 'London during the Great Fire', the 'City of Edinburgh', and 'Napoleon's passage over the Alps'.

[5] C Dickens, 'Vauxhall-Gardens by Day' in *Sketches by Boz* (London, Penguin Books, 1995) 153–5.

ballroom dancing, as the Viennese promenades did, the link with dance was clear as the conductors provided a programme filled with waltzes, polkas and quadrilles. Key to the success of the promenade was the persona of the musical conductor, who was also generally a composer. Promenades appeared in London towards the end of the 1830s as imitations of the immensely popular promenades of the Parisian Phillipe Musard.

The man who gave his name to the early London promenades was Louis Jullien.[6] Born in Sisteron, France in 1812, Jullien received extensive musical tutelage from his father, a military bandmaster. In his teens, Jullien served successively in the French navy and army. Following his departure, or possibly desertion, from the army, Jullien made his way to Paris in the early 1830s. There he studied music at the Conservatoire, leaving with an undistinguished record. He began to compose quadrilles and to conduct promenade concerts in Paris. Jullien was a dandy: above all, he was a showman and a crowd pleaser. He was able to entertain his audience in a way unmatched by his competitors and enjoyed great success in Paris in the final years of the 1830s. He arrived in London in 1840 to provide promenade concerts. Londoners loved him, for Jullien[7]

> not only conducted but acted. He was ceremonious, grandly emotional. He would appear in a demonstrative shirt-front, conduct with a demonstrative beat, would be warmed by the excitement of a quadrille into standing up on his gilt chair, wherein at the conclusion of a symphony, he would sink back with demonstrative exhaustion ('charming languor'). He was melodramatic, transpontine.

Jullien's technique was to present his show on a massive scale, with a huge orchestra, numbering in the hundreds and sometimes accompanied by an enormous choir. He was keen to present the leading singers of the day. His programme would consist of light music, principally dance music, interspersed with more serious pieces by composers such as Beethoven, Mozart and Mendelssohn. He sought to entertain people who would never attend a more serious concert and advertised his concerts in a manner unmatched by his competitors. Jullien struggled in London to find a venue large enough to house all of his performers and his ever-growing audiences. In the summer of 1845 Jullien began his long association with the Surrey Gardens when he held his first *Concert Monstre* to commemorate the accession of Queen Victoria, similar in scale and grandeur to those given in Paris at the *Jardin turc* and the *Champs Elysées*. Jullien conducted 300 instrumentalists on an outside platform to entertain an audience of 12,000 people. Jullien's concerts had an important cultural significance and became 'a feature of London life . . . in a way that could not be claimed by any other musical institution'.[8]

[6] A Carse, *The Life of Jullien* (Cambridge, W Heffer & Sons, 1951).

[7] H Davison, *From Mendelssohn to Wagner, being the memoirs of JW Davison* (London, WM Reeves, 1912) 109.

[8] Carse, *The Life of Jullien* (n 6 above) 65.

The 1850s were a critical time for the development of music in England. It has been described as a time during which there was a movement of 'musical idealism'.[9] This idealism was a part of the political context of its time; a kind of musical politics which 'attacked both aristocratic and bourgeois values'.[10] There was a shift from benefit concerts, high culture and virtuosi towards a varied classical repertory and music defined by popular taste. The promenade concerts played an important role in this process. They attracted a different audience than earlier concerts, an audience composed of some artisans and occasionally working men, but mainly people from the lower and middle levels of the middle class. The personalities who led these concerts—Johann Strauss in Vienna, Philippe Musard in Paris and Louis Jullien in London—showed the enormous commercial potential for classical music that lay in the middle class.[11]

3. The Surrey Music Hall

It was to tap into this enormous commercial potential that the concert hall at the Surrey Gardens was constructed. Because of a lack of concert halls, Jullien generally held his promenades in theatres, a device which was not considered satisfactory by either performers or audiences. By 1855, however, plans were afoot to change that. A group of promoters under the direction of James Coppock, a solicitor and Parliamentary election agent, resolved to take advantage of the new Joint Stock Company Acts to develop the Surrey Zoological Gardens. Jullien appears to have been involved with the promoters from the outset, although he was never involved in the management of the business.[12] The prospectus outlined the venture[13]:

> it is clear, from the great success of last season that much larger results may be achieved, and that the public require accommodation beyond that which any single proprietor would venture to give. The application of capital, with liberal but judicious outlay, is imperatively called for; and now, by the Limited Liability Act, no danger can accrue to the parties supplying it.

In November 1855 the animals in the menagerie were sold by auction to ready the site for further development,[14] and by January 1856 the Royal Surrey Gardens Company (Limited) was formed. In March it put out its prospectus and of the 4,000 shares offered (at £10 each) 3,740 were applied for and 3,256 were taken up. The prospectus outlined the development plans:

[9] W Weber, *Music and the Middle Class: the Social Structure of Concert Life in London, Paris and Vienna between 1830 and 1848*, 2nd edn (Aldershot, Ashgate, 2004) 152.

[10] *Ibid* xxii.

[11] Weber, *Music and the Middle Class* (n 9 above) 128.

[12] It is not clear why Jullien was not involved in the management of the concern, nor why he was never a director of the resulting company. It may have been because of his earlier bankruptcy in 1848, which arose from a failed attempt to create an English national opera.

[13] *The Times* (24 August 1857) 9.

[14] By auction on 27 November 1855: *The Times* (14 November 1855) 2.

> it is proposed to erect buildings of a character and magnitude to command the attention of the public, comprising a music-hall capable of accommodating 10,000 people.[15]

The entertainments would extend beyond the Music Hall to encompass conservatories, aviaries, aquaria, paintings, 'exhibitions of various kinds' and fireworks, all 'affording amusement to promenaders'.[16] Music was, however, central to the venture from its very outset and Jullien was to provide it. By the end of April the company was organised with limited liability and the building works were reported as making rapid progress.[17]

The Music Hall was the central feature of the redevelopment of the Surrey Gardens. In the words of one contemporary,

> a scheme was hatched for the transformation of the Zoological Gardens into a sort of Crystal Palace with a gigantic music hall.[18]

The construction of an enormous concert hall was necessary to accommodate Jullien's massive orchestral ensembles and to provide sufficient space for the thousands who came to hear the promenade concerts. The promoters chose Horace Jones as the architect. Victorian architecture is noted by the enormous proliferation of architectural styles; Jones favoured Gothic styles and what he described as 'Italian'.[19] Victorian architecture was marked by new choices of building materials. Railways had made possible the delivery of different forms of stone and brick, and technological and engineering advancements made it possible for architects to construct buildings with the use of iron. Victorian architects of the mid-century were challenged to meet the new demands of use for buildings and to balance these demands with advancing technology and the proliferation of different styles.[20] Jones's work was revolutionary in employing structural, and sometimes decorative, ironwork in constructing his buildings.[21] The Surrey Gardens Music Hall was one of the great ironwork constructions of London. It was constructed just at the very end of the time-period in which these constructions began to go into decline because of changing building regulations in London. These building regulations actively discouraged the use of exposed-iron construction; the regulations were premised on concerns about oxidisation and fragmentation. There was also great concern about fire hazards in the

[15] *The Times* (24 August 1857) 9.

[16] *Ibid*.

[17] *The Times* (21 April 1856) 7. The directors of the new company were Messrs Bain, Beale, Chappell, Coppock, Holmes and Wyld.

[18] Davison, *From Mendelssohn to Wagner* (n 7 above) 216–17.

[19] Pevsner had his doubts about this designation in some instances: S Bradley and N Pevsner, *London 1: the City of London* (London, Penguin Books, 1999) 339.

[20] For a discussion of these challenges, see J Mordaunt Crook, *The Dilemma of Style, Architectural Ideas from the Picturesque to the Post-Modern* (London, John Murray, 1987) ch 4.

[21] Something of his style can still be observed in London from his construction of Smithfield Market (completed in stages between 1866–83) and his reconstructions of Billingsgate Market (1874–78) and Leadenhall Market (1880–81). The Music Hall was his first major commission.

ironwork buildings; in addition to the increasingly stringent building regulations, it was also difficult to obtain adequate fire insurance for the buildings. In architectural terms, the destruction of the Surrey Gardens Music Hall by fire went some way to discrediting iron architecture, particularly in London.[22] Jones himself never gave up on the use of ironwork as a building material or on Gothic as a style: his last construction was the design of the London landmark, Tower Bridge.[23]

The construction of Jones's gigantic music hall proceeded very quickly and it was complete by the spring of 1856; the cost was immense—some £25,000.[24] The Surrey Gardens Music Hall was suitably enormous: at 170 feet long, 60 feet wide and 72 feet high,[25] it was larger and more suitably constructed than any of its rivals. It was considerably better than its nearest rival in size, Exeter Hall on the Strand, which 'possessed every fault that a building for public gatherings could possibly have'.[26] The Music Hall held 10,000 people and a further 2,000 could hear music from balconies and verandahs: its construction greatly facilitated the ambulatory nature of promenade concerts. The building was judged a great success by observers, both in its construction and in its suitability for music. The *Athenaeum* described the building as one which defied all 'architectural proprieties' but conceded that 'no one could have expected that a building so floridly decorated should have turned out so capital a music-room'.[27] *The Times*'s music critic gushed over its acoustic properties:

> the adaptation of the Surrey Music-hall for sound was placed beyond a doubt. In this essential no other building in Great Britain can be compared with it.[28]

The Music Hall opened on 5 July 1856 with an inaugural concert organised and conducted by Jullien. Jullien did not disappoint the thousands who turned up for a day of music, and chose that Victorian favourite, Handel's *Messiah*, as the work to be performed. Appropriately enough, amongst the singers was Mr Sims Reeves, the man who figured at the end of the Music Hall. *The Times* declared Jullien's efforts to be 'one of the best performances of Handel's masterpiece ever heard in London'.[29] Jullien conducted an enormous orchestra composed of musicians from most of London's orchestras; the chorus was similarly immense, comprised of men and women from not only London choirs but from all the major cities of the north, brought to the metropolis by the new railways. '[R]arely, indeed, has there been a more imposing choral

[22] Crook, *The Dilemma of Style* (n 20 above) 124.

[23] Tower Bridge conceals its ironwork structure within its Gothic masonry. The design was not without its contemporary critics; see Crook, *The Dilemma of Style* (n 20 above) 123.

[24] *The Times* (24 August 1857) 9. The cost included the refurbishment of the gardens.

[25] Davison, *From Mendelssohn to Wagner* (n 7 above) 217.

[26] CE Pearce, *Sims Reeves, Fifty Years of Music in England* (London, Stanley Paul & Co, 1924) 111.

[27] Quoted in Pearce, *Sims Reeves, Fifty Years of Music in England* (n 26 above) 191.

[28] *The Times* (16 July 1856) 9

[29] *Ibid*.

assemblage'.[30] Following the afternoon's *Messiah* was an evening concert comprised of vocal and instrumental music conducted by Jullien,

> who according to his established and respected custom, mingled with the lighter and more ephemeral pieces certain compositions of the great masters.[31]

The crowds loved it and *The Times* pronounced it a most 'auspicious beginning to a new and important undertaking'.[32] It is only with hindsight that the massive thunderstorm which ended the evening appears foreboding.

