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Since time immemorial, people have made contracts. For no doubt just as long, the expectations created by these contracts have sometimes been disappointed by subsequent events. If the disappointing event occurs before the contract has been fully performed by both sides, the question then arises: What is the legal effect of the event upon the unperformed contractual obligations? Does the disappointing event discharge or only suspend the obligations, or does it have no legal effect? This question has been with us for centuries¹ and can be exquisitely difficult to decide. This article studies the English solutions to the question from late medieval times to the present.

In the law of contracts, cases presenting this question are usually classified under the topic of impossibility, a shorthand reference to the doctrine of excuse for supervening impossibility of performance. In England this topic is sometimes called frustration, but this article uses the term "frustration" only to refer to a particular part of the larger topic of impossibility—excuse for inordinate delay.

English impossibility cases have traditionally played a significant role in the teaching of contract law in American legal education. Most students in American law schools encounter the English impossibility cases of *Paradine v. Jane*,² *Taylor v. Caldwell*,³ and *Krell v. Henry*⁴ in their first-year contract

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1. The effect of a supervening event on an unperformed contractual obligation is discussed in the Digest (or Pandects) of Justinian published by order of that Byzantine Emperor in 533 A.D. DIG. 45.1.23, .33. The Digest is a compilation of the best of the Roman jurists, most of whose works have not survived. See 1 S. SCOTT, THE CIVIL LAW 15-18 (1932) (describing compilation of Digest); *id.* 179-207 (Justinian's three prefaces to Digest that outline procedures to be followed in compiling Digest).

2. Aley 26, 82 Eng. Rep. 897, Style 47, 82 Eng. Rep. 519 (K.B. 1647) (lease of land for years; dispossession of lessee by Royalist forces during English Civil War held not to excuse obligation to pay rent).

3. 3 B. & S. 826, 122 Eng. Rep. 309 (Q.B. 1863) (contract for use of performance hall and gardens; hall destroyed by fire; contract terminated).

4. [1903] 2 K.B. 740 (C.A.) (hirer of flat along route of coronation procession excused from paying rent when coronation postponed).

law classes.⁵ The primary thesis of this article is that the English law of impossibility and its history are often incorrectly taught to law students. *Paradine*, for example, is usually cited for a proposition for which the case does not stand and which the judge had no intention of establishing.⁶ *Krell* is often taught without appreciation of its surrounding events or subsequent English case law that indicate it was really a creature of unique circumstances rather than the foundation of a new principle of impossibility law.⁷

This study has several additional goals. First, most of the other discussions of this area pay little attention to the authorities cited in the early English impossibility cases, perhaps because these authorities are relatively inaccessible. Many times, however, these cited authorities provide valuable clues for interpreting the main cases. Therefore, this study describes the authorities in detail, usually in the footnotes so as not to burden the text. Second, when the result of a case seemed puzzling attempts were made to locate additional facts not included in the court's opinion that might serve to explain the case. These endeavors were not always successful, but some were and have been included. Finally, this study provides an overview of the English law of impossibility that the reader may compare with its American counterpart to discern similarities and differences in approach between these two common law systems.

I. REMEMBRANCE OF THINGS PAST:⁸ THE ENGLISH LAW OF IMPOSSIBILITY BEFORE *PARADINE V. JANE*

It has often been said that, under early English common law, impossibility of performance arising after a contract had been made was not an excuse for nonperformance.⁹ The case usually cited in support of this rule is *Paradine v.*

5. These English cases are contained or referred to in many American contract law casebooks, e.g., F. KESSLER, G. GILMORE & A. KRONMAN, *CONTRACTS, CASES AND MATERIALS* 910-30 (3d ed. 1986); E. FARNSWORTH & W. YOUNG, *CONTRACTS, CASES AND MATERIALS* 952-57, 994-96 (3d ed. 1980); L. FULLER & M. EISENBERG, *BASIC CONTRACT LAW* 845-48, 865-68 (4th ed. 1981), and contract law treatises, e.g., 6 A. CORBIN, *CORBIN ON CONTRACTS* § 1320, at 328-31, § 1331, at 355-57, 462-67 (1962); 18 S. WILLISTON, *WILLISTON ON CONTRACTS* § 1931, at 3-5, §§ 1954-1955, at 124-42 (3d ed. 1978); E. FARNSWORTH, *CONTRACTS* 670-76, 689-90 (1982); J. CALAMARI & J. PERILLO, *CONTRACTS* 477, 479, 495 (2d ed. 1977); J. MURRAY, *MURRAY ON CONTRACTS* 388-91, 403 (2d rev. ed. 1974).

6. See *infra* text accompanying notes 20-53 (discussing *Paradine*).

7. See *infra* text accompanying notes 162-71 (reviewing factual circumstances and legal rationale of *Krell*).

8. "A la recherche du temps perdu." Title of a novel by Marcel Proust, perhaps from *Ecclesiastes* 1:11.

9. E.g., R. McELROY, *IMPOSSIBILITY OF PERFORMANCE* 4 (1941); 18 S. WILLISTON, *supra* note 5, § 1931, at 2-3; A. CORBIN, *supra* note 5, § 1320, at 322; G. TREITEL, *LAW OF CONTRACTS* 583 (4th ed. 1975); J. CALAMARI & J. PERILLO, *supra* note 5, at 477 n.4; J. MURRAY, *supra* note 5, at 388-89; L. SIMPSON, *HANDBOOK OF THE LAW OF CONTRACTS* § 174, at 359 (2d ed. 1965).

Jane.¹⁰ Sometimes this rule is characterized as a general rule with several exceptions.¹¹ It is, however, an oversimplification to say that any such rule existed before, or was established by, *Paradine*.

Prior to the decision in *Paradine*, the English law of supervening impossibility was still developing. Precedents steadily accumulated, but no general rule of excuse or nonexcuse seemed to emerge. Professor Brian Simpson reviewed Year Book¹² impossibility cases as part of his general study of the history of English contract law and concluded that medieval English law tended to excuse nonperformance of a contractual obligation if an act of God, occurring after the making of the contract, made performance wholly impossible.¹³ He also found that nonperformance was not excused if a third person caused the subsequent impossibility or if an act of God made performance merely more onerous.¹⁴ Nowhere in his study does Professor Simpson represent the Year Book cases as reflecting a general rule that impossibility was no excuse.

Nor does such a general rule seem to have emerged in the century between the last of the Year Books and the *Paradine* decision. Instead, that era saw a rich and varied development of the impossibility doctrine. For instance, when bailees or carriers were deprived of the bailed goods by events beyond their control, sometimes they were excused from delivering the goods; sometimes they were not.¹⁵ Likewise, various lessee covenants were only some-

10. E.g., R. MCELROY, *supra* note 9, at 5; 18 S. WILLISTON, *supra* note 5, § 1931, at 2-3; G. TREITEL, *supra* note 9, at 583; J. CALAMARI & J. PERILLO, *supra* note 5, at 477; J. MURRAY, *supra* note 5, at 388 n.54 (discussing Page, *The Development of the Doctrine of Impossibility of Performance*, 18 MICH. L. REV. 589 (1919)).

11. Aleyn 26, 82 Eng. Rep. 897, Style 47, 82 Eng. Rep. 519 (K.B. 1647) (lease of land for years; dispossession of lessee by Royalist forces during English Civil War held not to excuse obligation to pay rent during those years).

12. The Year Books were eventually printed and bound by the year of the monarch's reign in which the reported cases were argued. The books contain reports of the oral proceedings of cases, including the arguments of counsel. The earliest dated reports appeared in the 1280s; the last printed year book is from 1535. Virtually nothing is known about the authors of the Year Books, but some have speculated that the Year Books may have been produced primarily by or for law students. In any event, they were cited as authority well into the 16th century in other Year Book cases and in the Nominate case reports, which followed the Year Books. Together with the Plea Rolls, which were the official records of the cases, and a few treatises, the Year Books provide virtually the entire source of information now extant on medieval English case law. On the Year Books generally, see J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 151-55 (2d ed. 1979), and works cited in the bibliography at 167.

13. A. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT 30-33, 525-32, 573 (1975).

14. *Id.* at 29-32 (cases in covenant); *id.* at 107-10 (cases of conditioned bonds in debt); *id.* at 525-26 (summary of medieval law).

15. See *Williams v. Hide*, Palm. 548, 81 Eng. Rep. 1214 (K.B. 1629) (gratuitous bailment of horse that died; bailee excused) (another report of this case *sub nom.* *Williams v. Lloyd* appears in W. Jones 179, 82 Eng. Rep. 95); *Southcot v. Bennet*, Cro. Eliz. 815, 78 Eng. Rep. 1041 (Q.B. 1601) (bailment to keep safely; theft of goods by bailee's servant no excuse) (other reports of this case appear in 13 HARV. L. REV. 43 (1899) and 4 Co. Rep. 836, 76 Eng. Rep. 1061); *Taylor's Case*, 4

times excused by events beyond the lessee's control.¹⁶ The conditioned bond¹⁷ cases displayed a similar diversity of result.¹⁸

Leon. 31, 74 Eng. Rep. 708 (K.B. 1583) (carriage of apples by boat; tempest that sank boat no excuse); Woodlife's Case, Owen 57, 74 Eng. Rep. 897, Moore 462, 72 Eng. Rep. 696 (Q.B. 1597) (robbery no excuse in contract of carriage); see also Note, Dalis. 8, 123 Eng. Rep. 231 (1553) (note by two judges on carrier's liability for robbery) (a translation of this authority appears in Beale, *The Carrier's Liability: Its History*, 11 HARV. L. REV. 158, 164 & n.6 (1897)).

16. See [Anonymous], 1 Dyer 33a, 73 Eng. Rep. 72 (K.B. 1537) (covenant to sustain and repair banks of river; banks carried away by extraordinary flood; covenant to sustain excused but not covenant to repair); Sherborne v. [Anonymous], *digested in SPELMAN'S REPORTS Arbitriment* pl. 3, *Debt* pl. 4 (1522) (covenant to repair; house demolished by chance storm or enemies; no excuse) *reprinted in* 93 SELDON SOC'Y 18, 85 (1976); Andrews v. Needham, Noy 75, 74 Eng. Rep. 1042 (Q.B. 1598) (covenant to yield up premises at end of term; lessee dispossessed by one with older title; excuse); Richards le Taverner's Case, 1 Dyer 56a, 73 Eng. Rep. 123 (K.B. 1543) (lease of land and sheep for one rent; sheep died; division of opinion over whether to apportion rent) (described *infra* note 37).

17. The conditioned bond or obligation was a common form of written contract for a wide variety of transactions. Essentially, the bond was a promise to pay a sum certain in money if a condition failed to occur. As used to constitute a contract, the bargained for performance was the condition and the bond was the penalty to be paid if the bargained for performance was not forthcoming. For example, if Seller promised to sell Blackacre to Buyer for £100, this agreement commonly would be reflected in two conditioned bonds, one by the Seller and the other by the Buyer. Seller's conditioned bond would be a promise to pay Buyer, say £200, upon the condition that if Seller conveyed Blackacre to Buyer before a named date, Seller's bond was void. Buyer's bond would promise to pay Seller £200 upon the condition that if he paid Seller £100 before the named date, Buyer's bond would be void. Thus the condition describes the bargained for performance, while the bond itself is merely a penalty for nonperformance. See Simpson, *The Penal Bond with Conditional Defeasance*, 82 LAW Q. REV. 392, 393-96 (1966), *reprinted with minor changes in* A. SIMPSON, *supra* note 13, at 88-92 (1975).

This roundabout way of reducing an agreement to writing seems to have been developed by medieval lawyers to permit an injured party to sue by writ of debt for a sum certain rather than by writ of covenant for an uncertain amount of damages to be assessed by a jury. There may have been pleading advantages to the debt action as well. Simpson, *supra*, at 415. Additional incentive to use the conditioned bond was provided in 1352 when a statute extended the writ of *capias ad satisfaciendum* (arrest and imprisonment of judgment debtor) to debt actions but not to covenant actions. A. SIMPSON, *supra* note 13, at 43, 588; see Milsom, *Reason in Development of the Common Law*, 81 LAW Q. REV. 496, 509-10 & n.26 (1965).

18. Sparrow v. Sowgate, W. Jones 29, 82 Eng. Rep. 16 (K.B. 1623) (bond to be paid unless third person paid judgment or turned himself in to be imprisoned on the judgment; third person died before payment or turning himself in; bond excused); Hobs v. Tedcastle, Cro. Eliz. 596, 78 Eng. Rep. 839, Moore 433, 72 Eng. Rep. 677, Goulds. 174, 75 Eng. Rep. 1074 (K.B. 1597) (same); Kinguel v. Knapman, Cro. Eliz. 11, 78 Eng. Rep. 277, *sub nom.* Kinguel & Chapman's Case, 2 Leon. 155, 74 Eng. Rep. 438 (Q.B. 1577) (bond to be paid unless third person paid arbitration award; third person made partial payment, then died; bond not excused); [Anonymous], 3 Leon. 212, 74 Eng. Rep. 640 (K.B. 1588) (bond to be paid unless defendant paid arbitration award against him before certain day; person to be paid died before the certain day; bond not excused); Arundell v. Combe, 3 Dyer 262a, 73 Eng. Rep. 581 (Q.B. 1566) (bond to be paid unless third person failed to prove allegations in suit by certain date and failed to pay to plaintiff amount of a judgment against third person; third person died before the certain date; bond excused); Wood & Bate's Case, Palm. 512, 81 Eng. Rep. 1197 (K.B. 1628) (bond to be paid unless wife received payment from estate of third party's husband within specified time; wife died before specified time; bond excused); Laughter's Case, 5 Co. Rep. 21b, 77 Eng. Rep. 82, *sub nom.* Eaton & Monox v. Laughter, Cro. Eliz. 399, 78 Eng. Rep. 643 (Q.B. 1594) (suit on bond against surety; bond to be paid unless principal

II. THE HALF-TRUTHS OF ONE GENERATION BECOME THE WHOLE TRUTHS OF ANOTHER:¹⁹ *PARADINE V. JANE* AND ITS PROGENY

Paradine v. Jane is often taken as having established the general rule of no excuse. In fact it did not. The case arose from events set in motion during the English Civil War. Paradine had leased lands to Jane for a term of years, reserving for himself a stipulated rent.²⁰ Jane was dispossessed by "a certain German prince, by name, Prince Rupert, an alien born, enemy to the king and kingdom,"²¹ and his army, and did not regain possession or pay rent for

purchased land or bequeathed money to his wife in will; wife died before principal and before land purchased; bond excused); *Lamb's Case*, 5 Co. Rep. 23b, 77 Eng. Rep. 85, *sub nom.* *Lamb v. Brownwent*, Cro. Eliz. 716, 78 Eng. Rep. 950 (Q.B. 1599) (bond to be paid unless defendant gave third person a release that a judge of Prerogative Court would approve during a certain term; judge did not approve release during the term; bond not excused); [Anonymous], *reprinted in* SPELMAN'S REPORTS *Condicion* pl. 3 (1529) (bond to be paid unless defendant permitted plaintiff to take profits of certain land until plaintiff promoted to land by third party; third party died before promoting plaintiff; various opinions on whether bond excused; no result reported), *reprinted in* 93 SELDEN SOC'Y 41 (1976); *More & Baker v. Morecomb*, Cro. Eliz. 864, 78 Eng. Rep. 1090 (Q.B. 1601) (bond to be paid unless defendant delivered ship or its value assessed by third persons to plaintiff on certain date; third persons did not assess value; bond not excused); *Wistan Browns Case*, Ben. 8, 73 Eng. Rep. 937, *sub nom.* *Westan Brounes Case*, Ben. & D. 35, 123 Eng. Rep. 27 (1500) (bond to be paid unless defendant enfeoffed two third parties before certain day; one third party died before the day; bond excused); *Tropp v. Bedingfield*, Cro. Eliz. 278, 78 Eng. Rep. 532 (Q.B. 1591) (bond to be paid unless third party appeared for suit or paid specified amount; third party died before appearance or payment; result uncertain—judges inclined to excuse bond but took case under advisement). Later references to *Tropp* indicate that the bond may not have been excused. See *Eaton & Monox v. Laughter*, Cro. Eliz. 399, 401, 78 Eng. Rep. 643, 645, *sub nom.* *Eaton's Case*, Moore 357, 72 Eng. Rep. 627 (Q.B. 1594) (referring to case as "le cas dun Crop"); *Arundell v. Combe*, 3 Dyer 262a, 262a n.30, 73 Eng. Rep. 581, 581 n.30 (Q.B. 1566) (referring to case as "Crop and Beddingfield's case").

19. "The half truths of one generation tend at times to perpetuate themselves in the law as the whole truths of another, when constant repetition brings it about that qualifications, taken once for granted, are disregarded or forgotten." *Allegheny College v. National Chautauqua Bank*, 246 N.Y. 369, 373, 159 N.E. 173, 174 (1927) (Cardozo, J.).

20. Neither the Aleyn nor the Style report of the case tells when the lease was made. Consequently, it is not known whether the lease was made during the Civil War at a time when dispossession by enemy forces was foreseeable.

21. Aleyn 26, 26, 82 Eng. Rep. 897, 897. Prince Rupert was in fact the King's nephew and commanded Royalist troops during the Civil War. In his plea, the defendant's attorney most likely portrayed him as an alien enemy in an attempt to rely on precedent excusing performance interfered with by alien enemies. In the Case against the Marshal of the Marshalsea, Y.B. Hil. 33 Hen. 6, fol. 1, pl. 3 (1455), the Marshal, who was the warden of the Court of King's Bench prison, was sued for damages for permitting a prisoner to escape, presumably upon the ground that the warden was surety for the debt for which the prisoner had been imprisoned. A. SIMPSON, *supra* note 13, at 74. The plea in defense was that a great multitude of enemies broke into the prison and took the prisoner away. The distinction (borrowed from the law of waste) apparently accepted was that if those who freed the prisoner were subjects of the King ("traitours"), the plea was insufficient; but if they were not the King's subjects ("aliens enemies"), the plea was sufficient. For a brief description of this distinction, see *Southcote's Case*, 4 Co. Rep. 83b, 84b, 76 Eng. Rep. 1061, 1063 (Q.B. 1601). Neither the Year Book nor the Plea Rolls show that a decision was ever rendered in this case, although it was adjourned several times. E. FLETCHER, *THE CARRIER'S LIABILITY* 253-55 (1932) (no record of any decision; Plea Rolls show case adjourned seven times). Yet legal tradition has it

almost three years. Paradine sued, in debt, for the rent. Jane confessed for part of the rent²² and pleaded his dispossession by Prince Rupert in defense for the remainder. The court held Jane's plea to be insufficient and entered judgment for Paradine.²³ The court, in an opinion by Judge Rolle, relied on two grounds for its decision. First, the defendant had not pleaded that the members of Rupert's army consisted entirely of alien enemies.²⁴ Second, even if the whole army were alien enemies, the defendant still owed the rent. The reasons for this conclusion are described somewhat differently in the two reports of the case. Aleyn's report, which is the fuller of the two, states:²⁵

And this difference was taken, that 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. As in the case of waste,²⁶ if a house be destroyed by tempest, or by enemies, the lessee is excused. Dyer, 33. a.²⁷ Inst. 53. d. 283. a.²⁸ 12 H. 4. 6.²⁹ so of an escape. Co.

that the Marshal was held liable. Stoljar, *The Early History of Bailment*, 1 AM. J. LEGAL HIST. 5, 23 & n.73 (1957). The assault on the prison may refer to Cade's rebellion in 1450. See *Evans v. Hutton*, 4 Man. & G. 954, 963, 134 Eng. Rep. 391, 395 (C.P. 1842) (argument of Bompas, Serjt., citing the Marshal's case and referring to it as "Jack Cade's case"); T. PLUNCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 478 & n.8 (5th ed. 1956) ("As this was in 1450, the allusion must be to Cade's rebellion."). But see Stoljar, *supra*, at 24 & n.75 (no direct evidence that rebels freed prisoners).

22. The reports of the case do not say why Jane admitted to only a portion of the rent claim.

23. Interestingly, neither the English nor American courts uniformly agreed whether occupation of leased premises by enemy forces during the English Civil War or the American Revolution excused the lessee's obligation to pay rent. See *Paradine v. Jane*, Aleyn 26, 82 Eng. Rep. 897, Style 47, 82 Eng. Rep. 519 (K.B. 1647) (English Civil War; occupation by Royalist forces; no excuse); *Harrison v. Lord North*, 1 Ch. Cas. 83, 22 Eng. Rep. 706 (1667) (English Civil War; occupation by Parliamentary forces; Lord Chancellor declared that "if he could he would relieve the [lessee]"); *Pollard v. Shaffer*, 1 Dall. 210 (Pa. Super. 1787) (American Revolution; occupation by British army; no excuse); *Bayly v. Lawrence*, 1 S.C.L. (1 Bay) 499 (1792) (American Revolution; occupation by British Army; excuse).

24. Thus, the defendant had not brought himself within those cases excusing obligations interfered with by alien enemies. See *supra* note 21 (discussing excuse for alien enemy interference). The court's refusal to interpret the plea as alleging that not only Prince Rupert but also the members of his army were alien enemies may have been the court's way of taking judicial notice that the Royalist forces commanded by Rupert were subjects of the King and thus not alien enemies.

25. Aleyn at 26, 27-28, 82 Eng. Rep. at 897, 897-98 (emphasis added). The footnotes inserted in the following excerpt are mine.

26. One who took less than a fee estate in land was obliged to permit no acts of waste, specifically, acts that spoiled or deteriorated the property. BLACK'S LAW DICTIONARY 1425 (5th ed. 1979). This obligation did not depend upon a specific covenant or promise by the obligor. Thus, it appears to have been a duty created by the law. 6 A. CORBIN, *supra* note 5, § 1322, at 328 n.11 (law creates duty not to commit waste or permit waste by others, but no legal duty to repair destruction by storm or enemies).

27. [Anonymous], 1 Dyer 33a, 73 Eng. Rep. 72 (K.B. 1537). At issue was a lease for years of a meadow near a river. The lessee covenanted to sustain and repair the banks of the river to prevent water from overflowing, or to forfeit ten pounds. Later a "great, outrageous and sudden flood" destroyed the banks. *Id.* at 72. The court held the lessee excused from the penalty "because it is the act of God, which cannot be resisted; but still he is bound to make and repair the thing in convenient time, because of his own covenant." *Id.* at 72-73. Thus, while the lessee was excused from his

4. 84. b.³⁰ 33 H.6.1.³¹ So in 9 E. 3. 16.³² a supersedeas was awarded to the justices, that they should not proceed in a cessavit³³ upon a cesser during the war, 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*,³⁴ notwithstanding

covenant to sustain the river banks because an act of God had made performance of that covenant impossible, he was not excused from his covenant to repair, presumably because repair was still possible though no doubt more onerous.

28. The citations are probably to E. COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, OR, A COMMENTAIRE UPON LITTLETON, NOT THE NAME OF A LAWYER ONLY, BUT OF THE LAW IT SELF*, fols. 53a, 283a (1670). Both citations concern liability for waste and state in relevant part:

If the house fall down by tempest, or be burnt by lightning, or prostrated by enemies, or the like, without a default of the tenant, or was ruinous at his coming in, and fall down, the tenant may build the same againe with such materials as remains, and with other timber which he may take growing upon the ground for his habitation, but he must not make the house larger than it was. If the house be discovered by tempest, the tenant must in convenient time repair it.

Id. at fol. 53a.

So in an action of waste, upon the plea, *Nul wast fait*, he may give in evidence any thing, that proveth it no waste, as by tempest, by lightning, by enemies, and the like, but he cannot give in evidence justifiable waste, as to repair the house or the like.

Id. at fol. 283a.

29. The citation is to a discussion in *The Abbe of Sherbourne's Case* (or *Abbott of Shirbourne's Case*), Y.B. Mich. 12 Hen. 4, fol. 5, pl. 11 (1410). The Abbe sued for waste, and the defendant pleaded that a sudden tempest caused part of the damage to the farm building in question. It was agreed that if all the damage had been so caused there could be no action for waste. The notion that a tenant was not liable for waste occurring accidentally or by *vis major* was at least a century old at the time of the *Abbott of Shirbourne's case*. 3 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 123 n.9 (1923) (citing two Year Book cases from *circa* 1300).

30. The citation is probably to Coke's brief description in *Southcote's Case*, 4 Co. Rep. 83b, 84b, 76 Eng. Rep. 1061, 1063 (Q.B. 1601), of the distinction recognized in the *Marshalsea Case*, *supra* note 21: "If traitors break a prison, it shall not discharge the gaoler; otherwise of the King's enemies of another kingdom; for in the one case he may have his remedy and recompence, and in the other not." The point, taken directly from the *Marshalsea Case*, is that against wrongdoers who are subjects of the King ("traitors"), the jailer has a remedy against them, and thus their actions do not discharge him. On the other hand, if the wrongdoers are not subjects of the King ("enemies of another kingdom"), the jailer has no remedy against them, and thus their acts discharge him.

31. This citation is to the *Marshalsea Case*, described *supra* note 21.

32. The citation is to [Anonymous], Y.B. Pasch. 9 Edw. 3, fol. 16, pl. 30 (1335), which involved a petition by the commonalty of the County of Northumberland to the King for protection against writs of cessavit (for a description of the writ of cessavit, see note 33). The reason given was that their county had been devastated in the war with the Scots. The King commanded that his judges stay process on such writs during the war. This protection did not survive this King, for, as the report relates, the new King rescinded it. The Year Book report is translated in *Evans v. Hutton*, Man. & G. 954, 959, 134 Eng. Rep. 391, 395 n.(h) (C.P. 1842).

