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FRUSTRATION OF ADVENTURE AND UNJUST ENRICHMENT.

In *Klein v. Sanderson*¹ the Appellate Division in Alberta in effect applied the Roman doctrine, *Neminem cum alterius detrimento oportere fieri locupletiores*, to a situation which must be of common occurrence but to meet which there does not seem to be a great deal of direct English or Canadian authority. A agrees to thresh B's crop. When the threshing is partly done a snowstorm occurs which renders the completion of the work thereafter difficult, if not impossible. Assuming the stoppage of the work to be justified and that A is thereby permanently released from further performance, the question arises as to whether A is entitled to recover anything for the work already done at the time of the cessation of the threshing. If the contract is not an entire one and payment, by the express terms of the contract or by the custom of the country, is to be made as the work advances, at so much per bushel, there is no difficulty in saying that A is entitled to recover for what has been done, notwithstanding that the parties had in mind the threshing of B's entire crop as the normal consummation of the affair.² If, on the other hand, the contract is an entire one and payment is to be made as the work progresses, there is more difficulty. Cases like

¹ (1928) 2 W.W.R. 289; [1928] 3 D.L.R. 284.

² *Stubbs v. Holywell Railway*, L.R. 2 Ex. 311; *Mavor v. Pyne*, 3 Bing. 288; *Taylor v. Laird*, 25 L.J.R. Ex. 329; *Owen v. James*, 4 Terr. L.R. 174; *Moussseau v. Tone*, 7 Terr. L.R. 369; *Knox v. Munro*, 13 Man. L.R. 16; *LaPlante v. Kinnon*, 21 D.L.R. 293; *Neville v. MacDonald*, 36 D.L.R. 594; *Cowan v. Eisler*, 1927, 2 D.L.R. 713; *Klein v. Sanderson (supra)*; *Taylor v. Kinsey*, 4 Terr. L.R. 178; *Button v. Thompson*, L.R. 4 C.P. 330; *George v. Davies*, 1911, 2 K.B. 445; *Hanson v. Parks*, [1925] 3 D.L.R. 1103; *Roberts v. Havelock*, 3 B. & Ad. 404; *The Tergeste*, [1903] P. 26; *Williams v. Stewart Cameron, Limited* (1923), 3 W.W.R. 1024.

*Taylor v. Caldwell*³ and *Appleby v. Myers*⁴ and the numerous cases on frustration which arose out of the postponement of the Coronation of King Edward⁵ or out of the abnormal conditions created by the late war⁶ or which frequently supervene even in time of peace,⁷ make it clear that the non-existence of a certain basic state of things either at the time at which the contract purported to be made or arising at a later date, may prevent a contract from coming into existence at all or it may dissolve an existing contract for the future. The Courts imply a fundamental condition, either precedent or subsequent, upon which the contract obligation is to rest. If that implied condition is not satisfied at the time the contract purports to be made or if it subsequently ceases to be satisfied, the contract never comes into existence at all or it ceases to be effective from the date the condition is no longer fulfilled, as the case may be. In such cases the Court examines the surrounding circumstances and it may, as a result, read into the contract a term which is not there in express words, providing for the defeasance of the obligations imposed by the contract upon the happening of a certain event or upon the cesser of a certain condition which goes to the root of the transaction by rendering any or further performance commercially impossible by reason of the destruction of a basic factor necessary for performance⁸ or which goes to the root of the transaction by defeating the known

³ 3 B. & S. 826.

⁴ L.R. 2 C.P. 651.

⁵ *Krell v. Henry*, [1903] 2 K.B. 740, following *Nickoll v. Ashton*, [1901] 2 K.B. 126; *Chandler v. Webster*, [1904] 1 K.B. 493; *Civil Service et al. v. General Steam et al.*, [1903] 2 K.B. 756; *Blakely v. Muller*, [1903] 2 K.B. 760; *Herne Bay et al. v. Hutton*, [1903] 2 K.B. 683; *Clark v. Lindsay*, 19 T.L.R. 202.