The Music Hall enjoyed a good beginning and was used to host events requiring accommodation for large numbers of people. The directors of the Royal Surrey Gardens Company donated the use of the Music Hall and Gardens for a dinner to honour the Guards upon their return from the Crimea. An estimated 20,000 spectators attended and the Company's directors turned admission receipts of £1,100 over to the Guards.[33] The Music Hall received use of a spiritual nature as it was also hired out on Sunday nights to Charles Spurgeon. Spurgeon was one of the great Victorian Baptist ministers, who 'has by a style of oratory peculiar to himself become the object of great popularity'.[34] Spurgeon had attracted numbers so great that he soon outgrew his chapel and moved to the 5,000-seat Exeter Hall. He rapidly filled this hall and only the Music Hall could provide appropriate accommodation. It was during a sermon in October 1856 that the inherent dangers of such a large building became apparent. With upwards of 14,000 people in the building, concerted and false cries of 'fire' were made. The result was a mass panic as people were unable to exit the building: seven people died and many others were seriously injured. The 'dreadful accident' indicates how fortunate it was that the building was empty when it did later burn down.[35]

While the Hall was regularly let for these mass events, the principal entertainments were Jullien's enormous promenade concerts and the diverse amusements linked to them. It is uncertain whether Jullien had persuaded the directors to establish the Royal Surrey Gardens or whether the directors persuaded Jullien to enter into a financial and contractual relationship with the Company. At the outset of the relationship, each claimed to have persuaded the other and at the end of the relationship each side blamed the other for the problems that arose. Jullien was appointed as the Director of Music and Conductor, and he undertook to organise promenade concerts in July, August and September of

[30] *The Times* (n 28 above).
[31] *The Times* (n 28 above).
[32] *The Times* (n 28 above).
[33] *The Times* (26 August 1856) 7.
[34] *The Times* (20 October 1856) 8.
[35] Fire was a constant danger and concern in such large halls. The Report of the Select Committee on Theatrical Licenses and Regulations (1866) (no 373) stated that it was the opinion of the Committee that it was desirable that any Act of Parliament regulating the licensing of theatres, music halls and places of entertainment should render compulsory the inspection of such places as to their stability of structure, due security against fire and the means of ingress and egress: iii, para 5.

each year. He was to be paid for these concerts by the Company. Jullien, in turn, purchased large numbers of shares in the Company. Each side depended upon the other for the venture to be successful: Jullien had to have a large concert hall and the Music Hall was the largest concert hall in the metropolis. The Company, in turn, needed someone who could draw large crowds on a nightly basis. It was this dependency upon a single man that was to cause problems in the functioning of the Surrey Gardens, as Jullien proved to be the only promoter remarkable enough to make the Music Hall function profitably. His concerts were grand affairs for a modest price. His extravagant musical fêtes lasted most of the day and, for a shilling,[36] customers could enter the grounds at three in the afternoon and partake of all the pleasures of the gardens and their amusements.[37] Following a firework display beside the lake, the fêtes ended at 10 pm. Jullien combined the rare ability of bringing in masses of people at low prices whilst simultaneously pleasing music critics. Respectable people attended promenade concerts; continual concern was voiced about the possible attendance of thieves[38] or prostitutes.[39] *The Times* carefully pointed out how well-behaved Jullien's audiences were. The Victorians supported leisure as a source of moral and personal improvement to those who partook of it. On this account, the promenades were regularly applauded:

> [T]he Royal Surrey Gardens, with their new hall and their musical director, may be the means eventually of doing a great deal for the moral culture and improvement, as well as for the mere healthy relaxation of the masses.[40]

Jullien engaged the leading singers of the day and foremost amongst these was Sims Reeves. Jullien was the first to provide Sims Reeves with a leading operatic character before a London audience at Drury Lane in 1847. This appearance was praised by Hector Berlioz who wrote that

> Reeves has a beautiful natural voice, and sings as well as it is possible to sing in this frightful English language.[41]

[36] Or the purchase of a £10 share in the Company entitled the bearer to a season's admission.

[37] The amusements were an eclectic mix, indicative of the Victorians's concern to educate combined with their fascination with the bizarre. An indication of the sort of amusements available can be seen in the following extract: 'The exhibitions outside, too numerous to particularize in detail, comprised, among other things, the performances of a military band, an old English morris dance, Ethopian serenaders. The brothers Elliott, with their remarkable "classical delineations" on the "double trapeze"; a complete Spanish ballet . . . the "poses gymnastiques" of Herr Connor, who threw no less than 54 back somersaults in succession; 10 balloons of fair dimensions, "semaphorie and telegraphic", various entertainments, musical and otherwise on the lake; and . . . a "*café chantant*," . . . in which Miss Rose Braham and other vocalists took part, much to the pleasure of those who preferred the open air in the gardens to the heated atmosphere of the Music-hall. The whole concluded with a grand display of fireworks, with the extra attraction of Mademoiselle Pauline Violanti . . . upon the tight rope across the lake': *The Times* (25 August 1857) 12.

[38] See, eg, *The Times* (4 September 1856) 10.

[39] See, eg, the application for a licence renewal for the Surrey Gardens in *The Times* (21 October 1858) 9.

[40] *The Times* (19 July 1856) 9.

[41] Quoted in Sims Reeves, *His Life and Recollections written by Himself* (London, Simpkin Marshall and London Music Publishing Co, 1888).

Sims Reeves became the leading tenor of his day, one for whom Sullivan wrote parts, a favourite of Queen Victoria's,[42] and, while popular for his operatic parts in his early years, he increasingly turned to oratorio and concert work which was performed before mass concerts. Sims Reeves also acquired notoriety for being absent from performances. Sir Frederick Pollock, himself a Wagnerian enthusiast but whose parents were keen fans of Sims Reeves, wrote that as to Sims Reeves's appearing at any given performance 'there was a constant element of doubt until the last moment'.[43] While Pollock attributed these absences to a great concern on the part of Sims Reeves to preserve his voice[44] and Sims Reeves himself vociferously defended his absences on the grounds of illness,[45] the likely reason for the uncertainty of his appearances was his nerves.[46] As we shall see, the uncertainty of Sims Reeves' appearances and the state of his health was to have a bearing on the arguments in *Taylor v Caldwell*.

The first season of the Surrey Gardens Music Hall was an excellent one. Jullien's concerts met with financial success and critical acclaim[47]:

> [T]hus ended the inaugurative season of a new enterprise which has achieved, notwithstanding the frequent prevalence of unfavourable weather, a success with few precedents, the origin of which, it may be recorded with satisfaction, is principally traceable to the new music-hall and the varied and attractive performance of vocal and instrumental music designed by the experience and directed by the skill and judgment of M. Jullien, whose great distinction is to have been able to show that the public generally may be gratified and amused by the more refined no less than by the commoner manifestations of the musical art. The cheers with which he was greeted, on being recalled at the end of the concert last night, were the expression of a genuine sentiment.

The season was so successful that the Company had stated in their first half-yearly report that they were able to pay a dividend on the paid up capital of five per cent. The actual dividend declared was 10 per cent, the maximum

[42] He sang for her on her birthday in May 1857: Pearce, *Sims Reeves, Fifty Years of Music in England* (n 26 above) 196.

[43] Sir F Pollock, *For My Grandson, Remembrances of an Ancient Victorian* (London, John Murray, 1933) 113.

[44] A point upon which Pollock decided that 'Sims Reeves was justified. Occasional disappointment of an audience was for the gain of a younger generation who would otherwise never have heard him': *ibid*.

[45] See, eg, his letter to the editor in *The Times* (25 February 1869) 12, following a non-appearance which resulted in a lawsuit. More commonly, announcements were made publicly by promoters, eg *The Times* (30 January 1852) 1. Sims Reeves also detested giving encore performances and his indispositions apparently encouraged audiences to demand them. At one of the Surrey Gardens concerts, he refused the audience's repeated calls for an encore and for half an hour the concert would not proceed. Sims Reeves apparently stared the crowd down, stating: 'I'm too much of an Englishman to be beaten when I have right on my side', and waited for the audience to calm down: Pearce, *Sims Reeves, Fifty Years of Music in England* (n 26 above) 212.

[46] The *New Oxford Dictionary of National Biography*, entry for Reeves, (John) Sims.

[47] *The Times* (1 October 1856) 6.

permissible.[48] *The Times* reported that a 'considerable revenue is expected' in the next season.[49]

4. The Music Hall Faces Troubles

To all outward appearances, the next season began well with a 16-day musical festival conducted by Jullien that 'surpassed expectation'.[50] A grand military festival was held for Mrs Seacole, the Creole nurse who had tended the Crimean wounded.[51] Jullien conducted 'a gigantic combination of military music' composed of nine military bands in all,[52] together with his own orchestra and the chorus of the Royal Surrey Choral Society, 'constituting a vocal and instrumental force of little short of 1,000 performers'.[53] Sims Reeves sang ('magnificently') Purcell's 'Come if you dare'. The Company was perceived by the public as a solid endeavour and shares were sought for purchase.[54]

Behind the scenes, however, all was not well with the Company.[55] It was not on as secure a footing as had been thought and it faced stiff competition for audiences when the Crystal Palace began its first Handel Festival.[56] The takings were down and the Company needed money badly. A second ordinary general meeting was held at the beginning of April. It had been announced that ordinary business would be conducted and many shareholders stayed away. Those who attended were kept waiting in the Music Hall until the appointed time for the meeting had expired and were then shown into a room provisioned plentifully with sandwiches and wine. The accounts were simply set out on a table,[57] and before many shareholders had had time to look at them, it was moved that the accounts be received, approved and adopted. By a majority of two votes, the accounts passed. Immediately after the meeting, some shareholders began to examine matters more closely. It transpired that the accounts were in a perilous state. The previous dividend had been provided from the capital. The Company had paid £14,000 for the lease of the Surrey Gardens, a gross overvalue given

[48] *The Times* (16 October 1856) 5.
[49] *Ibid.*
[50] *The Times* (2 July 1857) 5.
[51] Mary Seacole had been 'ruined by the peace which others welcomed with such enthusiasm' (*The Times* (28 July 1857) 10) because she had laid in large stores of supplies and provisions which could not be moved or sold at the end of the Crimean War. She came to England and was rapturously received by the Guards at their dinner the previous year.
[52] *Ibid.* The bands were those of the 1st and 2nd Life Guards, the Royal Horse Guards Blue, the Grenadier Guards, the Coldstreams, Scots Fusileers, Royal Engineers, Royal Artillery, and Marines.
[53] *The Times* (n 51 above).
[54] *The Times* (12 August 1857) 4.
[55] The account is derived from *The Times* (24 August 1857) 8.
[56] Carse, *The Life of Jullien* (n 6 above) 91.
[57] It was later alleged by one of shareholders' leaders that the accounts had, in any event, omitted the mortgage and the unsecured debts: WA Coombe, letter to the editor, *The Times* (1 September 1857) 10.

that the lease had less than 12 years to run.[58] The lease had been purchased from Tyler who had then been able to pay his mortgagee, Mr Coppock, who had been paid in shares and seems to have retained a lien over the property. Prior to this purchase, the lease had been offered for sale for 18 months without any prospective purchasers. Coppock, it will be recalled, was the principal director in the Company. He had assured shareholders, when asked about the lease, that it had a long time to run, some 50 years. What the shareholders also discovered was that any improvements erected on the property, including their grand Music Hall, would become the property of the owner upon the expiration of the short lease. The Company had unsecured creditors to the extent of £11,500. As if this was not sufficiently grave, the property was subject to pay a septennial fine to the Dean and Chapter of Canterbury: £2,000 would have to be paid in five years' time. The directors had declared dividends when there was no money to pay them and, even worse, had carried on with another £4,000 worth of new buildings by Jones when they knew there was no money to pay for them. The second issue of shares, which increased the capital account against the original shareholders, had been made in an attempt to pay for these buildings.

All summer the discontented shareholders, led by a Mr WA Coombe, sought answers from the directors to difficult questions. The entire affair became public in August when the architect, Horace Jones, also a shareholder, sought an order for the winding up of the Company[59] on the ground that £11,500 was owed to creditors and without a shilling of assets. The event came as a 'thunderbolt' to some of the shareholders.[60] The shareholders, led by Coombe, sought an adjournment. The shareholders complained that a great fraud had been worked upon them—principally by Coppock—and that Jones was acting on behalf of the directors in seeking the winding up order. The shareholders' concern was a very real one: if the Company were wound up, it would benefit the directors by removing queries about, and responsibility for, their behaviour: the greatest cost would be to the shareholders who lost their money. The shareholders were angry enough about matters to suggest that certain directors ought to be indicted. The Commissioner adjourned the proceedings to allow the shareholders' committee to meet with the directors in an attempt to restructure the Company.

