THE FRUSTRATION OF CONTRACTS

(A Study in Comparative Law)

On the 15th of June, 1942, the House of Lords delivered a judgment dealing with the frustration of contracts. It was the case of a Polish firm, the *Fibrosa Spolka Akcyjna*, against an English Company, *Fairbanks, Lawson, Combe, Barbour Limited*.[1] This case, which I will call the *Fibrosa* case, is a far-off echo of the now almost forgotten coronation cases. The judgment overruled the most important of the latter decisions, *Chandler* v. *Webster*, [1904] 1 K.B. 493, which had stood for nearly forty years as an authoritative, but not an unquestioned, statement of the law. The problem involved has greatly interested me, as a civilian, and it is from the standpoint of a civilian that I venture to discuss it. Of course the Fibrosa decision is not binding on us here in Quebec, but it is certainly for all of us a judgment that can be described as *ratio scripta*.

Perhaps I may be allowed to add, without unduly emphasizing the personal note, that the subject of Frustration of Contracts had long tempted me, perhaps the more so because it had been overlooked by the framers of our Civil Code. I had some idea how I would deal with it if the question arose in Quebec, but the Coronation cases, with their very recent sequel, seemed to furnish a most useful illustration of the practical working of frustration in a common law jurisdiction. The topic is by no means free from difficulty, since we now find the highest court of Great Britain expressing its disapproval of the pronouncement of a bench on which sat masters of the common law. And the interest of the decision of the House of Lords is enhanced in that it has arrived at a solution which harmonizes with fundamental principles of jurisprudence, laid down centuries ago in the Roman forum.

I thought ,therefore, that, without unwarranted presumption, I might in an article discuss the issues of the Coronation and Fibrosa cases, as well as the doctrine of the Quebec law with regard to similar problems. The article would be written in French, a language admirably suited to the civil law, and I proposed to have it published in the recently founded and ably edited *Revue du Barreau*, which the Quebec Bar distributes to the judges of our courts and to our brethren of the Bar. The articles, as I conceived it, would be a study of comparative law. Such studies

[1] The judgment is reported in 58 T.L.R. 308 and in [1942] 2 All E.R. 122, the latter report being more complete than the former. The report in the current "Appeal Cases" had not reached us at time of writing.

have been rare in our professional journals, which is all the more surprising in that no country is in a more favourable situation, with regard to comparative law, than Canada.

It is indeed a happy circumstance for us that, east and west of the river Ottawa, in the greater part of its flow, two great systems of jurisprudence flourish side by side, solving, perhaps by different methods, but often with a similarity of result, the manifold problems inseparable from the administration of justice.

I mentioned my intention to the Editor of the CANADIAN BAR REVIEW, who suggested that I might contribute to this review an article on the same subject. That article would not be a translation of the other one, but rather a discussion of some features of the recent decision of the House of Lords, which seem to point to a new conception of the effects of frustration in English law, and, particularly, to treat quasi-contracts as affording a redress that had not been provided for in the frustrated contract. It is this outlook and this new conception which seemed to be of general interest to the profession in all parts of Canada.

THE PRINCIPLE OF FRUSTRATION.

I understand by the frustration of a contract simply that the contract, validly entered into, cannot, because of an intervening impossibility, be carried out. This supposes that neither of the parties is in fault, and therefore a frustration is something extrinsic to the parties or to their volition, that renders the performance of the contract impossible. Generally, and I think I could say essentially, the cause of the frustration is an unforeseen and uncontrollable event: unforeseen, because, if it were predictable, the parties should have provided for it; uncontrollable, because otherwise it would not have prevented the performance of the obligation.

The effects of frustration are now settled to be that the party who has paid money under the contract before the frustration, can, after the frustration, claim his money back as for a failure of consideration. This is the law in England since the House of Lords has so decided, and I also believe it to be the law in a civil law jurisdiction. The judgment of the House of Lords will help to solve questions as to other consequences of frustration, but it may not then be conclusive outside of the facts which arose in the Fibrosa case, and which may have controlled the decision.

The history of the doctrine of frustration of contracts is interesting. In England the foundation was laid down, as usual, in a decided case.

This case is a judgment, in 1865, of the Court of Queen's Bench in *Taylor* v. *Caldwell*, 3 B. & S. 826. A music hall and gardens had been hired for a series of concerts. Before any payment was made by the hirer, and before a concert had taken place, the music hall was destroyed by fire, and the concerts were abandoned.