33. This refers to the writ of *cessavit per biennium*, created by the Statute of Gloucester C.4 (1278). This writ enabled a landlord to recover leased land if the tenant had ceased to pay the rent for two years. *Cesser* refers to the tenant's conduct in failing to pay the rent. See 2 M. Bateson, *Borough Customs*, 21 SELDEN SOC'Y lxiii-lxv (1906) (discussing cessavit).

34. See *infra* text accompanying notes 43-53 (discussing meaning of phrase "if he may") (emphasis added).

any accident by inevitable necessity, because he might have provided against it by his contract. And therefore if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it. Dyer 33. a.³⁵ 40 E. 3. 6. h.³⁶

Aleyn then says that the court found the lessor's reservation of rent to be, in effect, an actual covenant by the lessee to pay rent so as to bring the case within the contract portion of the "difference" explained above. Aleyn concludes his report as follows:

Another reason was added, that as the lessee is to have the advantage of casual profits, so he must run the hazard of casual losses, and not lay the whole burthen of them upon his lessor; and Dyer 56.6.³⁷ was cited for this purpose, that though the land be surrounded, or gained by the sea, or made barren by wildfire, yet the lessor shall have his whole rent³⁸

Style's report of the court's reasoning states only that "if the tenant for years covenant to pay rent, though the lands let him be surrounded with

35. See *supra* note 27 (describing the case).

36. The citation is to [Anonymous], Y.B. Hil. 40 Edw. 3, fol. 6, pl. 11 (1366). The lessee covenanted that he would maintain the leased parsonage buildings and return them in the same condition as they had been in when he leased them. The lessor sued for breach of this covenant. In defense, the lessee pleaded that the damage, a fallen wall, had been caused by a great wind. The plaintiff argued that this was still a breach of the covenant. The defendant responded that he was not obliged to repair damage caused by acts of God, which were beyond his control and unavoidable. The response was: "But a man is liable to do a thing which is capable of being done by a man, thus when he bound himself to the lessor to repair them, even though it was knocked down by the wind, or by other sudden events, yet you are capable of repairing them, and can do this, and thus you have broken the covenant, and you could have made provision in advance for such sudden events and excluded such liability by express covenant" (author's translation). For a variant translation of this passage, see A. SIMPSON, *supra* note 13, at 31.

37. This citation is to Richards le Taverner's Case, 1 Dyer 56a, 73 Eng. Rep. 123 (K.B. 1543). The case involved a lease for years of land and of a stock of sheep. All the sheep died, and the question was whether the rent should be apportioned. The report of the case states:

And some were of opinion that it should not, although it is the act of God, and no default in the lessee or lessor; as if the sea gain upon part of the land leased, or part is burned with wildfire, which is the act of God, the rent is not apportionable, but the entire rent shall issue out of the remainder: otherwise is it if part be recovered or evicted by an elder title, then it is apportionable. And of this opinion were Bromeley, Portman, Hales, Serjeants, Luke, Justice, Brooke and several of the Temple. But Marvyne, Brown, Justices, Townshend, Griffith, and Foster; *è contra*; but all thought it was good equity and reason to apportion the rent. And afterwards this case was argued in the readings by Moore, in the following Lent. And it seemed to him, and to Brooke, Hadley, Fortescue, and Brown, Justices, that the rent should be apportioned, because there is no default in the lessee.

Id. at 56a, 73 Eng. Rep. at 124. The report records no decision. The "readings" referred to in the report were events held periodically at the Inns of Court. Readers would lecture those assembled and then there would be a discussion of the points made by the Reader. See A. KIRALFY, SELDEN SOCIETY—GENERAL GUIDE TO THE SOCIETY'S PUBLICATIONS 119 (1960) (describing the five Readings at the Inns of Court that occurred during the 15th century). See generally W.C. RICHARDSON, A HISTORY OF THE INNS OF COURT 91-127 (1975) (on the Readings at the Inns of Court).

38. Aleyn 27, 27-28, 82 Eng. Rep. 897, 898. The footnote is mine.

water, yet he is chargeable with the rent, much more here.”³⁹

The difference between duties created by law and duties created by contract set forth in Aleyn’s report is what has come down to us as the rule of *Paradine v. Jane*.⁴⁰ But just what rule did the court lay down? Some claim the court meant that contract duties are *not* excused if performance becomes impossible;⁴¹ others argue the court decided that such duties *are* excused if performance becomes impossible.⁴² Although the weight of authority is decidedly in favor of the former interpretation, the latter is probably correct. The answer turns upon what the court meant by the phrase “if he may.”⁴³

The court most likely meant that when a party creates a contractual duty in himself, he is bound to perform if performance is still possible—“*if he may.*” Two reasons favor this interpretation. First, the two authorities cited in Aleyn in support of the contractual duty part of the rule “Dyer, 33. a.,” and “40 E. 3. 6. h.” expressly distinguish performance that has been made impossible by inevitable accident from performance that is still possible, although more onerous. These authorities would excuse the former but not the latter. Thus, in “Dyer, 33. a.,”⁴⁴ the defendant was held excused from his covenant to sustain certain river banks, because they had been destroyed by an act of God which could not be resisted; however, he was held to his covenant to repair the banks. In the Year Book case of “40 E. 3. 6. h.,”⁴⁵ the defendant lessee had covenanted to return leased buildings in as good a condition as when he had leased them. The question arose whether he was liable for breach of that covenant because he had not rebuilt a wall blown down by “the great wind.” Defendant argued that he was not responsible for damage caused by events he could not control or avoid, such as acts of God. The response was that if a man promised to do something that was impossible, his promise was void; but where, as here, the promise was still capable of being performed (the defendant could repair the wind damage) the promisor was liable if he did not perform. If the defendant desired to avoid liability for damage caused by acts of God, he should have protected himself by expressly disclaiming such liability at the time of contracting.

39. Style at 47, 48, 82 Eng. Rep. at 519, 520.

40. The popularity of the rule explains why Aleyn’s report of the case has been cited much more frequently than Style’s report.

41. *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corp.*, [1942] A.C. 154, 184 (1941) (Wright, L.); R. McELROY, *supra* note 9, at 4 (by Glanville Williams); 18 S. WILLISTON, *supra* note 5, at 3; 6 A. CORBIN, *supra* note 5, at 328; Schlegel, *Of Nuts and Ships, and Sealing Wax, Suez and Frustrating Things—The Doctrine of Impossibility of Performance*, 23 RUTGERS L. REV. 419, 420 & n.8 (1969).

42. A. SIMPSON, *supra* note 13, at 531; Wade, *The Principle of Impossibility in Contract*, 56 LAW Q. REV. 519, 525 (1940).

43. See *supra* text accompanying notes 26-36 (quoting paragraph in which this phrase occurs).

44. See *supra* note 27 (for additional discussion of the case).

45. See *supra* note 36 (for additional discussion of the case).

Second, *Paradine* was not a case in which the defendant's dispossession made payment of the rent impossible. Indeed, obligations to pay money, such as the rent obligation, are never excused on the ground of impossibility of performance.⁴⁶ Even the defendant did not plead that it was impossible for him to pay, only that it was unreasonable to require him to pay when he had not received the use of the lands leased.⁴⁷ Furthermore, several of the authorities who read the *Paradine* rule as including impossibility recognize that actual impossibility was not present in the case.⁴⁸

The primary argument in favor of interpreting the contract part of the *Paradine* rule as covering actual impossibility rests upon the grammatical structure of the rule. The first part of the rule, so the argument goes, covers actual impossibility: "[W]here the law creates a duty or charge, and the party is disabled to perform it . . . there the law will excuse him."⁴⁹ This much may be conceded. The argument then continues that the second or contract part of the rule, "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,"⁵⁰ must also cover actual impossibility to effect the pointed contrast evidently intended between the two parts of the rule.⁵¹ Whether this so-called evident intent is what the court actually intended is debatable.

Upon a first reading of the rule without study of the authorities cited, one may well assume that the contract part of the rule covered actual impossibility. However, once one considers the facts of the case, the authorities cited, and the words "if he may," it seems much more likely that the court intended the contract portion of the rule not to include actual impossibility.⁵²

46. This is simply an application of the view that if one owes money but has insufficient assets or credit to pay, one is not excused from paying. The matter has been well expressed by Friedrich Savigny:

Impossibility may consist either in the nature of the action in itself, or in the particular circumstances of the promisor. It is only the first or objective kind of impossibility that is recognized as such by law. The second, or subjective kind cannot be relied on by the promisor for any purpose, and does not release him from the ordinary consequences of a wilful non-performance of his contract. On the last point the most obvious example is that of the debtor who owes a sum certain, but has neither money nor credit. There is plenty of money in the world, and it is a matter wholly personal to the debtor if he cannot get the money he has bound himself to pay.

Quoted in F. POLLOCK, *PRINCIPLES OF CONTRACT* 424 (8th ed. 1911).

47. Style at 48, 82 Eng. Rep. at 520. Style's report, although briefer than Ayley's on the court's reasoning, is more extensive on the arguments of counsel.

48. E.g., 6 A. CORBIN, *supra* note 5, at 330; cf. *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corp.*, [1942] A.C. 154, 184 (1941) (Wright, L.) (*Paradine* rule "dictum unnecessary to the decision").

49. Ayley at 27, 82 Eng. Rep. at 897.

50. *Id.*

51. See R. MCELROY, *supra* note 9, at 4 n.3.

52. There is a further difficulty with interpreting the contract part of the rule to cover actual

The court's intention here was likely two-fold: first, to distinguish those cases which had excused obligors for events beyond their control as cases concerning obligations imposed by law (the first part of the rule); second, to state a rule for obligations voluntarily assumed that was consistent with precedent (the second part of the rule). As discussed above, the precedents cited by the court excused voluntarily assumed obligations if performance became *truly* impossible, but not otherwise. Thus, on balance, it seems the *Paradine* court intended the contract portion of its rule to apply only if performance had not been made impossible.⁵³

Far from reflecting a general rule of the common law at the time, both the result and the reasoning in *Paradine* struggled for acceptance for some 150 years. Although the result of the case—that dispossession of the lessee through events beyond his control was no excuse for nonpayment of rent—was consistently followed at law,⁵⁴ in equity the decisions were not nearly as

impossibility: what then is the meaning of the words "if he may"? Some have speculated that the words may refer to supervening illegality. *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corp.*, [1942] A.C. 154, 184 (1941) (Wright, L.); *cf.* Schlegel, *supra* note 41, at 420 n.8 ("The other possible reading of the passage—'if he is able to do so'—either destroys the whole rule by exceptions by excepting actual impossibility or renders the rule tautological by excepting 'legal' impossibility."). But neither the facts of the case nor the authorities cited by the court in support of the rule concern supervening illegality; nor is there any other indication that the court had supervening illegality in mind. *See supra* notes 20-39 (discussing facts of *Paradine* and supporting authority).

53. Had the suit for rent been brought in assumpsit rather than debt, the court might have ruled that even actual impossibility was no excuse. There were at least two assumpsit cases holding that if performance became impossible by an act of God there was no excuse. Both concerned carriers who lost cargo in tempests. *Taylor's Case*, 4 Leon. 31, 74 Eng. Rep. 708 (1583) (carrier's boat with plaintiff's apples sunk by "a great and violent tempest . . . It was holden to be no plea in discharge of the assumpsit, by which the [defendant] had subjected himself to all adventures"); *Thompson v. Miles*, summarized in H. ROLLE, UN ABRIDGEMENT DES PLUSIEURS CASES ET RESOLUTIONS DEL COMMON LEY Condition § G, pl. 9, at 450 (1668) ("If a man for a certain consideration given by A. undertakes to deliver to A. certain goods in London, even though he afterwards puts the goods in a boat for carriage to London accordingly, and while en route the boat is overturned by the violence of the tempest and water, yet this does not excuse him in an action on the case on this promise.") (author's translation); *see* H. ROLLE, *supra*, pl. 8, at 450 ("If a man covenants to do a certain thing before a certain time, even though [it] becomes impossible by an Act of God, yet this does not excuse him, being that he bound himself precisely to do it.") (author's translation). Rolle cites no authority for this entry. Rolle was the judge in the *Paradine* case. 17 DICTIONARY OF NATIONAL BIOGRAPHY 162-63 (1888-1889) (sworn to King's Bench in 1645 and advanced to chief justice in 1648).

Whether suit for rent could have been brought in assumpsit rather than debt at the time of *Paradine* is somewhat conjectural. Traditionally assumpsit was not allowed for rent; however, this rule was beginning to break down in the early 17th century. A. SIMPSON, *supra* note 13, at 299-301.

54. *Monk v. Cooper*, 2 Stra. 763, 93 Eng. Rep. 833, 2 Ld. Ray. 1477, 92 Eng. Rep. 460 (K.B. 1727) (house burned down during term of lease; lessee required to pay rent for remainder of term); *Pindar v. Ainsley & Rutter*, cited and discussed in *Belfour v. Weston*, 1 T.R. 310, 312, 99 Eng. Rep. 1112, 1113 (K.B. 1767) (same); *Belfour v. Weston*, 1 T.R. 310, 99 Eng. Rep. 1112 (1786) (same); *Doe v. Sandham*, 1 T.R. 705, 706, 99 Eng. Rep. 1332, 1333 (1787) (lease provided that should building fall or burn, lessor must rebuild or lease cease; suit by lessor following destruction of building and lessee's refusal to pay rent until repairs tendered; held, lease provision void); *Baker v.*

uniform. For example, twenty years after *Paradine*, in *Harrison v. Lord North*,⁵⁵ a lessee who had abandoned leased premises to join the King in the civil war sought relief from his obligation to pay rent. The lessor refused to accept surrender of the premises. Parliamentary forces later used the property as a hospital. Quite some time after the end of hostilities the lessor's executor sued in debt for the rent. In response the lessee sued in Chancery to be relieved from the rent action. Although no final decision is given, the case reporter writes, "The Lord Chancellor took time to advise; but declared if he could he would relieve the Plaintiff."⁵⁶

Almost one hundred years later, in *Brown v. Quilter*,⁵⁷ another Lord Chancellor was prepared to relieve a lessee from his obligation to pay rent. In *Brown*, the lessee had rented a house and wharf, and the house burned. The lessor, who had insured the house, collected the insurance money but did not rebuild the house. The lessee refused to pay rent and, in response to the lessor's suit for rent, sought an injunction against the suit and other relief. The Lord Chancellor declared that there were good grounds for enjoining the rent action, but declined to do so and dismissed the injunction suit because the lessee had refused the lessor's offer to settle the matter by canceling the lease.⁵⁸

Despite *Brown* and *Harrison*, by the early nineteenth century it was settled that even Chancery would not relieve a lessee of his obligation to pay rent.⁵⁹ Thus, the *Paradine* result triumphed, but not without doubts.

Holtzapffel, 4 Taunt. 45, 45, 128 Eng. Rep. 244, 244 (C.P. 1811) (lessee held liable for rent after building burned; lessee could have rebuilt, but lessor could not since his entry on property would be trespass); *Izon v. Gorton*, 5 Bing. N.C. 501, 506, 132 Eng. Rep. 1193, 1195 (C.P. 1839) (lessee liable for rent accrued while lessor repairs rented rooms destroyed by fire).

Decisions by American courts were not as uniform. Compare *Pollard v. Shaffer*, 1 Dall. 210 (Pa. Super. 1787) (lessee dispossessed by British forces; rent obligation not excused) with *Bayly v. Lawrence*, 1 S.C.L. (1 Bay) 499 (1792) (lessee dispossessed by casualties of war; suit for rent; lessee excused) and *Ripley v. Wightman*, 15 S.C.L. (4 McCord) 447 (1828) (leased house damaged in hurricane; held, hurricane damage can excuse rent obligation).

55. 1 Ch. Cas. 83, 22 Eng. Rep. 706 (1667).

56. *Id.* at 84, 22 Eng. Rep. at 706.

57. Amb. 619, 27 Eng. Rep. 402 (Ch. 1764).

58. There may have been other Chancery cases that were unreported. In *Shubrick v. Salmond*, 3 Burr. 1637, 97 Eng. Rep. 1022 (K.B. 1765), Mr. Dunning, counsel for the defendant, stated that several cases cited by his opponent, "the case about Prince Rupert, particularly, *Pardine* [sic] v. Jane, in *Aleyn*," had been lately considered in Chancery and determined not to be law. Although this reference may have been to *Brown*, Mr. Dunning may also have been referring to *Camden v. Morton*, 2 Eden 219, 28 Eng. Rep. 882 (Ch. 1764), cited and discussed in *Hare v. Groves*, 3 Anst. 687, 698, 145 Eng. Rep. 1007, 1011 (Ex. 1796); and/or to *Steele v. Wright* (1773), cited in counsel's argument in *Doe v. Sandham*, 1 T.R. 705, 709, 99 Eng. Rep. 1332, 1334 (K.B. 1787).

59. *Hare v. Groves*, 3 Anst. 687, 145 Eng. Rep. 1007 (Ex. 1796); *Holtzapffel v. Baker*, 18 Ves. Jun. 115, 22 Eng. Rep. 261 (Ch. 1811); *Leeds v. Cheetham*, 1 Sim. 146, 57 Eng. Rep. 533 (V.C. 1827); see *Carter v. Cummins*, cited in *Harrison v. North*, 1 Ch. Cas. 83, 84, 22 Eng. Rep. 706, 706 (1667).

The *Paradine* result that lessees cannot be excused from paying rent remained the law of England

The *Paradine* reasoning, that once an obligation is undertaken the obligor is bound to perform *if he may*, did not become an important principle of decision until the nineteenth century. After it was decided, eighty years passed before *Paradine* was cited in a case,⁶⁰ and for an additional seventy years *Paradine* was cited exclusively in lease cases.⁶¹ At last, in 1796, the *Paradine* principle was applied to a nonlease situation, a covenant to repair incident to a contract to construct a bridge.⁶² Soon thereafter English courts applied the principle to charterparties frustrated by embargoes imposed during the French Revolution and the Napoleonic War.⁶³ *Paradine* was subsequently cited twice more in the context of charterparties,⁶⁴ then for breach of a covenant to repair.⁶⁵

Finally, in 1858 we find the first explicit recognition of the *Paradine* reasoning as a general principle in *Hall v. Wright*.⁶⁶ *Hall* involved a suit for

until 1980. See *National Carriers Ltd. v. Panalpina (Northern) Ltd.*, [1981] A.C. 675, 675 (1980) (English doctrine of frustration applicable to leases but doctrine not satisfied on facts of this case).

60. 12 ENGLISH AND EMPIRE DIGEST, *Contract* 459, case no. 3322 (1973) (lists *Monk v. Cooper*, 2 Stra. 763, 93 Eng. Rep. 833, 2 Ld. Ray. 1477, 92 Eng. Rep. 460 (K.B. 1727), as the first case to cite *Paradine*). The statement in text and all other statements relative to citations of cases rely upon what is shown in the citator paragraphs of the *English and Empire Digest*.

61. The cases all concern lessees seeking to be excused from payment of rent or a covenant to repair after the leased premises had burned down. *Monk v. Cooper*, 2 Stra. 763, 93 Eng. Rep. 833, 2 Ld. Ray. 1477, 92 Eng. Rep. 460 (K.B. 1727) (rent); *Brown v. Quilter*, Amb. 619, 27 Eng. Rep. 402 (Ch. 1764) (rent); *Belfour v. Weston*, 1 T.R. 310, 99 Eng. Rep. 1112 (K.B. 1786) (rent); *Bullock v. Dommitt*, 6 T.R. 650, 101 Eng. Rep. 752 (K.B. 1796) (covenant to repair; *Paradine* cited in counsel's argument but not by court); *Hare v. Groves*, 3 Anst. 687, 145 Eng. Rep. 1007 (Ex. 1796) (rent; *Paradine* cited by court with other cases for proposition that lessee still bound at law to pay rent).

62. *Company of Proprietors of the Brecknock & Abergavenny Canal Navigation v. Pritchard*, 6 T.R. 750, 101 Eng. Rep. 807 (K.B. 1796) (covenant to build and maintain bridge; extraordinary flood; no excuse; *Paradine* principle applied).

63. *Hadley v. Clarke*, 8 T.R. 259, 101 Eng. Rep. 1377 (K.B. 1799) (suit against shipowner for refusal to complete voyage; British embargo of uncertain duration which in fact lasted two years; held, no excuse; *Paradine* cited in opinion of one of three judges); *Touteng v. Hubbard*, 3 Bos. & P. 291, 127 Eng. Rep. 161 (C.P. 1802) (suit against British shipper for refusal to furnish cargo; British embargo directed against Swedish vessels including chartered vessel; held, shipper excused; in dictum court said *Paradine* principle was "good sense"); *Atkinson v. Ritchie*, 10 East 530, 103 Eng. Rep. 877 (K.B. 1809) (suit by shipper for failure to load and deliver complete cargo; threatened Russian embargo caused shipmaster to interrupt loading; held, no excuse; *Paradine* principle applied).

64. *Medeiros v. Hill*, 8 Bing. 231, 131 Eng. Rep. 390 (C.P. 1832) (suit by shipper for failure to undertake voyage; blockade of destination in effect at time contract made; held, no excuse; *Paradine* principle applied); *Spence v. Chodwick*, 10 Q.B. 517, 116 Eng. Rep. 197 (1847) (suit by shipper for failure to deliver goods confiscated by Spanish authorities; held, no excuse; *Paradine* principle applied).

65. *Clark v. Glasgow Assurance Co.*, 1 Macq. 668, 149 Rev. Rep. 97 (H.L. 1854) (Scotland) (suit by grantor of contract against assignee of contract for breach of covenant to repair; destruction of premises by fire; held, no excuse; *Paradine* principle applied).

66. 1 El. Bl. & El. 746, 120 Eng. Rep. 688 (Q.B. 1858), *rev'd*, 1 El. Bl. & El. 765, 120 Eng. Rep. 695 (Ex. Ch. 1859).

breach of a promise to marry. The primary defense was that after having made the promise, the promisor became consumptive⁶⁷ and thus unfit to be married. At trial the jury found the illness to be proved, and the trial judge directed a verdict for the promisor. On appeal, the four judges of the Queen's Bench split evenly. Consequently, the junior judge, Crompton, formally withdrew his opinion, causing the judgment to be affirmed.⁶⁸ On further appeal to the Exchequer Chamber, the judges, by a four to three vote, reversed the Queen's Bench judgment.⁶⁹ The majority in the Exchequer Chamber echoed the opinion of Lord Campbell, who had been in the minority on the Queen's Bench. Campbell had enshrined the *Paradine* reasoning as a general principle applicable to various kinds of contracts, including the marriage contract.⁷⁰ Thus by the mid-nineteenth century the *Paradine* principle had triumphed, although as subsequent events were to demonstrate the victory was pyrrhic.

Indeed, not only did the principle triumph, but it came to mean that even if performance were physically impossible there was no excuse. Thus in *Brown v. Royal Insurance Company*,⁷¹ Lord Campbell, after paraphrasing the *Paradine* principle, declared, "[T]he fact that performance has become impossible is no legal excuse for [nonperformance]"⁷² Similarly, in *Taylor v. Caldwell*,⁷³ Justice Blackburn, speaking for the court, stated, "There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible."⁷⁴

III. HARD CASES MAKE BAD LAW:⁷⁵ THE ERA OF STRICT INTERPRETATION OF THE *PARADINE* PRINCIPLE

Strict interpretation of the *Paradine* principle may well have resulted from

67. "[A]fflicted with dangerous bodily disease, which has occasioned frequent and severe bleeding from the lungs." 1 El. Bl. & El. at 747, 120 Eng. Rep. at 689. The promisor probably had pulmonary tuberculosis.

68. 1 El. Bl. & El. at 788, 120 Eng. Rep. at 704.

69. 1 El. Bl. & El. 765, 120 Eng. Rep. 695 (Ex. Ch. 1859).

70. 1 El. Bl. & El. at 761, 120 Eng. Rep. at 694 (Campbell, L.); 1 El. Bl. & El. at 785-86, 120 Eng. Rep. at 703 (Willes & Crowder, JJ.) (agreement with Lord Campbell's reasoning); *id.* at 789, 120 Eng. Rep. at 704 (Martin, B.) (general rule is *Paradine* principle); *id.* at 791, 120 Eng. Rep. at 705 (Williams, J.) (general rule applicable to contracts is *Paradine* principle).

71. 1 El. & El. 853, 120 Eng. Rep. 1131 (Q.B. 1859) (fire insurance contract; insured building damaged by fire; insurer elected to repair building, but authorities demolished building; held, insurer not excused).

72. *Id.* at 859, 120 Eng. Rep. at 1133.

73. 3 B. & S. 826, 122 Eng. Rep. 309 (Q.B. 1863) (contract for use of hall and gardens; fire that destroyed hall deemed to terminate contract).

74. *Id.* at 833, 122 Eng. Rep. at 312 (emphasis added).

75. "[H]ard cases, it is said, make bad law." *Ex parte Long*, 3 W. Rep. 18, 19, 103 Rev. Rep.

a series of "hard" cases decided between 1799 and 1850. The first case, *Hadley v. Clarke*,⁷⁶ involved a charterparty to carry goods. While the ship was en route, the British government imposed an embargo because the destination had fallen to French troops. Although initially of indefinite duration, the embargo in fact was lifted after two years. Two months before the lifting of the embargo, the ship's master returned the goods to the charterer. When the embargo ended, the charterer sued for failure to complete the voyage. The court ruled for the charterer, stating that the embargo had merely suspended, not terminated, the charterparty.⁷⁷

The next case, *Blight v. Page*,⁷⁸ involved a shipowner's suit for a freight charge under a charterparty to sail to Russia, load a cargo of barley, and return to England. When the ship reached its Russian destination, the charterer's agents were unable to furnish a cargo because the Russian government had prohibited the export of barley. The ship eventually returned empty. The court refused to excuse the charterer from its obligation to furnish a cargo and awarded the shipowner the freight charge.⁷⁹

In *Beale v. Thompson*,⁸⁰ a mariner agreed to serve aboard a ship making a voyage from London to St. Petersburg and back, for stated monthly wages.⁸¹ At St. Petersburg, the Russian government seized the ship and detained the crew members for almost seven months, after which they regained their ship

850, 851 (1854) (Campbell, C.J.); see *Winterbottom v. Wright*, 10 M. & W. 108, 116, 152 Eng. Rep. 402, 406 (Ex. 1842) (Wolfe, B.) ("Hard cases, it has been frequently observed, are apt to introduce bad law"); *Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1903) (Holmes, J., dissenting) ("Great cases like hard cases make bad law.").