Jullien announced at the shareholders' meeting that he was the principal unsecured creditor, owed some £6,000. Jullien's position was particularly unpleasant, as he had to pay his musicians and vocalists. The cheques he had received for his salary from the Company had been dishonoured. Whatever the arrangement entered into between the shareholders and the directors, the latter left the running of the Company in the hands of Jullien.[61] Jullien was concluding the season

[58] It was stated in later proceedings that the true value of the lease was probably about £2,000: *The Times* (28 August 1857) 9.

[59] *The Times* (24 August 1857) 9.

[60] *Ibid.*

[61] *The Times* (25 August 1857) 12.

with a grand festival of promenade concerts, complemented by diverse amusements in the gardens. The legal troubles continued. The adjourned hearing before the Commissioner came before him again on 27 August and was, again at the shareholders' request, re-adjourned. The shareholders sought a way to force Coppock and Tyler to disgorge most of their £14,000 and to bring the Company's capital down to a manageable amount.[62] An angry exchange of correspondence between the directors, shareholders and creditors ensued in *The Times*. The creditors met in September to try to protect their interests and those of the shareholders. It was then appreciated that the deed of settlement did not give the directors the power to give bills of exchange in the name of the Company. This was an important discovery because the unsecured creditors were owed £10,000 on bills of exchange, for which the directors were personally liable[63]: a matter subsequently established in court.[64]

Throughout the autumn and early winter of 1857, the shareholders and creditors continued to battle with the directors. It was a protracted and somewhat meaningless affair: it

> might almost as well have been a discussion among a number of the most talkative birds ever contained in the Surrey-gardens.[65]

In November, the first bankruptcy arose out of the affair when a certificate of bankruptcy was granted to the previous owner, Tyler. The Commissioner was very concerned as to the possibility of running the Company on a profitable basis, and urged the parties to put aside feeling and to treat this as business. By mid-December, the two sides reached some agreement. The shareholders' representative stated that they could find no reason for charging the directors with misappropriating money, for the failure was caused by bad management. The hearing was again adjourned to allow settlement with the creditors. The following day, Coppock died of heart failure, apparently brought on by the stress of the affair.[66] Jullien did not conduct his promenade concerts in 1858. It may well be that he had had a falling out with the shareholders who now controlled the Company through Coombe. Coombe's season was not a successful one; the advertisements were small, the entertainments nowhere near as grand as they had been, and by the end of the year, the police alleged that prostitutes were entering the gardens.[67] Ominously, a benefit concert was held for Coombe in September 1858.[68]

[62] The situation is outlined in Coombe's letter to the editor (n 57 above), *The Times* (1 September 1857) 10.
[63] *The Times* (16 September 1857) 10.
[64] The Court of Exchequer found three of the directors so liable in *Eastwood v Bain, Holmes and Coppock*, *The Times* (29 June 1858) 11.
[65] *The Times* (19 October 1857) 9.
[66] *The Times* (21 December 1857) 10.
[67] *The Times* (21 October 1858) 9.
[68] *The Times* (15 September 1858) 1.

In October of 1858 the Company ceased functioning, when Coombe was arrested for debt and imprisoned. He was released in March 1859; the Commissioner thought there was no reason to prolong the imprisonment as there was nothing in his conduct which called for the court's reprehension.[69] The Company was wound up in bankruptcy. Once the Court of Chancery made its decree, the property was advertised for sale by auction.[70] It appears that Caldwell and Bishop purchased the lease of the Surrey Gardens at the auction and were determined to carry on with the promenade concerts.

The difficulty that they faced was that without Jullien it was impossible to sell sufficient tickets to make the venture profitable. A tragic fate befell Jullien as a result of the Company's failures. He was deeply in debt and fled to Paris in May 1859 as a result. Once there, he was arrested and imprisoned for debt until the end of July. Upon his release he disappeared from view. By the beginning of 1860 he was beginning to plan concerts in Paris. He wrote a pitiful letter to his friend Davison, stating that 'if only I can get on my horse again, I shall fall off no more'.[71] He pleaded with Davison to try and get his orchestral manuscripts from the Surrey Gardens' creditors, for without his papers he was like a workman without his tools.[72] Shortly thereafter, Jullien was reported to be indigent to the point of destitution and signs of complete mental breakdown were evident. A Jullien Festival was planned for London in July to assist the conductor; by March, Jullien had been admitted to a lunatic asylum in Paris. He died a few days later, possibly by suicide. The Jullien Festival went ahead to raise money for his destitute widow. Jullien's leading singers and musicians performed without fee; amongst them was Sims Reeves. Had the Surrey Music Hall venture succeeded, contemporary London's promenades would be traced not to Sir Henry Wood but to Jullien.

5. The Demise and Destruction of the Music Hall

Sims Reeves does not seem to have sung again at the Music Hall. He was frequently engaged at Crystal Palace, with its large and successful shows. The Surrey Music Hall, in contrast, struggled greatly. Caldwell and Bishop worked to restore its reputation and the arrangement with the theatrical speculators, Taylor and Lewis, was a part of this endeavour. Caldwell and Bishop were in the final stages of the Hall's refurbishment when disaster struck. Plumbers repairing the roof left for their dinner. The fire they thought had been left in a place of safety set a part of the roof ablaze. A strong wind fanned the flames down the roof. By the time the fire brigades made their way to the site to pump the lake water onto the roof, it was too late. The entire structure burnt down

[69] *The Times* (12 March 1859) 11.
[70] *The Times* (29 April 1859) 16.
[71] Davison, *From Mendelssohn to Wagner* (n 7 above) 242.
[72] Davison, *From Mendelssohn to Wagner* (n 7 above) 242.

within three hours. So determined were Caldwell and Bishop to make a profit that scarcely were the fire engines out of sight

> when the band of the Gardens commenced playing, and an announcement was posted informing the public that the price of admission was one shilling.[73]

The building was so damaged as to be irreparable, although it was fully insured. Given the financial difficulties of running the enormous Hall in Jullien's absence, it is no surprise that it was not rebuilt. It had stood for less than five years. A year later, St. Thomas's Hospital was reconstructed on the site. It is now covered by a small park and a large local authority housing estate.[74]

C. ENGLISH CONTRACT LAW AND IMPOSSIBILITY

When Taylor and Lewis brought their action, the state of English contract law concerned with impossibility was tolerably certain, although not without difficulties. Impossibility arises in two ways: existing impossibility and subsequent impossibility.

1. Initial Impossibility

English law recognised that a contract to perform something physically impossible resulted in a void contract in cases of a patent absurdity, eg

> to overturn Westminster Hall with his finger; or to make the Thames overflow Westminster Hall; or to drink up the sea; or touch the sky with his hand.[75]

This rule only applied when the initial impossibility was evident to all of the parties at the time of contracting. If the impossibility was not evident at the time of contracting, then the party who had undertaken to perform the impossible was liable in damages for the non-performance of this impossibility. In *Thornborow v Whitacre*,[76] Holt CJ stated that

> where a man will for a valuable consideration undertake to do an impossible thing, though it cannot be performed, yet he shall answer damages.[77]

The court was of this view because the impossibility was only as to the promisor's ability to perform that which he had undertaken to perform, and 'the defendant ought to pay something for his folly'.[78] The contract had to be lawful to be valid; a contract to perform an illegal act was void

[73] *The Times* (12 June 1861) 5.
[74] It is not far from the Oval Cricket Ground.
[75] JJ Powell, *Essay upon the Law of Contracts and Agreements* (London, J Johnson and T Whieldon, 1790) 161.
[76] *Thornborow v Whitacre* (1705) 2 Lord Raym 1164, 92 ER 270.
[77] *Ibid* 2 Lord Raym 1164, 1165; 92 ER 270, 271 (Holt CJ).
[78] *Ibid*.

> for it would be absurd that an obligation, which derives its sanction from the law, should put us under a necessity of doing something which the law prohibits.[79]

In short, if the initial impossibility arose from a patent absurdity or a prohibition of law, the contract was not good; if the impossibility arose from an undertaking provided by the promisor, he was liable.

2. Subsequent Impossibility

In cases where the impossibility of performance was subsequent to the contract's formation the rule was harsh. Subsequent impossibilities were governed by *Paradine v Jane*.[80] The case concerned the action of a landlord for rent due from his tenant pursuant to his lease. The tenant defended this action on the ground that he had been dispossessed from his land by an alien enemy of the king. The plaintiff demurred.[81] Rolle J decided that the tenant was liable for his rent, for he had contractually assumed this obligation. A distinction was drawn between obligations imposed by the law and obligations accepted by the promisor under his own contract[82]:

> where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him . . . but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.

This distinction came to stand[83] for the rule that a subsequent impossibility would excuse a party from obligations imposed by the law, but not obligations assumed by his own contract. Professor Ibbetson stated that

> it seems likely that the formulation of Rolle J. in *Paradine v Jayne* was intended to go further than was demanded by the arguments of counsel, and to state the law in terms of absolute liability in contract.[84]

In *Paradine v Jane* absolute liability in contract worked a hardship upon the tenant: his liability for rent was not excused despite his inability to occupy the land. He was also unlikely to succeed in a cross-action against the landlord for damages arising from his loss of possession, because there is no indication that

[79] Powell, *Essay upon the Law of Contracts and Agreements* (n 75 above) 164.

[80] *Paradine v Jane* (1647) Aleyn 26, 82 ER 897; Style 47, 82 ER 519.

[81] The case has received a detailed consideration from D Ibbetson in 'Fault and Absolute Liability in Pre-Modern Contract Law' (1997) 18 *Journal of Legal History* 1 and 'Absolute Liability in Contract: the Antecedents of *Paradine v Jayne*' in FD Rose (ed), *Consensus ad Idem* (London, Sweet and Maxwell, 1996) ch 1.

[82] *Paradine v Jane* (n 80 above) Aleyn 26, 27; 82 ER 897, 897.

[83] It took a period of time for the 'law to settle down with this rule': Ibbetson, 'Fault and Absolute Liability in Pre-Modern Contract Law' (n 81 above) 23.

[84] Ibbetson, 'Fault and Absolute Liability in Pre-Modern Contract Law' (n 81 above) 23.

the landlord had covenanted to make himself liable for dispossession arising from the actions of a hostile stranger.[85] The harshness of absolute liability was recognised in the 19th century. As one critic wrote[86]:

> The law of England differs from the law of all other countries by the peculiar strictness with which it construes and enforces contracts. The act of God and the King's enemies, to which may be added those of the national government having a commanding or prohibitory force, are the only accidents that can excuse an obligor from performing his engagement.

The merit of absolute liability lies in the simplicity of its application. The initial question is how was the duty imposed: by law[87] or by express contractual term? If it were the latter the promisor was liable for performance unless the contract provided for the non-performance, or the impossibility of performance could be attributed to the other party. The liability probably appears harsher to modern eyes than to those who were subject to it because, as one case reports, 'the parties know what they are about'[88] when they formed these contracts. The parties knew what liabilities they were assuming when they contracted and could attempt to provide against them; failing this, they were aware of the risks that they had assumed and would have been able to insure against these risks, if they chose. The harshness of absolute liability was dealt with in ways that prevented what modern eyes view as subsequent impossibilities from arising. Those subsequent impossibilities that could not be prevented from arising often formed legal exceptions to this absolute standard, for to do otherwise would be to create an absurdity. We turn now to consider how the structure of contractual arrangements and the rules governing them worked to reduce the number of cases of subsequent impossibility that might arise.

3. Contractual Arrangements

Contracts then, as now, could be either entire or severable. In the case of an entire contract the entire fulfilment of the promise by either was a condition precedent to the fulfilment of the promise by the other. It was

[85] Sir GH Treitel, *Frustration and Force Majeure*, 2nd edn (London, Thomson, Sweet & Maxwell, 2004) 22–3.

[86] Anon. 'Art III. Execution of a Contract Impossible' (1833) 10 *American Jurist & Law Magazine* 250, 251.

[87] The phrase 'where the law creates a duty' encompassed not only the modern distinction between contractual and non-contractual duties, but also terms which were implied by law within a contract: Treitel (n 85 above) 20.