Litigation ensued, and Mr. Justice Blackburn, as he then was, speaking for the Court defined the rule of law applicable to a case of frustration. This rule has been called the rule in *Taylor* v. *Caldwell*, and it is an exception to a more general rule that a party who has made a promise, not prohibited by law, must fulfil it or pay damages.

Here is the rule as stated by the learned judge and it is recognized as a binding rule of the English law.

> 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.

The Coronation Cases.

The above rule was a sort of yard-measure by which the liability of the parties in these cases was determined. Whether there was frustration or not was of course a question of fact, depending upon the circumstances of each case. These circumstances in the coronation cases were as follows.

Edward VII succeeded to the throne on the death of Queen Victoria, in the first weeks of the 20th century. His coronation was to take place towards the end of June, 1902. It is well known that the coronation of a King and Queen in England is the occasion for festivities among the most noted of which are the coronation processions. On the route to be followed by these processions, windows, rooms and even whole apartments are rented at high prices, according to their location. On this

occasion a very great number of contracts were so made, and, generally, the price was paid in advance, or a deposit was furnished to secure the payment of the balance of the rent.

Two days before the date fixed for the coronation and for the processions, Edward VII fell suddenly critically ill, and the coronation as well the processions were postponed *sine die.* As the contracts were made on the basis that there would be processions to view, the courts held that the contracts had been frustrated. The difficulty arose merely as to the effects of the frustration. Would the hirer be obliged to pay the considerable rent he had promised? Or, when he had made a deposit, or an advance payment, could he recover it back as for a total failure of consideration?

This was the issue in the coronation cases of which I will mention three, including *Chandler* v. *Webster* which the House of Lords overruled.

Blakely v. *Muller* was decided by a Divisional Court, Alverstone C.J., Wills and Channel, JJ. January 1903, 83 L.T.R. 90. The plaintiff had hired seats on the route of the procession and after the abandonment of the processoin he claimed back the money he had paid in advance. His action was dismissed on the ground that the contract, frustrated by reason of the non-existence of its object, to wit the cancellation of the procession for which it was made, was not void from the beginning, and that the parties were subsequently freed from their obligations only from the time of the abandonment of the procession. Channel J, explained this ground more fully by stating that if the price of the seats had been made payable at a time subsequent to the abandonment of the procession it could not have been demanded of the hirers, but that if the time fixed for payment was a date prior to the abandonment, it had to be paid, the contract being then in full force. A so-called maxim was cited in support of the decision: *"the loss lies where it falls,"* as the rule governing the liability of the parties. We will meet this maxim again, but maxims, it must be remembered, are often delusive.

In *Krell* v. *Henry,* [1903] 2 K.B 740 (Vaughan Williams, Romer and Stirling, L. JJ.), the defendant had hired a flat in Pall Mall, intending to rent seats for the 26th and 27th June, 1902, to view the coronation processions. He had made a deposit of a third of the price, and the balance was payable two days before the processions. After the abandonment of the coronation, action was taken against him to claim the balance but it was dismissed. This decision was in harmony with the conten-

tion that anything done after the abandonment to carry out the contract could not be upheld. In an article by the eminent romanist, Dr. W. W. Buckland, in 46 Harvard Law Review, it is stated that the defendant had claimed back his deposit made before the abandonment but withdrew his demand. That is the point on which the battle was fought in the following case.

In *Chandler* v. *Webster*, [1904] 1 K.B. 493, the defendant had rented a room to the plaintiff for the coronation procession and had received from him a substantial deposit before the abandonment. The plaintiff's action asking for the return of this deposit was dismissed. The defendant counterclaimed for the balance of the rental which was payable before the procession was abandoned, and obtained judgment ordering its payment. This case was the subject of much criticism among jurists, but it ruled subsequent cases for nearly forty years. See the statement in the judgment of Lord Simon, L.C., in the Fibrosa Case.. I have already said that *Chandler* v. *Webster* was finally overruled in the former case. The ground on which it was disapproved will be fully explained later, for that is the point with which this article is concerned. I should add that *Chandler* v. *Webster* was a decision of the Court of Appeal.

It is rather rare that such a long-standing decision is overruled, but Lord Simon after stating the contention of the respondent's counsel that the judgment should not now be disturbed, based upon what he termed "weighty considerations", said:

> If the view which has hitherto prevailed in this matter is found to be based upon a misapprehension of legal principles, it is of great imporance that these principles should be correctly defined, for, if not, there is a danger that the error may spread in other directions, and a portion of our law may be erected on a false foundation.