76. 8 T.R. 259, 101 Eng. Rep. 1377 (K.B. 1799).

77. The court, per Lord Kenyon, specifically rejected a rule that the charterparty would remain in effect only for a reasonable time. *Id.* at 264, 101 Eng. Rep. at 1380. It also declined to rest its decision upon the fact that the shipmaster had kept the goods for almost the entire two years. *Id.* at 265, 101 Eng. Rep. at 1381.

The case might have been justified on the ground that the charterparty did not contain the "restraints of princes" clause common in later charterparties. I have been unable to confirm whether such clauses were usual in charterparties of this time. Yet even had there been such a clause in the charterparty, the court still could have held, as it did, that the contract was only suspended, not terminated.

78. 3 Bos. & Pul. 295 n.(a), 127 Eng. Rep. 163 n.(a) (C.P. 1801).

79. The court, per Lord Kenyon, cited a passage from E. COKE, *supra* note 28, concerning a promise to enfeoff a third person. If the third person refused the enfeoffment, Coke stated that the promisor was liable. Lord Kenyon applied this authority as follows: "The reason of this is clear. If a man undertakes what he cannot perform, he shall answer for it to the person with whom he undertakes. I am always desirous to apply settled principles of the law to the regulation of commercial dealings." 3 Bos. & Pul. at 295 n.(a), 127 Eng. Rep. at 164 n.(a). See *Sjoerds v. Luscombe*, 16 East 201, 104 Eng. Rep. 1065 (K.B. 1812) (charterparty to ship freight from America; embargo prevented loading at American port; held, no excuse).

80. 4 East 546, 102 Eng. Rep. 940 (K.B. 1804), *rev'g* 3 Bos. & Pul. 405, 127 Eng. Rep. 221 (C.P. 1803), *aff'd mem.*, 1 Dow 299, 3 Eng. Rep. 707 (H.L. 1813).

81. *Id.* at 547, 102 Eng. Rep. at 940.

and returned to London.⁸² The court upheld the mariner's claim for wages for the period of detention.⁸³

After *Beale* came another charterparty case, *Atkinson v. Ritchie*.⁸⁴ There, the ship was to proceed to St. Petersburg, load a cargo of hemp and iron, and return to London. Upon arrival at St. Petersburg the ship's master, after hearing rumors that the Russian government might detain British ships, had a partial cargo hurriedly loaded and sailed away. The rumored embargo did occur but not until six weeks later. In a prior proceeding involving the same parties, the charterer had been held liable for the freight charge for the partial cargo actually delivered.⁸⁵ In this case the charterer sued the shipowner for failure to deliver a full cargo. Despite a jury finding that the ship's master had acted reasonably and in good faith in cutting short the ship's stay at St. Petersburg, the court refused to relieve the shipowner from its obligation to load a full cargo and awarded the charterer damages.⁸⁶

In another charterparty case, *Barker v. Hodgson*,⁸⁷ a ship was to sail to Gibraltar, deliver a cargo, load another, and return home. After unloading the first cargo, an epidemic broke out at the port causing the local authorities to prohibit all contact with ships in the harbor. Consequently, the ship sailed home empty. The court declined to excuse the charterer for its failure to furnish a cargo and held that the shipowner was entitled to freight for the homeward voyage.⁸⁸

Next came *Marquis of Bute v. Thompson*.⁸⁹ In *Marquis of Bute*, the pur-

82. *Id.* at 548-51, 102 Eng. Rep. at 941-42.

83. *Id.* at 566, 102 Eng. Rep. at 947. The court, per Lord Ellenborough, concluded that the contract for wages was not dissolved by the actions of the Russian government. *Id.* at 560-62, 102 Eng. Rep. at 945-46. The court further concluded that since the shipowner had received his freight and since the mariner had performed all of the services required of him by the shipowner, the mariner was entitled to his monthly wages, including the time of his detention. *Id.* at 562-66, 102 Eng. Rep. at 946-47.

The case later was justified on the ground that the shipowner had received the benefit of the mariner's services on the homeward voyage. *Horlock v. Beal*, [1916] 1 A.C. 486, 493-94 (Loreburn, L.).

84. 10 East 531, 103 Eng. Rep. 877 (K.B. 1809).

85. *Ritchie v. Atkinson*, 10 East 295, 103 Eng. Rep. 787 (K.B. 1808).

86. The court, per Lord Ellenborough, declined to imply a term excusing the shipowner. It held further that the case was not within the "restraint of Princes" clause in the contract because there had been no actual restraint. *Atkinson v. Ritchie*, 10 East 531, 531-32, 103 Eng. Rep. 877, 877 (K.B. 1809). Finally, in response to the shipowner's argument that he had a paramount duty to the state to save ship and crew from threatened danger, the court replied that the threatened danger was too remote. *Id.* at 534-35, 103 Eng. Rep. at 878.

87. 3 M. & S. 267, 105 Eng. Rep. 612 (K.B. 1814).

88. The court, per Lord Ellenborough, declared that the charterer was to bear the risk in this instance. The court drew a distinction between domestic illegality and foreign illegality, the former being an excuse for nonperformance but not the latter. *Id.* at 270-71, 105 Eng. Rep. at 613.

Perhaps this case can be justified on the ground that the shipowner had incurred expenses to make the voyage.

89. 13 M. & W. 487, 153 Eng. Rep. 202 (Ex. Ch. 1844).

chaser of certain mining rights agreed to pay, for a period of fifty years, a fixed yearly rent. The amount of rent was based upon an estimated annual extraction of 13,000 tons of coal. A year or two later the mine was so depleted that less than one-fourth of 13,000 tons could be extracted. The purchaser refused to pay the fixed rent, and the vendor sued. The court held the vendor entitled to the rent.⁹⁰

*Hills v. Sughrue*⁹¹ involved an unusual charterparty. The shipowner agreed to sail to Ichaboe, a guano island on the west coast of Africa, load a full cargo of guano, and return to the British Isles. There was insufficient guano on Ichaboe to fill the ship, so the ship's master loaded what was available and returned.⁹² The charterer sued for failure to deliver a complete cargo. The court held the shipowner was not excused from his obligation to load a full cargo.⁹³

Still another charterparty was before the court in *Spence v. Chodwick*.⁹⁴ The ship was to transport goods from Gibraltar to London, with a call at Cadiz. While the ship was at Cadiz, Spanish authorities confiscated the goods as contraband. The charterer sued the shipowner for failure to deliver the goods. The court gave judgment for the charterer, holding that the confiscation was no excuse.⁹⁵

90. The court, per Chief Baron Pollock, refused to imply a condition that there should be coal at least equal to the agreed yearly extraction amount. It noted that "[i]f that was the intention of the parties, they should so have expressed it." *Id.* at 494, 153 Eng. Rep. at 206.

The case could be justified on the following ground: The vendor had purchased the mineral rights from one Davis some 15 years before he sold them to the defendant. Through the sale to the defendant, the vendor was, in effect, recouping his cost of acquisition and transferring the risk of mineral depletion to the defendant in return for installment payments over fifty years. In fact, counsel for vendor made this argument. *Id.* at 490, 153 Eng. Rep. at 204.

91. 15 M. & W. 253, 153 Eng. Rep. 844 (Ex. 1846).

92. Apparently, though not clear from the opinions, the ship's crew was to gather the guano, bag it, and load it aboard ship.

93. The court viewed the charterparty not as an ordinary one in which the charterer furnishes the cargo, but as one in which the shipowner had obliged himself to furnish a full cargo. It then held that this obligation was not excused by a clause in the charterparty providing that in the event of unforeseen causes preventing completion of the charterparty, the shipowner was to repay any money advanced to it by the charterer. *Id.* at 261, 153 Eng. Rep. at 847. The parties intended that the charterer's advances be advances of freight which would eventually be owed to the shipowner. The judges agreed that the "unforeseen causes clause" was intended only to require the shipowner to repay the freight advances in the event that the cargo were lost. *Id.* at 261, 153 Eng. Rep. at 847.

The case could be justified on the ground that the transaction was really a sale of guano by the shipowner to the charterer. *See id.* at 261, 153 Eng. Rep. at 847 (Parke, B.) ("He is to receive freight at a high rate, and it looks very much like a contract for supplying guano at that price."). Courts generally do not excuse contracts for the sale of nonspecific goods, if the seller's expected source of supply fails. *See Twentsche Overseas Trading Co. v. Uganda Sugar Factory*, 172 L.T.R. 163 (P.C. 1944) (contract for sale of nonspecific goods; failure of seller's source of supply does not excuse seller); *Blackburn Bobbin Co. v. T.W. Allen & Sons*, [1918] 2 K.B. 467 (C.A.) (same). *But see In re Badische Co.*, [1921] 2 Ch. 331 (dictum) (same, but seller excused).

94. 10 Q.B. 517, 116 Eng. Rep. 197 (1847).

95. The court indicated that the shipowner had not pleaded that the contract was illegal or that

In *Brown v. Royal Insurance Co.*,⁹⁶ an insurance company had issued a fire insurance policy covering certain premises that permitted the company, at its option, either to pay the amount of any loss or to reinstate the premises. Fire damaged the premises, and the company elected to reinstate them. Before it could do so, however, the premises were declared dangerous for reasons other than the fire damage and were torn down by the authorities. The insured sued to recover under the policy. The court held that the company's obligation to reinstate the premises was not excused by the subsequent demolition.⁹⁷

In the last of the hard cases, *Kearon v. Pearson*,⁹⁸ a charterer agreed to load coal "with usual dispatch" at Liverpool for delivery to Dublin. Some of the coal was loaded on the day the chartered vessel arrived. The rest was delayed because the canal by which the charterer had planned on bringing the coal from the colliery had frozen after a severe frost. The ship's master declined to proceed to another place about ten miles away to which the coal could be transported by railway. Consequently, the ship was delayed thirty-four days awaiting the coal. The shipowner succeeded in his suit against the charterer for failure to load with usual dispatch.⁹⁹

Although only two of the ten hard cases involve actual impossibility,¹⁰⁰ they all evidence a strict view of excuse: the obligor is excused from performing only if the contract so provides, even if his performance becomes impossible. These cases provided a sturdy foundation for the broken marriage promise case of *Hall v. Wright* and for the triumph there of the strict view of

the charterer had deceived the ship's master. *Id.* at 520, 116 Eng. Rep. at 199. It stated that the confiscation did not come within any of the exceptions to liability contained in the contract. *Id.* at 522, 116 Eng. Rep. at 201. It also refused to extend the contract exceptions. *Id.* at 530, 116 Eng. Rep. at 202 (citing the *Paradine* principle as paraphrased by Lord Ellenborough in *Atkinson v. Ritchie*, 10 East 531, 103 Eng. Rep. 877 (K.B. 1809)).

96. 1 El. & El. 853, 120 Eng. Rep. 1131 (Q.B. 1859).

97. The court treated the insurance company's election to reinstate the premises as irrevocable. It then held that the company was not excused from its obligation to reinstate. *Id.* at 858, 120 Eng. Rep. at 1133. Lord Justices Campbell and Crompton were of the view that impossibility did not excuse, although Crompton acknowledged that here performance was not impossible, only more expensive. *Id.* at 855, 120 Eng. Rep. 1132. Lord Justice Hill agreed that there was no impossibility. *Id.* at 859-60, 120 Eng. Rep. at 1133. Lord Justice Erle dissented.

98. 7 H. & N. 386, 158 Eng. Rep. 523 (Ex. Ch. 1861).

99. The court reasoned that the charterer had undertaken to load "with usual dispatch," and he had not done so. *Id.* at 391, 158 Eng. Rep. 525. In effect, the fact that his breach was caused by a severe frost, an event beyond his control, was no excuse.

The result could be justified on the ground that the shipowner had incurred expenses to maintain the ship and crew during the delay.

100. *Hills v. Sughrue*, 15 M. & W. 253, 153 Eng. Rep. 844 (Ex. 1846) (shipowner to furnish full cargo of guano; insufficient guano available); *Spence v. Chodwick*, 10 Q.B. 517, 116 Eng. Rep. 197 (1847) (shipowner to deliver goods to shipper; confiscation by Spanish authorities); see *Splidt v. Heath*, 2 Camp. 57 n.(a), 170 Eng. Rep. 1080 n.(a) (1809) (sale of St. Petersburg hemp; goods seized by Russian government).

the *Paradine* principle as a general rule of law.¹⁰¹

IV. AN INVASION OF ARMIES CAN BE RESISTED, BUT NOT AN IDEA WHOSE TIME HAS COME:¹⁰² THE AGE OF EXCUSE, 1860-1920

Between 1860 and 1920, the English judiciary proceeded to erode significantly the strict view of excuse presented by the ten hard cases and *Hall v. Wright*.¹⁰³ The opening attack on the strict view commenced with the fa-

101. See *supra* text at notes 66-70 (*Paradine* recognized as general rule in *Hall v. Wright*).

102. V. HUGO, *HISTOIRE D'UN CRIME* (1852), quoted in J. BARTLETT, *FAMILIAR QUOTATIONS* 491:11 (15th ed. 1980).

103. *Hadley v. Clarke* (two-year embargo does not terminate contract, shipowner liable) was limited in *Jackson v. Union Marine Ins. Co.*, 10 L.R.-C.P. 1245 (Ex. Ch. 1874) (described *infra* in text accompanying notes 139-47 (delay longer than reasonable time allowed charterer to cancel charter party), and finally disapproved in *Metropolitan Bd. v. Dick, Kerr & Co.*, [1918] A.C. 119, 127 (1917) (Finlay, L.)).

The authority of *Blight v. Page* (charterer liable despite Russian embargo on barley) was weakened by *Ralli v. Compania Naviera Sota y Aznar*, [1920] 2 K.B. 287 (C.A.) (charterparty; illegality of performance under foreign law excuses charterer). See T. SCRUTTON, *CHARTERPARTIES AND BILLS OF LADING* 13 n.(k) (16th ed. 1955) (*Ralli* in conflict with older cases such as *Blight v. Page*, which exemplify old and rigid rule). *Barker v. Hodgson* (shipowner liable despite local epidemic which prevented loading) was also undermined by the *Ralli* case.

Later cases justified the result in *Beale v. Thompson* by stating that since the mariner had aided the shipowner on the ship's homeward voyage after the detention, he was entitled to wages during the period of detention. See *Horlock v. Beal*, [1916] 1 A.C. 486, 493-94 (Loreburn, L.); *id.* at 527 (Wrenbury, L.) (mariner's wage contract; German detention of ship and crew upon outbreak of World War I excuses shipowner).

The holding in *Atkinson v. Ritchie*—that the mere threat of seizure will not excuse a shipowner's failure to load the full cargo specified in the contract—was eroded in subsequent cases. *Duncan v. Koster, The Teutonia*, 4 L.R.-P.C. 171 (1872) (charterparty; rumors of outbreak of war between France and Prussia excused Prussian shipowner from proceeding directly to French port); *Embircos v. Sydney, Reid & Co.*, [1914] 3 K.B. 45 (charterparty; Greek shipowner excused by outbreak of war between Greece and Turkey and threat of seizure by Turkish authorities); *Nobel's Explosives Co. v. Jenkins & Co.*, [1896] 2 Q.B. 326 (charterparty; shipowner's duty to deliver explosives in Japan excused by outbreak of Sino-Japanese War and threat of seizure by Chinese government).

Marquis of Bute v. Thompson is apparently still good law. See *Cricklewood Prop. & Inv. Trust v. Leighton's Inv. Trust*, [1945] A.C. 221, 239 (*Marquis of Bute* cited as authoritative); R. MCELROY, *supra* note 9, at 50-52 (same).

If *Hills v. Sughrue* is classified as a sale of goods case rather than a charterparty case, see *supra* note 93, it may still be good law. See *Twentsche Overseas Trading Co. v. Uganda Sugar*, 172 L.T.R. 163 (P.C. 1944) (contract for sale of nonspecific goods; failure of seller's source of supply due to war does not excuse seller); *Blackburn Bobbin Co. v. T.W. Allen & Sons*, [1918] 2 K.B. 467 (C.A.) (same). But see *In re Badische Co.*, [1921] 2 Ch. 331 (outbreak of war does excuse seller).

While *Spence v. Chodwick* (confiscation of goods by Spanish authorities does not excuse shipowner) has apparently never been directly questioned, its authority may also have been undermined by the *Ralli* case discussed above.

Brown v. Royal Ins. Co. (insurance company not excused from rebuilding property torn down by authorities) is apparently still good law. See *Matthey v. Curling*, [1922] 2 A.C. 180, 239 (Atkinson, L.) (temporary occupation by military did not excuse tenant from obligations to reinstate premises destroyed by fire).

Keaton v. Pearson (charterer not excused for failing to load "with usual dispatch") apparently is

mous case of *Taylor v. Caldwell*.¹⁰⁴

In *Taylor*, the lessees¹⁰⁵ of a music hall and gardens agreed to let a promoter use the premises on four separate days, for a specified rent, to conduct concerts and *fêtes*. Six days before the first concert, the hall was destroyed by fire. The promoter sued the lessees to recover expenses incurred in preparing for the concerts. At trial the promoter obtained a verdict, but leave was reserved to enter a verdict for the lessees on certain of their pleas. The Court of Queen's Bench, in an opinion by Justice Blackburn, directed that a verdict be entered for the lessees. Justice Blackburn first found that there had been no demise of the premises to the promoter.¹⁰⁶ He then recognized that the strict view of excuse was the general rule¹⁰⁷ and proceeded to synthe-

also still good law. See T. SCRUTTON, *supra*, at 153 (absent express provisions, charterer has absolute duty to put cargo on vessel).

104. 3 B. & S. 826, 122 Eng. Rep. 309 (Q.B. 1863).

105. The case report in the *Law Journal Reports* states that the defendant was a lessee. 32 L.J.Q.B. 164, 165 (1863).

106. The demise issue resolved the question whether the arrangement for the use of the music hall and grounds by a promoter was a lease. *Id.* at 831-32, 122 Eng. Rep. at 311 (argument of hirer's attorney, H. Tindal Atkinson). If the arrangement had been a lease, the defendant as lessor of the hall would not have been liable, based on a long line of cases from the 17th through 19th centuries ruling that destruction of leased premises does not excuse the lessee's obligation to pay rent. See, e.g., *Izon v. Gorton*, 5 Bing N.C. 501, 132 Eng. Rep. 1193 (C.P. 1839) (landlord may recover rent accrued after premises destroyed by fire); *Baker v. Holtzapffel*, 4 Taunt. 45, 138 Eng. Rep. 244 (C.P. 1811) (same).

One minor puzzle remains. The promoter's attorney apparently argued that the arrangement was not a lease but an agreement to lease. It is not clear what the promoter's attorney hoped to gain by this argument. Even if it were an agreement to lease it would seem, by analogy to the agreement of sale cases, that the lessee would bear the risk of destruction occurring after the agreement but before the actual demise. In the agreement to sell, where the premises are destroyed before the actual conveyance of title, the purchaser takes that risk and is still liable for the purchase price. *Paine v. Meller*, 6 Ves. Jun. 349, 31 Eng. Rep. 1088 (Ch. 1801). The reason for the rule is that since the purchaser has become the owner in equity of the premises (since the agreement is subject to specific performance), the purchaser effectively becomes the owner for purposes of risk of loss. *Cf.* *White v. Nutts*, 1 P. Wms. 61, 24 Eng. Rep. 294, 295 (Ch. 1702) (parties contracted to sell two life estates; one life ceased; held, loss fell on purchaser). Agreements to lease are capable of specific performance. E.g., *Fenner v. Hepburn*, 2 Y. & C.C.C. 159, 63 Eng. Rep. 70 (Ch. 1843); *Browne v. Warner*, 14 Ves. Jun. 156, 33 Eng. Rep. 480 (Ch. 1807). Thus it would seem that the person with an agreement to lease would be, in equity, the lessee and therefore bear the risk of loss. Justice Blackburn never specifically defined the arrangement except to comment that "the contract was merely to give the plaintiffs [the promoters] the use of [the Music Hall and gardens] on those days." *Taylor*, 3 B. & S. at 832, 122 Eng. Rep. at 312. The arrangement was probably a license to use the premises.

107. "There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible." *Taylor*, 3 B. & S. at 833, 122 Eng. Rep. at 312. In support of the general rule, Blackburn cites H. ROLLE, *supra* note 53, *Condition* § G, at 450, and *Walton v. Waterhouse*, 2 Wms. Saund. 420, 422 n.2, 85 Eng. Rep. 1233, 1234 n.2 (K.B. 1845). He also declares that this general rule was recognized as such by all the judges in *Hall v. Wright*, 1 El. Bl. & El. 765, 120 Eng. Rep. 695 (Ex. Ch. 1859).

Footnote two in *Walton* does lend support to the statement that the general rule is not to excuse.

size several lines of authority into an exception.¹⁰⁸ That exception has be-

However, the note does not rule out supervening impossibility of performance as an excuse. This is probably because the note concerns itself only with the effect of the destruction of the leased premises upon either the lessee's obligation to continue paying rent or the lessee's covenant to keep the premises in repair. In both of these situations there is no impossibility of performance.

Justice Blackburn's statement that the general rule was recognized as such by all of the Exchequer Chamber Judges in *Hall* is not supported by the opinions in that case. His general rule really contains two propositions: first, unforeseen accidents do not excuse; second, even impossibility of performance does not excuse. As to the first proposition, only the opinions of Judges Martin and Williams in *Hall* refer to the *Paradine* principle (once an obligation is undertaken, the obligor is bound to perform if performance is still possible) as the general rule. The opinions of Judges Crowder and Willes may also be taken as recognizing the general rule. Although they say nothing of the principle in their opinions, both expressly adopt the reasoning of Lord Campbell in his opinion in the court below. In that opinion, Lord Campbell does refer to the *Paradine* principle as the general rule. 1 El. Bl. & El. at 761, 120 Eng. Rep. at 694. The other judges in *Hall* do not recognize the general rule Justice Blackburn stated; in fact, two of these judges distinguish *Paradine*.

Support for the second proposition, that impossibility does not excuse, is even more problematical, for none of the judges clearly adopt it. Judge Martin comes closest, yet he acknowledges that *Hall* does not involve impossibility. None of the other judges even acknowledges this second proposition. Judge Willes, who adopts Lord Campbell's reasoning below, states that the case does not involve impossibility. Judge Crowder goes further, declaring that since there is no impossibility in the case before him, he does not express any opinion as to whether impossibility excuses. Judges Watson, Bramwell, and Pollock seem to lean decidedly against the proposition. Thus in *Hall*, only four of the seven judges recognize *Paradine* as a rule of general application and, at most, one judge may have adopted the proposition that impossibility does not excuse.

The cases digested in H. ROLLE, *supra* note 53, *Condition* § G, at 450, may be taken to support the general rule Justice Blackburn states. There is support for the proposition that impossibility does not excuse in at least two of Rolle's entries. The first, *Thompson v. Miles*, in H. ROLLE, *supra* note 53, *Condition* § G, pl. 9, at 450, holds a paid carrier liable to the owner of goods sunk along with the carrier's boat by a tempest. Unless there was more to this case, such as negligence by the carrier or a specific agreement to be liable for acts of God, it does not survive *Coggs v. Bernard*, 2 Ld. Ray. 909, 92 Eng. Rep. 107 (Q.B. 1703) (Lord Holt's fifth sort of bailment—bailment for carriage; if bailee is common carrier he is not liable for acts of God; if other than common carrier, he is liable only if negligent), which remains the law of England to this day. See T. SCRUTTON, *supra* note 103, at 230-35 (explaining carrier's liabilities). For a discussion of the development of the act of God exception to the bailee's liability, see E. FLETCHER, *THE CARRIER'S LIABILITY* 146-50, 156-72, 207-08 (1932).

The second entry in H. ROLLE, *supra* note 53, *Condition* § G, pl. 8, at 450, is untitled. That entry reads, "If a man covenants to do a certain thing before a certain time, even though [it] becomes impossible by the Act of God, yet this does not excuse him, being that he bound himself precisely ["*précisément*"] to do it" (author's translation). However, Rolle cites no supporting authority for this entry. Perhaps this entry is not a case at all but one of the "resolutions" of the common law referred to in the title of Rolle's *Abridgment*. See *supra* note 53.