[88] *Beale v Thompson* (1803) 3 B & P 405, 433; 127 ER 221, 235 (Lord Alvanley CJ); reversed: (1804) 4 East 546, 102 ER 940 (Court of King's Bench).

> wholly immaterial whether the exact and complete performance of the whole contract be rendered impossible by overwhelming necessity or be occasioned by the negligence of the other party.[89]

If the party could not, for whatever reason, provide complete performance, no action would lie for the recovery of the consideration.[90] Contracts were also divided into absolute contracts and conditional contracts; the latter was not simply an executory contract 'but it is a contract, whose very existence and performance depend on a contingency and condition'.[91] The condition upon which the contract depended could be either precedent or subsequent. By creating a contract dependent upon a condition precedent, parties could ensure that the risk of a particular thing happening or not happening clearly fell upon one party. Since one party alone had assumed the risk of this event, the event could not generally be said to be one that rendered the contract impossible of performance. The event was, instead, a risk assumed by that party.

(a) Contractual Arrangements and Inevitable Accidents: Shipping

The use of these devices can be seen in the context of shipping. A condition precedent was frequently employed in the carriage of goods by sea to overcome the manifold problems that could arise in these ventures. The parties would provide as a condition precedent that the goods would arrive at the port stipulated; should the goods not arrive, the contract was at an end.[92] If, for example, a ship was wrecked and the cargo not delivered at the place and by the date stipulated, the vendors would not be answerable for the non-delivery of the cargo.[93] Where one of the parties assumed an absolute undertaking, for example to load and unload a ship within a certain period of time, the prevention of this by natural events such as the Thames freezing would not absolve the party of this responsibility.[94] The shipping merchant might also make the arrival of a ship by a certain time, or the arrival of another ship, the condition precedent of receiving a homeward cargo.[95] While a charter party was generally a reciprocal contract, it was also possible to contract in such a way as to make the performance of the contract mandatory upon one party and optional upon the other. In this instance, if the party subject to the mandatory obligation was unable to perform

[89] William W Story, *A Treatise on the Law of Contracts Not Under Seal* (Boston, Little, Brown & Co, 1847) §22.

[90] See, eg, *Cutter v Powell* (1795) 6 TR 320, 101 ER 573.

[91] Story, *A Treatise on the Law of Contracts Not Under Seal* (n 89 above) §26.

[92] *Hawes v Humble* (1809), referred to in the footnotes to *Boyd v Siffkin* (1809) 2 Camp 326, 170 ER 1172. See also *Hayward v Scougal* (1812) 2 Camp 56, 170 ER 1080; *Storer v Gordon* (1814) 3 M & S 308, 105 ER 627 (where the cargo was seized by a foreign government).

[93] *Idle v Thornton* (1812) 3 Camp 274, 179 ER 1380.

[94] *Barret v Dutton* (1815) 4 Camp 333, 171 ER 106. In the same case the freighter was not held to be liable for delay occasioned by difficulty in obtaining customs clearances because the customs house had burnt down.

[95] *Shadforth v Higgins* (1813) 3 Camp 385, 170 ER 1419.

this obligation for reasons beyond his control, he was still bound by it and liable in damages unless it came with an excepted risk.[96]

In contracts concerned with the carriage of goods by sea express contractual provisions were made to exclude liability in certain instances: the perils of the sea, eg

> the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever excepted.[97]

Such exceptions could also be provided in other kinds of contracts. Courts viewed the determination of whether or not a risk fell within the exception clause as a question of fact and evidence rather than of law. In this determination the judge would have recourse to the usage of trade and practice among merchants.[98] The exceptions were strictly construed.[99] It remained to be determined whether the loss arose without negligence on the part of the master.[100]

While parties structured their contracts in such a way as to provide for the allocation of risk or the exception of risk arising from future events, the law itself operated to provide an excuse for non-performance in two instances. A carrier was excused from performance where he was prevented from it by an act of God or by the King's enemies.[101] The act of God had to be a natural accident (eg, lightning, earthquake or tempest) and it could not be an accident arising from the negligence of man.[102] The act of God had to be an immediate one.[103] If there was any possibility that the parties could have provided against the occurrence of the event in their contract, the event was not one which excused performance. Thus, an outbreak of an infectious disease within the port for which the ship was destined did not excuse the non-performance.[104] In addition, the contract for the carriage of goods could be dissolved by law upon the occurrence of certain extrinsic events arising out of hostilities. If, before the commencement of the carriage, war or hostilities broke out between the state in

[96] *Shubrick v Salmond* (1765) 3 Burr 1637, 97 ER 1022. The court seems to have followed the authority urged upon it by the merchant, namely, *Paradine v Jane*. Courts seem, however, to have allowed the master of the vessel some leeway for reasonable actions where he had been prevented from complying with the contractual provisions: *Puller v Stainforth* (1809) 11 East 232, 103 ER 993.

[97] *Colvin v Newberry* (1832) 6 Bligh NS 167, 170; 5 ER 562, 563–4. Similar exception clauses can be found in *Storer v Gordon* (n 92 above) and in *Deffell v Brocklebank* (1821) 3 Bligh PC 561, 564; 4 ER 706, 708.

[98] *Pickering v Berkeley* (1648) Style 132, 82 ER 587.

[99] Eg, in the case of a restraint by princes and rulers, the exception only covered actual rather than expected restraint, even if the expectation was reasonable: *Atkinson v Ritchie* (1809) 10 East 530, 103 ER 877.

[100] JH Abbott, *A Treatise of the Law relative to Merchant Ships and Seaman*, 5th edn (London, Joseph Butterworth & Son, 1827) 256.

[101] Abbott, *A Treatise of the Law relative to Merchant Ships and Seaman* (n 100 above) 251.

[102] *Company, Trent & Mersey Navigation v Wood* (n 110 below), referred to in *Forward v Pittard* (1785) 1 TR 27, 99 ER 953.

[103] *Smith v Shepherd*, cited in Abbott, *A Treatise of the Law relative to Merchant Ships and Seaman* (n 100 above) 251.

[104] *Barker v Hodgson* (1814) 3 M & S 267, 105 ER 612.

which the ships or cargo belonged and that for which they were destined, or commerce between them was prohibited, then the contract for the carriage was at an end. If the war, hostilities, or prohibition occurred after the commencement of the carriage but before delivery, the same rule probably applied. If the war or hostilities occurred between the place to which the ship or cargo belonged and any other nation for which they were not destined, the contract was not at an end, even though the carriage might be more difficult or hazardous as a result of the hostilities.[105] While contracts were dissolved by the outbreak of war, they were not dissolved where there was an embargo or a temporary restraint by governments[106] because the parties could have provided for such an event in their contract.

4. Exceptions and Qualifications to Contractual Liability

In certain instances the law qualified the absolute liability of a contracting party and excused him from performance without liability to pay damages. These exceptions were narrowly construed and applied by courts.

(a) Common Carriers and Bailees

Bailment arose when there was a delivery of a thing for some object or purpose and upon a contract to conform to the object or purpose of the trust.[107] Where the bailment arose to carry or deliver goods, the bailee was excused from liability where he could establish[108] that the loss arose as a result of the acts of God or of the King's enemies.[109] An act of God was an inevitable accident which arose from natural causes, without human intervention.[110] It encompassed

[105] Abbott, *A Treatise of the Law relative to Merchant Ships and Seaman* (n 100 above) 427.

[106] *Hadley v Clarke* (1799) 8 TR 259, 101 ER 1377. Where, however, the embargo was imposed by another country which worked against a British merchant, the contract was at an end: *Touteng v Hubbard* (1802) 3 B & P 291, 127 ER 161. In this case, Lord Alvanley CJ thought that *Paradine v Jane* made good sense but that it would be wrong for a British merchant to effectively act against his country's own interests.

[107] The definition is paraphrased from J Story, *Commentaries on the Law of Bailments*, 8th edn (Boston, Little, Brown and Co, 1870) §110.

[108] *Forward v Pittard* (n 102 above).

[109] *Coggs v Bernard* (1703) (sub nom *Coggs* v *Barnard*) 2 Lord Raym 912, 918; 92 ER 109, 112 (Holt CJ). See further Chapter 1 (above). It became the case that in contracts for the carriage of goods by sea the express exceptions for the acts of God or of the King's enemies would be placed in the bill of lading or the charter party. A problem that could arise when foreign contracts of affreightment were entered into, in which most countries the civil law exceptions of overwhelming force (*vis major*) or accident without fault (*casus fortuitus*) were implied, because in such an instance, the English exceptions would be omitted. The resulting problem that could arise was that if the foreign law did not govern the contract, the ship owner or master would not have the protection that an English owner or master would have expressly sought: *Chartered Mercantile Bank of India v Netherlands India Steam Navigation Company* (1883) 6 B & S 101, 132; 122 ER 1135, 1146 (Willes J).

[110] *Company, Trent and Mersey Navigation v Wood* (1785) 4 Douglas 286, 290; 99 ER 884, 886 (Lord Mansfield).

> loss by lightning or storms, by the perils of the seas, by an inundation or earthquake, or by a sudden death or illness.[111]

Fire was not an act of God unless caused by lightning.[112] Acts of the King's enemies were those of a public enemy.[113] It was immaterial whether the carriage of goods was by sea or by land.[114] The duties of a bailee, and the exceptions, arose by operation of the general law. This was significant for two reasons. First, parties could stipulate otherwise in their contracts; a bailee could expressly covenant to assume a liability excepted by the general law.[115] Secondly, because these exceptions arose by operation of the general law, they were within the first proposition of *Paradine v Jane*: where a duty was imposed by law and the party was unable to perform it without fault upon him, the law excused him. As Professor Treitel states, *Coggs v Bernard* stands outside the strict contractual liability imposed by *Paradine v Jane* rather than constituting an exception to it.[116] It is significant, however, that Blackburn J referred to 'the great case of *Coggs* v *Bernard*' in deciding *Taylor v Caldwell*. The significance apparent to contemporaries was that in a common form of contract the law would excuse cases of non-performance because of impossibility.[117] While this did not in principle form an exception to strict contractual liability, in practice, it operated to alleviate its harshness and to prevent absurdities.

(b) Supervening Illegality

Where parties entered into a contract the performance of which was subsequently rendered illegal by British law, the contract was discharged without liability on the part of either party. Where the parties covenanted that a man would not do something that was lawful and an act of Parliament compelled him to do it, the contract was discharged: 'the statute repeals the covenant'.[118] Likewise, where the parties covenanted to do something lawful, and Parliament subsequently made this unlawful, the contract was discharged.[119] A complication, notably apparent in shipping, was the distinction drawn between supervening illegality brought

[111] Story, *Commentaries on the Law of Bailments* (n 107 above) §25.

[112] *Forward v Pittard* (n 102 above).

[113] *Forward v Pittard* (n 102 above).

[114] *Company, Trent and Mersey Navigation v Wood* (n 110 above) *ibid* (Buller J).

[115] Story, *Commentaries on the Law of Bailments* (n 107 above) §§10, 31. Story expressed some doubt as to whether or not there was a power to vary by contract the ability to accept loss which arose by inevitable accident: §36.

[116] Treitel, *Frustration and Force Majeure* (n 85 above) 31.

[117] Although the verdict of the jury was such as to indicate that they did not find that an act of God prevented the contractual performance of the defendant, the address of Cockburn CJ to the jury in *Cohen v Gaudet* (1863) 3 F & F 455, 176 ER 204 gives an indication of how the overall matrix of contractual and legal duties would operate in such instances.

[118] *Brewster v Kitchel* (1679) Holt KB 175, 90 ER 995 (Holt CJ). The principle was approved by Hannen J in *Baily v De Crespigny* (1869) LR 4 QB 180, 186.