⁶ *Tamplin v. Anglo-Mexican etc.*, [1916] 2 A.C. 397; *Horlock v. Beale*, [1916] 1 A.C. 486; *Metropolitan Water Board v. Dick*, [1917] 2 K.B. at 21; [1918] A.C. 119; *Scottish Navigation et al. v. Souter*, [1917] 1 K.B. 222; *Bank Line v. Capel*, [1919] A.C. 435; *Bradley v. Newsome*, [1919] A.C. at 51, 57; *London et al. v. Schlesiger*, [1916] 1 K.B. 20; *Marks Realty v. Hotel Hermitage*, 170 App. D. 484 (N.Y.).

⁷ *Kerrigan v. Harrison*, 54 D.L.R. 258, 62 S.C.R. 374; *Canadian Trading et al. v. Canadian Government Merchant Marine* (1922), 3 W.W.R. 197 (S.C.C.); *Cheong etc. v. Hirji etc.*, [1926] A.C. 497, (1926) 1 W.W.R. 917; *Vancouver Milling, etc. v. C. C. Ranch*, [1924] S.C.R. 671, [1925] 1 D.L.R. 185; *Goulding v. Rabinovitch*, 60 O.L.R. 607; *Ellis v. Midland Railway*, 7 O.A.R. 464; *Blacburn Bobbin v. Allen*, [1918] 1 K.B. 540; *Nickoll v. Ashton* (*supra*); *cf. Bailey v. de Crespigny*, L.R. 4 Q.B. 180; *Vancouver Breweries v. Dana*, 52 S.C.R. 134; *Cherrier v. McCreight*, 11 Alberta L.R. 270.

⁸ *Taylor v. Caldwell* (*supra*); *Appleby v. Myers* (*supra*); *Ellis v. Midland et al.* (*supra*); *Howell v. Coupland*, 1 Q.B.D. 258, *cf. Carr v. Berg* (1918), 2 W.W.R. 368, 59 S.C.R. 660. See the judgment of Lord Sumner in *Hirji etc. v. Cheong etc.* (*supra*); *Canadian Trading et al. v. Canadian Government et al.* (*supra*); *Lord Watson v. Dahl v. Nelson et al.*, 6 A.C. at 59, referred to by Lord Sumner in the *Hirji* Case.

and common purpose of the parties while leaving performance literally possible.⁹ Frustration is quite a different thing from rescission.^{9a} It does not operate *ab initio*. "Rights and wrongs which have already come into existence, remain, and the contract remains too, for the purpose of giving effect to them" (Lord Sumner in the *Hirji* case (*supra*)). Rescission is normally the right of one party only. Frustration arises from circumstances created independently of the volition of the parties and when it arises the whole substratum of the contract is swept away. Because of its extrinsic origin it is equally available for both parties. It is to be noted, too, that in cases of frustration the Court implies a condition *stricto sensu* and not an undertaking, and, in implying it, the Court purports (nominally at least) to be explaining the contract, not to be varying it.¹⁰ The condition so implied is really constructive and not consensual. Its introduction is for the purpose of mitigating the rigour of the Common Law principle that impossibility does not excuse from the performance of a promise voluntarily undertaken. The *Coronation* cases go even further and they treat failure of the essential and known purpose of the parties as having a similar resolutive effect. A condition is implied which takes away the absolute character of the promise.¹¹ The Courts in effect add a *rebus sic stantibus* clause.¹²

Frustration has a strictly negative effect. It merely releases the parties from further performance. In none of the cases cited has it been held that it has any retroactive effect upon the rights of the respective parties already accrued and perfected at the moment of the frustration. It merely crystallizes things as they are at that instant.¹³ It may be used as a shield but not as a sword. If nothing has been done by either party, the situation is the same after the frustration as if the contract had never been made. If money has already been paid or performance otherwise rendered by one of the parties in advance of performance by the other, there can be no recovery by the former on the ground of failure of consideration or on any other ground. If money is due at the date of the frustration it can be recovered in spite of the changed situation. If money is not then due, there can be no recovery on a *quantum meruit* basis or on the

⁹ The *Coronation Cases* (*supra*). Williston on Contracts, vol. 3, sec. 1954.