108. In addition to English cases concerning contracts performable only by the promisor, risk of loss in sales of specific goods, bail bonds, and bailments, Justice Blackburn cites several authorities from Roman and Civil law: (1) DIG. 45.1.33 ("If Stichus [a slave] is promised to be delivered on a certain day, and dies before that day arrives, the promisor will not be liable") (translation from 10 S. SCOTT, *supra* note 1, at 99); (2) DIG. 45.1.23 ("If you owe me a certain slave on account of a legacy, or a stipulation, you will not be liable to me after his death; unless you were to blame for not delivering him to me while he was living. This would be the case, if, after having been notified to deliver him, you did not do so, or you killed him.") (translation from 10 S. SCOTT, *supra* note 1, at 98); (3) R. POTHIER, *TRAITÉ DES OBLIGATIONS SELON LES REGLES TANT DU FOR DE LA CONSCIENCE QUE DE FOR EXTÉRIEUR* pt. 3, ch. 6, art. 3, § 668 (stating when obligor excused by

come known as the *Taylor* principle: "The principle seems to us to be that, in contracts in which the performance depends upon 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."¹⁰⁹ The reason given for the principle was that it tends to carry out the intent of the parties.¹¹⁰ Since the existence of the hall was, Blackburn said, essential to the performance of both parties, when it perished both parties were excused from their respective obligations.¹¹¹

destruction of subject matter). Justice Blackburn's statement in *Taylor* of what this section says is almost a verbatim translation of the first sentence of the section; (4) R. POTHIER, *TRAITÉ DU CONTRAT DE VENTE* pt. 4, § 307, *translated in* C. BLACKBURN, *TREATISE ON THE EFFECT OF THE CONTRACT OF SALE ON THE LEGAL RIGHTS OF PROPERTY AND POSSESSION IN GOODS, WARES, AND MERCHANDISE* 89-96 (1847) (discussing when seller excused by destruction of thing sold); (5) *id.* pt. 2, ch. 1, sec. 1, art. 4, § 1.

109. 3 B. & S. at 839, 122 Eng. Rep. at 314. A more detailed statement of the principle appears earlier in Justice Blackburn's opinion:

[T]here are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

Id. at 833-34, 122 Eng. Rep. at 312.

110. "There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfil the intention of those who entered into the contract. For in the course of affairs men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition." *Id.* at 834, 122 Eng. Rep. at 312.

111. *Id.* at 839, 122 Eng. Rep. at 314. Justice Blackburn's statement that the promoter was also excused creates something of a puzzle. *Taylor* was a suit by the promoter, apparently to recover expenses incurred in preparation for the concerts. The defendant did not counterclaim for the rent; thus the effect of the fire on the promoter's obligation to pay the rent was not in issue. Further, the authorities from which Justice Blackburn synthesized his exception discuss, for the most part, only the excuse of one party, not both. In fact, some of the authorities Justice Blackburn cites make clear that the excuse of one party's obligations does not excuse the obligations of the other. Instead, the other remains obliged to perform despite the fact that he does not receive the promised counterperformance. As Justice Blackburn himself notes, this was the rule in sale of goods cases where the property had passed to the buyer. *See Taylor*, 3 B. & S. at 837, 122 Eng. Rep. at 313-14 (discussing *Rugg v. Minett*, 11 East 210, 103 Eng. Rep. 985 (K.B. 1809)). It was also the law of leases and sales of real property. *See supra* note 106. This was also the Roman law. *See Buckland, Casus and Frustration in Roman and Common Law*, 46 HARV. L. REV. 1281 (1933) (addressing the doctrine of impossibility under Roman law).

It is also difficult to reconcile Justice Blackburn's declaration that the promoter was excused with his earlier statement that "[n]othing however, in our opinion, depends on, [whether the arrangement for the use of the hall and gardens was a demise.]" *Taylor*, 3 B. & S. at 832, 122 Eng. Rep. at 312. If the issue were merely whether the defendant is excused from his obligation to make the premises available, then nothing does depend on whether there was a demise: if there were a demise, the rule applicable to leases would excuse the defendant, *supra* note 106; if there were no

The *Taylor* principle was applied in *Appleby v. Myers*,¹¹² a case involving a contract to manufacture and install machinery on the buyer's premises. After a portion of the machinery had been installed, a fire destroyed the buyer's premises and the installed machinery. Reasoning that the continued existence of the buyer's premises was necessary for performance, the court excused both parties from further performance.¹¹³ The court extended the *Taylor* principle to cover the perishing of something not the direct subject matter of the contract but nevertheless essential to performance.

Several years after *Appleby*, the *Taylor* principle was applied in the context of personal service contracts when the performer became either permanently or temporarily ill and unable to perform.¹¹⁴ The principle was subsequently applied to a sale of potatoes to be grown on the seller's land.¹¹⁵ Eventually the *Taylor principle* was extended to a case where physical damage temporar-

demise, then under the *Taylor* principle the destruction of the hall (the subject matter of the arrangement) would excuse the defendant. If the issue were excuse of the promoter's obligation, however, then everything does seem to depend on whether there was a demise: if there were a demise, under the rule for leases, *supra* note 106, the promoter would remain obliged to pay the rent; if there were no demise, the *Taylor* principle would excuse the promoter's obligation.

112. 2 L.R.-C.P. 651 (Ex. Ch. 1867), *rev'd* 1 L.R.-C.P. 615 (1866).

113. The main question, whether the seller could recover the value of work performed on the buyer's premises before the fire, was resolved against the seller on two grounds. First, the property rights in the machinery installed had not yet passed to the buyer. Second, since the seller had expressly agreed that he would not be entitled to any payment until he completed the work, he was not entitled to a partial recovery.

114. *Boast v. Firth*, 4 L.R.-C.P. 1 (1868) (apprenticeship contract guaranteed by apprentice's father; held, apprentice's permanent illness excused father); *Robinson v. Davison*, 6 L.R.-Ex. 269 (1871) (contract by defendant to furnish certain pianist for recital given by plaintiff; held, defendant would have been excused but for his failure to give timely notice of pianist's illness to plaintiff).

115. *Howell v. Coupland*, 1 Q.B.D. 258 (C.A. 1876), *aff'd* 9 L.R.-Q.B. 462 (1874) (contract to sell 200 tons of potatoes to be grown on specified land of seller; disease caused land to yield only 80 tons; held, seller excused).

The lower court was unanimous in its conclusion that the *Taylor* principle applied. The Court of Appeal, however, was decidedly less enthusiastic about applying the *Taylor* principle. Justices James and Mellish both appear to apply the *Taylor* principle. Baggallay's opinion is very short and says nothing about the legal theory upon which the seller was to be excused. The opinions of Lord Coleridge and Cleasby seem to emphasize the construction of the contract rather than the *Taylor* principle. Although his reasoning is not very clear from his opinion, Lord Coleridge seems to rest the excuse upon a condition implied *in fact*, in accord with the parties' actual intent to excuse the farmer if he did not produce sufficient potatoes, rather than upon a condition implied *in law* (i.e., the *Taylor* principle) in the absence of any actual intent of the parties. Cleasby's opinion is even more puzzling. He seems to proceed upon the theory that since the subject matter of the contract, the entire 200 tons, did not come into existence, the seller is excused because "there is nothing to which the promise can apply." 1 Q.B.D. at 263. The rather curious approach of these two judges led a later court to distinguish *Howell* as having been decided on the construction of the particular contract at issue. *Ashmore & Son v. C.S. Cox & Co.*, [1899] 1 Q.B. 436, 442 (*Howell* decision based on construction of the contract in that case). Nevertheless, the prevailing view is that *Howell* is an application of the *Taylor* principle. *E.g.*, *Horlock v. Beal*, [1916] 1 A.C. 486, 496-97 (Atkinson, L.); *Nickoll & Knight v. Ashton, Edridge & Co.*, [1901] 2 K.B. 126, 132 (C.A.) (A.L. Smith, M.R.); W. McNair, *LEGAL EFFECTS OF WAR* 137 (1966); R. McElroy, *supra* note 9, at 25.

ily disabled a ship necessary for performance.¹¹⁶ Finally, in 1893 the principle was codified in the British Sales of Goods Act.¹¹⁷

Two cases appear to have limited the *Taylor* principle to situations where performance had become physically impossible, not just commercially impracticable. The first case, *Turner v. Goldsmith*,¹¹⁸ concerned a contract in which a manufacturer of goods to be sold agreed to employ a traveling salesman on a commission basis for at least five years. When the employer's factory was destroyed by fire he gave up the business and discharged the salesman. The salesman sued for breach of contract. The Court of Appeal reversed the lower court and held for the salesman, stating that the existence of the factory was not essential to performance because the employer could have obtained the goods to be sold in ways other than by manufacturing them.¹¹⁹

116. *Nickoll & Knight v. Ashton, Edridge & Co.*, [1901] 2 K.B. 126 (C.A.), *aff'g* [1900] 2 Q.B. 298. This case involved a contract for sale of Egyptian cotton seed to be shipped by a certain ship no later than a specified date. The ship was stranded and damaged through no fault of the seller and was thus unable to be loaded on a timely basis. The seller canceled the contract, and the buyer sued. The court excused the seller, but limited its holding to physical damage causing the ship to be unavailable, in order to avoid conflict with *Shubrick v. Salmond*, 3 Burr. 1637, 97 Eng. Rep. 1022 (K.B. 1765), in which temporary unavailability of a specified ship caused by adverse winds was held not to excuse a delay.

Lord Justice Vaughan Williams dissented in *Nickoll*. In his view the more reasonable result was not to excuse the seller. Instead, he would have construed the time for loading as a condition for the benefit of the buyers that could be waived by them to keep the contract in force.

117. "Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided." Sale of Goods Act, 1893, 56 & 57 Vict., ch. 71, § 7, *reenacted as* Sale of Goods Act, 1979, ch. 54, § 7. This section was adopted without change in substance as § 8(1) of the American Uniform Sales Act, which served in turn as the statutory antecedent to § 2-613 of the Uniform Commercial Code.

118. [1891] 1 Q.B. 544 (C.A.), *rev'g* 6 T.L.R. 411 (Q.B. 1890).

119. This case might be justified on the ground that the employment contract was somewhat unusual. *See* [1891] 1 Q.B. at 550 ("[t]he contract is peculiar; it is to employ the plaintiff for five years certain") (Kay, L.J.); 6 T.L.R. at 411 ("The agreement was rather an unusual one.").

The case appears to be somewhat inconsistent with the state of the law at the time it was decided. *See Rhodes v. Forwood*, 1 App. Cas. 256 (1876) (seven-year agreement to employ firm as agents for sale of principal's coal from named colliery; during term of agreement principal sold named colliery; suit by agent for breach of agreement; held, principal not liable); *Ex parte Maclure*, 5 L.R.-Ch. App. 736 (1870) (five-year employment contract for salary and commission; company voluntarily wound up during term of contract; claim for salary and estimated commissions for remainder of term; held, company not liable).

In his *Turner* opinion, Judge Lindley may have used the unusual nature of the employment agreement to distinguish *Rhodes* from *Turner*: "In *Rhodes v. Forwood* it was held that an action very similar to the present was not maintainable. But that case went on the ground that, there not being any express contract to employ the agent, such a contract could not be implied. In the present case we find an express contract to employ him." [1891] 1 Q.B. at 549. In any event, *Turner* has subsequently been narrowly construed. *See In re R.S. Newman, Ltd. (Raphael's Claim)*, [1916] 2 Ch. 309 (C.A.) (one-year employment contract for salary and commission; company voluntarily wound up during term of agreement; claim for salary and estimated commission during remainder of term; held, claim dismissed).

The second case, *Ashmore & Son v. C.S. Cox & Co.*,¹²⁰ involved a contract for the sale of Manila hemp to be shipped by sail between certain dates. As a result of the outbreak of the Spanish-American War, it became commercially impractical to ship by sail in a timely fashion. Nevertheless, the seller later shipped the hemp by steamer so that it would arrive about the same time as if it had been shipped earlier by sail. The buyer refused the goods and sued for damages.¹²¹ The court, in holding for the buyer, declined to excuse the seller from its obligation to ship by *sail*. Additionally, the court noted that there had been at least one shipment of hemp by others that would have satisfied the contract had the seller been able to obtain it. Neither in this case nor in *Turner* had performance become physically impossible, and the courts used that lack of physical impossibility to hold the obligor to his bargain.¹²²

By 1900, the *Taylor* principle, through a process of moderate expansion, excused both parties to a contract if a specific thing or person necessary for performance had perished or become temporarily or permanently unavailable because of illness or injury caused by an act of God, thereby rendering performance impossible and not merely impracticable.

Theories of excuse other than the *Taylor* principle made headway during this era. One of the most important of these theories was supervening change of law (sometimes called supervening illegality). Under this doctrine, if performance was legal when the contract was made and a subsequent change of law made performance illegal or otherwise prevented it, the obligation to perform was excused. This doctrine predated the *Taylor* principle and initially only concerned changes of law making performance illegal.¹²³ How-

120. [1899] 1 Q.B. 436 (1898).

121. The market price of hemp was apparently falling. In their respective arguments, counsel for the buyer wanted damages measured on October 27, counsel for sellers, on the following November 4. *Id.* at 439.

122. *Jacobs, Marcus & Co. v. Crédit Lyonnaise*, 12 Q.B.D. 598 (C.A. 1884), *aff'g* 12 Q.B.D. 589 (1883), is another case in which the court may have viewed commercial impracticability as insufficient to excuse. There, the parties entered into a contract for the sale of a large quantity of Algerian esparto. The seller agreed to have the esparto ready for shipment in installments over the course of a year. During the year, an insurrection in Algeria interfered with the collection and transportation of esparto. Apparently esparto was available elsewhere in Algeria, but not from the seller's usual source. Also, it was not possible to transport the esparto to the grading facility named in the contract. On these facts the seller was held not to be excused. The court stated that English law applied to the contract and then held that there was no excuse, citing the *Paradine* principle. The *Taylor* principle was not argued by either party or mentioned in either of the opinions.

This case might be justified on the ground that the buyer had relied upon the contract by committing himself to resale contracts. *See* 12 Q.B.D. at 592 (buyer had to purchase esparto at higher prices to fulfill resale contracts).

123. The earliest reference to the doctrine in the Nominate Reports appears in the argument of counsel for the defendant in *Abbott of Westminster v. Executors of Leman Clerke*, 1 Dyer 26b, 28a, 73 Eng. Rep. 59, 62 (1536-37). The Abbott sued the executors on a bond. The executors defended on the basis of an "indenture of defeazance," apparently a document executed separately from the bond and containing covenants that, if performed, prevented liability on the bond. *See* BLACK'S

ever, in 1869 the doctrine was extended to include government intervention

LAW DICTIONARY 376 (5th ed. 1979) (defining "defeasance"); A. SIMPSON, *supra* note 13, at 90-92 (explaining defeasance). One of the covenants required that the defendant not convey the interest in land granted to him by the indenture without "the special licence" of the Abbott. The grantee had in fact conveyed his interest without such license apparently because a statute, 21 Hen. 8, ch. 13 (1529), passed some years after the indenture, forbade him as a "spiritual person" (clergyman) from continuing to occupy the land. To this defense the Abbott demurred, in part, on the ground that no license for the conveyance had been alleged. In response, the defendant's attorney argued that the statute constituted a license to convey. He then gave an example of supervening illegality which excused an obligation: "[A]s if the condition of an obligation be, that if the obligor carry twenty quarters of wheat before a certain day into a foreign county, the obligation shall be void; and before the day a statute be made, which prohibits any man from carrying corn into a foreign county; that is a dispensation with the condition." 1 Dyer at 28b, 73 Eng. Rep. at 63. ("Corn" is a term used in England to refer to cereals generally, including wheat. II OXFORD ENGLISH DICTIONARY 995 (1933).) Thus, this example means that the enactment of a statute rendering performance of the condition illegal excuses its nonperformance. One of the judges may have assented to this part of the argument, but this is not clear from the report. In any event, the Abbott prevailed.

Brewster v. Kitchell, 1 Salk. 198, 91 Eng. Rep. 177, *sub nom.* Brewster v. Kitchin, 1 Ld. Raym. 317, 91 Eng. Rep. 1108 (K.B. 1697), involved supervening government regulation. Here, the owner of land, for a price, granted a rent charge to the ancestor of the plaintiff. The deed granting the rent charge (and a later confirmation of the deed) declared that the charge was to be paid without deduction of any taxes on the rent. Subsequently Parliament passed an act imposing a tax on the rent and permitting the tax to be deducted from the rent due. A proviso to the act, however, stated that agreements otherwise were not be altered. The defendant proceeded to deduct the amount of the tax from his rent, and the plaintiff sued. The court held that the deduction was not proper because of the agreement not to deduct. In the course of the argument the question arose whether the deduction would have been proper if the act had not expressly saved agreements otherwise. Lord Holt said it would not. He reasoned that the provision for deduction was for the defendant's benefit and thus could be waived by him without violating the law. Lord Holt then discussed when a statute would excuse an obligation: "For the difference, where an Act of Parliament will amount to a repeal of a covenant, and where not, is this; where a man covenants not to do a thing which was lawful for him to do, and an Act of Parliament comes after and compels him to do it; there the Act repeals the covenant; and vice versa." 1 Ld. Raym. at 321, 91 Eng. Rep. at 1110. Although dictum, this statement was apparently considered important enough to be quoted by Chitty in his treatise on contracts. J. CHITTY, A PRACTICAL TREATISE ON THE LAW OF CONTRACTS 540 (2d ed. 1834).

The Bubble Act, 1720, 6 Geo. 1., ch. 18, enacted to terminate an intense period of speculative activity in 1719-20, generated several supervening illegality cases. See *Winnington v. Briscoe*, 8 Mod. 51, 88 Eng. Rep. 41 (K.B. 1722) (contract to sell stock; subsequently Bubble Act prohibited transfer of stock; buyer sued for return of down payment; held, (*semble*) judgment for buyer); *Stent v. Bailis*, 2 P. Wms. 216, 24 Eng. Rep. 705 (Ch. 1724) (contract to sell stock; subsequently Bubble Act prohibited transfer of stock; buyer sued in equity to enjoin enforcement of contract; Master of the Rolls granted injunction; on rehearing before Lord Chancellor, report reads as follows: "I cannot divide the loss, but would recommend it to both parties to treat together, and share the same, and for that purpose a day was given to the parties, who (as I hear) agreed the matter"). For a bibliography of works discussing the South Sea Bubble, see H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS 21 & n.4 (3d ed. 1983).

The doctrine of supervening illegality was recognized at the end of the 18th century in *Hadley v. Clarke*, 8 T.R. 259, 101 Eng. Rep. 1377 (K.B. 1799) (embargo imposed by English government suspended charterparty); by Lord Ellenborough in dictum in two early nineteenth century cases, *Atkinson v. Ritchie*, 10 East 531, 534, 103 Eng. Rep. 877, 878 (K.B. 1809) ("That no contract can properly be carried into effect, which was originally made contrary to the provisions of law; or which, being made consistently with the rules of law at the time, has become illegal in virtue of

that prevented performance other than by making it illegal.¹²⁴ The various limited wars in the latter half of the nineteenth century also provided the courts with ample opportunity to apply the doctrine.¹²⁵ The only other significant development in this area was the rise and decline of the foreign law exception.¹²⁶ Under this exception, if performance of the contract became

some subsequent law; are propositions which admit of no doubt.”), and *Barker v. Hodgson*, 3 M. & S. 267, 270, 105 Eng. Rep. 612, 613 (K.B. 1814) (“[i]f indeed the performance of this covenant had been rendered unlawful by the Government of this country, the contract would have been dissolved on both sides”); and by the Exchequer Chamber in *Esposito v. Bowden* 7 E. & B. 764, 119 Eng. Rep. 1430 (Ex. Ch. 1857) (charterparty; neutral shipowner to proceed to Russian port and load cargo from English charterer; outbreak of Crimean War before arrival of ship to load; charterer refused to load; suit by shipowner for breach of contract; held, charterparty dissolved).

One of the earliest published English treatises on contract law recognized the doctrine. J.J. POWELL, *ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS* 444-46 (1790); see E. COKE, *supra* note 28, at fol. 206 (“[A]nd therefore in all cases where a Condition of Bond, Recognizance, etc. is possible at the time of the making of the Condition, and before the same can be performed the Condition becomes impossible by the act . . . of the Law . . . , there the Obligation, etc. is saved.”).

124. See *Baily v. De Crespigny*, 4 L.R.-Q.B. 180 (1869) (lease with covenant by lessor not to permit buildings on adjacent land; act of Parliament compelled lessor to assign land to railway company and company constructed station; suit against lessor for breach of covenant; held, lessor excused); *Melville v. De Wolf*, 4 El. & Bl. 844, 119 Eng. Rep. 313 (Q.B. 1855) (mariner's contract; mariner ordered home by authorities in mid-voyage to testify in court-martial; suit by mariner for wages after leaving ship; held, shipowners excused); *Evans v. Hutton*, 4 Man. & G. 953, 134 Eng. Rep. 391 (1842) (principle recognized but not applied because defendant failed to plead that interference by government officers was authorized).

125. See *Esposito v. Bowden*, 7 E. & B. 764, 119 Eng. Rep. 1430 (Ex. Ch. 1857) (Crimean War; shipowner excused when performance would require trading with the enemy, in violation of British law); *The Teutonia*, 3 L.R.-Adm. & Eccl. 394 (Adm. 1871) (charterparty; Prussian shipowner to transport cargo to named French port; before arrival *de facto* state of war arose between France and Prussia; shipowner refused to enter French port; suit by charterer; held, shipowner excused); *United States v. Pelly*, 15 T.L.R. 166 (Q.B. 1899) (sale of steamships; outbreak of Spanish-American War; buyer sued for failure to deliver; held, sellers excused).

126. There is little direct legal authority for this exception. Only in *Barker v. Hodgson*, 3 M. & S. 267, 105 Eng. Rep. 612 (K.B. 1814) (charterparty; epidemic at loading port; port health regulations prohibited loading; suit by shipowner; held, charterer not excused), was the foreign law exception an explicit ground of decision. Nevertheless, several previous cases were consistent with the exception though they do not explicitly refer to it. See *Sjoerds v. Luscombe*, 16 East 201, 104 Eng. Rep. 1065 (K.B. 1812) (charterparty loading prohibited by United States embargo; suit by shipowner; held, charterer not excused); *Atkinson v. Ritchie*, 10 East 531, 103 Eng. Rep. 877 (K.B. 1809) (charterparty; shipowner refused to complete loading because of rumors that embargo by Russian government imminent; suit by charterer; held, shipowner not excused); *Splidt v. Heath*, 2 Camp. 57 n.(a), 170 Eng. Rep. 1080 n.(a) (1809) (sale of hemp to be shipped before stated date; Russian government seized hemp; suit by buyer; held, seller not excused); *Beale v. Thompson*, 4 East 546, 548-51, 566, 102 Eng. Rep. 940, 941-42, 947 (K.B. 1804), *aff'd mem.*, 1 Dow 299, 3 Eng. Rep. 707 (H.L. 1813) (mariner's contract; ship and crew seized by Russian government and interned for almost seven months; internment ended and crew sailed ship home; suit for wages during internment; held, shipowner liable); *Blight v. Page*, 3 Bos. & Pul. 295 n.(a), 127 Eng. Rep. 163 n.(a) (C.P. 1801) (charterparty; charterer unable to load because Russian government prohibited export of cargo; suit by shipowner; held, charterer liable).

Two cases subsequent to *Barker v. Hodgson* are perhaps consistent with the exception, although they do not make it an explicit ground of decision. See *Spence v. Chodwick*, 10 Q.B. 517, 116 Eng. Rep. 197 (1847) (charterparty cargo confiscated by Spanish authorities; suit by charterer; held,

illegal by foreign law at the place of performance, the performer was not

shipowner not excused); *Kirk v. Gibbs*, 1 H. & N. 810, 156 Eng. Rep. 1427 (K.B. 1857) (charterparty to load cargo of guano; charterer to obtain Peruvian government pass to load; government issued pass for only partial cargo; suit by shipowner; held, charterer liable).

The erosion of the foreign law exception began in 1870. See *Ford v. Cotesworth*, 5 L.R.-Q.B. 544 (Ex. Ch. 1870) (charterparty; unloading delayed one week by Peruvian port authorities; suit by shipowner for demurrage; held, charterer not liable); *Cunningham v. Dunn*, 3 C.P.D. 443 (C.A. 1878) (charterparty, loading prohibited by Spanish authorities because ship contained military stores; suit by charterer; held, shipowner not liable).

The exception was abrogated in 1920. See *Ralli Bros. v. Compania Naviera Sota y Aznar*, [1920] 2 K.B. 287 (C.A.) (charterparty; freight to be paid in Spain; subsequent Spanish regulation set maximum freight rate below that in charterparty; charterer tendered maximum allowable freight; suit by shipowner; held, charterer not liable for freight above maximum allowed). There has been a good deal of discussion by commentators as to whether the rule of *Ralli* is an English conflict of laws rule that applies to any contract litigated in an English court, or whether it is a rule of English domestic law that applies only to contracts litigated in an English court in which the conflict of laws rules have already determined that English law controls. For a discussion of the conflict of law problems, see A. DICEY & J. MORRIS, *DICEY AND MORRIS ON THE CONFLICT OF LAWS* 781-788 (9th ed. 1973), and the authorities cited therein.