[119] *Ibid*. Although, if the parties had covenanted to do something then unlawful, and the act of Parliament made it lawful, this did not repeal the covenant.

about by British law and supervening illegality brought about by foreign law. In the latter case, this was viewed as an impossibility in fact, for which the parties ought to have made contractual provision. Where the parties were prevented from contractual performance by reason of a supervening change in foreign law, the contract was therefore not discharged.[120] Where the supervening illegality arose under British law, the contract was dissolved at once, so absolutely and inevitably that not even the consent of the parties could revive it.[121] The proposition was at one point stated more broadly to encompass situations in which hostility between Britain and another state involved one or both of the parties in a breach of his moral duty to his Sovereign.[122] This did not develop into a broader ground of contractual discharge.

(c) Contracts for Personal Services

In some instances a contract to provide personal services was discharged by the provider's death because his executors were not liable to tender the performance. The common law construed this exception, if it was one, narrowly.[123] As early as 1597 it had been held that

> a covenant lies against an executor in every case,—although he is not named; unless it be such a covenant as is to be performed by the person, of the testator, which they cannot perform.[124]

In the curious case of *Hall v Wright*,[125] it was said that where there was a contract for personal services which could only be performed by the contractor, his executors would not be liable for the performance. It was also stated that no liability attached to the person who contracted to perform a personal service but who became permanently disabled from so performing it.[126] The case law was inconsistent, however, and did not entirely support these statements. The

[120] *Blight v Page* (1801) 3 B & P 295, 127 ER 163; *Barker v Hodgson* (1814) 3 M & S 267, 270; 105 ER 612, 613: 'Is not the freighter the adventurer, who chalks out the voyage, and is to furnish at all events the subject matter out of which freight is to accrue?' (Lord Ellenborough CJ); *Spence v Chodwick* (1847) 10 QB 517, 116 ER 197.

[121] *Esposito v Bowden* (1855) 4 E & B 963, 979; 119 ER 359, 365 (Lord Campbell CJ). See also *Touteng v Hubbard* (1802) 3 B & P 291, 299; 127 ER 161, 166; *Esposito v Bowden* (1855) 4 E & B 963, 976; 119 ER 359, 364; and *Barker v Hodgson* (n 120 above) *ibid*.

[122] *Atkinson* v *Ritchie* (n 99 above) 534–5, 878 (Lord Ellenborough CJ).

[123] It is striking that such an excuse is not mentioned in either CG Addison, *A Treatise on the Law of Contracts*, 4th edn (London, Stevens and Norton, 1856) nor J Chitty, *A Practical Treatise on the Law of Contracts*, 5th edn JA Russell (ed) (London, S Sweet, 1853).

[124] *Hyde v Dean and Canons of Windsor* (1597) Cro Eliz 552, 78 ER 798. In addition, later cases such as *Boast v Firth* (n 204 below), *Poussard v Spiers* (n 215 below) and *Robinson v Davison* (n 204 below) were to rely directly upon *Taylor v Caldwell* rather than any earlier base.

[125] *Hall v Wright* (1859) El Bl & El 765, 120 ER 695.

[126] *Ibid* El Bl & El 765, 794–5; 120 ER 695, 706 (Pollock CB). Although Pollock wrote in dissent, this point seems to have been accepted by later judges. In the Queen's Bench, Crompton J made much the same point, *Hall v Wright* (1858) El & Bl El 746, 749;120 ER 688, 690, and his reasons were accepted in the Exchequer at 788, 704 (Martin B).

contract had to be for services which could only be provided by the contracting party. A payment of money was not excused by death,[127] nor was a contract to take delivery of goods, unless the quantity of goods had to be selected or ordered by the now deceased contractor.[128] Where, however, the executors performed the deceased's services, they could recover for this performance.[129] It was also held in cases where the employee was unable to perform his services for several months that he was able to recover his wages,[130] even where he was permanently unable to perform.[131] In one instance the executors of a master's apprentice had to instruct the apprentice themselves or arrange for him to be instructed by someone skilled in the trade.[132] In short, the obiter dicta in *Hall v Wright* only applied where to attempt to enforce the contract would have resulted in an absurdity, or where the contract could only be performed personally.[133]

(d) The Sale of Goods

In *Taylor v Caldwell*, Blackburn J also relied upon the qualification of absolute liability which arose in a contract for the sale of goods. It was possible to transfer property in the goods from the vendor to the purchaser before delivery. If the property had passed and the goods perished before delivery, the vendor was excused from delivery.[134] He relied upon *Rugg v Minett*[135] and stated that it seemed to be based upon the ground that the destruction of the thing excused the vendor from fulfilling his contract to deliver. Although this has been criticised as an inadequate authority for his proposition,[136] other, uncited, authorities do exist to the same effect.[137] Blackburn J had discussed the matter extensively in his treatise on sale and provided an analysis of the law which was supported by other authorities: he therefore employed *Rugg v Minett* only to indicate where changes had first been introduced into the law.[138] Where

[127] *Sanders v Esterby* (1617) Croke Jac 417, 79 ER 356.

[128] *Wentworth v Cock* (1839) 10 Ad & El 42, 113 ER 17.

[129] *Marshall v Broadhurst* (1831) 1 Cr & Jervis 403, 148 ER 1480.

[130] *Beale v Thompson* (1804) 4 East 546, 102 ER 940; *Cuckson v Stones* (1858) 1 El & El 248, 120 ER 902.

[131] *Chandler v Grieves* (1792) 2 H Bl 606, 126 ER 730.

[132] *Walker v Hull* (1665) 1 Levinz 177, 83 ER 357.

[133] The point, and the concern about the consistency of the case law, is made in 'Contracts Impossible of Peformance', the *Irish Law Times*, reproduced in (1883) 16 *Central Law Journal* 105, 106–7.

[134] *Taylor v Caldwell* (n 1 above) 122 ER 309, 314.

[135] *Rugg v Minett* (1809) 11 East 210, 103 ER 985. Although he did not rely on this, he made the same statement in his treatise on the sale of goods: C Blackburn, *A Treatise on the Effect of The Contract of Sale* (London, William Benning & Co, 1845) 152

[136] Treitel, *Frustration and Force Majeure* (n 85 above) 2-017.

[137] See, eg, *Rohde v Thwaites* (1827) 6 B & C 388, 108 ER 495 and *Alexander v Gardner* (1835) 1 Bing NC 671, 131 ER 1276. See also S Comyn, *The Law of Contracts and Promises*, 2nd edn (London, Joseph Butterworth, 1824) 143.

[138] Blackburn, *A Treatise on the Effect of The Contract of Sale* (n 135 above) 151–61. It seems likely that he had *Rugg v Minett* in mind as the most significant of these cases rather than the one most applicable to his situation.

undelivered goods had not yet been ascertained, property remained in the vendor; if the goods were destroyed they were at the vendor's risk.[139]

D. THE DECISION IN *TAYLOR v CALDWELL*

It was within this legal context that Taylor and Lewis sought damages from Caldwell and Bishop for their breach of contract in not supplying the Surrey Music Hall and Gardens for four Monday nights in the summer of 1861. They sought £58 to cover their wasted expenditures, for 'divers sums expended and expenses incurred by them in preparing for the concerts'.[140] It is interesting that the parties sought to recover the cost of their reliance rather than the profit they would have expected to receive for the concerts. Not only would the anticipated profit have been difficult to prove, but it may also have been slight: the advertisements for their fêtes[141] were small, not only in comparison with Jullien's extravaganzas but also with the competing attractions at Crystal Palace. While Taylor and Lewis offered only Sims Reeves as their main attraction,[142] Crystal Palace advertised attractions at length, of which Blondin, the conqueror of Niagara, was the principal one.[143] Two of the defendants' pleas were important. They pled not only that they were wholly exonerated and discharged from their agreement and the performance thereof but also that[144]

> there was a general custom of the trade and business of the plaintiffs and the defendants, with respect to which the agreement was made . . . and which was part of the agreement, that in the event of the Gardens and Music Hall being destroyed or so far damaged by accidental fire as to prevent the entertainments being given according to the intent of the agreement, between the time of making the agreement and the time appointed for the performance of the same, the agreement should be rescinded and at an end; and that the Gardens and Music Hall were destroyed and so far damaged by accidental fire as to prevent the entertainments, or any of them, being given . . . between the time of making the agreement and the first of the times appointed for the performance . . . and continued so destroyed and damaged until after the times appointed for the performance of the agreement had elapsed, without the default of the defendants or either of them.

[139] *Logan v Mesurier* (1847) 6 Moore 116, 13 ER 628.

[140] *Taylor v Caldwell* (n 1 above) 122 ER 309, 310. It has been impossible to ascertain whether or not one of these expenditures was a retainer paid to Sims Reeves for his planned appearance.

[141] *The Times* (11 June 1861) 1 and (10 June 1861) 1.

[142] Other artistes had been engaged by Taylor and Lewis in accordance with their contract with Caldwell and Bishop. The advertisements also announce the performances of Mesdames Poole, Palmer, Rebecca Isaacs, J Wells, M Wells, Emma Heywood, Mina Poole, Nina Vincent, and Annie Fowler; Messrs Sims Reeves, Montem Smith, JL Hatton, Fowler, Chaplin, Hneyr: *The Times* (11 June 1861) 1.

[143] *Ibid*.

[144] *Taylor v Caldwell* (n 1 above) 3 B & S 826, 827–8. It is interesting to see the argument arise in the context of theatrical and musical productions, an area in which one of the few exceptions to the absolute liability in contract existed, namely the rendering of personal services by performing artists.

At the trial[145] before Blackburn J and a common jury, the defendants appear to have argued that they were not bound to restore the Music Hall and that they had been prepared to provide the gardens, orchestra and the ruined Hall to the plaintiffs on the provision of the stipulated sum. The defendants failed to prove that it was the custom of the trade to rescind the contract in the event of fire or other accidental cause preventing the concerts from proceeding. A verdict was given for the plaintiffs, with liberty to the defendants to move to the court above to enter the verdict for them if that court was of the opinion that they were not liable.

It was on this basis that the matter was argued in January 1863 before Cockburn CJ, Wightman, Crompton and Blackburn JJ. The plaintiffs showed cause with two arguments. First, the contract was not a 'letting' of the Hall. This was important because had this been a lease, the plaintiffs would have been bound to pay the rent regardless of the condition of the land and buildings. Secondly, liability was absolute following *Paradine v Jane* and fire did not excuse the defendants from the performance that they had contractually assumed. This was a compelling argument, for the defendants had not contractually excused their performance in the event of the subject-matter's destruction and the jury had refused to find that it was trade custom that such destruction rescinded the contract. The defendants raised two weak arguments. First, the contract amounted to a demise and the plaintiffs were bound to pay the £100 for each of the four nights.[146] The argument was a weak one because the terms of the contract make clear that what the parties intended was a Jullien-like promenade concert in which the two parties co-operated to provide the concert. The defendants had undertaken to supply the Gardens and Music Hall *and* the necessary bands *and* a diversity of amusements and al fresco entertainments of various descriptions nightly.[147] The second argument raised by the defendants hinted at what they had failed to establish as a trade custom, namely that in the event that a supervening impossibility in the nature of an act of God arose, the contract was rescinded without liability on their part. The argument is recorded as 'the words "God's will permitting" override the whole agreement'.[148] It is unlikely that Blackburn J's decision is based on this argument because the words in the contract were not intended to subject the entire agreement to God's will, which had never been accepted as encompassing fires caused by man.[149] The most likely explanation for the words was that they qualified the attendance of the principal attraction, Sims Reeves. His attendance was always an uncertain matter and Pollock, in his memoirs, leaves little doubt that the words had been

[145] Court of Queen's Bench, 18 December 1861, *The Times* (19 December 1861) 10.

[146] Although not cited, *Izon v Gorton* (1839) 5 Bing NC 501 supports this argument.

[147] The other amusements listed were coloured minstrels, fireworks and illuminations, a ballet (but only if permitted), a wizard, Grecian statutes, tight-rope performances, rifle galleries, air-gun shooting, Chinese and Parisian games, boats on the lake and, if the weather permitted, other aquatic entertainments: *Taylor v Caldwell* (n 1 above) 3 B & S 826, 828–9; 122 ER 309, 311.