This passage is well worth noting "en passant", for legal errors have a tendency to "spread", and it is a poor argument to say they should not be corrected because nobody has attacked them before a proper court. By long standing bad law never becomes good; the longer it stands the more urgent it becomes that it should be eradicated like a tumor that is also likely to spread, if it is not removed. It is vain to wait until Parliament intervenes, for Parliament never acts except when pressed, to use a mild expression.[2]

Apologizing for this digression, I will now attempt to show how the erroneous rule in *Chandler* v. *Webster* was corrected.

[2] I know there are dicta to the contrary but Lord Simon's answer nevertheless seems conclusive.

THE FIBROSA CASE.

The first opportunity which occurred for reviewing this rule was afforded by this case. Here are its circumstances.

By a contract in writing of the 12th July, 1939, the appellants, carrying on business at Vilna, Poland, ordered certain machinery from the respondents, an engineering company of Leeds, England, who were to manufacture and deliver it *c.i.f.* Gdynia, Poland, in three to four months from the settlement of the final details. The price was £4800, of which £1600 were to be paid with the order, and the balance £3200 was payable against shipping documents. The appellants on the 18th of July, 1939, paid the respondents, on account of the initial payment, the sum of £1000. It seems probable that the manufacturing of the machinery was under way when, on the 1st September, 1939, German troops invaded Poland and on the 3rd September, 1939, Great Britain declared war against Germany, after which, delivery of the machinery in Poland became impossible, and moreover would have been illegal under the Order in Council of the 23rd September, 1939, made in pursuance of the *Trading with the Enemy Act*, 1939.

Under these circumstances it was clear that the contract could not be carried out, and that there was frustration of the agreement between the parties. The appellants demanded the return of their advance payment of £1000, which was refused, and a writ was issued against the respondents. The latter pleaded frustration, and contended that the appellants were not entitled to the return of their advance payment.

In the first court and in the Court of Appeal the appellants' action was doomed to failure; the authority of *Chandler* v. *Webster* stood against them, and was binding on both courts.

In due time, therefore, the action was dismissed by the trial court, and the dismissal was sustained in appeal. The appellants then brought their case to the House of Lords where the authority of *Chandler* v. *Webster* could be impeached.

On account of the very great importance of the appeal to the House of Lords, seven law-lords heard the case: Viscount Simon, Lord Chancellor, and Lords Atkin, Russell of Killowen, Macmillan, Wright, Roche and Porter. The seven law-lords were unanimous, and each of them delivered a separate judgment allowing the appeal, and ordering the return of the advance payment to the appellants. I take it that the judgment of the Lord Chancellor represents the view of the whole House, and certainly there was no expression of dissent. *Chandler* v. *Webster* was necessarily overruled, and a new rule of law concerning the effects

of frustration became a part of the law of England. It is fair to add, however, that this "new rule" was really an old rule which *Chandler* v. *Webster* had disregarded.

I think it may now be stated as the result of the judgment, that when frustration ends a contract which is still executory, both parties are discharged from further performance. If one of the parties had already paid money to the other, before frustration, in fulfilment of his obligation under the contract, and supervening impossibility of performance deprives him of the consideration on which the payment was made, he is entitled to get his money back, for the consideration which induced him to make the payment has failed. I think it is safer, especially for a civilian, to restrict his comment on the judgment to these two points, for that was the question in issue in the Fibrosa case. But to my mind, if I may venture to make the remark, the reasons given for the result greatly transcend in importance the result itself. I crave the indulgence of my readers versed in the common law while I now consider the *ratio decidendi* of the judgment.

The Ratio Decidendi

Inasmuch as there could be no doubt that the circumstances of the Fibrosa case evidenced a complete frustration of the contract of the parties, and a total failure of consideration for the pre-payment made by the appellants, the only question before the House of Lords was whether *Chandler* v. *Webster*, which had stood in the way of the appellants in the first court and in the Court of Appeal, should or should not be approved. This turned upon a somewhat narrow point, to wit, in case of frustration of a contract, should a pre-payment by one of the parties to the other be refunded?