There may have been more at stake here than the simple question of an excuse when contractual performance became illegal under foreign law. Much may have depended upon the British national interest. Cf. *Touteng v. Hubbard*, 3 Bos. & Pul. 291, 127 Eng. Rep. 161 (1802) (charterparty for Swedish ship; arrival to load delayed by English embargo directed against ships of Sweden; charterer, not wishing to wait out the embargo, refused to load; shipowner sued; held, charterer not liable; usual rule that embargo suspends but does not dissolve charterparty inapplicable because embargo here directed against nation of chartered ship). Some of the foreign laws preventing performance in the litigated cases were directed specifically against England. For example, the Russian embargo that resulted in the seizure of the ship and crew in *Beale v. Thompson*, 4 East 546, 102 Eng. Rep. 940 (K.B. 1804), *aff'd mem.*, 1 Dow 299, 3 Eng. Rep. 707 (H.L. 1813), had been imposed by Tsar Paul as a result of England's failure to deliver the island of Malta, after its capture from the French, to the Order of Saint John of Jerusalem of which the Tsar was the Grand Master. *Id.* at 548-49, 102 Eng. Rep. at 941. Following the death of Paul, the new Tsar, Alexander I, rescinded the embargo and promised reparation. *Id.* at 551, 102 Eng. Rep. at 942. The Russian embargo threatened in *Atkinson v. Ritchie*, 10 East 530, 103 Eng. Rep. 877 (K.B. 1809), which the case report records as having actually been imposed sometime later, was probably the same embargo that prevented performance of the contract in *Splidt v. Heath*, 2 Camp. 57 n.(a), 170 Eng. Rep. 1080 n.(a) (1809). That embargo probably arose out of the following events: In 1807 Tsar Alexander signed a secret provision of the Treaty of Tilsit with Napoleon I, promising to join Napoleon's Continental System if Britain rejected Russian mediation of its conflict with France. The Russian mediation was unsuccessful, whereupon Alexander broke diplomatic relations (October 26) and then declared war (November 7) against Britain. See III W. SLOAN, *LIFE OF NAPOLEON BONA-PARTE* 81-82 (1896). The United States embargo, which prevented the loading of cargo in *Sjoerds v. Luscombe*, 16 East 201, 104 Eng. Rep. 1065 (K.B. 1812), probably resulted from the passage of the Embargo Act of 1807 in the United States. The Act was directed primarily against England and France in retaliation for their interference with American seaborne commerce. 4 E. CHANNING, *A HISTORY OF THE UNITED STATES* 349-381, 399-400 (1917).

Most of the early cases involved charterparties that had been partially executed by the shipowners. In *Blight*, *Sjoerds*, and *Barker*, the shipowners did not learn of the illegality until they had arrived to load the cargo. At that point they had incurred the substantial reliance expenses of putting their ships in order, hiring a crew, and purchasing stores. To excuse the charterer would have left the shipowners without means to recoup these expenses. Indeed, the British national interest as well as the fact of these substantial reliance expenses may have had more to do with the results in these early cases than any rule that foreign illegality does not excuse.

excused.¹²⁷

By 1870, the so-called general rule that supervening impossibility did not excuse performance was subject to the following exceptions: (1) when the subject matter of the contract—a specific thing or person—had become unavailable (the *Taylor* principle);¹²⁸ (2) when performance had been made illegal or impossible by English law;¹²⁹ (3) when a clause in the contract provided for excuse;¹³⁰ and (4) when the event causing impossibility was the fault of one of the parties.¹³¹

Another significant excuse doctrine, frustration of contract, developed primarily as an offshoot of the above-listed excuses. In the course of exploring the limits of the established excuses, a question arose as to the effect a *temporary* excuse should have on contractual obligations. Should it discharge the obligations or merely suspend them so that when the excuse terminated the obligation would revive? This is an important question because very few excuses are permanent in the sense that the event causing the excuse cannot be overcome by the expenditure of time and/or money. The burned music hall in *Taylor*, for example, could have been reconstructed; the Crimean War that made illegal the performance of the contract in *Esposito v. Bowden* would have ceased eventually. Virtually the only instances of permanent excuse are the death or permanent incapacity of a performer under a personal services contract, or the loss or destruction of an irreplaceable object necessary for performance.

In responding to the question whether a temporary excuse merely suspended or permanently excused a contractual obligation, courts looked at

127. See F. POLLOCK, *PRINCIPLES OF CONTRACTS AT LAW AND IN EQUITY* 332 (1876); W. ANSON, *PRINCIPLES OF THE ENGLISH LAW OF CONTRACT* 315 (1879) ("Legal impossibility arising from a change in the law of *our own country* exonerates the promisor.") (emphasis added).

128. See *supra* text accompanying notes 103-22 (discussing *Taylor* principle).

129. See *supra* text accompanying notes 123-27 (discussing doctrine of illegality).

130. This exception was explicit in the *Paradine* rule. See *supra* text accompanying notes 26-35 ("because he might have provided against it by his contract"). It can be traced back to the Middle Ages. See A. SIMPSON, *supra* note 13, at 30 & n.8, 108 nn.5-6 (discussing Year Book supervening impossibility cases from 1455 (33 Hen. 6) to 1535 (27 Hen. 8) in which fault of parties is said to be relevant); see also E. COKE, *supra* note 28, at fol. 206 ("and therefore in all cases where a condition of a Bond, Recognizance, etc. is possible at the time of the making of the Condition, and before the same can be performed, the Condition becomes impossible by the act of the Obligee, etc. there the Obligation, etc. is saved."); *id.* at fol. 209 ("[i]f the feoffment had beene by the Condition to be made to the Obligee . . . a tender and refusall shall save the Bond, because he himselfe upon the matter is the cause wherefore the Condition could not be performed, and therefore shall not give himselfe cause of action").

131. This exception also has a venerable lineage—it is reflected in the *Taylor* principle. See *supra* note 109 (the contract is to be construed "as subject to an implied condition, that the parties shall be excused in case, before breach, performance being impossible from the perishing of the thing *without default of the contractor*") (quoting *Taylor*) (emphasis added). It also has roots in the Middle Ages. See A. SIMPSON, *supra* note 13, at 30 & n.8, 108 nn.5-6 (discussing Year Book supervening impossibility cases from 1455 (33 Hen. 6) to 1535 (27 Hen. 8) in which fault of parties is said to be relevant); see also E. COKE, *supra* note 28, at fol. 206 ("and therefore in all cases where a condition of a Bond, Recognizance, etc. is possible at the time of the making of the Condition, and before the same can be performed, the Condition becomes impossible by the act of the Obligee, etc. there the Obligation, etc. is saved."); *id.* at fol. 209 ("[i]f the feoffment had beene by the Condition to be made to the Obligee . . . a tender and refusall shall save the Bond, because he himselfe upon the matter is the cause wherefore the Condition could not be performed, and therefore shall not give himselfe cause of action").

whether the excuse was likely to last so long that performance after the excuse ceased would no longer satisfy the object of the contract. If the excuse were found to last an unreasonable length of time, the contract was said to have been frustrated by inordinate delay and performance was excused. When deciding whether to excuse for frustration of contract, the courts addressed three issues: (1) Is there an initial excuse for the delay; (2) is the excuse temporary; and (3) is the excuse likely to cease in time for performance to effect the object of the contract. Another way of stating this third issue is whether the excuse is likely to cease before a reasonable time for performance has expired.¹³² This frustration doctrine has been applied essentially in cases where the contract does not fix a specific time for performance.¹³³

The decade from 1871 to 1881 saw the application of this approach to three cases which were to exercise a major influence upon the development of the English law of impossibility. All three cases involved charterparties. In the first case, *Geipel v. Smith*,¹³⁴ the chartered ship was to load coal at Newcastle and transport it to Hamburg, Germany. Before the ship could load, war erupted between France and the North German Confederation and the French fleet blockaded Hamburg. The shipowner then declared the charter terminated. Upon suit by the charterer, the court gave judgment for the shipowner, finding that a clause in the charterparty excused the shipowner's refusal to perform while the blockade existed.¹³⁵ However, because the blockade was only temporary, the court had to determine whether at the time the shipowner terminated the charterparty the blockade was likely to cease in time for performance to effect the object of the contract. Since no

132. See *Jackson v. Union Marine Ins. Co.*, 10 L.R.-C.P. 125, 145 (Ex. Ch. 1874) (Bramwell, B.) ("There is then, a condition precedent that the vessel shall arrive in a reasonable time. On failure of this, the contract is at an end The same result follows, then, whether the implied condition is treated as one that the vessel shall arrive in time for that adventure, or one that it shall arrive in a reasonable time, that time being, in time for the adventure contemplated.").

133. The doctrine applies to two types of contracts. It applies first to those contracts such as charterparties, in which there are too many variables to fix a specific time for performance, and so performance is subject to general limits such as "with all convenient speed." See *Esposito v. Bowden*, 7 El. & Bl. 764, 119 Eng. Rep. 1430, 1431-32 (Ex. Ch. 1857) (charterparty delayed by hostilities between England and Russia; contract rescinded). It also applies to contracts in which there is a specific time for performance as well as a clause suspending that time should enumerated events occur. Usually the suspension clause does not provide a new specific time for performance. Thus, once the clause operates and suspends the initial specific time for performance, the contract is essentially one without a specific time for performance. See *Distington Hematite Iron Co. v. Possehl & Co.*, [1916] 1 K.B. 811, 813-14 (1915) (contract including suspension clause between English and German parties; war only suspended primary performance while other obligations continued).

134. 7 L.R.-Q.B. 404 (1872).

135. The charterparty contained the usual clause excepting "the act of God, Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatsoever nature or kind, during the said voyage." *Id.* at 405. The blockade was held to be a restraint of princes and rulers and thus within the clause. *Id.* at 407.

certain time for performance was fixed by the charterparty,¹³⁶ the court implied a reasonable time for performance.¹³⁷ It then held that at the time the shipowner terminated the charterparty the blockade was likely to continue for longer than a reasonable time.¹³⁸ Consequently, the shipowner was relieved of his obligations under the charterparty.

The next and most frequently cited of the three cases, *Jackson v. Union Marine Insurance Co.*,¹³⁹ involved a shipowner's suit against his insurance company for losses allegedly covered by a freight insurance policy. The insurance policy covered freight losses caused by perils of the sea during a voyage under charterparty from England to San Francisco.¹⁴⁰ The ship was damaged by perils of the sea en route to loading, and the charterers canceled the charterparty because a lengthy time, at least seven months, would be required for repairs.¹⁴¹ The shipowner submitted an insurance claim for the

136. The charterparty contained the usual clauses that shipowner was to load "with all convenient speed," *id.* at 404, and "as soon as wind and weather permit" proceed to Hamburg, *id.* at 405. There was no certain time specified for departure or arrival at Hamburg.

137. The basis for the reasonable time limitation was only briefly addressed in the opinions. Chief Justice Cockburn listed a parade of horrors that might occur if the parties held themselves in readiness to perform for however long the blockade lasted, whether a reasonable time or not. *Id.* at 410-11. Justice Blackburn agreed, citing the case of *Touteng v. Hubbard*, 3 Bos. & Pul. 291, 127 Eng. Rep. 163 (1802), as support for the reasonable time limitation. *Id.* at 411. This choice is puzzling. There were cases that could have been cited in support of the reasonable time limit, e.g., *Soames v. Lonergan*, 2 B. & C. 564, 107 Eng. Rep. 493 (1824); *Schilizzi v. Derry*, 4 El. & Bl. 873, 119 Eng. Rep. 324 (1855); *Hurst v. Osborne*, 18 C.B. 144, 139 Eng. Rep. 1321 (1856); cf. *Espósito v. Bowden*, 7 E. & B. 764, 792, 119 Eng. Rep. 1430, 1440 (Ex. Ch. 1857) (charterparty delayed by hostilities between England and Russia; contract rescinded), but *Touteng v. Hubbard* was not one of them. If anything, that case supports the view that there is no time limit. Perhaps the fact that *Geipel* was a hasty decision delivered immediately after argument (none of the reports of the case indicates, *cur. adv. vult.*) explains Blackburn's misplaced reliance on *Touteng*.

The haste with which the decision was rendered may also explain why the opinions did not mention *Hadley v. Clarke*, 8 T.R. 259, 101 Eng. Rep. 1377 (K.B. 1799), discussed *supra* notes 76-77 and accompanying text, a case that specifically rejected the reasonable time limit and held a shipowner liable on a charterparty delayed almost two years by an embargo. The summary of counsel's arguments in *Geipel* indicates that Chief Justice Cockburn would have distinguished *Hadley* on two grounds. First, an embargo was not excepted in the *Hadley* contract (the exceptions clause covered only perils of the seas, not restraint of princes). 7 L.R.-Q.B. at 409-11. This point would seem to be a distinction without a difference, because the *Hadley* court excused the delay on the ground of supervening governmental interference. Second, in *Hadley* the voyage had begun before the embargo suspended performance. *Id.* This ground is more substantial than the first. It was also used in *Jackson v. Union Marine Ins. Co.*, 10 L.R.-C.P. 125 (Ex. Ch. 1874) (discussed *infra* in text accompanying notes 139-47).

138. Later cases often cite the comment of Justice Lush: "If the impediment had been in its nature temporary I should have thought the plea bad; but a state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants, as to defeat and destroy the object of a commercial adventure like this." 7 L.R.-Q.B. at 414-15. This presumption is rebuttable. See *Finelvet A.G. v. Vinava Shipping*, [1983] 2 All E.R. 658, 668 (Q.B. 1982) (presumption that war will be of indefinite duration is rebuttable).

139. 10 L.R.-C.P. 125 (Ex. Ch. 1874).

140. *Id.* at 126

141. *Id.*

freight lost by the cancellation, but the insurance company denied coverage.¹⁴² The case turned on whether the charterer had the right to cancel the charterparty due to the delay in performance necessitated by the repairs. If so, the freight was lost through damage to the ship by perils of the sea, a covered peril; if not, the freight was lost by the charterer's breach, which was not a covered peril. The shipowner asserted that the charterer had the right to cancel because the delay, though excused by a clause in the charterparty,¹⁴³ would last for more than a reasonable time. The insurance company argued that the charterer was bound regardless of whether the shipowner could perform within a reasonable time. There was case law to support both arguments.¹⁴⁴ Both the trial judge and the en banc Common Pleas panel sided with the insured shipowner,¹⁴⁵ as did the Exchequer Chamber.¹⁴⁶ The Exchequer Chamber held the charterer entitled to terminate the charterparty because the delay, though temporary, would last longer than a reasonable length of time.¹⁴⁷

In the final case of the trilogy, *Dahl v. Nelson, Donkin & Co.*,¹⁴⁸ a ship was chartered to load timber and proceed to a named London dock, "or so near thereunto as she may safely get, and lie always afloat."¹⁴⁹ Upon arrival at

142. *Id.*

143. *Id.* at 144.

144. To the effect that there is a reasonable time limit after which the charterparty is dissolved, *Geipel v. Smith*, 7 L.R.-Q.B. 404 (1872) (discussed *supra* text accompanying notes 134-38), see *supra* note 137 (cases supporting the reasonable time limitation). To the effect that unreasonable delay does not dissolve the charterparty, *Hadley v. Clarke*, 8 T.R. 259, 101 Eng. Rep. 1377 (K.B. 1799) (discussed *supra* text accompanying notes 76-77), see *Touteng v. Hubbard*, 3 Bos. & Pul. 291, 127 Eng. Rep. 161 (C.P. 1802) (discussed *supra* note 126); *Hurst v. Osborne*, 18 C.B. 144, 139 Eng. Rep. 1321 (C.P. 1856).

145. *Jackson v. Union Marine Ins. Co.*, 8 L.R.-C.P. 572, 581-95 (1873). Chief Justice Bovill, one of the three Common Pleas judges, dissented on ground that the circumstances were insufficient to prove total loss. *Id.* at 581-95.

146. Cleasby, one of the six barons, dissented. 10 L.R.-C.P. at 125. Blackburn, the author of the *Taylor* opinion and one of the opinions in *Geipel*, was a member of the majority. *Id.* at 148.

147. To imply the reasonable time limit, Baron Bramwell, writing for the majority of the Exchequer Chamber, reasoned that the relevant contract term required the ship to sail to the port of loading with "all possible dispatch." 10 L.R.-C.P. at 142, 143. This term did not so precisely define the time for performance that it was inconsistent with an implied term to arrive within a reasonable time for the voyage contemplated. The reasonable time term was implied because "reason and good sense require it," *id.* at 143, and because "where no time is named for the doing of anything, the law attaches a reasonable time." *Id.* at 144. Bramwell's point seems to be that where a specific time for performance is not stipulated, the law will imply a term that performance must occur within a reasonable time. Cases inconsistent with the approach were either disapproved, (*Touteng v. Hubbard*, 3 Bos. & Pul. 291, 127 Eng. Rep. 161 (C.P. 1802)), or distinguished, (*Hadley v. Clarke*, 8 T.R. 259, 101 Eng. Rep. 1377 (K.B. 1799)). *Id.* at 146. The ground on which Bramwell distinguished *Hadley* was cogently criticized by Cleasby. *Id.* at 134. Though grievously wounded as authority, *Hadley* lingered until 1917 when the *coup de grâce* was administered by Lord Finlay in *Metropolitan Water Bd. v. Dick Kerr & Co.*, [1918] A.C. 119, 127 (1917).

148. 6 A.C. 38 (1880).

149. *Id.* at 42.

the dock entrance, the ship was denied admittance because the dock was full and was expected to remain so for at least five weeks. After the charterer refused to name another dock for unloading, the shipowner claimed that he had gotten as near to the dock as possible and unloaded the ship by lighter to the named dock. The shipowner later sued for demurrage and landing charges.¹⁵⁰ Since demurrage is not due until after the ship has complied with the charterparty arrival provisions, the issue was whether the ship had so complied. The ship had not entered and, therefore, had not arrived at the named dock. Thus, the question was whether the temporary delay caused by the crowded conditions at the named dock was sufficiently lengthy to discharge the primary obligation to enter the named dock and to effect the alternate obligation to get "so near thereunto as she may safely get." The Master of the Rolls thought not, and dismissed the action.¹⁵¹ The Court of Appeal reversed,¹⁵² and its decision was affirmed by the House of Lords. The Lords excused performance of the primary obligation, concluding that the crowded conditions at the dock were likely to continue for more than a reasonable time.¹⁵³ The Lords also found that the shipowner had satisfied the alternate

150. Demurrage in maritime law is the sum allowed to compensate the owner of a ship for the detention of the vessel beyond the number of days allowed in the charterparty for loading and unloading. Sometimes the amount is fixed by the contract of carriage. BLACK'S LAW DICTIONARY 389 (5th ed. 1979).

151. 12 Ch. 572 (1879).

152. 12 Ch. 576 (C.A. 1879).

153. *Id.* at 578. Both lords who gave opinions, Blackburn and Watson, cited *Geipel* and *Jackson* in support of the reasonable time limit. Lord Watson went further and explained the reasonable time limit, not on the basis of any actual intent of the parties, but on the basis of a presumed intent resting on what fair and reasonable parties would have assented to:

I have always understood that, when the parties to a mercantile contract such as that of affreightment, have not expressed their intentions in a particular event, but have left these to implication, a Court of Law, in order to ascertain the implied meaning of the contract, must assume that the parties intended to stipulate for that which is fair and reasonable, having regard to their mutual interests and to the main objects of the contract. In some cases that assumption is the only test by which the meaning of the contract can be ascertained. There may be many possibilities within the contemplation of the contract of charterparty which were not actually present to the minds of the parties at the time of making it, and, when one or other of these possibilities becomes a fact, the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence.

6 A.C. at 59.

A number of contemporary cases of lesser importance also fit the inordinate delay pattern. In several, the temporary excuse involved delay sufficient to discharge the contract. *See Nobel's Explosives Co. v. Jenkins & Co.*, [1896] 2 Q.B. 326 (charterparty to carry dynamite to Yokohama; war erupted between China and Japan while ship at Hong Kong; shipowner refused to carry goods to Japan and unloaded at Hong Kong; suit by charterer; held, shipowner not liable; delay to last for more than reasonable time); *Bush v. Trustees of the Town and Harbour of Whitehaven*, 52 J.P. 392, 2 Hudson on Building Contracts (4th ed.) 122 (Div'l Ct. 1888), *aff'd*, 2 Hudson on Building Con-

obligation and held the charterer liable.¹⁵⁴

By the beginning of the twentieth century, the following well-established excuses for impossibility of performance existed: (1) Unavailability of a specific person or thing necessary for performance; (2) supervening domestic illegality or other governmental interference; (3) contractual excuse clause; (4) fault of a party; and (5) temporary delay likely to last for more than a reasonable time.

V. GREAT CASES MAKE BAD LAW:¹⁵⁵ THE CORONATION CASES

The *Taylor* principle, the first of the above-listed excuses, underwent a radical metamorphosis in the first decade of the twentieth century as a result of litigation sparked by events surrounding the coronation of Edward VII. The so-called "coronation cases" reinterpreted and expanded the *Taylor* principle so that it applied not only when a specific person or thing necessary for performance became unavailable, but also when any condition or state of facts "basic" to the contract ceased or failed to occur.¹⁵⁶

tracts (4th ed.) 130 (C.A. 1888) (contract to lay water main; performance delayed into winter by Trustees' failure to give contractor timely possession of necessary land; suit by contractor for added expense of winter performance; held, Trustees liable; delay so significant that contract at end; contractor entitled to quantum meruit recovery), *described in* Parkinson (Sir Lindsay) & Co. v. Comm'rs, [1949] 2 K.B. 632, 651-55 (C.A.), *disapproved in* Davis Contractors v. Fareham Urban Dist. Council, [1956] A.C. 696.

In the other cases, the delay was held not to be sufficient to discharge the contract. *See* Metcalfe v. Britannia Ironworks Co., 2 L.R.-Q.B.D. 423 (C.A. 1877) (charterparty; sole sea route to destination closed by ice for winter; shipowner unloaded cargo at another port; suit by charterer; held, shipowner liable; delay not sufficient to discharge obligation to proceed to destination); *Hudson v. Hill*, 30 L.T.R. 555 (C.P. 1874) (charterparty; ship delayed en route to loading by perils excepted in charterparty; charterer refused to load as agreed; suit by shipowner; held, charterer liable; jury direction in accord with pattern discussed in text, approved); *King v. Parker*, 34 L.T.R. 887 (Ex. 1876) (Pollock, B.) (contract to sell coal; obligation suspended in event of collier's strike; strike at colliery; when strike ended buyer refused to take coal; suit by seller; held, buyer liable; strike did not last so long as to put end to contract in commercial sense).

154. None of the opinions explicitly discusses the initial excuse point, probably because the charterer was not attempting to hold the shipowner liable for that delay. The charterer was content to argue only that the delay was insufficient to discharge the shipowner's primary obligation to enter the named dock and thus the shipowner must suffer the delay until it could enter the dock. If the point had been argued, it would seem that the delay caused by the crowding of the named dock would have been excused under the *Taylor* principle, because a thing necessary for performance, the named dock, was unavailable.

155. Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Northern Securities Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting).

156. *E.g.*, *Krell v. Henry*, [1903] 2 K.B. 740 (C.A.).

The facts giving rise to the coronation cases may be stated briefly: Edward VII was to be crowned on Thursday, June 26, 1902, in Westminster Abbey. There was to be a coronation procession that day between the royal residence at Buckingham Palace and the Abbey,¹⁵⁷ and a lengthier one the following day throughout the city of London.¹⁵⁸ In addition, on Saturday, June 28, a naval review of the fleet was to take place.¹⁵⁹ Flats were let, grandstands erected, and seats sold along the routes of the processions. Boats were also chartered to take the public to the naval review. However, during the morning of June 24 it was determined that Edward, who had been suffering from appendicitis, needed to undergo surgery.¹⁶⁰ Later that day it was announced that the coronation would be postponed and the naval review not held.¹⁶¹

Numerous lawsuits resulted from these events,¹⁶² the most significant of which was *Krell v. Henry*.¹⁶³ In that case, a hirer rented a flat along the

157. *Chandler v. Webster*, [1904] 1 K.B. 493, 494 (C.A.).

158. *Victoria Seats Agency v. Paget*, 19 T.L.R. 16, 17 (K.B. 1902).

159. *Herne Bay Steam Boat Co. v. Hutton*, [1903] 2 K.B. 683, 685 (C.A.).

160. *Griffith v. Brymer*, 19 T.L.R. 434, 437 (K.B. 1903).

161. *Clark v. Lindsay*, 88 L.T.R. 198, 201 (K.B. Div'l Ct. 1903); see *The Times* (London), June 25, 1902, at 9, col. 6 (coronation postponed); *id.* at 10, col. 2 (naval review not to be held).

162. In chronological order the coronation cases were as follows: *Krell v. Henry*, 18 T.L.R. 823 (K.B. 1902) (Darling, J.) (letting of flat for June 26 and 27; suit for unpaid balance of price; counterclaim for return of deposit; both parties excused; defendant entitled to return of deposit), *aff'd in part*, [1903] 2 K.B. 683 (C.A.); *Victoria Seats Agency v. Paget*, 19 T.L.R. 16 (K.B. 1902) (Willis, J.) (letting of seats; contract clauses covering postponement; suit for recovery of money paid; no recovery); *Lumsden v. Barton & Co.*, 19 T.L.R. 53 (K.B. 1902) (Darling, J.) (letting of seats to view procession; suit for recovery of money paid; no recovery); *Blakeley v. Muller*, [1903] 2 K.B. 760 n.4, 88 L.T.R. 90 (K.B. Div'l Ct.) (Alverstone, L.C.J., Wills & Channell, JJ.) (letting of seats; suit for return of money paid, no recovery); *Clark v. Lindsay*, 88 L.T.R. 198 (K.B. Div'l Ct. 1903) (Alverstone, L., C.J., Wills & Channell, JJ.) (letting of rooms; suit for return of money paid; no recovery); *Herne Bay Steam Boat Co. v. Hutton*, 88 L.T.R. 269 (K.B. 1903) (Grantham, J.) (charter of ship for naval review and cruise; suit for unpaid balance of price; counterclaim for return of deposit; no recovery of unpaid balance of price), *rev'd*, [1903] 2 K.B. 683 (C.A.); *Griffith v. Brymer*, 19 T.L.R. 434 (K.B. 1903) (Wright, J.) (letting of room; suit for return of money paid; recovery ordered); *Elliott v. Crutchley*, [1903] 2 K.B. 476 (Ridley, J.) (contract to cater voyage to observe naval review; contract clause covering cancellation; suit for price; no recovery), *aff'd*, [1904] 1 K.B. 565 (C.A.), *aff'd*, [1906] A.C. 7 (1905); *Herne Bay Steam Boat Co. v. Hutton*, [1903] 2 K.B. 683 (C.A.), *rev'g* 88 L.T.R. 269 (K.B. 1903) (Williams, Romer & Stirling, JJ.); *Krell v. Henry*, [1903] 2 K.B. 740 (C.A.), *aff'g in part* 18 T.L.R. 823 (K.B. 1902) (Williams, Romer & Stirling, JJ.) (counterclaim for return of deposit abandoned); *Civil Service Coop. Soc'y v. General Steam Navigation Co.*, [1903] 2 K.B. 756 (C.A.) (Earl of Halsbury, L.C., Alverstone, C.J. & Cozens-Hardy, L.J.) (charter of ship for naval review; suit for return of money paid; no recovery); *Chandler v. Webster*, [1904] 1 K.B. 493 (C.A.) (Collins, M.R., Romer, L.J. & Mathew, L.J.) (letting of room; suit for return of deposit; counterclaim for unpaid balance of price; no recovery of deposit; recovery on counterclaim for unpaid balance of price); *Elliott v. Crutchley*, [1904] 1 K.B. 565 (C.A.) (Collins, M.R., Romer, L.J., Mathew, L.J.), *aff'g* [1903] 2 K.B. 476, *aff'd*, [1906] A.C. 7 (1905) (Earl of Halsbury, L.C., Robertson, L., & Lindley, L.); see McElroy & Williams, *The Coronation Cases—I*, 4 MOD. L. REV. 241 (1941) (analyzing history behind coronation cases).