[148] *Taylor v Caldwell* (n 1 above) 3 B & S 826, 832; 122 ER 309, 312.

[149] *Forward v Pittard* (n 102 above).

inserted to cover the possibility that Sims Reeves would not attend.[150] The contract was thus drafted in such a way as to excuse the plaintiffs from the absolute obligation of providing the fickle star.

The plaintiffs should have succeeded.[151] It might have been hard upon the defendants to bear the risk of this loss, although there are hints that they received insurance for their losses.[152] Even if it were a hardship, the law was quite clear in its position that the defendants had, by their contract, taken upon themselves the burden of providing the Music Hall and, by not excepting its loss, assumed the risk of not providing it. The fire was caused by human actions initiated by the defendants.[153] Blackburn J used the case to introduce an incremental change to absolute liability in contract. That this incremental change was apparently of his initiative, rather than counsel's, is strikingly similar to his later decision in *Kennedy v Panama, New Zealand and Australian Royal Mail Co Ltd*,[154] a case which was to provide an explicit introduction of the doctrine of mistake into English contract law.[155] In these initiatives, Blackburn J was responsible for introducing both frustration and mistake into English contract law; his actions mark him as one of the 'creative minds in a creative age'.[156]

Blackburn J introduced this change into the law using a method similar to that which he was later to employ in *Kennedy's case*.[157] He began by describing the situation. The contract did not amount to a letting because possession had never passed; nothing, however, turned on the letting point.[158] In the giving of these concerts, the contract made clear that the existence of the Music Hall was essential to fulfill the contract because the contemplated entertainments could not be given without it. The destruction of the Music Hall was a supervening event, which occurred without the fault of either of the parties and was so

[150] Pollock, *For My Grandson, Remembrances of an Ancient Victorian* (n 43 above) 113.

[151] In this sense it might be said that a landmark case is one where the party expected to succeed does not.

[152] *The Times* (19 December 1861) 10. It is not clear whether or not the insurance would have covered such incidental losses as the plaintiffs'. It is also possible that the insurance was held by the defendant's landlord.

[153] For these reasons, fire was not regarded as an act of God because measures could be taken to prevent it or to put it out.

[154] *Kennedy v Panama, New Zealand and Australian Royal Mail Co Ltd* (1867) LR 2 QB 580, 8 B & S 571.

[155] The case was accepted by Lord Atkin in *Bell v Lever Bros* [1932] AC 161 as support for the doctrine, and although Lord Phillips was to criticise this in *The Great Peace* [2002] EWCA Civ 1407, [2002] 3 WLR 1617, it remains as one of the significant early mistake cases. Interestingly, counsel in *Kennedy's* case (n 154 above) raised *Taylor v Caldwell* in argument; Blackburn J did not rely upon it in giving judgment and it is likely that he drew a clear distinction between existing impossibility (which might be a mistake) and subsequent impossibility (which was to become frustration).

[156] CHS Fifoot, *Judge and Jurist in the Reign of Victoria* (London, Stevens & Sons, 1959) 135.

[157] Treitel, *Frustration and Force Majeure* is critical of the substance of Blackburn J's decision: (n 85 above) 42–4.

[158] In making this statement, Blackburn J can be interpreted as stating that these implied conditions could, in appropriate circumstances, be read into a lease. The matter was to be of considerable concern in the future development of the law until it was laid to rest in *National Carriers v Panalpina* (n 229 below).

complete a destruction that the contemplated concerts could not be given. The examination of promenade concerts indicates that Blackburn J was right: without the splendid and enormous Music Hall, there was no venue suitable for staging the concerts. The issue was whether the defendants were liable in the circumstances to make good the loss of the plaintiffs. The contract itself had made no provision for this event and so 'the answer to the question must depend upon the general rules of law applicable to such a contract'.[159]

Blackburn J set and affirmed the general rule: where there was a positive contract to do a thing not in itself unlawful, the contractor was obliged to perform or to pay damages. He then stated the incremental change:

> this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied.[160]

The condition was one which related to something essential for the performance of the contract. Where the parties clearly contemplated that the contract could not be fulfilled unless something existed—such that at the outset the continued existence of the thing formed the foundation of the contract—and neither party had warranted that such a thing would exist, if it ceased to exist without the fault of the contractor (and before any breach) such that performance became impossible, the parties were excused from their performance. As has been noted above, such an implication had been argued in previous cases[161] and had been rejected on the ground that such implications would tend to disturb commercial certainty and were not conditions that had been within the parties' contemplation. Blackburn J was at pains to point out that the implication was one made in furtherance of 'the great object' of construing the contract in such a way as to fulfill the intention of the contractors.[162] His assertion is an unlikely one. It seems entirely accurate that the parties had not considered the question of what would occur if the Music Hall had burnt down. It also seems entirely accurate on the basis of the existing law that they would have expected one or the other of them to have been entirely responsible: if it was a lease, the risk lay with the plaintiffs; if it was not, the risk lay with the defendants. While Blackburn J's assertion goes some way in meeting possible criticisms of the decision,[163] it does

[159] *Taylor v Caldwell* (n 1 above) 833, 312.

[160] *Ibid*.

[161] See, eg, *Atkinson v Ritchie* (n 99 above) in which counsel had argued that 'other necessary exceptions might be implied' and that a paramount duty was imposed by law to act for the benefit and safety of the crew, ship, cargo and state to which the master belonged; 10 East 531, 103 ER 877. The majority of the court had also been adamant in refusing to extend the exceptions and implied conditions in *Hall v Wright* (n 125 above).

[162] *Taylor v Caldwell* (n 1 above) 834, 312. It is on this basis that it has been argued that the case was one in which rules of law were devised behind the façade of the will theory of contract; DJ Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford, Oxford University Press, 1999) 224.

[163] Primarily that the decision was inconsistent with the slightly earlier case of *Hall v Wright* (n 125 above).

not reflect the underlying assumptions of the parties. If it did, it seems likely that the jury would have found such a trade usage.[164]

To demonstrate that this principle already existed in English law, Blackburn J argued both by comparison and by analogy. For comparison, he chose the civil law of Justinian's *Digest* and Pothier's *Treatise of Obligations*. In doing so he recognised that while the civil law was not authority in an English court 'it affords great assistance in investigating the principles on which the law is grounded'.[165] The comparison bolstered the conclusion that Blackburn J had reached on the matter.[166] Blackburn J stated that in Roman law an exception was implied in the obligation such that if the foundation of the contract ceased to exist through no fault of either party, then the parties were excused from further performance. Blackburn J relied upon portions of the *Digest*[167] which dealt with continued life of a slave, and he probably used it because it tied together nicely with the analogy he was about to make with common law contracts for personal services. His use has been criticised by Buckland,[168] who pointed out that the Romans identified common law supervening impossibility as *casus*. Its effect in different transactions was not always the same. Roman law recognised two forms of contractual obligations; the remedies under the older system were *stricti iuris* and under the later system, the remedies were *bonae fidei iudicia*. The obligations in the former system were unilateral, in the latter system they were bilateral.[169] A contract of hire fits within the second system. In the situation where unilateral obligations co-existed, such as a *stipulatio* met with a counter stipulation, *casus* had the effect of releasing one party but if this occurred before the other party had performed his obligation, the other party would still be bound: 'the release was of the party, no less and no more'.[170] Blackburn J's use of Roman law was inapposite in reaching the conclusion that *casus* excused both the parties because he relied upon texts that were on *stricti iuris* unilateral relations. *Casus* would only release both parties where *casus* made both performances impossible. Blackburn J apparently failed to realise that the texts upon which he relied had nothing to do with a bilateral bonae fidei contract of hire. In a bonae fidei contract, the release of the other party is not made by a release by *casus*

[164] It may be that the entire basis for Blackburn J's decision was that the jury, being a common jury and not a special jury, simply came to the wrong conclusion as to trade custom. Judges were often critical of the abilities of juries but in this case such an argument is too speculative to be asserted strongly.

[165] *Taylor v Caldwell* (n 1 above) 3 B & S 826, 835; 122 ER 309, 313.

[166] The comparative use of the civil law was not that different from the use contemporary judges have made of French and German law.

[167] *Digest*, 45.I. 23, 33.

[168] WW Buckland, 'Casus and Frustration in Roman and Common Law' (1932–33) 46 *Harvard Law Review* 1281, 1287–8.

[169] *Ibid* 1281.

[170] Buckland, 'Casus and Frustration in Roman and Common Law' (n 168 above).

> but on the very different principle that, *ex fide bona*, a party ought not to be called upon to pay for a service he has not had.[171]

Buckland concluded that 'the Roman law cannot be made responsible for the rules laid down'.[172] Blackburn J's use of Pothier's *Treatise of Obligations* is accurate in applying what Pothier stated: that a debtor is freed from his obligation when the thing which forms the matter and object of the obligation is destroyed:

> the debtor of a specific thing is discharged from his obligation, when the thing is lost, without any act, default or delay on his part.[173]

This was

> subject to an exception, when he has, by a particular clause in the contract, expressly assumed the risk of such loss upon himself.[174]

While it is questionable whether or not the principle was applicable in the common law,[175] Blackburn J clearly sought to base his incremental change upon a broader principle.[176] Pothier was regarded by lawyers of the era as a source of rational and scientific jurisprudence and he was a writer with whom Blackburn J had a great deal of familiarity.[177] Neither the Digest nor Pothier supported the implied term solution that Blackburn J devised, and Buckland was right when he wrote that the decision in *Taylor v Caldwell* 'is a little surprising'.[178] The use of comparative materials was likely undertaken to indicate that other legal systems were able to excuse performance in cases of impossibility.

[171] Buckland, 'Casus and Frustration in Roman and Common Law' (n 168 above) 1287.

[172] Buckland, 'Casus and Frustration in Roman and Common Law' (n 168 above) 1300.

[173] RJ Pothier, *Treatise of Obligations*, WD Evans (trans) (London, Strahan, 1806) P III. c VI, A III §633. Some confusion exists as to the exact passage due to the reporter's inaccurate citation. Pothier had started from the general proposition that 'there cannot be any debt without something being due, which forms the matter and object of the obligation whence it follows, that if that thing is destroyed, as there is no longer any thing to form the matter and object of the obligation, there can be no longer any obligation. The extinction of the thing due, therefore, necessarily induces the extinction of the obligation': *ibid* P III. c VI, A I §613. 19th century civilian lawyers in France and Germany faced their own difficulties with regard to the impossibility they had inherited as a part of their Roman legacy: see J Gordley, *Foundations of Private Law* (Oxford, Oxford University Press, 2005) ch 15 'Impossibility and Unexpected Circumstances'.

[174] Pothier, *Treatise of Obligations* (n 173 above) P III. c VI, A III §633.

[175] Buckland and McNair argued that until this decision and the cases that followed it the common law position was almost exactly opposite that of Roman law: *Roman Law and Common Law* (London, Cambridge University Press, 1965) 242.

[176] It was a technique that Blackburn J employed again in *Kennedy's case* (n 154 above) when he stated that the decision in *Street v Blay* (1831) 2 B & Ad 456 was the same as the Civil law: *Digest* 18.1.9, 10 and 11. In that case, Blackburn J likely sought to rationalise the existing English cases around a Roman principle.

[177] Blackburn J was the author of the then leading treatise on the sale of goods, *A Treatise on the Effect of The Contract of Sale* (n 135 above) and he employed Pothier's writings within the treatise as an analytical tool. He was, however, careful to warn his readers that Pothier's positions were not necessarily universally true of the civil law and 'far less to be taken as authorities for English Law': 172. He was cognisant of the substantially different results that arose in the civilian and common law legal systems: 188–9.

[178] Buckland, 'Casus and Frustration in Roman and Common Law' (n 168 above) 1288.

