REVIEWS AND NOTICES

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Impossibility of Performance: a Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration, and Frustration. By ROY GRANVILLE MCELROY. Edited with Additional Chapters by GLANVILLE WILLIAMS. Cambridge University Press and the Macmillan Company of Canada. 1941. Pp. xl, 255. ($5.00)

Any person who is called upon to advise a client with regard to a situation falling within the field which is commonly but misleadingly designated as Impossibility of Performance, and *a fortiori* any person who, as a teacher of law, is obliged to make an intensive study of the English case law supposedly relating to this general subject, must become aware of the manifold elements of confusion which pervade the treatment by the English courts of this department of law. The present book is a noteworthy and valuable effort to analyze and disentangle these elements of confusion by a discussion of the cases under the three headings mentioned in the sub-title of the book.

The book is a composite one. It is based on a manuscript written by the author (Dr. McElroy) at Cambridge in 1934. The author having returned to New Zealand and being engaged there in the practice of the law, at his request the editor (Dr. Glanville Williams) revised the manuscript for publication. The editor (whose book on Liability for Animals was very favourably reviewed in (1939), 17 Can. Bar Rev. 613) has also made some substantial additions of his own. Some of the arguments advanced in the book have also been amplified and supplemented in four articles, two entitled The Coronation Cases, written jointly by the author and the editor, published in 1941 in the Modern Law Review (vol. 4, p. 241, and vol. 5, p. 1), and two entitled Partial Performance of Entire Contracts, written by the editor, published in 1941 in the Law Quarterly Review (vol. 57, pp. 373, 490). Cross-references to those parts of the book contributed by the editor are conveniently distinguished as "Williams in McElroy, Impossibility of Performance."

The main thesis of the book is that the three topics of Supervening Impossibility of Performance of Contract, Failure of Consideration and Frustration have become almost inextricably confused, although "there was a time when they were properly distinguished," and that "it is not impossible even at this day to start about the task of unscrambling the eggs and stating the law in a consistent and intelligible way." (p. xxvii). The unscrambling of the eggs involves a re-examination of the cases bearing on each of the three topics above mentioned, and a refreshingly frank criticism of judgments, especially those which have tended to confuse or merge distinct and different grounds of discharge or excuse. The book will be highly stimulating for all classes of readers, including, it is to be hoped, judges as well as practitioners, in Canada as well as England. It is of course not to be expected that every detail of the constructive criticism

contained in the book will command exact agreement, but the book will undoubtedly serve as a useful guide to anyone who is trying to find his way through the maze of confusion prevailing in the dicta and reasons for judgment in the reported cases.

Part I of the book, entitled Impossibility of Performance, is divided into chapters on (1) The Sanctity of Contract, (2) Exceptions to 'Absolute' Promises and (3) Limits of the Principle of *Taylor* v. *Caldwell*. Part II, entitled Failure of Consideration, is divided into chapters on (4) The Development of the Doctrine of Failure of Consideration and (5) The Nature of the Doctrine of Failure of Consideration. Part III, entitled Inordinate Delay, is divided into chapters on (6) The Development of the Doctrine of Frustration to the End of the Nineteenth Century, (7) The War Cases, (8) The Nature of the Doctrine of Frustration, and (9) Implication in Cases of Frustration. Part IV consists of a single chapter (10) containing General Propositions relating to Impossibility, Failure of Consideration and Frustration.

The foregoing arrangement, which is of course consistent with the chief object of the book, namely, to distinguish and segregate the three main topics, suggests some observations, which are not intended to show any lack of appreciation of the substantial merits of the book. One result of postponing the discussion of Failure of Consideration until the second part is the undue postponement of the discussion of the fundamental defects of the language of the judgment of Blackburn J. in *Taylor* v. *Caldwell* (1863), 3 B. & S. 826.[1] It is submitted that no other single judgment has contributed so much to the confusion of language and confusion of thought prevailing in the judicial treatment of Supervening Impossibility as well as Failure of Consideration. Personally I should have liked to find near the beginning of the book a frontal attack on *Taylor* v. *Caldwell*. The only question in the case being whether the defendant was excused from performance of his promise by reason of supervening impossibility, (the question of the plaintiff being excused not being in issue), Blackburn J. stated that both parties were excused from performance. The result was not unjust in the particular case because the contract was still wholly executory on both sides, but Blackburn J.'s theory of bilateral excuse or discharge was misapplied, with grotesque results, in some of the Coronation cases, (especially in *Chandler* v. *Webster*, [1904] 1 K.B. 493, at pp. 498—499, where *Taylor* v. *Caldwell* is relied on as authority for the proposition that rights accrued up to the time of the occurrence of the supervening impossibility are not affected, but that the contract is then terminated and both parties are excused from further performance). Blackburn J.'s language obscured the fact that the plaintiff was excused from the performance of his promise, not by impossibility of performance but by failure of consideration. The Roman law cited by him related to unilateral excuse or discharge of a promisor by reason of destruction of the *certum corpus*, as has been pointed out by Buckland in an article on *Casus and Frustration in Roman and Common Law* (1933), 46 Harvard L. Rev. 1281 (see especially pp. 1287–1288), and afforded no support for the conclusion that both parties were excused or discharged by impossibility. If the discussion in the book had begun in this way, with emphasis on the normally unilateral effect of supervening impossibility (although of course cases do occur in which performance on both sides becomes impossible), it would then have been natural to speak of performance of a promise being rendered impossible,

and of a promisor being excused from performance or discharged by impossibility or other cause, and to avoid speaking of a "contract" being "terminated" or "discharged" or "dissolved" (pp. 5, 17, 27, 61) by impossibility or frustration (*cf.* the observations of C.A.W. (1941), 19 Can. Bar Rev. 226), or of "excuse for breach of contract" (pp. xxviii, 5)—is there any "breach of contract" on the part of a promisor who is excused from performing? I hasten to add that it is only rarely that these misleading expressions, which are not uncommon in English judgments, have been allowed to slip into the book now under review, but as the editor and author have engaged in a courageous crusade in favour of greater accuracy of language and thought, and have necessarily referred many times to *Taylor* v. *Caldwell* in the first part of the book, they might well at an early stage have put the innocent reader on his guard with regard to that case.

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