^{9a} *Salmond on Contracts*, 310; Per Lord Parmoor, in *French Marine et al. v. Cie et al.* [1921] 2 A.C. at 523; *Chandler v. Webster* (*supra*).

¹⁰ The *Coronation cases* (*supra*); Per Lord Loreburn in the *Tamplin* case, [1916] 2 A.C. 403-404.

¹¹ Lord Loreburn in the *Tamplin case*, (*supra*) [1916] 2 A.C. at 403.

¹² *Salmond on Contracts*, 51-55, 296-301.

¹³ *Chandler v. Webster* (*supra*); *French Marine etc. v. Compagnie*, [1921] 2 A.C. at 523.

basis of constructive or quasi-contract merely because there has been a partial performance by one party followed by a frustration for which neither party is to blame. These propositions are illustrated by the cases:

(1) The case in which frustration occurs before performance in whole or in part by either party is simple. In such case each party is released from all further liability under the contract and the circumstances do not call for *restitutio in integrum*.¹⁴

(2) That money already paid by one party in advance of performance by the other cannot be recovered in the event of frustration is illustrated by *Chandler v. Webster* (*supra*). In that case the plaintiff agreed to pay £141 for the hire of a window from which to view the procession at the time of the Coronation of King Edward VII. The whole amount was payable before the procession was to take place and 100 pounds had in fact been paid to the defendant before the postponement occurred. It was held that the plaintiff could not recover the 100 pounds already paid but that he was released from liability as to the balance. In other words, things crystallized as they were at the date of the postponement.¹⁵ If the performance rendered before the frustration consists of service there can likewise be no recovery for that which has been done.¹⁶ The Roman law and the Scotch law founded upon it, seem to have reached a different result. An interesting discussion of the doctrines of the Civil Law with respect to a situation similar to that in *Chandler v. Webster* (*supra*) is to be found in the case of *Cantiare San Rocco v. Clyde et al.*, on appeal from Scotland.¹⁷ One might surmise from the speeches of the Law Lords in this case that the decision in *Chandler v. Webster* (*supra*) might not receive a kindly reception in the ultimate English Court. Cases of recovery in the event of a total failure of consideration are found in connection with the sale of specific goods. When the price has been paid before the property has passed and the goods subsequently perish without the fault of either party while the property is still in the seller, the buyer may

¹⁴ *Taylor v. Caldwell* (*supra*) *Krell v. Henry* (*supra*); *Jackson v. Union Marine*, L.R. 10 C.P. 125.

¹⁵ *French Marine, et al. v. Compagnie*, [1921] 2 A.C. 494, 523; *Blakely v. Muller*, [1903] 2 K.B. 760; *Civil Service, et al. v. Steam, et al.*, [1903] 2 K.B. 756; *Goulding v. Rabinovitch* (*supra*); *Lumsden v. Barton*, 19 T.L.R. 53; *Anglo-Egyptian et al. v. Rennie*, L.R. 10 C.P. 271; *Hirji v. Cheong* (*supra*).

¹⁶ *Appleby v. Myers* (*supra*); *Cutter v. Powell* (*infra*); *Appleby v. Dods*, 8 East (K.B.) 300; *Foreman v. Liddlesdale*, [1900] A.C. at 202; cf. *Menetone v. Athawes*, 3 Burr. 1592; *The Madras*, [1898] P. 90; see cases cited under (23), *infra*; *Salmond on Contracts*, 310-12; cf. *Butterfield v. Byron*, 153 Mass. 517.

¹⁷ [1924] A.C. 226.

recover the price which he has paid.¹⁸ The distinction in principle between these cases and *Chandler v. Webster* (*supra*) is not clear.^{18a} In some of the *Coronation* cases payment was made after the postponement but in ignorance of it. Recovery was allowed as for money paid under mistake of fact.¹⁹