Having set out what he understood to be the principle in the civil law for comparative purposes, Blackburn J proceeded to reason by analogy with the existing qualifications to the principle of absolute liability in English law. He sought to ascertain the underlying rationale to these qualifications in order to apply this rationale.[179] Happily for Blackburn J, he discovered that the underlying rationale in the common law was entirely in accordance with the principles upon which the civil law proceeded. The three qualifications that he chose were: contracts for personal services; contracts for the sale of goods; and contracts which involved the loan of chattels or bailment. There is a common weakness shared between all three of these instances and this weakness undermines Blackburn J's attempt to ascertain the underlying rationale. The weakness is that it is arguable that in none of the instances did the contract cover the impossibility that arose. It is likely, however, that Blackburn J considered these applications to make readily apparent that the rule in *Paradine v Jane* was one to which the law admitted certain practical exceptions, and that another exception would not, by itself, remove the rule. It was also important to indicate that this was an area in which his development would have limited scope. He may also have felt it necessary to clearly justify what he was doing because the course of action he took does not appear to have received the benefit of counsel's arguments.

Blackburn J examined the authorities[180] in which the obligation to perform a personal service had not been found to be binding upon the executors following the provider's death. This appeared as a genuine qualification to absolute liability, although it was very narrowly construed. It was also the case that where one sought the personal services of an individual, it was not contemplated by the recipient that the services would be performed by another.[181] In these cases, Blackburn J found the underlying rationale that excused the parties from their non-performance was that the nature of the contract implied a condition of the continued existence of the contractor, or his essential abilities, to perform the personal services. This is an interesting conclusion to reach and one contrary to *Hall v Wright*. Blackburn J had no hesitation in reaching the conclusion rejected in the earlier case. The possibility that the law refused to make the executors liable because in these instances it would create an absurdity was not considered.

Blackburn J then noted that this implied condition of the continued existence of 'the life', or 'the abilities of the life', could also be discerned in instances where the contract depended upon the continued existence of a 'thing'. He began with the contract of sale, and in those instances where the property, and thus the risk, had passed to the purchaser who awaited delivery. If the chattel perished without fault of the vendor, the vendor was excused from the obligation of the

[179] Treitel has pointed out that Blackburn J employed the same technique in *Rylands v Fletcher*, deducing a general principle from a series of specific examples, in order to create a strict liability in tort. Treitel, *Frustration and Force Majeure* (n 85 above) 42.

[180] *Hyde v The Dean and Canons of Windsor* (n 124 above), *Marshall v Broadhurst* (n 129 above), *Wentworth v Cock* (n 128 above), *Hall v Wright* (n 125 above).

[181] Although, as we have seen, authority did exist that where suitable arrangements could be made, this would be acceptable: *Walker v Hull* (n 132 above).

delivery of the chattel although the purchaser was required to pay the purchase price. Blackburn J supported this rule with *Rugg v Minett*[182] and Pothier's *Treatise on the Contract of Sale*, as translated by Blackburn in his own treatise.[183] Pothier stated that when the thing due ceased to exist, so too did the obligation. Thus, in a contract for sale, as soon as the sale was perfected, the thing sold is at the risk of the purchaser although it has not yet been delivered. If it should perish without the fault of the vendor, the purchaser was still bound to pay for it. The underlying rationale was that English law recognised that the continued existence of the thing was an implied condition of the contract; if the thing ceased to exist without the fault of the contracting party, the contracting party was excused performance. There are two weaknesses to this. First, it would be an absurdity to require the vendor to deliver that which no longer existed. Secondly, because the parties contracted on the basis that the sale of specific, or ascertained, goods acted to pass property and thus risk to the purchaser, the vendor had never assumed an obligation to deliver the goods in the event of destruction.

The third qualification Blackburn J examined was the loan of chattels and bailments.[184] Where the chattel perished without fault of the bailee or carrier the impossibility of performance excused the borrower or bailee of his obligation. This use is subject to two criticisms. First, Blackburn J's characterisation of the exception[185] was over broad. The law recognised different divisions of bailments dependent upon whom the bailment sought to benefit.[186] Attendant upon these different divisions were different standards of care[187]. Secondly, in all of these cases, it was understood from the outset that the bailee or carrier did not undertake an absolute liability for the care of the thing given over to him.

The utility of Blackburn's use of these three instances is that they were all instances in which the law allowed parties to structure their affairs to allow them to predict with whom the risk of destruction lay. They were also instances in which the law operated to remove the prospect of a subsequent impossibility from arising. The use of these instances would remind lawyers that absolute liability did not arise in all instances and that the creation of another instance would not necessarily be objectionable. It would have been impossible for the

[182] *Rugg v Minett* (1809) 11 East 210, 103 ER 985. Treitel, *Frustration and Force Majeure* has criticised this as an inappropriate choice as it was not truly a case involving specific goods (n 85 above).

[183] Blackburn refers to *Blackburn on the Contract of Sale*, but he does so because he has translated the relevant portion of Pothier's *Contract of Sale* into English; an English version of Pothier's work existed in America but seemingly not in England at this time. It is interesting that Blackburn felt the need to direct readers to a translation from French into English but not from the Latin of the *Digest* into English. The portion of *Blackburn on the Contract of Sale* referred to contains no opinion of Blackburn's.

[184] He cites *Sparrow v Sowgate* (1623) Jones W 29, 82 ER 16; *Williams v Lloyd* (1628) Jones W 179, 82 ER 95; and *Coggs v Bernard* (n 109 above).

[185] '[I]n all contracts of loan of chattels or bailments if the performance of the promise of the borrower or bailee to return the things lent or bailed, becomes impossible because it has perished, this impossibility . . . excuses the borrower or bailee from the performance', *Taylor v Caldwell* (n 1 above) 3 B & S 826, 838–9.

[186] Story, *Commentaries on the Law of Bailments* (n 107 above) §3.

[187] Story, *Commentaries on the Law of Bailments* (n 107 above) §9.

concerts to be held without the Music Hall; to award damages would have been an absurdity. Blackburn J drew the underlying principle that[188]

> 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. In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel.

Blackburn J found that the parties had contracted on the basis of the continued existence of the Music Hall and this existence was essential to performance: when it ceased to exist without fault of either party both were excused from their further obligations. The court found for the defendants. The effect of the decision was to ensure that the entire loss arising from the venture did not fall upon one party alone but was shared between both contracting parties.[189]

Blackburn J's decision did not seek to challenge the rule in *Paradine v Jane*; indeed, it reaffirms this rule. The judgment hints that the situation before the court was distinguishable from *Paradine v Jane* where the tenant's performance was still possible. Rather than distinguish the earlier case, Blackburn J sought a different route around the problem of absolute liability: one of an implied condition. There was nothing new in the device of an implied term. What was new was that the device was employed by the court where counsel had not argued it. The essential question that arises from the judgment in *Taylor v Caldwell* is why the court chose to imply these conditions at all. Unfortunately, the answer to this question is by no means clear. A number of possible answers present themselves. First, there had been criticisms of this rule of absolute liability in the 19th century:

> the doctrine that it [*Paradine v Jane*] lays down is in direct opposition to common sense and common justice. For the accidents of life are so various, that it is impossible to foresee them all, and to require of a contracting party that he should foresee and provide for them, is to require an impossibility.[190]

It seems probable that this difficulty was one which Blackburn J had considered. A second possible answer is that the reluctance of courts to reallocate liability in cases of subsequent impossibility had been rationalised on the basis that to do so was to re-write the parties' contract: that the courts would create a contract for the parties by their decision.[191] The use of an implied condition sought to

[188] *Taylor v Caldwell* (n 1 above) 3 B & S 826, 839; 122 ER 309314.

[189] Whether this was a just allocation of the losses arising cannot be ascertained: we know that the plaintiffs suffered certain reliance losses, it seems equally possible—given the known facts—that the defendants had suffered losses in engaging the diverse amusements and readying the hall for the concerts.

[190] Anon, 'Art III. Execution of a Contract Impossible' (n 86 above) 251.

[191] Anon, 'Art III. Execution of a Contract Impossible' (n 86 above) 252.

prevent judicial remaking on the basis of the fulfillment of the parties' intention. A third possibility lies in the fact that the decision as to whether or not something came within an existing qualification was one made with reference to previous case law on the effects of fires, lightning, embargoes and so forth. It may have appeared easier to devise a form of exception, which, although a disguised rule of law, operated in accordance with the actual facts of each given case. A fourth possibility is that the use of an implied condition to excuse performance had the effect of discharging the performance owed by both parties. The effect of such a discharge has the appearance of equality in the allocation of loss, or at least, appears in principle more attractive than making one of the parties bear all of the loss. A fifth possibility lies in the intellect of Blackburn J himself. He was a learned lawyer who sought to order and to explain the structure of the common law in such a way as to facilitate future development. His efforts in *Taylor v Caldwell* were not unique; they were early indications of a great common law judge. He may well have found this an unsatisfactory area of law; it is striking that he appeared as counsel or was the reporter in a number of supervening impossibility cases. As one familiar with the civil law, he was aware that other legal systems dealt with supervening impossibility by excusing further performance. To implement such excuses directly was not a route open to him and he chose an accepted common law route: the incremental change. That it was based upon an implied condition—implied from the parties' intent—fitted neatly within the common law of contract as it was then developing. In this sense, it may be that the decision in *Taylor v Caldwell* is a manifestation of an increasingly sophisticated legal system.

That all of these possible answers, either in isolation or in conjunction with each other, existed can be seen within a sixth possible answer. *Taylor v Caldwell* is, in many ways, best seen as a continuation of the debate that arose in *Hall v Wright*.[192] The case was odd: the plaintiff sued her fiancé for a breach of promise of marriage. The defendant alleged, inter alia, that he was excused from performing the agreement because after the promise had been made he became, and remained, afflicted with a serious bodily disease.[193] He was incapable of marriage due to the great danger to his life and was unfit for the married state. Blackburn J described the case as 'much discussed'[194] and *The Law Times* wrote of an 'astounding decision . . . at variance with the dictates of reason, justice and morality'.[195] It caused great divisions of opinion amongst the judges who heard it. The Queen's Bench judges were equally divided[196] and when the junior judge

[192] The decision was criticised on many grounds. See, eg 'Contracts Impossible of Performance', originally published in *The Irish Law Times* and republished in (1883) 16 *Central Law Journal* 105.

[193] From the descriptions given in the case, it appears that he was afflicted with tuberculosis. Sadly, his predictions proved true for he died before the Exchequer Chamber gave judgment: (1860) 6 *The Jurist (NS)* 193, 198.

[194] *Taylor v Caldwell* (n 1 above) 3 B & S 826, 833; 122 ER 309, 310.

[195] *The Law Times* (3 December 1859) 121. The author was considerably aggrieved that the woman had received the money without having to take the man with it.

[196] *Hall v Wright* (1858) El & Bl El 746, 120 ER 688.

withdrew his opinion, the defendant succeeded. On the plaintiff's appeal to the Exchequer Chamber,[197] the judges were as divided: four found for the plaintiff and three for the defendant. The division turned on whether the rule of absolute liability established in *Paradine v Jane* applied to all contracts or whether it was limited to certain kinds of contracts. Another fundamental difference was whether or not it was reasonable or necessary to imply conditions into the performance of a contract such that if these conditions were not met, the parties were discharged from performance. The majority applied the rule in *Paradine v Jane* because it was thought that contractual certainty required it and that it was better to adhere to this rule than to create an exception which destroyed legal certainty and could be generally inconvenient.[198]

The real division between the judges in the Exchequer Chamber lay in whether or not to imply a condition in these circumstances. It was also expressed that to imply a condition would allow a party to set up their own infirmity as a ground for discharge[199] and that to imply a condition into the contract would be to guess at the parties' contract rather than to construe it.[200] The dissenting judges viewed the contract as subject to implied conditions, including the fitness of the parties: once these failed, performance was discharged. The authority of *Paradine v Jane* was misapplied because it begged the question of whether or not the contract was one made subject to implied conditions.[201] In reaching this conclusion, the dissenting judgments referred to the personal services contracts in which death excused performance, or at least, meant that the executors were not obliged to perform the services. The dissenting judgments recognised that the conditions are implied out of necessity or in the interests of reasonability.[202] Pollock CB acknowledged that to imply a condition in these cases was really to create a legal exception.[203] It is plausible that what Blackburn J did in *Taylor v Caldwell* was to revisit the decision in *Hall v Wright* and place the law upon a more secure footing.[204]

1. Contemporary Reactions to the Decision

Whatever the reasons behind Blackburn J's extraordinary decision, it is clear that *Taylor v Caldwell* did not establish the doctrine of frustration whereby the

[197] *Hall v Wright* (1859) El & Bl El 765, 120 ER 695.