163. [1903] 2 K.B. 740 (C.A.), *aff'g in part* 18 T.L.R. 823 (K.B. 1902).

route of the processions at a price of seventy-five pounds.¹⁶⁴ He paid twenty-five pounds on deposit and promised to pay the balance on June 24. Following the postponement of the processions, the hirer declined to pay the balance. The owner of the flat sued for the unpaid balance, and the hirer counterclaimed for the return of his deposit. The trial judge held the hirer excused and gave judgment for him on both the claim and counterclaim.¹⁶⁵ The Court of Appeal dismissed the owner's appeal.¹⁶⁶

164. The defendant hired the flat through the plaintiff's solicitor. The plaintiff left the country in March 1902 after instructing his solicitor to let the flat on such terms and for such period not exceeding six months as the solicitor thought proper. [1903] 2 K.B. at 740-41.

165. 18 T.L.R. at 824. The trial court's reasoning was reported as follows: "He [the trial judge] thought the case of 'Taylor v. Caldwell' threw a great deal of light on this question." The reporter then quoted Blackburn's general rule of no excuse, *supra* text accompanying note 74, and the *Taylor* principle, *supra* note 109 and accompanying text. The report then continued:

It was perfectly true that the decision there [*Taylor*] was exclusively limited to the contract becoming impossible because of the perishing of the thing contracted for It seemed to [the trial judge], however, that the reasoning of the learned Judge [in *Taylor*] had a wider application, for [the *Taylor* judge] went on to say:—"There seems little doubt that this implication [of a condition] tends to further the great object of making the legal construction such as to fulfil the intention of those who entered into the contract. For in the course of affairs men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition." Now here it seemed to [the trial judge] that what the [*Taylor* judge] had said authorized [the trial judge] to go beyond the case of a contract becoming impossible because of the perishing of the subject-matter, and he thought he was entitled to ask himself, "Would the parties have made this contract just as it stands, or if the matter had been brought to their minds would they not have said, 'Yes, I make the contract, but subject to this condition.' " . . . If the possibility of there being no procession had been brought to their minds, they would have said, "If the procession does not go by, you will not have a license to go to my rooms, and of course I shall not have a right to the payment of £75 from you.

18 T.L.R. at 824. To the point that if this had been the arrangement, the rent would have been higher, the response was: "It was impossible to speculate about that, because that would have depended upon the bargaining between the parties." *Id.* at 824-25.

What the trial judge did was to expand the *Taylor* principle to fit the reason given for it by Mr. Justice Blackburn in *Taylor*. Thus, the reason had become the rule.

166. [1903] 2 K.B. at 747. The effect of dismissing the appeal was to affirm judgment for the defendant on the claim but not on the counterclaim for return of the deposit, because, in the course of argument, counsel for defendant abandoned the counterclaim. *Id.* at 745.

At this time there was a split of authority as to recovery of money paid under a contract excused for subsequent impossibility. *Krell v. Henry*, 18 T.L.R. 823 (K.B. 1902), *aff'd in part*, [1903] 2 K.B. 740 (C.A.), and apparently *Herne Bay Steam Boat Co. v. Hutton*, 88 L.T.R. 269 (K.B. 1903), *rev'd*, [1903] 2 K.B. 683 (C.A.), permitted recovery. On the other hand, two King's Bench Divisional Court cases, *Blakeley v. Muller*, [1903] 2 K.B. 760 n.4, 88 L.T.R. 90 (K.B. Div'l Ct.), and *Clark v. Lindsay*, 88 L.T.R. 198 (K.B. Div'l Ct. 1903), denied recovery, and the principle of these cases was approved in *Elliott v. Crutchley*, [1903] 2 K.B. 476. Later the rule denying recovery of money paid prevailed. *See Elliott v. Crutchley*, [1904] 1 K.B. 565, 568 (C.A.) (contract for luncheon; money paid prior to contingency should remain where it is); *Chandler v. Webster* [1904] 1 K.B. 493, 497-98 (C.A.) (lease of room; same); *Civil Service Coop. Soc'y v. General Steam Navigation Co.*, [1903] 2 K.B. 756, 764 (C.A.) (charterparty; same). This rule became known as the rule of *Chandler v. Webster*, the principal case adopting the rule. It was eventually overruled in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1943] A.C. 32 (1942) (contract for

In the course of his opinion, Lord Justice Vaughan Williams in the Court of Appeal reformulated and broadened the *Taylor* principle into what came to be known as the *Krell* principle: "if the contract becomes impossible of performance by reason of the non-existence of the state of things assumed by both contracting parties as the foundation of the contract, there will be no breach of the contract" ¹⁶⁷ Additionally, the Lord Justice noted that the relevant "state of things" need not be expressed in the contract; it could be proved by parol evidence. ¹⁶⁸ But the event causing the impossibility had to be of such a character, wrote Lord Justice Williams, that it could not "reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made." ¹⁶⁹ He then proceeded to find that

manufacture of machinery; held, contract excused by World War II; buyer entitled to recover advance payment). The matter is now regulated by the Law Reform (Frustrated Contracts) Act, 1943, 6 & 7 Geo. 6, ch. 40. This Act permits recovery of money paid, subject to such offset as the court deems just for the performance expenses incurred by the other side before the contract was excused. For detailed discussion of the cases and the Frustrated Contracts Act, see G. WILLIAMS, *THE LAW REFORM (FRUSTRATED CONTRACTS) ACT 1943* (1944); McElroy & Williams, *The Coronation Cases—II*, 5 MOD. L. REV. (1941).

167. [1903] 2 K.B. at 749. Additionally, the rule discharges both parties from further performance. *Id.* at 751.

168. *Id.* at 749, 752-54. A large portion of Lord Justice Vaughan Williams' opinion was devoted to the admissibility of parol evidence to prove the state of things basic to the contract. This discussion was necessary because the written contract of hire in *Krell*, unlike those in the other room or seat hire cases, did not state the purpose for which the rooms had been hired—to view the processions. Since this was the state of things basic to the contract which had not occurred, the Lord Justice, in order to excuse, had to admit extrinsic evidence of that purpose.

169. *Id.* at 749. The requirement is from *Baily v. De Crespigny*, 4 L.R.-Q.B. 180 (1869), and is discussed by Lord Justice Vaughan Williams, [1903] 2 K.B. at 751, 752. Its purpose seems to be to ensure that the event is one the risk of which the parties did *not* allocate by their contract. *Baily* involved a long term lease of land and buildings with a covenant by the lessor that neither he nor his heirs or assigns would permit construction of certain kinds of buildings on adjoining land. Subsequently, a railway company, acting pursuant to powers conferred on it by act of Parliament, condemned the adjoining land and built a station on it. The lessee sued the lessor for breach of the lease covenant. The court gave judgment for the lessor. In the course of its opinion the court discussed the "contemplation" requirement:

We have first to consider what is the meaning of the covenant which the parties have entered into. There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance, and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor.

But where the event is of such character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens.

4 L.R.-Q.B. at 185. For a systematic development of a similar idea, see Farnsworth, *Disputes over Omission in Contracts*, 68 COLUM. L. REV. 860 (1968).

since the flat had been advertised and let to view the processions, the occurrence of the processions on the days of hire was the state of things that formed the foundation of the contract.¹⁷⁰ He also concluded that the nonoccurrence of the processions on the days of hire had prevented the performance of the contract and that the nonoccurrence could not reasonably have been in the contemplation of the parties when they made the contract. Consequently, both parties were excused from further performance.¹⁷¹

The *Krell* case greatly expanded the *Taylor* principle in several respects. Initially the principle covered only the perishing of some "particular specified thing" that was the subject matter of the contract.¹⁷² *Krell* extended the principle to include the perishing of any state of things, not necessarily the contract's subject matter, basic to the contract. Lord Justice Williams used the case of *Nickoll & Knight v. Ashton Edridge & Co.*¹⁷³ as authority for this expanded principle.¹⁷⁴ Although this expansion does not misstate the result in *Nickoll*, it does state the rule of that case in a very generalized fashion.¹⁷⁵ The *Nickoll* court did not use anything like the broad principle for which the case is made to stand in *Krell*. Rather, both judges in *Nickoll* who voted to excuse by application of the *Taylor* principle did so on the rather precise ground that a particular thing specified in the contract had, for the purposes of that case, perished.¹⁷⁶

170. By way of contrast, Lord Justice Vaughan Williams stated that the hire of a cab to take the hirer to Epsom on Derby Day would not be excused if the race became impossible, because the occurrence of the race would not be the foundation of the cab hire. For a discussion of this hypothetical and the "foundation" test, see *infra* text accompanying notes 193-197.

171. [1903] 2 K.B. at 752-54.

172. *Krell*, [1903] 2 K.B. at 748; see *supra* note 109 and accompanying text (describing the *Taylor* principle).

173. [1901] 2 K.B. 126 (C.A.); see *supra* note 116 (describing the case).

174. [T]he case of *Nickoll v. Ashton* makes it plain that the English law applies the [*Taylor*] principle not only to cases where the performance of the contract becomes impossible by the cessation of existence of the thing which is the subject-matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things, going to the root of the contract, and essential to its performance.

Krell, [1903] 2 K.B. at 748 (opinion of Vaughan Williams, L.J.) (footnote omitted).

175. This technique is often used by a court to capitalize on a welcome precedent. See K. LLEWELLYN, *BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 66-68 (1960) (the "loose view" of prior precedent, as opposed to the "strict view," is a device for capitalizing on welcome precedents); K. LLEWELLYN, *COMMON LAW TRADITION: DECIDING APPEALS* 83, Technique no. 28 (1960) ("A principle theretofore unphrased is extracted from the decisions and applied.").

176. *Nickoll*, [1901] 2 K.B. 126 (Smith, M.R. & Romer, L.J.). The decision in *Nickoll* is somewhat puzzling. The seller promised to ship goods by a specific date on a certain ship. When the ship was damaged and thus delayed, the seller was excused, not just from the delay, but from his entire obligation to sell. This result seems especially curious when one considers that the market price of the goods had risen above the contract price. Why should a delay making timely shipment impossible excuse the seller from his obligation to sell and thus give him the benefit of an increased market price for the goods? Lord Justice Vaughn Williams specifically noted this fact in his *Nickoll*

The cases are also quite dissimilar factually,¹⁷⁷ particularly on one important point: at least one party's promised performance had become impossible in *Nickoll* but not in *Krell*. In *Nickoll*, the seller's promise to ship by a certain date became impossible to perform. In *Krell*, neither the owner's promise of the use of the flat nor the hirer's promise to pay for the flat had become impossible to perform. This difference is highly significant because prior to *Krell* courts had refused to extend the *Taylor* principle to situations where performance was not physically impossible.¹⁷⁸

Counsel for the flat owner argued this very point,¹⁷⁹ and in fact, although the *Krell* court ruled against the flat owner, it nevertheless seemed to accept the flat owner's argument.¹⁸⁰ Indeed, Lord Justice Vaughan Williams concluded that "the non-happening of [the coronation procession] prevented the performance of the contract,"¹⁸¹ but never explained why this was so. Perhaps it was because "the subject of the contract was rooms to view the coronation procession."¹⁸² In effect, this may mean that the owner had promised not just the use of rooms on particular days, but rooms with a view of the coronation processions on those days. With the postponement of the processions, the owner's promise did become impossible to perform.¹⁸³ From this

dissent. The answer may well lie in the buyer's conduct. The buyer could have, but did not, obtain another cargo of goods when the seller first notified him that it would be impossible to ship timely. If the buyer had covered, his damages would have been negligible. Instead, the buyer attempted to arbitrate and then, one month after the shipment date, sued for damages. Several weeks later, when the ship had been repaired and was ready to proceed to the port of shipment, the seller offered to ship the goods, but the buyer refused. (Most of these facts appear only in the reports of the lower court's opinion at 82 L.T.R. 761 and 9 Asp. M.L.C. 94.) Thus, we have a buyer who could have covered had he needed the goods on time, but did not, and who could have had the goods later but refused them. Perhaps the buyer did in fact cover but was disingenuous with the court. In any event, this puzzling behavior on the buyer's part may account for the decision to excuse the seller, although, doctrinally, a better solution would perhaps have been either to excuse only the delay, or to deny any excuse and award the buyer negligible damages measured from the time when he should have covered.

177. *Nickoll* involved a contract for the sale of goods in which the seller was to ship by a specified date aboard the ship *Orlando*. The ship was stranded and suffered damage, and thus was unable to arrive to be loaded on a timely basis. *Nickoll*, [1901] 2 K.B. at 129. *Krell* involved the hire of a flat on specific days to view processions which were subsequently postponed. *Krell*, [1903] 2 K.B. at 130.

178. See note 122 and text accompanying notes 118-22 (commercial impracticability insufficient to excuse).

179. *Krell*, [1903] 2 K.B. at 742, 743.

180. Whenever Lord Justice Vaughan Williams, who formulated the *Krell* principle, stated that principle he included as an element that "performance of the contract becomes impossible" or "renders the contract incapable of performance," or "rendering performance of the contract impossible," or "causing the impossibility of performance," or "the contract becomes impossible of performance," or "was performance of the contract prevented," or "causes the impossibility," or "prevents the achievement of . . . the foundation of the contract." *Id.* at 748-54.

181. *Id.* at 751.

182. *Id.* at 754.

183. This theory of the case is developed in McElroy & Williams, *supra* note 162, at 247-49, and

perspective the hirer was excused from further performance because the owner was excused from the impossibility of having to furnish a room with a view of the processions on the agreed dates. In other words, the hirer was excused because the owner could not give him what he bargained for; there had been a failure of consideration.¹⁸⁴

What is not clear from the *Krell* court's opinion is why the owner had been allocated the risk of the nonoccurrence of the processions. This allocation effectively made it his responsibility to furnish a room with a view of the processions, rather than just a room with the opportunity to view whatever might pass on the street below.

Another coronation case decided by the same panel of justices, *Herne Bay Steam Boat Co. v. Hutton*,¹⁸⁵ may shed some light on the *Krell* Court's thinking. Although this case was argued and decided about a week before the judgment in *Krell* was announced, the panel had heard arguments and had reserved the decision in the *Krell* case some three weeks before the argument and decision in *Herne Bay*.¹⁸⁶ Thus the justices had the *Krell* case under advisement when they decided *Herne Bay*, and for all practical purposes these two cases may be taken to have been decided together.

In *Herne Bay*, a party chartered a steamboat for the purpose of taking paying passengers to see the naval review at Spithead¹⁸⁷ scheduled for June 28 as part of the coronation festivities, and also for trips to view the fleet on that day and the next. The boat owner agreed to supply a crew and fuel and place the steamer at the charterer's disposal at Southampton on the morning of the review.¹⁸⁸ Of the charter price of £250, the charterer paid a deposit of

was advanced by counsel in several of the coronation cases, including *Krell*. See, e.g., *Krell v. Henry*, 89 L.T.R. 328, 330 (C.A. 1903) (Holman Gregory, in reply); *Blakeley v. Muller*, 88 L.T.R. 90, 91 (K.B. Div'l Ct.) (Griffith Jones for Blakeley; McCurdy for Hobson); cf. W. ANSON, PRINCIPLES OF THE ENGLISH LAW OF CONTRACTS 374 (17th ed. 1929) (suggesting that *Krell* result explainable if contract viewed as contract to supply flat from which procession could be seen on days in question).

184. McElroy & Williams would explain *Krell* not upon the basis of the *Taylor* principle, but upon the basis of failure of consideration. McElroy & Williams, *supra* note 162, at 249; R. MCELROY, *supra* note 9, at 88, 89.

185. [1903] 2 K.B. 683 (C.A.), *rev'g* 88 L.T.R. 269 (K.B. 1903). The panel consisted of Lord Justices Vaughan Williams, Romer, and Stirling.

186. The respective dates of argument and decision are set forth in marginal notes at the beginning of each case. The meaning of the marginal dates is usually indicated in the reports of the case.

187. Spithead is a stretch of sheltered water between the Isle of Wight and Portsmouth on the southern coast of England. Herne Bay, the chartered boat's home port, is approximately 160 miles from Spithead. Herne Bay lies on the south shore of the Thames Estuary, to the west of Margate. RAND McNALLY NEW INTERNATIONAL ATLAS 43 (1980).

188. Southampton is approximately 180 miles from Herne Bay and about 18 miles from Spithead. It lies at the head of an inlet, the mouth of which opens into Spithead. Apparently the defendant planned to embark the passengers at Southampton. See *Civil Serv. Coop. Soc'y v. General Steam Navigation Co.*, [1903] 2 K.B. 756, for a similar arrangement. Many of the passengers probably were expected to come from London. Southampton is about 60 miles by rail from

fifty pounds, with the balance to be paid before the boat left Herne Bay for Southampton. After the cancellation of the review, the charterer did not respond to the boat owner's inquiries or pay the balance due. Consequently, the boat owner directed the steamboat to follow its usual route on the charter days¹⁸⁹ and earned ninety pounds.¹⁹⁰ The shipowner sued for the two hundred pound balance due under the contract.¹⁹¹ Upon trial without a jury, the judge held for the charterer.¹⁹²

London. Thus it was possible for passengers to catch an early train in London and arrive in Southampton in time for the review. See 1 A. FITZROY, MEMOIRS 102, 103 (n.d.) (describing trip from London to Southampton on August 16, date review actually took place).

189. The boat was usually employed for the daily conveyance of passengers between Herne Bay and Gravesend and other places on the Thames. [1903] 2 K.B. at 683.

190. The amount and the characterization of the amount are not free from doubt. As to the amount, some reports of the case state that the difference between the contract price (presumably a reference to the balance due of £200) and the earnings was £90, indicating that the earnings were £110. 88 L.T.R. at 270; 89 L.T.R. at 422. Other reports, including the authorized report, indicate earnings of £90, and this is the figure used in the text.

As to the characterization of the amount earned, the figure is apparently a gross, not a net profit figure. That is, the amount is what the plaintiff received without any deduction for expenses. The amount is variously characterized as "earnings," "takings," or "profit." The authorized report employs the latter characterization. [1903] 2 K.B. at 684, 685, 688. The term "profit" here is ambiguous; it can mean either receipts (gross profit) or receipts less expenses (net profit). Probably the court used the term to mean receipts. In his opinion, Lord Justice Williams notes that it was agreed that the plaintiff's damages were not £200, but that amount less the "profit" made by the plaintiff on the charter days. Since by the terms of the charterparty the plaintiff was to pay the cost of crew and fuel, the measure of damages so stated is correct only if "profit" means receipts without deduction for these expenses. The characterization of the amount earned is a matter of some importance, for it determines whether the plaintiff still had uncompensated reliance expenses despite his use of the boat on the chartered days. If the £90 refers to receipts less expenses, then presumably the plaintiff had recovered his reliance expenses. If the £90 refers to receipts only, the possibility remains that plaintiff still had uncompensated reliance expenses, as the amount of the receipts may not have equaled or exceeded the amount of the plaintiff's reliance expenses. The actual amount of the plaintiff's reliance expenses is not stated in any of the reports of the case.

191. The defendant counterclaimed for the return of his £50 deposit. The trial judge evidently did not permit recovery of the money, although he did excuse the defendant. [1903] 2 K.B. at 685-86. Since the Court of Appeal did not excuse the defendant, it did not discuss the counterclaim in its opinion.

192. 88 L.T.R. at 270-72. The judge gave three reasons for excusing the defendant. First, this case was unlike other coronation cases in which the courts protected reliance expenses. In the other cases the reliance expenses, erection of seats, produced no benefit. In *Herne Bay* the reliance expenses did give the shipowner a benefit, because he could use the crew and fuel obtained for the charter afterwards in his own business. Referring to the plaintiff's reliance expenses, the judge said, "I do not mean to say they got full value for it, for they did not, but at the same time they got something." *Id.* at 270. The reference to less than full value is ambiguous. It may mean either that the benefits received did not cover the expenses incurred, so that uncompensated reliance expenses remained, or that the benefits received did not equal the contract price.

Second, the trial judge rejected the argument that there had been only a partial failure of consideration. Counsel for the shipowner had argued that the contemplated voyages around the fleet were still possible even though the review had been canceled. The judge opined that without the review, few people would have come out just to sail around the fleet. *Id.* at 272. Finally, the judge concluded that by using the boat on the charter days without the defendant's permission, the boatowner had terminated the contract. *Id.*

The Court of Appeal reversed the trial judge, concluding that the cancellation of the naval review did not excuse the charterer. In the opinion of Lord Justice Vaughan Williams, the happening of the naval review was not "the basis and foundation" of the contract. He reasoned that the charter was essentially no different from a hypothetical case concerning the hire of a cab to Epsom for Derby Day. Should the Derby be canceled, he said, the hirer would not be excused from paying the hire.¹⁹³ Lord Justice Romer viewed the transaction as an ordinary hire of a ship for a certain voyage.¹⁹⁴ He also would have applied the result of the Epsom cab hypothetical case, since in both cases the vehicle hired had no special attributes that made it more suitable for the hirer's purpose than any other similar vehicle. Lord Justice Romer further said that there had not been a total failure of consideration.¹⁹⁵ Lord Justice Stirling concluded from the correspondence of the parties that the venture was that of the hirer alone, as was the risk. He also found that the naval review was not the basis of the contract, in part because there was no total failure of consideration.¹⁹⁶

193. Lord Justice Vaughan Williams discussed this hypothetical case in detail in *Herne Bay*, stating:

Having expressed that view [the happening of the naval review was not the basis of the contract], I do not know that there is any advantage to be gained by going on in any way to define what are the circumstances which might or might not constitute the happening of a particular contingency as the foundation of a contract. I will content myself with saying this, that I see nothing that makes the contract differ from a case where, for instance, a person has engaged a brake to take himself and a party to Epsom to see the races there, but for some reason or other, such as the spread of an infectious disease, the races are postponed. In such a case it could not be said that he could be relieved of his bargain.

[1903] 2 K.B. at 689.

Although *Krell* was decided after *Herne Bay*, the Epsom cab hypothetical apparently was raised in the arguments of the *Krell* case, which occurred before the arguments in *Herne Bay*. See *supra* text accompanying note 186 (*Krell* had been argued and was under advisement when *Herne Bay* was decided); *infra* text accompanying note 197 (Lord Justice Vaughan Williams' discussion of the Epsom cab hypothetical in *Krell*).

194. For Romer, this view of the transaction had several significant corollaries. First, the arrangement was a hire, not a mere license, to use the boat. [1903] 2 K.B. at 690-91 (Romer, L.J.). (This was thus somewhat unlike *Krell*, in which the court did find a license.) Second, the reason that the parties had described the object of the boat's voyage—to view the naval review—in the contract was that contracts for the hire of ships commonly state the objects of the hire as well as other details of the voyage without intending to make those objects common to both parties. *Id.* This was apparently Romer's way of implying that the object of the voyage, to view the naval review, was not the basis of the contract.

195. Presumably Romer's thinking was that the hire was to view the naval review *and* to voyage around the fleet for two days. Only the review had been canceled; the fleet remained to be seen at anchor. [1903] 2 K.B. at 690-91.

196. [1903] 2 K.B. at 692 (Stirling, L.J.) (object of voyage was not limited to review, but included review of fleet; fleet was present). This fact may well explain why the court did not excuse the ship charterer. It appears that money could still be made transporting people around the fleet even after the review had been canceled. The naval review was to be a rather elaborate affair. The Channel fleet was apparently supplemented with English ships from other stations. Additionally, there were

What is the difference between the room hire in *Krell*, and the hires of the steamboat in *Herne Bay* and the cab in the hypothetical case? Why is the happening of the coronation procession the basis of the hire in *Krell*, but the happening of the naval review or the Epsom races not the bases of the other hires? Lord Justice Vaughan Williams addressed this distinction in *Krell* and gave the following reasons:

No doubt the purpose of the engager [of the Epsom cab] would be to go to see the Derby, and the price would be proportionately high; but the cab had no special qualifications for the purpose which led to the selection of the cab for this particular occasion. Any other cab would have done as well Whereas in the case of the coronation, there is not merely the purpose of the hirer to see the coronation procession, but it is the coronation procession and the relative position of the rooms which is the basis of the contract as much for the lessor as the hirer. . . . It could not in the cab case be reasonably said that seeing the Derby race was the foundation of the contract, as it was of the licence in this case. Whereas in the present case, where the rooms were offered and taken, by reason of their peculiar suitability from the position of the rooms for a view of the coronation procession, surely the view of the coronation procession was the foundation of the contract, which is a very different thing from the purpose of the man who engaged the cab—namely, to see the race—being held to be the foundation of the contract.¹⁹⁷

The essential difference thus seems to be the “peculiar suitability” of the hired rooms in *Krell*, which the Epsom cab and the steamboat in *Herne Bay*

foreign warships from Germany, Portugal, Japan, Russia, United States, Argentina, Greece, and Chile. See *The Times* (London), June 30, 1902, at 5, col. 6 (description of foreign warships departures). A report in the *London Times* on June 28 stated that daily numerous steamers were transporting thousands around the fleet. *Id.*, June 28, 1902, at 10, col. 5. The author of a brief note in the *Law Quarterly Review* agreed that the assembled ships were worth seeing even without the naval review. See Notes, 20 LAW Q. REV. 3, 4 (1904) (“In point of fact, the fleet was still there, as Stirling L.J. observed, and, as the writer of these lines can bear witness, it was very well worth seeing without the review.”). This note has been attributed to Sir Frederick Pollock. Note, *Krell v. Henry*, 52 LAW Q. REV. 168, 169 (1936).