(3) Money already due and payable under the express terms of the contract whether for performance already rendered or as a payment in advance of performance, can be recovered notwithstanding the frustration. "In *Krell v. Henry*, it does not appear whether there was any express contract as to when the money was payable. If payable on some day subsequent to the abandonment of the procession, I do not think it could have been sued for. If payable prior to the abandonment of the procession, the position would be the same as if it had been actually paid and could not be recovered back and it could be sued for."²⁰ This is illustrated as to payments due before frustration by *Stubbs v. Holywell Railway* (*supra*), which is referred to with approval in the *Krell* case. In that case an engineer was to be paid £500 in equal quarterly instalments for doing certain work. Before the work was finished and at a time when two instalments were due him, the contract was put an end to by the engineer's death. It was held that his executors could recover the two instalments. In that case the money was actually due under the *express* terms of the contract before the death of the engineer. Recovery was not allowed on the basis of any hypothetical term implied in the contract by the Court to do what it considered to be abstract justice after the event.²¹ This is true as to perform-

¹⁸ *Logan v. LeMesurier*, 6 Moo. P.C. 116; *McDill v. Hilson*, 53 D.L.R. 228; *McLean v. Graham*, 6 Terr. L.R. 438.

^{18a} It may be that there is a total failure of consideration in these cases. The destruction of the goods terminates the contract at a time when the purchaser may have received nothing. Nevertheless it is difficult to see how this renders the contract a nullity *ab initio* to any greater degree than in the *Coronation* Cases. In *Chandler v. Webster* (*supra*), [1904] 1 K.B. at 499, the absence of a right to recover payments made before the postponement is rested upon the view that there is not rescission *ab initio*, but merely a termination of the vitality of the contract from the moment of the frustration and from that moment only. Different considerations apply, of course, if the destruction of the goods occurred, unknown to the parties, before the making of the contract or before the time at which the money was paid by the buyer.

¹⁹ *Clark v. Lindsay*, 19 T.L.R. 202; *Griffith v. Brymer*, 19 T.L.R. 434.

²⁰ Per Channel, J., approved by Halsbury, L.C., L.R. [1903] 2 K.B. at 764; Salmond on Contracts, 311.

²¹ The Appellate Division in the principal case relies upon *Stubbs v. Holywell*, but it does not seem to attach any significance to the fact that in that case the contract, by its express terms, provided for payment as the work progressed in quarterly payments.

ance already rendered even in cases in which a party deliberately breaks his contract without excuse and refuses to render further performance. In such a case a defaulter can recover instalments expressly due under the contract before the breach but he can be met by a counterclaim for damages for breach of contract in not going on with the performance, which is not the case if there is a true frustration.²²

(4) If money was not due at the date of the frustration, no recovery can be had for the performance rendered up to that time on the basis of constructive or quasi-contract.²³ Similarly money paid in advance of performance is irrecoverable if performance becomes impossible or useless within the doctrine of the Coronation cases. The law applicable under these circumstances is thus stated by Lord Parmoor in *French Marine etc. v. Cie etc.* (*supra*), referred to [1924] A.C. at 241: "When the terms of the contract can no longer be carried out by either party, and there is no provision in the contract to meet the contingency, the contract cannot be treated as rescinded *ab initio*, but the parties are released from

²² *Taylor v. Laird*, 25 L.J.R. Ex. 329; *George v. Davies*, [1911] 2 K.B. 4; *Parkin v. South Helton et al.*, 24 T.L.R., 193; *Salmond on Contracts*, 286, 288. See also cases cited in (2), *supra*.