The judgment of the Court of Appeal rested on the so called maxim quoted above:—in case of frustration *"the loss lies where it falls"*. The argument in favour of the maxim, as briefly stated in the judgment of Sir Richard Henn Collins, the Master of the Rolls, was that the contract was a perfectly good contract until it became frustrated without there being any fault of either of the parties. Then, to quote the language of the Master of the Rolls:

> The fulfilment of the contract having become impossible through no fault of either party, the law leaves the parties where they were, and relieves them both from further performance of the contract. Therefore, if by the contract the obligation to pay for the room did not arise until after the procession had taken place, then, the obligation being

based on the happening of the procession, which had become impossible, the hirer is relieved from that obligation, but if by the contract the obligation to pay for the room had accrued before the procession became impossible, the hirer, if he has paid, cannot get his money back, and if he has not paid, is still liable to pay.

The Master of the Rolls cited no authority for this conclusion save the above mentioned rule in *Taylor* v. *Caldwell*, saying that the frustrated contract remains a perfectly good contract until frustration occurs,

and everything previouly done in pursuance of it must be treated as rightly done, but the parties are both discharged from further performance of it. If the effect were that the contract were wiped out altogether, no doubt the result would be that the money paid under it would have to be repaid as on a failure of consideration.

This is substantially the distinction made by Mr. Justice Channel in *Blakely* v. *Muller*, 88 L.T.R. 90. To this argument the Lord Chancellor made a twofold answer.

(a) The claim of a party who has paid money under a contract to get the money back by reason of failure of consideration,

is not based on any provision in the contract, but arises because, in the circumstances which have happened, the law gives a remedy in quasi-contract to the party who has not got that for which he bargained. It is a claim to recover money to which the defendant has not further right because in the circumstances which have happened the money must be regarded as received to the plaintiff's use.

Conceding, as the effect of frustration, that the contract remains a perfectly good contract up to that point, and everything previously done in pursuance of it must be treated as rightly done, the Lord Chancellor observed:—

It by no means follows that the situation existing at the moment of frustration is one which leaves the party who has paid and has not received the stipulated consideration without any remedy. To claim the return of the money paid on the ground of total failure of consideration is not to vary the terms of the contract in any way. The claim arises not because the right to be paid is one of the stipulated conditions of the contract, but because, in the circumstances which have happened the law gives the remedy. It does not follow that because the plaintiff cannot sue on the contract, he cannot sue *dehors* the contract for the recovery of a payment in respect of which consideration has failed.

(b) Granting that there is a distinction between cases in which a contract is "wiped out altogether" and cases in which intervening impossibility only releases the parties from further performance of the contract, does this distinction justify the

deduction that the doctrine of failure of consideration does not apply where the contract remains a perfectly good contract up to the date of frustration? Lord Simon continued:—

> This conclusion seems to be derived from the view that, if the contract remains good and valid up to the moment of frustration, money which has already been paid cannot be regarded as having been paid for a consideration which has wholly failed. The party who has paid the the money has had the advantage, whatever it may be worth, of the promise of the other party. That is true, but it is necessary to draw a distinction. In English law, an enforceable contract may be formed by an exchange of a promise for a promise, or by the exchange of the promise for an act. . . But when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promises which is referred to as the consideration, but the performance of the promise. The money was paid to secure performances and, if performance fails, the inducement which brought about the payment is not fulfilled.

Possibly a further answer could be made to the argument of the Master of Rolls. The coronation contracts (and that is also true of the Fibrosa contract) were contracts for future performance. Of course such contracts, if subsequently frustrated, are perfectly good contracts up to the time of frustration. Then if performance at the due time proves impossible, there is complete frustration, and if this frustration justifies a party to claim back a payment made before frustration, it is no answer to say that the contract was a good contract at the time the payment was made. In the case of a sale—and in the Fibrosa matter it was a contract of sale—the obligation of the vendor is to deliver the thing sold, and the obligation of the buyer is to pay the price, but if delivery is impossible at the appointed time, surely the buyer cannot be forced to pay, nor can the vendor retain an advance payment although made before frustration. Such a payment is conditional upon the performance of the contract.

In fewer words, the time when the contract must be a good contract is when it is to be performed; its validity at any other period is immaterial.

In the two preceding paragraphs I speak of course as a civilian and with all due deference.

Some Recent Decisions of the House of Lords

It may be instructive here to make a comparison between three recent decisions of the House of Lords where somewhat similar questions were discussed.

This comparison, which will be purely objective, should bear on two points, for of course the facts in these cases were different.

1. The two-fold division of the action *in personan* into actions flowing from contracts and actions arising out of torts;

2. The existence or non-existence of quasi-contracts in the common law.

The decisions to be compared are those rendered in the three following cases:—*Sinclair* v. *Brougham,* [1914] A.C. 398; *Jones, Limited* v. *Waring and Gillow, Limited,* [1926] A.C. 670; *The Fibrosa Case*

A short statement of the facts and issues in each case will be made except that in the Fibrosa case I will not repeat the full statement given above.