It should be noted that in a decision rendered some two and a half months after *Herne Bay*, a different panel of Court of Appeal justices did excuse the charterer of a boat for the naval review. *Civil Service Coop. Soc’y v. General Steam Navigation Co.*, [1903] 2 K.B. 756 (C.A.) (Earl of Halsbury, L.C., Alverstone, C.J. & Cozens-Hardy, L.J.). Neither the barristers in their arguments nor the justices in their opinions cited *Herne Bay*, which indicates that they probably were unaware of that decision. They were, however, aware of *Krell*; it is cited in the Earl of Halsbury’s opinion. *Id.* at 763, 764.

197. [1903] 2 K.B. at 750-51. The omitted portions of the quotation discuss the enforceability of the two contracts by the parties claiming excuse. In the cab hypothetical, the judge concludes that the hirer could require the cabman to drive him to Epsom even if the races were canceled. The room hire contract could not have been enforced, states the judge, if the King had died before the coronation date. *Id.* These discussions have been omitted from the quotation because they seem to beg the question, failing to advance the analysis.

lacked.¹⁹⁸ At first glance, this distinction is puzzling. Why do the hired rooms, but not the cab or the steamboat, have this "peculiar suitability" when any similar rooms along the route of the coronation procession, just as any similar cab capable of going to Epsom or any similar steamboat capable of going to Southampton, would have been sufficient for the hirer's purpose? Two possible reasons suggest themselves. First, the connection between the thing hired and the event that does not happen is more direct in *Krell* than in the other two cases. In the cab and steamboat cases, the vehicle hired is only one link in a chain of events leading to fulfillment of the hirer's purpose. The cab will take the hirer fifteen miles to Epsom, he will disembark, enter the racetrack, find his box, and view the Derby; the steamer will travel 180 miles to Southampton, embark paying passengers, and then proceed another eighteen miles to Spithead for the naval review. In the room hire case, the hire is also a link, but it is the final link in the process of fulfilling the hirer's purpose. Once the hirer obtains the rooms, he need only look out the windows at the procession. In other words, in neither the cab hypothetical nor the *Herne Bay* case can it be said that the hirer had purchased a view of the Derby or the naval review; but in the *Krell* case, one could argue that what the hirer had purchased was a view of the coronation processions. This distinction probably would have appealed to the *Krell* court, which desired to limit excuse for what is essentially a frustration of the hirer's purpose.

A second possible distinction lies in the manner in which the rooms for hire were let. The *Krell* court seems to have been influenced by the fact that the rooms were advertised and let on the basis that they had a view of the coronation processions. Such was not the case in the cab hypothetical or *Herne Bay*, since neither the cab nor the steamboat was promoted as offering a view of the Derby or the naval review. Thus the equities of the particular facts in *Krell* may have swayed the court.

There may also have been other equities at work. The coronation events were not canceled, but only postponed.¹⁹⁹ The procession the flat hirer expected to see on June 26 eventually took place on August 9 and proceeded along the same route as had originally been planned.²⁰⁰ The procession

198. The distinction has puzzled at least two legal giants, Corbin, *see* 6 A. CORBIN, *supra* note 5, at 465 n.10 ("the present writer cannot perceive any important distinction" between hire of flat and hire of cab), and Scrutton, *see* Metropolitan Water Bd. v. Dick Kerr & Co., [1917] 2 K.B. 15 at 30 (C.A.) (*Krell* principle difficult to apply), as well as generations of law students.

199. This fact is mentioned in one of the coronation cases. *See* Victoria Seats Agency v. Paget, 19 T.L.R. 16, 17 (K.B. Div'l Ct. 1902) (coronation procession scheduled for June 27 postponed until October 25).

200. *See* The Times (London), June 25, 1902, at 9, col. 6 (coronation ceremony postponed); *id.*, July 12, 1902, at 10, col. 1 (approximate date of coronation announced); *id.*, July 15, 1902, at 11, col. 1 (procession on coronation day "will traverse exactly the same route as it would have done had the Coronation taken place on June 26"); *id.*, July 19, 1902, at 13, col. 1 (coronation date announced as August 9); *id.*, July 28, 1902 at 10, col. 1 (Royal Proclamation officially setting corona-

scheduled for June 27 occurred on October 25 and followed as nearly as possible the original route.²⁰¹ Even the naval review that had been canceled was rescheduled and held on August 16.²⁰²

That the coronation events were only postponed, not canceled, completely changed the complexion of the coronation cases. A difficult loss allocation question had become simple. To excuse those who hired rooms for the originally scheduled coronation events would not injure the lessors of these facilities, provided they had not incurred reliance expenses to prepare the facilities. The lessors' expected profits would not be prevented, only delayed until the facilities were relet when the postponed events took place. Indeed, not to excuse the hirers under these circumstances would have resulted in a positive injustice. The hirers would have had to pay dearly for something they did not receive, views of the coronation events, while those who let the facilities would have been permitted to profit twice: once for the original lettings and once more for lettings on the rescheduled dates. Since there was no indication that the owner of the rooms in *Krell* had incurred any reliance expenses, it was hardly surprising that the court excused the hirer.²⁰³ The

tion date as August 9). The August 9 procession proceeded from the King's residence, Buckingham Palace, to Westminster Abbey, where the King was crowned, and then returned to the Palace. *Id.*, Aug. 11, 1902, at 8, col. 5 (description of coronation procession on Aug. 9).

201. See *The Times* (London), July 15, 1902, at 11, col. 1 (long procession on day after coronation abandoned, but King hoped to be able to make procession in early October; "it may be anticipated that he will follow as nearly as possible the original route"); *id.*, Sept. 20, 1902, at 6, col. 4 ("The Royal Progress through the streets of London which was appointed for the 27th June, the day following that fixed for their Majesties' Coronation, will take place on Saturday, October 25th."); *id.*, Oct. 7, 1902, at 4, col. 1 (route of October 25 procession announced); *id.*, Oct. 26, 1902, at 7, col. 6 (description of the procession); see also *Victoria Seats Agency v. Paget*, 19 T.L.R. 16 (K.B. Div'l Ct. 1902) (recounting announcements of procession). The route of this procession was as follows: Buckingham Palace, the Mall, Marlborough-gate, Pall-Mall, the north side of Trafalgar Square, the Strand, Fleet Street, Ludgate Hill, St. Paul's churchyard, Cannon Street, Queen Victoria Street, the Mansion House, Prince's Street, Gresham Street to the Guildhall, returning by King William Street, London Bridge, Bridge Street, Whitehall, the Horse Guards, and the Mall back to the Palace. *The Times* (London), Oct. 7, 1902, at 4, col. 1.

This procession should not be confused with the much smaller procession on Sunday, October 26, on the occasion of the Thanksgiving Service at St. Paul's Cathedral. *Id.*, Oct. 7, 1902, at 4, col. 1 (announcement of October 26 procession and route); *id.*, Oct. 27, 1902, at 12, col. 2 (description of October 26 procession). The route of this procession was as follows: The Palace, Buckingham Palace Road, Victoria Street, Parliament Square, the Embankment, Ludgate Hill to St. Paul's Cathedral, returning by Newgate Street, Marble Arch, through Hyde Park straight to Hyde Park Corner, Constitution Hill, the Palace. *Id.*, Oct. 27, 1902, at 12, col. 2.

202. See *The Times* (London), June 25, 1902, at 10, col. 2 (naval review will not take place); *id.*, July 18, 1902, at 9, col. 1 (naval review announced); *id.*, July 21, 1902, at 10, col. 1 (August 16 set as date for naval review); *id.*, Aug. 18, 1902, at 5, col. 1 (description of naval review).

203. When the lessor of facilities had incurred significant unrecoverable reliance expenditures before the postponement of the coronation, the loss allocation question was more difficult. The tendency was to protect these reliance expenditures by declining to permit hirers to recover down payments made before the postponement, even though the hire contracts were discharged. See *Lumsden v. Barton & Co.*, 19 T.L.R. 53, 54 (K.B. Div'l Ct. 1902) (contract to hire seats; no recov-

equities and peculiar circumstances of the case go far toward explaining why the court felt compelled to reinterpret so radically an established principle. Moreover, these equities probably explain why the *Krell* court's unusual approach was typical of the coronation cases.²⁰⁴

The hypothesis here advanced, that *Krell* and the other coronation cases were products of unique circumstances, is supported by the fact that the *Krell* principle played a relatively insignificant role in the subsequent development of the English law of impossibility. This is so even though the *Krell* principle, despite criticism at the highest judicial levels²⁰⁵ and by several

ery of deposit where defendant had erected grandstand); *Blakeley v. Muller*, [1903] 2 K.B. 760 n.4 (contract for room; no recovery of deposit); *Civil Service Coop. Soc'y. v. General Steam Navigation Co.*, [1903] 2 K.B. 756 (C.A.) (charterparty; same). When there does not appear to have been unrecoverable reliance expenses, the earlier coronation cases permitted recovery of down payments. See *Krell v. Henry*, 18 T.L.R. 823, *aff'd in part*, [1903] 2 K.B. 740 (C.A.) (hirer entitled to recovery of all sums paid; on appeal the hirer abandoned his claim to the down payment); *Griffith v. Brymer*, 19 T.L.R. 434 (K.B. 1903) (plaintiff entitled to recovery of all sums paid). *But cf.* *Clark v. Lindsay*, 88 L.T.R. 198 (K.B. Div'l Ct. 1903) (contract had no provision for return of deposit). Later, the rule against recovery of down payments came to be applied regardless of whether there were reliance expenses to protect. See *Chandler v. Webster*, [1904] 1 K.B. 493, 499-500 (C.A.) (law only relieves parties of further obligations). Thus was born the rule of *Chandler v. Webster*. This rule was eventually overruled by the House of Lords in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, [1943] A.C. 32 (1942), and came to be the subject of statutory regulation. Law Reform (Frustrated Contracts) Act, 1943, 6 & 7 Geo. 6, ch. 40 (permitting recovery of money paid; subject, however, to equitable consideration of reliance expenses incurred by other side); see G. WILLIAMS, *supra* note 166 (discussion of Law Reform (Frustrated Contracts) Act).

Although the rule has been discredited, the result in *Chandler* may well have been fair. There, the hirer of the room, rather than the owner, planned to erect a stand and sell seats. If the hirer had incurred reliance expenses before the postponement, then under the authority of *Lumsden* and *Blakeley* he would not have had to refund the money he received from the sale of the seats. Thus, if the room hirer were entitled to keep the benefits of the hire (the seat receipts), it would only be fair that he should also pay the costs of the hire.

204. In the following coronation cases *Taylor* was applied: *Krell v. Henry*, 18 T.L.R. 823 (K.B. 1902), *aff'd in part*, [1903] 2 K.B. 740 (C.A.); *Blakeley v. Muller*, 88 L.T.R. 90 (K.B. Div'l Ct. 1903); *Clark v. Lindsay*, 88 L.T.R. 198 (K.B. Div'l Ct. 1903) (opinion of Channell, J.); *Elliott v. Crutchley*, [1903] 2 K.B. 476, *aff'd*, [1904] 1 K.B. 565 (C.A.), *aff'd*, [1906] A.C. 7 (1905). In the following coronation cases the performance or fulfillment of the contract was said to be impossible: *Griffith v. Brymer*, 19 T.L.R. 434 (K.B. 1903); *Chandler v. Webster*, [1904] 1 K.B. 493, 498 (C.A.); *cf.* *Blakeley v. Muller*, 88 L.T.R. 90, 91-92 (K.B. Div'l Ct. 1903) (contract for seats in grandstand; continued performance impossible); *Elliott v. Crutchley*, [1903] 2 K.B. 476, 479, *aff'd*, [1904] 1 K.B. 565 (C.A.), *aff'd*, [1906] A.C. 7 (1905) (contract for luncheon; same).

205. See *Larrinaga & Co. v. Société Franco-Américaine des Phosphates de Médulla*, 129 L.T.R. 65, 68 (H.L. 1923) (Finlay, L.) ("I share the doubts which have been expressed as to the extension of the [*Taylor*] doctrine to such cases as *Krell v. Henry* . . . and the other cases known as the Coronation cases."); *Maritime Nat'l Fish, Ltd. v. Ocean Trawlers Ltd.*, [1935] A.C. 524, 528-29 (P.C.) (Wright, L.) ("The correctness of that [the *Krell*] decision has been questioned, for instance by Lord Finlay L.C. in *Larrinaga v. Société Franco-Américaine des Phosphates* The authority is certainly not one to be extended. . . ."). Note the curious phrasing of Viscount Simon in *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corp.*, [1942] A.C. 154, 164 (1941) ("if the coronation cases, such as *Krell v. Henry*, are to be regarded as rightly decided on their facts").

Lord Dunedin's reference to the coronation cases in *Cantiare San Rocco, S.A. v. Clyde Ship-Building & Eng'g*, [1924] A.C. 226, 247 (1923) (Scotland) ("First as to the Coronation cases. None

commentators,²⁰⁶ has apparently been generally accepted by the English judiciary.²⁰⁷ At least two commentators have remarked that since the coronation cases, no other case has been decided solely upon the basis of the *Krell* principle.²⁰⁸ The cases support these remarks.²⁰⁹ Nor has there been much

of these cases reached your Lordships' House, and it has been mooted that some at least of them were wrongly decided. I do not propose to consider any such question."), probably refers to the rule of *Chandler v. Webster* rather than the *Krell* principle.

206. See F. POLLOCK, *PRINCIPLES OF CONTRACTS* 439-40 (8th ed. 1911); W. ANSON, *PRINCIPLES OF THE LAW OF CONTRACT* 351 (11th ed. 1906); Gordon, *Krell v. Henry*, 52 *LAW Q. REV.* 324 (1936); R. McElroy & G. Williams, *The Coronation Cases—I*, 4 *MOD. L. REV.* 241, 246-53 (1941). For a brief discussion and analysis of the authorities up to 1936 that criticize the *Krell* principle, see Landon, *Krell v. Henry*, 52 *LAW Q. REV.* 168 (1936).

207. The following cases appear to have approved the *Krell* principle: *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, [1943] A.C. 32, 49, 50 (1942) (Simon & Atkin, LL.); *F.A. Tamplin S.S. Co. v. Anglo-Mexican Petroleum Prods.*, [1916] 2 A.C. 397, 403 (Earl Loreburn & Buckmaster, L.C.) (*Krell* principle adopted without identification as such); *Horlock v. Beal*, [1916] 1 A.C. 486, 512-13 (Shaw, L.); *May v. May*, [1929] 2 K.B. 386, 393-94 (C.A.) (Scrutton, L.J.); *Scottish Navigation Co. v. W.A. Souter & Co.*, [1917] 1 K.B. 222, 238 (C.A. 1916) (Swinfen-Eady, L.J.); *Leiston Gas Co. v. Leiston-cum-Sizewell Urban Council*, [1916] 2 K.B. 428, 432 (C.A.) (Reading, L.C.J.); *First Russian Ins. Co. v. London & Lancashire Ins. Co.*, [1928] Ch. 922, 940 (Romer, J.); *The Penelope*, [1928] P. 180, 194 (Adm.) (Merrivale, L., Pres.); see *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corp.*, [1942] A.C. 154, 198 (1941) (Porter, L.) (recognizing existence of *Krell* principle); *In re Shipton, Anderson & Co. and Harrison Bros. & Co.*, [1915] 3 K.B. 676, 683 (Reading, L.C.J.) (same).

208. G. TREITEL, *supra* note 9, at 591; McElroy & Williams, *supra* note 162, at 253.

209. Of the cases citing *Krell*, collected *supra* note 207, five, *May*, *F.A. Tamplin*, *Leiston Gas*, *First Russian Ins. Co.*, and *Sergeant*, did not excuse performance. In the other six cases, the court excused performance, but in none of those cases was the *Krell* principle the primary ground of decision:

1. *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1943] A.C. 32 (1942) (contract to manufacture machinery in England for delivery to buyer in Poland; outbreak of World War II; buyer suit for failure to deliver; held, contract frustrated; buyer entitled to return of down payment). It should be noted that the main issue of this case was not whether the contract was ended (it was), but rather whether money paid under the contract could be recovered if ending the contract worked a total failure of the consideration promised for the money. The excuse question was easily resolvable on the basis of established doctrine. The lower court had applied the rule of *Geipel v. Smith*, 7 L.R.-Q.B. 404 (1872) and found the contract to be excused. [1942] 1 K.B. 12, 26 (1941). On appeal, only four of seven Lords, Simon, Atkin, Roche, and Porter, addressed the excuse question, and of the four only Lord Simon did so in any detail. *Id.* at 40, 41. He would also have applied the rule of *Geipel v. Smith*. *Id.* In addition he stated that the contract was excused because the outbreak of war constituted supervening illegality. *Id.* at 41. Lord Atkin essentially agreed with Lord Simon. *Id.* at 50. Lords Roche and Porter briefly stated that they also considered the contract excused. *Id.* at 73, 83. None of these Lords cited or relied on the *Krell* principle in these parts of their judgments. Four of the seven Lords did cite *Krell* or its principle. Lord Simon, who gave the fullest discussion of excuse, cited it in that portion of his judgment concerning recovery of money paid. *Id.* at 49. He indicated that the rule permitting recovery would apply where a contract had been excused under the *Krell* principle. *Id.* Lord Atkin approved the *Krell* principle in his judgment, but only after finding the contract to be excused for indefinite delay (the *Geipel v. Smith* rule), and legal impossibility (supervening illegality). *Id.* at 50. Lords Wright and Porter cited *Krell* only on the issue concerning recovery of money paid. *Id.* at 68, 80. Thus, *Krell* was discussed, but was not the basis for excuse.

2. *Horlock v. Beal*, [1916] 1 A.C. 486 (mariner's wage contract; ship seized and crew interned

indirect effect. As the remainder of this study will show, virtually every case subsequent to *Krell* that excused performance did so on facts covered by theories of excuse already in existence when *Krell* was decided.

VI. THE MORE THINGS CHANGE, THE MORE THEY REMAIN THE SAME:²¹⁰ TWENTIETH CENTURY DEVELOPMENTS

The era since the coronation cases has seen two world wars as well as a global economic depression. These events wrought cataclysmic economic and political changes. Thus, one might expect to see changes of similar magnitude in the doctrine of excuse for impossibility. Indeed, there have been numerous cases concerning the doctrine as well as a good deal of intellectual ferment about its basis.²¹¹ In England, the prevailing view of the doctrine's basis has moved from the "implied term" theory toward the "just solution"

on outbreak of World War I; suit for wages during internment; held, shipowner excused). Three of the five Lords cited *Krell*. Lord Shaw stated that he concurred in the *Krell* principle and that it was sound, but he said this only after having decided the case by applying the rule of *Geipel v. Smith*. [1916] 1 A.C. at 507, 510. The other two Lords who cited *Krell*, Atkinson and Wrenbury, merely said that it was an illustration or application of the *Taylor* principle. *Id.* at 509, 511. Neither Lord mentioned the *Krell* principle or based his judgment upon it. Thus three of the five Lords did not rely upon the *Krell* principle as the main ground of decision.

3. *Scottish Navigation Co. v. W.A. Souter & Co.*, [1917] 1 K.B. 222 (C.A. 1916) (charterparty for voyage to Russian Baltic ports and back to England; outbreak of World War I trapped ship in Baltic; suit by shipowner for hire fee; held, charterparty excused). Lord Justice Swinfen-Eady first determined that the charterparty was dissolved because of indefinite delay in performance. Only then did he discuss the *Krell* principle. *Id.* at 237-38. Justice Bankes also cited *Krell* but only for the puzzling reference that it contained a historical treatment of the frustration of adventure doctrine. *Id.* at 243.

4. *The Penelope*, [1928] P. 180 (Adm. 1928) (12-month time charter; general strike prevented loading of any cargo for seven months; at end of strike shipowner refused to load; suit by charterer; held, charter frustrated). The ground of the court's judgment is somewhat difficult to discern. There is a discussion of the *Taylor* principle and mention of the *Krell* principle as well as several recent House of Lords cases. *Id.* at 184. Eventually the court appears to apply the "different contract" test of Lord Dunedin in *Metropolitan Water Bd. v. Dick, Kerr & Co.*, [1918] A.C. 119, 130 (1917).

5. *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corp.*, [1942] A.C. 154 (1941) (charterparty; ship damaged by boiler explosion before arrival; suit by charterer; held, charterparty frustrated). The main issue in this case was whether the shipowner bore the burden of proving that the explosion was not its fault. The charterers conceded that the delay caused by the explosion was so great as to frustrate the charterparty if the shipowner were not at fault. Thus the issue of excuse, aside from the burden of proof question, was not disputed. Viscount Simon, L.C. and Lord Porter did cite *Krell* in their discussions of the frustration doctrine. *Id.* at 164, 198.

6. *In re Shipton, Anderson & Co., and Harrison Bros. & Co.*, [1915] 3 K.B. 676 (contract for sale of specific goods; goods seized by government; buyers claimed damages; held, contract excused). Previous cases had established that government seizure of the subject matter excused the contract. Chief Justice Lord Reading discussed those cases in some detail. *Id.* at 681-83. He then referred to the "principles laid down in *Krell v. Henry*" without elaboration and declared the sellers excused. *Id.* at 683.

210. A. KARR, *LES GUÊPES* (Jan. 1849).

211. For a good overview, see W. MCNAIR, *supra* note 115, at 143-52. See *National Carriers*

theory.²¹² However, despite the proliferation of cases and the accompanying debate over the basis of the doctrine, one significant fact remains unchanged: English courts still grant excuse essentially only upon facts on which they would have granted excuse at the end of the nineteenth century. The *Krell* principle might never have been enunciated for all the change it has brought. This study will now examine the twentieth century developments in the doctrine, with an emphasis on what the courts have done rather than on what they said they were doing.

A study of the House of Lords and Privy Council cases granting excuse²¹³

Ltd. v. Panalpina (Northern) Ltd., [1981] A.C. 675, 687-88 (1980) (reviewing theories regarding basis of doctrine).

212. The implied term theory seems to be the earliest. See, e.g., *Taylor v. Caldwell*, 3 B. & S. 826, 834, 122 Eng. Rep. 309, 312 (Q.B. 1863) (destruction of subject matter is implied exception to contract); *F.A. Tamplin Co. v. Anglo-Mexican Petroleum Prods. Co.*, [1916] 2 A.C. 397, 403 (Earl Loreburn) (court should imply term if relied upon by both parties when bargaining). The "just solution" theory was first proposed by Lord Sumner in *Hirji Mulji v. Cheong Yue S.S. Co.*, [1926] A.C. 497, 510 (P.C.), and was approved by Lord Wright in *Denny, Mott & Dickenson, Ltd. v. James B. Fraser & Co.*, [1944] A.C. 265, 275 (Scotland), and *Cricklewood Prop. & Inv. Trust v. Leighton's Inv. Trust*, [1945] A.C. 221, 237, 245 (with Lord Goddard). It suffered a reverse when it was rejected by the entire panel of Lords in *British Movietones Ltd. v. London & Dist. Cinemas Ltd.*, [1952] A.C. 166, 181-88 (1951). However, it was endorsed in some fashion by all but one of the panel of Lords in *National Carriers Ltd. v. Panalpina (Northern) Ltd.*, [1981] A.C. 675, 687, 696, 700, 707, 713 (1980). (Hailsham, L.C., Wilberforce, Simon & Roskill, LL.).

213. The following is a list of House of Lords and Privy Council impossibility cases that grant excuse and were decided after the coronation cases. The numbers in the parentheses after each case indicate the following: (1) type of contract in suit; (2) supervening event making performance temporarily impossible; (3) applicable traditional excuse theory; (4) description of suit; (5) result.

Horlock v. Beal, [1916] A.C. 468 ((1) seaman's wage contract; (2) ship and crew interned by enemy for duration of World War I; (3) unavailability of specific person and thing; failure of consideration; (4) for wages during period of internment; (5) for shipowner—contract ended).

This case was not the usual impossibility case, although it is often discussed as such. The shipowner was not seeking excuse because a supervening event had made his performance more difficult or impossible. Rather, he was seeking to avoid his obligation to pay wages, because a supervening event had made it impossible for the crewman to perform the services for which the shipowner agreed to pay. In other words, the shipowner's situation was that the supervening event had caused a failure of the consideration for his promise to pay wages. Surprisingly, the case was not argued or decided on the ground of failure of consideration. Nevertheless, the lords seem to have realized that failure of consideration was essentially the issue. [1916] A.C. at 494 (Lord Loreburn's statement, "[i]f they were bound it must mean that wages were to be paid, without any service in return, for the entire duration of this war, or, in the present case, til the expiry of two years from the commencement of the service"); *id.* at 514 (Lord Shaw's conclusion that crewman's inability to serve disables him from being entitled to wages); *id.* at 518 (Lord Wrenbury's reference to crewman's inability to serve and to *Melville v. DeWolf*, 4 El. & Bl. 844, Eng. Rep. 313 (Q.B. 1855)). Seven months after *Horlock*, Lord Atkinson indicated that *Horlock* had been a failure of consideration case in *F.A. Tamplin, S.S. Co. v. Anglo-Mexican Petroleum Prods.*, [1916] 2 A.C. 397, 420 (*Horlock* decided on principles contained in *Jackson v. Union Marine Ins. Co.*, 10 L.R.-C.P. 125 (Ex. Ch. 1874) and *Poussard v. Spiers*, 1 Q.B.D. 410 (1876), a recognized failure of consideration case).