²³ *Salmond on Contracts*, 312-313; *Cutter v. Powell*, 6 Durn. & E. 320; *Stubbs v. Holywell Ry.*, L.R. 2 Ex. at 313; *Sumpter v. Hedges*, [1891] 1 Q.B. 673; *Appleby v. Myers* (*supra*); *The "Liddesdale"* (*supra*); *The Madras* (*supra*); *Anglo-Egyptian et al. v. Rennie* L.R. 10 C.P. 271; *Lakin v. Nuttall*, 3 S.C.R. 685; *Vigers v. Cooke*, [1919] 2 K.B. 475; *Williams v. Stewart & Cameron* (1923), 3 W.W.R. 1024; *LaCroix et al. v. Cook* (1927), 4 D.L.R. 747; *Munro v. Butt*, 8 E. & B. 738; *Knight v. Ducklow Motors* (1926), 3 W.W.R. 684; *Burton v. Hookwith*, 48 D.L.R. 339; *Oldershaw v. Garner*, 38 U.C.R. 37; *Sheddon v. Regina etc.*, 6 Terr. L.R. 290; *Sherlock v. Powell*, 26 O.A.R. 407; *Brazeau v. Wilson*, 30 D.L.R. 378; *Goulding v. Rabinovitch* (*supra*); *Whincup v. Hughes*, L.R. 6 C.P. 78; *Ferns v. Carr*, 28 Ch. D. 409; *Civil Service et al. v. Steam et al.* (*supra*); *Blakely v. Muller* (*supra*); *Chandler v. Webster* (*supra*); *French Marine et al. v. Cie. et al.* (*supra*); *Williams Thomas & Co. v. Harrowing* [1915] A.C. 58; *Bradley v. Newson* [1919] A.C. 16; *Enoch v. Phosphate et al.*, [1916] 2 K.B. 624; Cases cited under (16) *supra*. In many of the cases just cited, the failure to complete performance of the entire contract was not due to frustration but to the fault of the plaintiff. Nevertheless the cases do not seem to treat the default as having any different effect from that which excusable frustration has. Cases of defective performance are to be distinguished from cases of partial performance. In the former case the "entire contract" rule does not operate and the plaintiff can recover, subject to an allowance or deduction to compensate the defendant for the defective performance. See *Dakin v. Lee*, [1916] 1 K.B. 566; *House Repair et al. v. Miller*, 64 D.L.R. 115; *Burton v. Hockworth*, 48 D.L.R. 339; *Taylor v. Hunt*, 35 D.L.R. 504; *McGregor v. Sterling*, [1925] 4 D.L.R. 211; *Diebel v. Stratford et al.*, 33 D.L.R. 296; *Dumont v. Landry*, [1927] 3 D.L.R. 605; *Fisher v. Cox*, 57 D.L.R. 567; *Canadian Webster et al. v. Hoover*, 37 D.L.R. 285; *Mertens v. Home et al.*, [1921] 2 K.B. 526; *LaCroix v. Cook*, [1926] 4 D.L.R. 747; *Clarke v. Lee*, 3 Terr. L.R. 191; *Allen v. Pierce*, 3 Terr. L.R. 319; *Watts v. McLeay*, 19 W.L.R. 916; *Webster v. McIntosh*, [1927] 3 D.L.R. 115.

further performance. Thus, any payment previously made and any legal right previously accrued, *according to the terms of the agreement* will not be disturbed, but the Courts will decline to construct a hypothetical contract by suggesting terms which were not within the intention of the parties when the contract was entered into." *St. Enoch etc. v. Phosphate etc.*²⁴ illustrates the same doctrine. Owners of a British ship were carrying goods from Florida to Hamburg. During the course of the voyage war broke out and the further prosecution of the voyage thereby became illegal and impossible. The goods were landed in England. The Court decided that the owners were not entitled to the whole of the freight because they had not completed the voyage, the completion being a condition precedent under the terms of the contract, which was an entire one. The question as to whether freight *pro rata itineris* could be recovered was likewise answered adversely to the owners. No new contract could be implied in fact for the substituted performance. To recover on a *quantum meruit* it is necessary to show a true contract based on actual agreement. This can be done when a service is asked for but the amount to be paid for it is left undecided. In such a case the Court can award an amount which is measured by the value of the services rendered. But these services must be expressly or impliedly asked for. "If the contract once becomes legally impossible of performance, then, in the absence of a new agreement the parties remain in the circumstances in which they find themselves. There is no new obligation upon one party to pay money to the other unless there is some agreement to that effect." (Per Rowlatt, J.). This doctrine is applied generally in connection with attempts to recover freight *pro rata itineris* in cases in which the completion of the voyage is excused by shipwreck or some other circumstance which determines the carrier's obligation to complete the voyage. The fact that the goods have reached a point which is near to the destination intended and that the partial carriage may be of great value to the shipper, has not induced the English Courts to formulate a hypothetical term to prevent an apparent unjust enrichment of the shipper²⁵. English Courts may be almost alone in refusing recovery in such cases. Nevertheless the law is clear. Continental and American Courts seem to have reached a different conclusion.²⁶ In *Bradley v. Newson*²⁵ a ship was torpedoed

²⁴ [1916] 2 K.B. 624; *Chandler v. Webster*, *supra*.