Sinclair v. *Brougham,* [1914] A.C. 398

This is a very interesting case. Here are the facts as briefly as they can be stated.

The Birkbeck Permanent Benefit Building Society was incorporated under the Building Societies Act, 1886. It had since its inception received deposits of money from those who were willing to leave their funds in its hands, and, besides the regular business of a building society, for which it had full capacity, the receiving of deposits developed into a very extensive banking business, so much so that the society became popularly known as the Birkbeck Bank. This banking business thus carried on was beyond its corporate powers. It had also members or shareholders who subscribed for its shares. The Birkbeck Society was put into liquidation in 1911, under a winding-up order, and at that time the amount of deposits in the banking business reached over ten million pounds, while its share capital was about one million pounds. There were two classes of shareholders of which one class had made a settlement with the depositors, and was not concerned in the litigation. The contest was therefore restricted to the other class of shareholders, called the unadvanced shareholders, and the group of depositors, for all the society's debts to outsiders had been paid. The money furnished by subscribers to shares, and the sums deposited with the society in the banking business, were inextricably mixed, and what physical assets the society possessed had been acquired with the funds of both shareholders and depositors, but it was impossible to trace in any particular asset the source of the money invested in it.

In this situation recourse was had to the courts to settle the order of distribution between the shareholders and the depositors. The case came eventually to the House of Lords where the judgment with which we are concerned was rendered. The House was composed of Lord Haldane, Lord Chancellor, and Lords Dunedin, Atkinson, Parker of Waddington and Sumner, a very strong court.

The position was certainly a difficult one. The banking business of the Society was undoubtedly *ultra vires*, and according to the strict rules governing such matters in England, the contracts made by the Society with its depositors were void. Adherence to these strict rules would have given the whole assets to the shareholders and nothing to the depositors. Their Lordships however recoiled from allowing this to be done if in any way such a result could be avoided.

But how could it be avoided? What action could the depositors take? Lord Haldane made an exhaustive study of the English forms of action. Could the depositors exercise a right of action *in personam*? Lord Haldane (p. 415) observed that the common law of England recognized only two forms of this action: actions based on contracts and actions founded on torts. Here the contract was void and could give no right of action. And as to an action upon a quasi-contract, the noble lord objected (p. 415) that "when it (the common law) speaks of actions arising *quasi ex contractu*, it refers merely to a class of action in theory based on a contract which is imputed to the defendant by a fiction of law". The law he said (p. 417) "cannot impute a promise where it would be *ultra vires* to give it." His conclusion therefore was that the depositors could not exercise an action *in personam*. Had they a remedy *in rem*? Yes, but the difficulty was that their money could not be identified. And as to the physical assets, they were acquired with money coming from the shareholders and the depositors, and no one could say to what extent the depositors' money had been invested in a particular asset.

Lord Haldane's conclusion was that the claims of the depositors could be treated as in a proceeding for a "tracing order", and although the money coming from the depositors could not be identified, still inasmuch as the funds of the Society were many times in excesss of the price paid for their shares by the shareholders, to that extent, and as to the difference, there was a kind of identification of the depositors' money. The order of the distribution was therefore varied by treating the shareholders and the depositors as though they had been entitled in common,

and by ranking both groups on the same footing, *pari passu*, on what remained of the assets after paying the costs of the liquidation. Neither group was to be preferred to the other, for each had participated in an illegal business,

Lord Dunedin's judgment should be read in full, for Lord Dunedin himself was a civilian, as a member of the House from Scotland. His judgment is certainly interesting reading, He appeals to the Roman Law as well as to Pothier, Obligations, Nos. 114 and 115 (these passages deal with the quasi-contract treated as a source of rights of action, and have been virtually copied in the French and Quebec Civil Codes), to show that, in the civil law, a remedy by quasi-contract would have been available, and he puts the question to himself (p. 435):—"Is English equity to retire defeated from the task which other systems of equity have conquered?" But Lord Dunedin nevertheless expressed the opinion that there were no quasi-contracts in the English law. Referring to the difficulty of finding a remedy he observed that "the English law, having no quasi-contracts, got over the difficulty in such cases in the action for money had and received by the fiction of a contract". (p. 432).