[198] This view is best expressed in the reasons of Martin B, *Hall v Wright* (n 197 above) El & Bl El 765, 789.

[199] *Hall v Wright* (n 197 above) 792 (Williams J).

[200] *Hall v Wright* (n 197 above) 785 (Willes J).

[201] *Hall v Wright* (n 197 above) 777 (Bramwell B), 775 (Watson B).

[202] *Hall v Wright* (n 197 above) 784 (Bramwell B).

[203] *Hall v Wright* (n 197 above) 794.

[204] In *Boast v Firth* (1868) LR 4 CP 1, the judge distinguished *Hall v Wright* in preference to the decision in *Taylor v Caldwell* (at 8). The relationship between the two cases is also explained in the decision in *Robinson v Davison* (1871) LR 6 Exch 269.

parties were excused from contractual performance when a supervening impossibility arose. This can be seen from the reaction of contemporary observers. The small and incremental nature of the change provided by Blackburn J attracted almost no immediate reaction in legal journals. There was no recognition that this decision worked against the absolute liability imposed by *Paradine v Jane*, let alone an acknowledgement that a new doctrine of contract law had begun. *The Jurist* did not report the case and briefly summarised it.[205] *The Solicitor's Journal* gave a brief summary and explained that this was a case of implied conditions in contract.[206] *The Law Times* reported the original hearing of the case at the end of Hilary Term[207] and noted that judgment was pending[208] but never did manage to report the decision itself. In fairness, the paper was, at the time, rather concerned about the merits of pending legislation prohibiting poisonous birdseed. The *American Law Register* noted briefly that the parties had been discharged from performance because of impossibility but went no further.[209] After the decision in *Appleby v Myers*[210] it was recognised in the *Jurist* that *Taylor v Caldwell* seems to have worked a change upon the law, but neither the nature nor the desirability of the change were commented upon.[211]

2. Later Decisions

Decisions shortly after *Taylor v Caldwell* indicate that the judiciary did not regard the case as establishing a new doctrine. *Appleby v Myers* is regarded as a case which approved *Taylor v Caldwell*, and yet a careful reading does not support this interpretation. The court found the application of implied terms useful in reaching its conclusion but did not accept the argument of counsel that the decision in *Taylor v Caldwell* meant that the entire contract was subject to the implied term that the factory would continue to exist and that performance on both sides was discharged when it no longer did. In addressing this argument, Montague Smith J was sceptical of *Taylor v Caldwell*:

> the Court of Queen's Bench *may have properly adopted and applied this principle* in the case of the contract before them: but we think it cannot be correctly applied to the present case (emphasis added).[212]

[205] (1863) IX(1) *The Jurist (NS)* 48 and 163. It was summarised under two headings: one being contract and implied terms and conditions, and the other being landlord and tenant, implied conditions

[206] (1862–63) VII *The Solicitor's Journal & Reporter* (13 June 1863) 602.

[207] *The Law Times* (28 January 1863) 184.

[208] *The Law Times* (11 April 1863) 313.

[209] (1863–64) 12 *American Law Register* 442.

[210] *Appleby v Myers* (1866) LR 1 CP 615.

[211] Anon, 'Inevitable Accident', reprinted in (1866) 2 *Upper Canada Law Journal (NS)* 236.

[212] *Appleby v Myers* (n 210 above) 622. When stating the implied condition in *Taylor v Caldwell*, the judge refers to it as one stated 'no doubt in general terms'.

Courts declined to imply conditions in cases where they could usefully have been employed.[213] Absolute liability co-existed with the new implied conditions of *Taylor v Caldwell* for some time.[214] There are indications that Blackburn J himself did not see his incremental change as one which was intended to overturn the doctrine of absolute liability and that the use of an implied condition was to be used sparingly, only in the cases of supervening impossibilities which could work an absurdity.[215] The early judicial treatment of the decision supports the view that it was intended to introduce an incremental change based on sanctity of contract, rather than a new doctrine which undermined this sanctity.

3. Commentators

The 19th century commentators regarded *Taylor v Caldwell* as adding a limited exception to the existing qualifications to *Paradine v Jane*. In their second report on contract,[216] the Indian Law Commissioners noted that a person who fails to do an act he has undertaken to do by contract shall pay damages to the person to whom the obligation was owed. An express 'Exception' was set out to this general rule that[217]

> [a] man incurs no liability through the non-performance of an act which he has engaged by contract to do, where, since the date of the contract, the performance of the act has been rendered unlawful, or has been made impossible by some event of which he did not, expressly or by implication, take upon himself the risk.

The illustration of this exception was *Taylor v Caldwell*, suitably modified to give a hire price in rupees. The resulting Indian Contract Act extended the principle of *Taylor v Caldwell* to make it an implied condition in all contracts that the performance should remain possible.[218]

Addison's treatise explained *Taylor v Caldwell* as an exception to the rule of absolute liability on the grounds that a supervening act of God had made

[213] See, eg, *Baily v De Crespigny* (1869) LR 4 QB 180; *Carstairs v Taylor* (1871) LR 6 Exch 217, *The Teutonia* (1872) LR 4 PC 171; *Jacobs* v *Crédit Lyonnais* (1884) 12 QBD 589.

[214] See, eg, *Re Arthur* (1880) 14 Ch D 603; *Chartered Mercantile Bank of India v Netherlands India Steam Navigation Company* (1883) 6 B & S 101, 122 ER 1135; 10 QBD 540; *Lloyd v Guibert* (1865) LR 1 QB 115. In some cases, the co-existence was for some time: Treitel, *Frustration and Force Majeure* (n 85 above) 53–5.

[215] In *Ford v Cotesworth* (1868) LR 4 QB 127; affirmed (1870) LR 5 QB 544, Blackburn J gave a decision in which he relied upon *Barker v Hodgson* (n 104 above), a case based upon *Paradine v Jane*. He also appears to approve of counsel's argument based upon absolute liability in *Geipel v Smith* (1872) LR 7 QB 404, 407. In a contract for personal services in which the artiste was unable to perform due to illness, *Poussard v Spiers* (1876) 1 QBD 410, 24 WR 870, Blackburn J did not consider the application of *Taylor v Caldwell* despite counsel's argument on this point.

[216] *Copies of Papers showing the present position of the Question of a Contract Law for India* (1868), No 239.

[217] *Ibid* para 28, 12.

[218] F Pollock, *Principles of Contract At Law and In Equity* (London, Stevens and Sons, 1876) 353 explained that this was a departure from English law.

the performance impossible unless the terms of the contract make clear that the obligor was bound in any event.[219] Addison's treatise was an old one and the addition is made without substantive change to the topic. More recently composed treatises were written by Anson and Pollock. Anson dealt briefly with the subject of subsequent impossibility.[220] The general rule was set out in *Paradine v Jane*. To this rule, the law admitted three limited exceptions. The second of these was based upon *Taylor v Caldwell*: where the continued existence of a specific thing was essential to the performance of the contract and it was destroyed without the fault of the parties, a discharge operated. As was his fashion, Pollock gave a somewhat more convoluted account which set out the general rule in *Paradine v Jane* and then explained *Taylor v Caldwell* as an exception 'where the performance of the contract depends upon the existence of a specific thing'.[221]

E. HOW THE EXCEPTION BECAME THE RULE

Blackburn J's incremental change might have disappeared if it had not received desirable attention. Nothing in the immediate treatment of the case indicated that it would be considered the foundation of a new contractual doctrine. Within two decades, however, the flexibility of the approach offered by an implied condition became apparent and the case was frequently raised in arguments. As this occurred, the link between *Taylor v Caldwell* and discharge for impossibility was built up.[222] From a judicial perspective, this fictitious device allowed courts to impose a rule of law while appearing to do so on the grounds of the parties' intentions. The device had the advantage of allowing a contract to be discharged not only in the face of a subsequent impossibility, but also in the face of radically changed circumstances which left performance possible, but without the purpose the parties had intended.[223] It also included situations in which the adventure was frustrated; primarily shipping cases where the event so disrupted the schedule of the contract that its purpose was lost. The broadness of this device allowed many different events to be swept up under the new rubric of 'impossibility' or 'frustration'. In this process, Blackburn J's implied condition device became a doctrine. As McElroy noted, it was the application of the case to the 'Coronation Cases' and to the numerous cases that arose from the

[219] CG Addison, *A Treatise on the Law of Contracts*, 9th edn (London, Horace Smith, Stevens and Sons, 1892) 133–4.

[220] Sir WR Anson, *Principles of the English Law of Contract* (Oxford, Clarendon Press, 1879) 314–17. The other two exceptions were legal impossibility and a contract for personal services.

[221] Pollock (n 218 above) 415.

[222] In addition to the treatises cited above, the treatment by CG Tiedeman, 'Impossibility of Performance as a Defense to Actions Ex Contractu' (1881) 12 *Central Law Journal* 4, 8–10 illustrates the process underway from an American perspective.

[223] The 'Coronation Cases'—in which a room or a seat was still capable of occupation, but not of allowing the viewing of the cancelled coronation—are a good example.

massive disruption of commercial activities brought about by the First World War that extended the doctrine enormously.[224] By 1920, Scrutton LJ remarked that the numerous cases decided on this new exception had made a 'serious breach in the ancient proposition' of *Paradine v Jane*.[225] The exception had come to dominate the rule. Glanville Williams noted, with some despair, that in the half-century following the decision, three separate concepts were swept together under the *Taylor v Caldwell* ruling: first, the discharge of contracts for physical impossibility (those actually covered by the ruling); secondly, the frustration of the adventure, or commercial impossibility; and thirdly, the discharge of contracts for a failure of consideration.[226] It is in this sense that *Taylor v Caldwell* marked a starting point for the development of a new doctrine that was not fully developed until the House of Lords' decisions in *Davis Contractors Ltd v Fareham UDC*,[227] in which Lord Radcliffe recognised that the doctrine of frustration did not depend upon a condition implied by the parties but upon the operation of a rule of law[228] and *National Carriers Ltd v Panalpina (Northern) Ltd*,[229] in which it was recognised that the doctrine of frustration extended to leases.[230] In the intervening period, the ruling in *Taylor v Caldwell* was to cause an enormous number of problems.[231]

It is correct to view *Taylor v Caldwell* as a landmark case in the law of contract. We can trace the development of a new contractual doctrine of frustration to this case because it was the case which initiated questions about the absolute liability of contractual obligations and instigated the change which developed into a new doctrine. And while frustration is not entirely the right legal term for the situation that arose between Taylor and Caldwell, it is an entirely suitable term to describe the Surrey Music Hall and those involved with it during its short existence.

[224] RG McElroy, *Impossibility of Performance* (Cambridge, Cambridge University Press, 1941) 133.

[225] *Ralli Brothers v Compañia Naviera* [1920] 2 KB 287, 300.

[226] McElroy, *Impossibility of Performance* (n 224 above) 'Introduction', xxvii–xl.

[227] *Davis Contractors Ltd v Fareham UDC* [1956] 1 AC 696 (HL).

[228] Lord Radcliffe stated, after considering the fiction of implied terms: 'perhaps it would be simpler to say at the outset that frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do': *ibid* 728–9.

[229] *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] 1 AC 675 (HL).

[230] And by doing so, arguably finished Blackburn's original statement that it did not matter if the contract between Taylor and Caldwell was a lease or not.

[231] These problems are beyond the scope of this paper, but they revolve around the difficulty of utilising the fiction of implied terms, loss allocation following the discharge of the contract, and the restitution of unjust enrichments. The underlying problem of when something is the foundation of a contract remains in English law.