²⁵ *Williams Thomas & Sons v. Harrowing et al.*, [1915] A.C. 58; *Bradley v. H. Newson et al.*, [1919] A.C. 16.

²⁶ See the argument of counsel for the plaintiff in *Cantiare San Rocco v. Clyde, et al.* (*supra*), criticizing the English law in this respect; *Allison v.*

near the British Isles. She was carrying a cargo from abroad to the United Kingdom. The crew left the ship at the order of those in charge of the enemy submarine. The ship did not sink as the crew expected when they left her, and the cargo ultimately reached land and it was forwarded to its destination. The owner of the goods refused to pay the freight on the ground that there had been an abandonment (although an excusable one) before complete performance. The House of Lords found on the facts that there was not an abandonment of the contract in any proper sense and that the freight was due on the goods reaching their destination. It does not seem to have been questioned that an abandonment, although excusable, would terminate any inchoate liability there might be to pay freight and the mere fact that the goods subsequently reached their owners through some fortuitous channel would not impose any liability upon the cargo owner, notwithstanding that the most substantial part of the voyage had already been completed at the date of the abandonment and that the owner of the goods had thereby derived substantial advantages which were capable of exact evaluation. The case of *Cutter v. Powell* (*supra*) illustrates the same principle. In that case a ship's captain agreed to bring a ship from abroad to Liverpool. He died when the voyage was almost completed. It was held that the contract was an entire one and that the captain's personal representatives could recover nothing. Such cases are stronger than *Appleby v. Myers* (*supra*) in which the plaintiff agreed to erect certain machinery in the defendant's mill and to keep it in repair for two years. After part of the machinery was erected, the mill was accidentally destroyed. It was held that the plaintiff could recover nothing. Here the defendant, in the result, derived no benefit from the plaintiff's partial performance.^{26a} It was otherwise in *Cutter v. Powell*. In the case of an entire, as distinguished from a severable, contract, nothing can be recovered upon the express contract as the condition upon which payment was to become due under it has not or cannot be satisfied. The Court in such a case refuses to treat the services already rendered at the

Bristol Marine et al., L.R. 1 A.C. 209; *Byrne v. Schiller*, L.R. 6 Ex. 319; *Abbott on Shipping* (14th Ed.), 657; the Common Law seems to have reached a similar conclusion with respect to the apportionment of rent. If a tenant for life let lands reserving rent which was to be paid quarterly or at other fixed times and if he died between rent days, nothing was due from the tenant for the period during which he had occupied. This was apparently so although the death occurred almost at the end of the quarter, etc. *Co. Litt.*, 292b; 3 Rep. 128; *Williams on Real Property*, 23rd Ed. 136. The law has now been changed by statute.

^{26a} See also *The Madras*, 1898, P. 90.

date of frustration as having been rendered under a contract implied in fact because they were rendered under an express contract and the Courts are not prone to imply contracts in such cases.²⁷ This is true *a fortiori* when further performance does not take place owing to the fault of one of the parties. In such case the delinquent party can recover nothing for what he has already done although the services rendered may be of great value to the party not in default. Where the supervening impossibility or illegality is due to the fault of one of the parties, it is of course clear that the party not to blame can recover on a *quantum meruit* basis, if he so desires, for what he has already done. This is illustrated by the case of *O'Neill v. Armstrong, Mitchell etc.*^{27a} In that case the plaintiff contracted with the master of a vessel belonging to the Japanese Government to serve as one of the crew on a voyage for a fixed sum. The vessel sailed from the Tyne. Before she reached her destination war broke out between Japan and China and the plaintiff was warned that the further prosecution of the voyage would be an offence for him. It was held that the plaintiff was entitled to recover wages up to the point where further performance by him became illegal. This result was reached in two ways. The Japanese Government had itself brought about the illegality by declaring war while the performance was incomplete. It was further found that the conduct of the parties after the declaration of war was a sufficient basis upon which to found a new and an actual contract whereby the parties became bound to pay for work already done. Both parties seem to have regarded the original contract as one which could no longer be acted upon. The captain of the boat himself treated the voyage as at an end. As pointed out by Rowlatt, J., in the *Enoch* case (*supra*) at p. 628, the shipowners had said that they could go no further and the seaman had said he did not want to go further. There was in effect a *voluntary* acceptance of a *pro tanto* performance instead of a complete performance such as the contract originally called for. The right to recover *pro tanto* was, as Rowlatt, J., points out, based upon a new agreement drawn from the conduct of the parties. It was not based upon a constructive agreement which the Courts made for them.^{27b} In the *Enoch* case the owner took his goods before they reached the contractual destination. He had no option. No agreement to modify the original contract of carriage could be