Ebbw Vale Steel, Iron & Coal Co. v. Macleod & Co., 116 L.T.R. 449 (H.L. 1917) ((1) sale of goods; clause permitting seller to suspend contract if source of supply fails; (2) outbreak of World War I

shows that each case fits the inordinate delay pattern.²¹⁴ In each case an event disrupted the contract and provided at least a temporary excuse under traditional excuse doctrines. In all but two of the cases the court terminated the contract because the event and the traditional excuse lasted for a length

caused seller's source of supply to fail; (3) contract clause; (4) by buyers for declaration that sellers not entitled to suspend contract; (5) for sellers—contract suspended).

Tennants (Lancashire) Ltd. v. C.S. Wilson & Co., [1917] A.C. 495 ((1) sale of goods; clause permitting seller to suspend contract in event of supply shortage; (2) outbreak of World War I caused supply shortage; (3) contract clause; (4) by buyers for damages for breach; (5) for sellers—contract suspended).

Metropolitan Water Bd. v. Dick, Kerr & Co., [1918] A.C. 119 (1917) ((1) to construct reservoir; (2) wartime government order halting work and requiring sale of accumulated plant; (3) government interference; (4) by Water Board for declaration that contract still binding; (5) for builder—contract ended).

Ertel Bieber & Co. v. Rio Tinto Co., [1918] A.C. 260 ((1) sale of ore to German buyer; (2) outbreak of World War I; (3) illegality—trading with enemy; (4) by seller to declare contracts abrogated; (5) for seller—contract ended).

The illegality here was only temporary; nevertheless, the court treated it as permanent. It did so on the ground that if contracts were merely suspended, the enemy might be aided. [1918] A.C. at 274-75 (Dunedin); *id.* at 279 (Atkinson); *id.* at 290 (Summer).

Bank Line, Ltd. v. Arthur Capel and Co., [1919] A.C. (1918) ((1) time charterparty; (2) ship requisitioned before charterer took possession; (3) government interference; (4) by charterer for nondelivery of ship after requisition ended; (5) for charterer—charterparty ended).

Fried Krupp Aktiengesellschaft v. Orconera Iron Ore Co., 120 L.T.R. 386 (H.L. 1919) ((1) arrangement between British and German companies for ore; (2) outbreak of World War I; (3) illegality—trading with enemy; (4) by British company for declaration that contract dissolved; (5) for British company—contract ended).

Federal Steam Navigation Co. v. Sir Roylton Dixon & Co., 1 Lloyd's List L.R. (H.L. 1919) ((1) to build ship; (2) wartime government regulations preventing building of ship; (3) government interference; (4) by builder for declaration that contract not binding; (5) for builder—contract ended).

Hirji Mulji v. Cheong Yue S.S. Co., [1926] A.C. 497 (P.C.) (H.K.) ((1) charterparty; (2) ship requisitioned before charterer took possession; (3) government interference; (4) by shipowner for charterer's failure to accept ship when requisition ended; (5) for charterer—charterparty ended).

Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corp., [1942] A.C. 154 (1941) ((1) charterparty; (2) ship damaged by boiler explosion en route to loading; (3) subject matter of contract unavailable; (4) by charterers for failure to load cargo; (5) for shipowner—charterparty ended).

Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd., [1943] A.C. 32 (1942) ((1) manufacture and delivery of machinery to Polish buyer; (2) outbreak of World War II and German occupation of Poland; (3) supervening illegality; (4) by buyers for return of down payment of specific performance; (5) for buyer—contract ended).

Denny, Mott & Dickinson, Ltd. v. James B. Fraser & Co., [1944] A.C. 265 (Scotland) ((1) agreement for sale of timber and lease of timber yard with option to purchase on termination of agreement; (2) wartime government orders preventing sale of timber; (3) illegality of main part of contract; (4) by owner of timber yard to determine effect of lessee's exercise of option to purchase; (5) for owner of timber yard—contract ended before option exercised).

214. See *supra* text accompanying notes 132-54 (discussing development of doctrine of inordinate delay).

of time judged inordinate.²¹⁵ In none of the cases was the *Krell* principle required for the decision.

The lower court cases granting excuse tell much the same story. Of forty-four lower court cases that granted excuse, only one case cannot be justified under traditional excuse theories.²¹⁶ The one exceptional case, *Minnevitch v.*

215. The two cases are *Ebbw Vale Steel, Iron & Coal Co. v. Macleod & Co.*, 116 L.T.R. 449 (H.L. 1917), and *Tennants (Lancashire), Ltd. v. C.S. Wilson and Co.*, [1917] A.C. 495. In each case a clause permitted suspension of the contract upon the occurrence of specified events. The issue in each case was whether certain supervening events fell within the suspensory clause so that performance was suspended. None of the parties asserted that the contract was ended; consequently, in neither case did the House of Lords have the inordinate delay question before it.

216. The following lists lower court impossibility cases, decided after the coronation cases, granting excuse. The list was compiled primarily from the *Empire and England Digest*. The numbers in the parentheses after each case indicate the following: (1) type of contract in suit; (2) supervening event making performance temporarily or permanently impossible; (3) applicable traditional excuse theory; (4) description of suit; (5) result.

Embiricos v. Sydney Reid & Co., [1914] 3 K.B. 45 ((1) charterparty; (2) temporary—outbreak of war between Turkey and Greece trapped ship in Black Sea; (3) restraint of princes clause in charterparty; (4) by charterer for breach; (5) for shipowner—charterparty frustrated).

In Re Arbitration Between Shipton Anderson & Co. and Harrison Bros. & Co., [1915] 3 K.B. 676 ((1) contract for sale of specific wheat; (2) permanent—wheat requisitioned; (3) government interference; unavailability of contract subject matter; (4) by buyers for nondelivery; (5) for seller—contract at end).

Edward Grey & Co. v. Tolme & Runge, 31 T.L.R. 551 (K.B. 1915) ((1) contract for sale of goods located in Germany; (2) temporary—outbreak of World War I; (3) illegality—trading with enemy; (4) by buyers for declaration that contract at end; (5) for buyers—contract at end).

Duncan, Fox & Co. v. Schrempft & Bonke, [1915] 3 K.B. 355 (C.A.) ((1) documentary sale of goods, buyer to take delivery in Germany; (2) temporary—outbreak of World War I; (3) illegality—trading with enemy; (4) by sellers for refusal to accept documents; (5) for buyers—contract at end).

In re R.S. Newman, Ltd. (Raphael's Claim), [1916] 2 Ch. 309 (C.A.) ((1) option to buy shares in company and receive 10-year employment contract; (2) permanent—company went into liquidation proceedings; (3) unavailability of thing necessary for performance; (4) claim in liquidation by optionee for damages for loss of employment contract; (5) for liquidator—option terminated before exercise).

Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co., [1916] 1 K.B. 495 (C.A.) ((1) sale of goods shipped on German vessels; (2) temporary—outbreak of World War I; (3) illegality—trading with enemy; (4) by sellers for nonacceptance; (5) for buyers—contract at end).

Zinc Corp. v. Hirsch, [1916] 1 K.B. 541 (C.A. 1915) ((1) sale of goods to German buyer; (2) temporary—outbreak of World War I; (3) illegality—trading with enemy; (4) by seller for declaration that contract at end; (5) for seller—contract at end).

Jager v. Tolme & Runge, [1916] 1 K.B. 939 (C.A.) ((1) sale of goods located in Germany; (2) temporary—outbreak of World War I; (3) illegality—trading with enemy; (4) by buyers for declaration that contract at end; (5) for buyers—contract at end).

Heilgers & Co. v. Cambrian Steam Navigation Co., 34 L.T.R. 72 (C.A. 1917) ((1) charterparty; (2) temporary—ship requisitioned; (3) government interference; unavailability of contract subject matter; (4) by charterers for declaration that charterparty still in effect; (5) for shipowner—charterparty at end).

Scottish Navigation Co. v. W.A. Souter & Co., [1917] 1 K.B. 222 (C.A. 1916) ((1) charterparty; (2)

temporary—ship trapped in Baltic Sea by outbreak of World War I; (3) unavailability of contract subject matter; (4) by shipowner for hire payments; (5) for charterer—charterparty at end).

Marshall v. Glanvill, [1917] 2 K.B. 87 ((1) employment contract; (2) temporary—employee drafted; (3) government interference; (4) by employee for damages for termination; (5) for employee—contract at end).

Clapham S.S. Co. v. Naamlouze Vennootschap Handels-En Transport-Maatschappij Vulcaan of Rotterdam, [1917] 2 K.B. 639 ((1) charterparty; charterer a German-owned company; (2) temporary—outbreak of World War I; (3) illegality—trading with enemy; (4) by shipowners for declaration that charterparty at end; (5) for shipowner—charterparty at end).

Innholders' Co. v. Wainwright, 33 T.L.R. 356 (K.B. 1917) ((1) building lease; lessee to demolish buildings then construct new buildings; (2) temporary—wartime government order prevented construction; (3) government interference; (4) by lessor for rent; (5) for builder/lessee—lease suspended during prohibition).

Naylor, Benyon & Co. v. Aron Hirsch & Son, 33 T.L.R. 432 (K.B. 1917) ((1) sale of goods to German buyers; (2) temporary—outbreak of World War I; (3) illegality—trading with enemy; (4) by sellers for declaration that contract at end; (5) for sellers—contract at end).

Lloyd Royal Belge Société Anonyme v. Stathatos, 34 T.L.R. 70 (C.A. 1917) ((1) charterparty; (2) temporary—ship detained by British government; (3) government interference; unavailability of contract subject matter; (4) by charterers for declaration that charterparty at end; (5) for charterers—charterparty at end).

Countess of Warwick S.S. Co. v. Le Nickel Société Anonyme, [1918] 1 K.B. 372 (C.A. 1917) ((1) charterparty; (2) temporary—ship requisitioned; (3) government interference; unavailability of contract subject matter; (4) by shipowners for hire payments; (5) for charterers—charterparty at end).

Naylor, Benzon & Co. v. Krainische Industries Gesellschaft, [1918] 2 K.B. 486 (C.A.) ((1) sale of goods to Austrian buyer; (2) temporary—outbreak of World War I; (3) illegality—trading with enemy; (4) by sellers for declaration that contract at end; (5) for sellers—contract at end).

Woodfield Steam Shipping Co. v. J.L. Thompson & Sons, 36 T.L.R. (C.A. 1919) ((1) contracts to build ships; (2) temporary—wartime government order prevented construction of ships as agreed; (3) government interference; (4) by buyers for declaration that contracts only suspended; (5) for builders—contracts at end).

Pacific Phosphate Co. v. Empire Transp. Co., 36 T.L.R. 750 (K.B. 1920) ((1) contract to furnish ships; clause suspending contract in event of war; (2) temporary—outbreak of World War I; (3) contract clause; (4) by recipient of ships for declaration that contract only suspended; (5) for supplier—contract at end).

Ralli Bros. v. Compania Naviera Sota y Aznar, [1920] 2 K.B. 287 (C.A.) ((1) charterparty; (2) permanent—Spanish government order set maximum permissible freight rate below charterparty rate; (3) illegality under foreign law; (4) by shipowners to recover freight at charterparty rate; (5) for charterers—contract discharged as to freight in excess of legal rate).

In re Badische Co., [1921] 2 Ch. 331 ((1) sales of goods by German-controlled British seller; (2) temporary—outbreak of World War I; (3) illegality—trading with enemy; (4) by buyers in seller's liquidation proceedings for damages for nondelivery; (5) for liquidator—contracts at end).

E.N.J. Coppee v. Blagden, Waugh & Co., 6 Lloyd's List L.R. 319 (K.B. 1921) ((1) sales of goods by Belgian seller; (2) temporary—outbreak of World War I and German occupation of Belgium; (3) illegality—trading with enemy; (4) by seller after war ended for declaration that contract at end; (5) for seller—contract at end).

Acetylene Corp. v. Canada Carbide Co., 8 Lloyd's List L.R. 456 (C.A. 1921) ((1) sale of goods; clause suspending contract in event delivery hindered; (2) temporary—shipping shortage caused by

wartime requisition of ships; (3) contract clause; (4) by buyer for damages for nondelivery; (5) for seller—contract at end).

William Cory & Son v. Bolckow, Vaughan & Co., 9 Lloyd's List L.R. 142 (K.B. 1921) ((1) sale of goods; clause suspending contract if production or delivery of goods hindered; (2) temporary—government took control of source of production; (3) government interference; contract clause; (4) by buyer for declaration that contract still in effect; (5) for seller—contract at end).

A.M. Peebles & Son v. Becker & Co., 10 Lloyd's List L.R. 773 (K.B. 1922) ((1) sales of goods; provisions for suspension of contract in event of war; (2) temporary—outbreak of World War I; (3) contract clause; (4) by buyers for damages for nondelivery; (5) for sellers—contracts at end).

Snia Societa Di Navigazione Industria e Commercio v. Suzuki & Co., 29 Com. Cas. (C.A. 1924) ((1) charterparty; (2) temporary—ship not seaworthy at start of charterparty; (3) fault—breach of shipowner; (4) by charterers to cancel charterparty and for damages; (5) for charterers—charterparty at end).

Browning v. Crumlin Valley Collieries, Ltd., [1926] 1 K.B. 522 ((1) employment contract; (2) temporary—mine at which employees worked closed for repairs because employees refused to work until repairs done; (3) unavailability of thing necessary for performance; (4) by employees for wages during period of repairs; (5) for employer—obligation to pay wages suspended).

Kursell v. Timber Operators & Contractors Ltd., [1927] 1 K.B. 298 (C.A. 1926) ((1) sale of specified goods; (2) permanent—goods expropriated by foreign government; (3) illegality under foreign law; unavailability of contract subject matter; (4) by sellers for the price; (5) for buyers—contract at end).

The Penelope, [1928] P. 180 ((1) charterparty to carry coal; provision that ship not to be ordered to loading port at which strike in effect; (2) temporary—general coal strike so no loading ports available; (3) contract clause; (4) by charterers for failure to load after strike ended; (5) for shipowner—charterparty at end).

Carras v. London & Scottish Assurance Corp., [1936] 1 K.B. 291 (C.A. 1935) ((1) charterparty; policy insuring freight to be earned on voyage; (2) permanent—ship damaged to such extent as to be constructive total loss; (3) contract clause; unavailability of charterparty subject matter due to perils of the sea; (4) by shipowner/insured for freight insured under policy; (5) for shipowner/insured—freight lost through covered risk).

Kulukundis v. Norwich Union Fire Ins. Soc'y, [1937] 1 K.B. 1 (C.A. 1936) ((1) charterparty; policy insuring freight to be earned on voyage; (2) permanent—ship damaged to such extent as to be constructive total loss; (3) contract clause; unavailability of charterparty subject matter due to perils of the sea; (4) for shipowner/insured for freight insured under policy; (5) for shipowner/insured—freight lost through covered risk).

W.J. Tatem, Ltd. v. Gamboa, [1939] 1 K.B. 132 (1938) ((1) charterparty for use of ship in Spanish Civil War; (2) temporary—ship seized by Spanish nationalists; (3) unavailability of contract subject matter; (4) by shipowner for hire payments; (5) for charterer—charterparty at end).

D/S A/A Gulnes v. Imperial Chem. Indust. Ltd., The Gulnes, [1938] 1 All E.R. 24 (K.B. 1937) ((1) charterparty; (2) permanent—ship suffered severe bomb damage and became constructive total loss; (3) unavailability of contract subject matter; (4) by shipowner for demurrage; (5) for charterer—charterparty at end).

Court Line, Ltd. v. Dant & Russell, Inc., [1939] 3 All E.R. 314 (K.B.) ((1) charterparty; (2) temporary—ship trapped in Yangtse River by outbreak of Sino-Japanese War; (3) unavailability of contract subject matter; (4) by shipowner for hire payments; (5) for charterer—charterparty at end).

White & Carter Ltd. v. Carbis Bay Garage, Ltd., [1941] 2 All E.R. 633 (C.A.) ((1) contract to display ads; (2) temporary—wartime government regulations required obliterating of information so as to make ads worthless; (3) government interference; (4) by displayer for agreed price; (5) for advertiser—contract at end).

Café de Paris (Londres) Ltd.,²¹⁷ concerned the hiring of a band to give humorous performances at the defendant's café. On a Monday during the term of the hire, George V, then King of England, died. The café owner canceled

Unger v. Preston Corp., [1942] 1 All E.R. 200 (K.B. 1941) ((1) employment contract; (2) temporary—employee interned as enemy alien; (3) government interference; unavailability of contract subject matter; (4) by employee for salary during internment; (5) for employer—contract at end).

The Steaua Romana, [1944] P. 43 ((1) leases of wireless radio sets for use on Rumanian ships; (2) temporary—ships requisitioned, then seized as enemy ships; (3) illegality—trading with enemy; (4) by British government in prize proceeding to condemn sets; (5) for lessors—leases terminated when Russia became enemy country).

Morgan v. Manser, [1947] 2 All E.R. 666 (K.B.) ((1) contract to manage performer; (2) temporary—performer drafted into army; (3) government interference; unavailability of person necessary for performance; (4) by manager for damages when performer hired another manager after World War II over; (5) for performer—contract at end).

Blane S.S. Ltd. v. Minister of Transp., [1951] 2 K.B. 965 (C.A.) ((1) charterparty with option to purchase ship; (2) permanent—ship damaged so as to become actual or constructive total loss; (3) unavailability of contract subject matter; (4) by charterer for declaration that option to purchase timely exercised; (5) for shipowner—option terminated before exercise).

W. Young & Son (Wholesale Fish Merch.), Ltd. v. British Transp. Comm'n, [1955] 2 All E.R. 98 (K.B.) ((1) contract of carriage; exoneration clause for losses caused by strikes; (2) temporary—strike prevented delivery of goods; (3) contract clause; (4) by consignor for damages for nondelivery; (5) for carrier—nondelivery excused by contract clause).

The "Athamas" (Owners) v. Dig Vijay Cement Co., [1963] 1 Lloyd's List L.R. 287 (C.A.) ((1) charterparty; (2) temporary—legally required pilotage to port of unloading refused; (3) illegality; (4) by shipowner for demurrage incurred in unloading at nearest port; (5) for shipowner—obligation to unload at stipulated port ended; unloading at nearest port sufficient).

Kodros Shipping Corp. v. Empresa Cubana de Fletes (The "Evia" (No. 2)), [1981] 2 Lloyd's List L.R. 613 (Q.B.), *aff'd*, [1982] 1 Lloyd's List L.R. 334 (C.A.), *aff'd*, [1982] 3 All E.R. (H.L.) ((1) charterparty; (2) temporary—ship trapped in Shatt al-Arab river by outbreak of Iran-Iraq War; (3) unavailability of contract subject matter; (4) by shipowner for hire charges; (5) for charterer—charterparty at end).

Finelvet AG v. Vinava Shipping Co., Ltd., The Chrysalis, [1983] 2 All E.R. 658 (Q.B. 1982) ((1) charterparty; (2) temporary—ship trapped in Shatt al-Arab river by outbreak of Iran-Iraq War; (3) unavailability of contract subject matter; (4) by shipowner for hire charges; (5) for charterer—charterparty at end).

In both *Carras* and *Kulukundis*, the impossibility question was subsidiary to the main action. In each case the insured sued on a freight insurance policy for freight claimed to have been lost through an insured peril. The chartered ships in both cases had become a constructive total loss because of the perils of the sea. These damages had caused the insured charterparty to end and thus the freight to be lost. In each case the court concluded that the freight had been lost by perils of the sea, which were covered perils.

In each case the charterparty ended because the ship was a constructive total loss. The shipowner was not obligated to repair the ship and proceed regardless of cost. The concept of constructive total loss had been established sometime before the *Krell* principle and thus did not—and does not—depend on that principle. See *Moss v. Smith*, 9 C.B. 94, 137 Eng. Rep. 827 (C.P. 1850); *Dahl v. Nelson, Donkin & Co.*, 6 L.R.-A.C. 38, 52 (1881); *The Assicurazioni Generali v. S.S. Bessie Morris Co.*, [1892] 2 Q.B. 652 (C.A.). Furthermore, the notion that unreasonable cost alone can excuse performance seems to have been limited to this concept of constructive total loss as applied to ships. See *R. McELROY*; *supra* note 9, at 191-93, 194-96.

217. [1936] 1 All E.R. 884 (K.B.).

the band's performances for that week and declined to pay for the canceled performances. In a suit by the bandleader for that week's fee, the café owner pleaded the King's death as a defense. The court found the café owner justified in canceling the performances scheduled for the day of the King's death and the following day but not for the rest of the week. Accordingly, it awarded the bandleader his fee on that basis. Although, the judge's opinion is rather short on reasoning and cites neither principle nor authority, the result of the case is consistent with the *Krell* principle and therefore can be taken to be an instance of its application.²¹⁸ *Minnevitch*, however, does not appear to be cited in any other cases.²¹⁹ It remains the sole case decided on facts not justifying excuse under traditional theories.

These cases show relatively little movement toward a broader jurisprudence of excuse for supervening events. The *Krell* principle, which might have provided a basis for expansion of the doctrines of excuse, has been un influential. To be sure, there has been some broadening of the traditional excuse doctrines, but that has been accomplished through the logical development of those doctrines, rather than by their synthesization into a broader theory of excuse and application of that theory to factual patterns not covered by traditional doctrines. Thus, for example, when the House of Lords decided, in *National Carriers Ltd. v. Panalpina (Northern) Ltd.*,²²⁰ that a lease of real property could be frustrated, the effect of its decision was really to extend traditional excuse doctrines to the leasing of real property, an area previously thought to be exempt from such traditional excuse law. The *Krell* principle derived from the coronation cases has proved not to be the harbinger of a new era of excuse theory; rather, it is like a nursery rhyme character remembered in legend more for unusual circumstance than for earthly accomplishment.²²¹

CONCLUSION

This study traces the development in England of the doctrine of excuse for supervening impossibility of performance from the Year Books to the present. The Year Book and Nominate Reporter cases decided before *Paradine*

218. See the editorial note to *Minnevitch* ("The principle to be applied in the present case was considered in the 'Coronation cases' and depends upon the implied condition that the state of things necessary for the performance of the contract will continue to exist and so make its performance possible.").

219. 12 ENGLISH AND EMPIRE DIGEST 478, case no. 3416 (1973 and Supp. 1985) (absence of annotations).

220. [1981] A.C. 675 (1980).

221. The timid approach of the English courts is mirrored on the other side of the Atlantic Ocean. The *Krell* principle has seldom been applied in the United States. See Anderson, *Frustration of Contract—A Rejected Doctrine*, 3 DE PAUL L. REV. 1 (1953); Comment, *Contracts—Frustration of Purpose*, 59 MICH. L. REV. 98 (1960).

v. Jane show the doctrine in a state of flux; no general rule appears to have emerged. Tradition has it that *Paradine* declared as a general rule that a person's obligation to perform under a contract is not excused by impossibility of performance. In fact, the case did not declare any such rule. At most, the court announced a general rule that events beyond a person's control do not excuse him from a contractual obligation if his performance is still possible. Properly construed, the *Paradine* rule takes no position on situations where the performance has become impossible. During the first half of the eighteenth century, however, courts began to misinterpret *Paradine* and apply it to situations where performance was impossible. Thus, not until a century and a half after the *Paradine* decision did the case come to represent the principle for which it is cited today in American contract law treatises and casebooks.

The triumph of the so-called *Paradine* rule, that impossibility is no excuse, proved to be short-lived, for the era from 1860 to 1920 was the age of excuse. During that time cases reaffirmed theories of excuse that pre-dated *Paradine* and developed new theories of excuse, such as the *Taylor* principle and frustration. From 1920 until the present there has been much discussion but little real change in the application of the doctrine of excuse for supervening impossibility. The principle that evolved from *Krell v. Henry* might have provided a basis for reordering the doctrine but instead has had little discernible effect upon the development of the law, even though it often has been discussed in the cases. Consequently, rather than synthesizing the theories developed in the age of excuse into new jurisprudence, English courts and commentators have simply tended to refine the existing theories.

Today in England it might be said that a remnant of the so-called *Paradine* principle survives. Generally one is not excused from a contractual obligation by events that make performance impossible. This rule, however, is subject to a number of important exceptions for which excuse is recognized: (1) a specific person or thing necessary for performance is unavailable (the *Taylor* principle); (2) the event is the fault of the obligee; (3) the obligor has protected himself with a clause in the contract; and (4) there is an initial temporary excuse lasting for an inordinate period of time (frustration or inordinate delay).

This article now ends where it began, with the treatment of historical English impossibility cases in American contract law casebooks. While there is little to criticize in the treatment of the *Taylor* case, the treatment of *Paradine* and *Krell* warrants criticism. *Paradine* should not be used as an illustration of the so-called general rule of early common law that impossibility does not excuse, since no such rule existed before or was created by the case. The *Krell* case can be deleted or reduced to the status of a footnote case. For all the trouble it has caused generations of law students, and law

professors, *Krell* has had virtually no influence upon the law. If it is retained, it ought to be taught not as a case of general application but as a case reaching an equitable result on the unique set of circumstances surrounding Edward VII's postponed coronation.