²⁷ *Britain v. Rossiter*, 11 Q.B.D. 123; Salmond on Contracts, 312; *Lakin v. Nuttall*, 3 S.C.R. at 697 (per Taschereau, J.).

^{27a} [1895] 2 Q.B. 70.

^{27b} cf. *Lakin v. Nuttall* (*supra*); *Sumpter v. Hedges* (*supra*); *LaCroix et al. v. Cook*, [1827] 4 D.L.R. 752; (Lamont, J.).

implied from that fact alone. Unless there was an agreement in fact there could be no recovery on the basis of *quantum meruit* which rests upon a real, though implied, agreement.^{27c}

In the principal case the Appellate Division proceeds upon the ground that it ought to treat as done that which the parties would probably have done if they had thought about the matter in the first instance.²⁸ The Court, therefore, added to the contract a conjectural term which it considered the parties themselves would have added had they anticipated the storm. By this added term payment was to be made *pro rata* for threshing done in partial performance before the excusable cessation of the performance. In so doing the Court went further than the English Courts have yet gone and it seems to have adopted a different view of the law from that stated by Lord Parmoor in *French Marine et al v. Cie et al*²⁹, and by Rowlatt, J., in the *Enoch* case (*supra*). Nevertheless the result of the judgment seems to be consistent with the Scotch law as enunciated in the *Cantiare* case (*supra*), and it appears to be consistent with the weight of authority in the United States.³⁰

The English cases on frustration, as already stated, seem to have held that the condition implied by the Court to deal with frustration operates in defeasance only of an existing contract. The English Courts do not seem to have taken the further step of implying a constructive term which is to regulate the rights of the parties with respect to performance already rendered before the frustration ensued. To take this step involves importing *ex post facto* a positive term into the contract which the parties themselves admittedly never agreed upon. To do this is to add to the contract. It is not merely interpreting the existing terms by turning an apparently absolute promise into an impliedly conditional one. Lord Loreburn in the *Tamplin* case^{30a} treats the frustration doctrine as being a matter of interpretation—

^{27c} [1916] 2 K.B. 628-629.

²⁸ The reasons of the Alberta judgment other than those involved in the question of frustration are not dealt with in this note. The discussion herein is limited to that part of the reasoning of the Court which seems to assume that there was no actual agreement for payment on partial performance only and that the contract was an entire one for the threshing of the defendant's whole crop. If the contract was not an entire one there would have been no necessity for invoking *Dahl v. Nelson et al.* or *Krell v. Henry*. This note is not concerned with the propriety of the view that the contract was terminated as to the future by the difficulties created by the storm.

²⁹ [1921] 2 A.C. at 523; cf. [1924] A.C. at 241.

³⁰ Williston on Contracts, Vol. 3, 1972; 1972a; Thurston's Cases on Quasi-Contracts. 246-267; Woodward on Quasi-Contracts, c. 7; *Carroll v. Bowersock*, L.R.A. 1917D, 1006.

^{30a} [1916] 2 A.C. at 403-404.

not of variation or addition.³¹ There may be some doubt as to how far improvident litigants will go (once they are invited) in asking the Court to imply a term in a contract, which term they themselves ought to have anticipated but to which they did not advert when entering into the affair. A snow storm in Alberta at threshing time is not such an unusual event that extraordinary prescience is required

³¹ The Alberta Appellate Court bases part of its reasoning on certain statements of Lord Watson, in *Dahl v. Nelson et al.*, 6 A.C. at 59: "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 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 charter-party 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 a possibility in view, they had made express provision as to their rights and liabilities in the event of the occurrence." This passage, if considered apart from its context, might lend support to the doctrine that the Court can make a new contract *ex post facto* to do what it considers to be justice. Lord Watson, however, was dealing with the interpretation of an existing clause in a charter-party whereby the ship chartered was to go to a certain dock "or as near thereto as she may safely get, etc." The question was whether a refusal of the dock company to let the ship into the dock allowed the alternative performance. The Court held that it did. The liability of the defendant, therefore, depended on an express term in the contract as thus interpreted. The Court did not itself create the clause or term upon which the liability was rested. There was a frustration of the primary and expected mode of performance and thereupon an alternative mode expressly provided by the contract became permissible. In the Alberta case the Court does not interpret an existing express term of the contract. It adds a term which was not there, expressly or impliedly, to deal with the situation reated by the frustration. In the *Dahl* case the parties had themselves provided that term. See *Tamplin v. Anglo-Mexican etc.*, 1916 2 A.C. at 403 (per Lord Loreburn).

"It is one thing for the Court to effectuate the intention of the parties to the extent to which they may have, even imperfectly expressed themselves, and another to add to the instrument all such covenants as upon a full consideration the Court may deem fitting for completing the intention of the parties, but which they either purposely or intentionally have omitted. The former is but the application of a rule of construction to that which is written; the latter adds to the obligations by which the parties have bound themselves, and is, of course, quite unauthorized, as well as liable to great practical injustice in the application." (Per Denman, C.J., in *Aspdin v. Austin*, 5 Q.B. 671; cited with approval by Cameron, J.A., in *Brandon Gas Co. v. Brandon Creamery*, 3 W.W.R. at 291. The attitude of the Courts towards the question of the implication of terms is illustrated in the following cases: *Hamlyn & Co. v. Wood*, [1891] 2 Q.B. 488; *The Moorcock*, 14 P.D. 64; *Ex p. Ford*, 16 Q.B.D. 305; *Churchward v. The Queen*, L.R. 1 Q.B. 173, 195; *Hopkins v. Jannison*, 30 O.L.R. at 319-321; *Williams v. Stewart Cameron*, (1923) 3 W.W.R. at 1039 *et seq.*; *Brandon Gas Co. v. Brandon Creamery*, 3 W.W.R. 283, 290-291.

to foresee it. The implied condition hitherto introduced by the Courts to cope with the situations found in the frustration cases, even when given the limited significance suggested, seems to be purely a fiction designed to do justice in the face of an absolute contract.³² It is doubtful, therefore, whether it adds to the simplicity of the law to go further and add a second fictitious term of a positive character to meet the situation created by the other implied term whereby the contract has already been put an end to for the future. The process of 'implying' two conjectural or hypothetical terms to escape the undoubted harshness of the Common Law doctrine as to absolute or entire contracts, has some analogies to Stephen's instance of the forged release of a forged bond. The circumstances of the Alberta case undoubtedly suggest unjust enrichment if the plaintiff is not allowed to recover and the refusal of the plaintiff to pay for the benefits he has received, savours of dishonesty. Nevertheless, if recovery is to be allowed, it would appear that the plaintiff's claim ought to be based squarely on quasi-contract. The apparatus of fictitious implied promises created to attain the same end, while it may give an appearance of consistency to the law, surrounds it with a cloud of unreality. The existing English authorities seem to deny recovery even on a quasi-contractual basis.

In the *Cantiare* case Lord Shaw regarded the principle upon which *Chandler v. Webster* (*supra*) is founded as being admirably adapted for "tricksters, gamblers, and thieves." He was reluctant, therefore, to treat it as part of the law of Scotland. The Alberta Appellate Division apparently felt a similar and easily understandable reluctance in the present case. Nevertheless one cannot help feeling that the Common Law, insofar as this matter is concerned, has now got itself in a position similar to that of a man who has put out to sea in an unseaworthy ship equipped with leaky lifeboats.

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³² See judgment of Lord Sumner in the *Hirji* case (*supra*); Williston on Contracts, vol. 3, 1937.