Jones Limited v. *Waring and Gillow*, [1926] A.C. 670

One B had purchased some furniture from Waring and Gillow, Limited, under a conditional contract of sale whereby he had promised to make a down payment of £5000 on delivery of the furniture and the balance was to be paid at stated periods. For the down payment he gave a cheque which was dishonoured, whereupon the vendors repossessed the furniture. B then said he expected shortly some large payments and would be in position to make the cash payment. He went to Jones, Limited, stating that he represented a firm known as International Motors which was bringing out a new car, and he offered Jones, Limited, to obtain for them the agency of the sale of the car, provided they purchased 500 cars and made a payment of £10 on each. He said that Waring and Gillow were financing the deal and prevailed on Jones to make out two cheques, payable to Waring and Gillow, one for £2000 and the other, postdated, for £3000. These cheques he brought to Waring and Gillow in payment of the £5000 he owed them on the furniture. Waring and Gillow objected to the postdated cheque, and further to one director of Jones Limited having alone signed the cheques, whereas the form of cheque was adapted for signature by two directors. Waring & Gillow then took up the matter directly with Jones, Limited, by telephone, and Jones, Limited, agreed to substitute one ch-

for £5000, signed by two directors, for the two cheques B had brought them. In the telephone conversation nothing was said about the purpose of the payment. Jones, Limited, then sent this cheque by post to Waring and Gillow, and the latter delivered the furniture to B. Subsequently, hearing nothing further about the agency for the new car, Jones, Limited made enquiries and discovered the fraud. In the meantime, Waring and Gillow, knowing nothing about the fraud, had cashed Jones' cheque, crediting it to B's furniture purchase. Upon their discovery of B's fraud, Jones, Limited, took proceedings against Waring and Gillow, Limited, claiming back the £5000 as having been paid by them by mistake of fact.

The cause of action asserted by the plaintiffs was that through a mistake in fact, induced by the false statements of B, they had paid this sum to the defendents to whom they owed nothing. This was and is recognized as a perfect cause of action in England. As far back as 1841 in *Kelly* v. *Solari*, 9 M & W 54 at p. 57, Baron Parke stated that:

> where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it.

The point I think I can make with confidence, is that the cause of the action, as described by Baron Parke, is a quasi-contractual one. When the Jones case reached the House of Lords, where it was heard by Lord Cave L.C., and Lords Atkinson, Shaw, Sumner and Carson, the Lord Chancellor, and Lord Atkinson who concurred with him, admitted (p. 679) that there was a good cause of action, although they dissented because they thought, on the issue of estoppel, that the conduct of the appellants disentitled them to assert it. Lord Shaw rested his judgment on the dictum above quoted of Baron Parke, and with the concurrence of Lords Sumner and Carson, judgment was rendered in favour of the appellants Jones, Limited. The action was undoubtedly an action *in personam*..

The Fibrosa Case—No description of the action here is necessary. It also was an action *in personam*.

I have now only to compare these decisions with reference two points above stated.

a twofold division of the action *in personam* into from contracts and actions arising out of torts.

Lord Haldane, as already mentioned, held in *Sinclair* v. *Brougham* that the common law of England recognized only those two classes. He did not have to say whether a contract could be imputed to the Birkbeck Society by fiction of law, because in his view a promise to return the deposit, if one had been expressly made, would have been *ultra vires* and void.

In *Jones, Limited* v. *Waring and Gillow, Limited* no mention was made of this classification. Moreover, as I have said, there was no contract, nor was any attempt made to impute one to the respondents by fiction of law.

In the Fibrosa case quasi-contracts were expressly referred to as forming a separate head of the division of the action *in personam*. The narrow classification of the common law was therefore enlarged to comprise this separate head, I would consequently submit that a conflict exists on this point between *Sinclair* v. *Brougham* and the Fibrosa decision. Of course there was in the former case a question of *ultra vires*, but, as observed by Lord Dunedin, the *ultra vires* feature did not have a greater effect than to render the contract, if there was one, void.

2. The existence or non-existence of quasi-contracts in the common law.

I take it that *Sinclair* v. *Brougham* rejected quasi-contracts as a cause of action in the common law. The qualification suggested by Lord Haldane of imputing a contract to the defendant by fiction of law excludes quasi-contracts as being, *per se*, a cause of action in the common law, and is a reiteration of the old classification restricted to contracts or torts.

Jones, Limited v. *Waring and Gillow, Limited* entertained a personal action based upon a quasi-contractuel cause of action. No question apparently was raised as to the existence or non-existence of such a cause of action in the common law. It was implicitly, I could say expressly, admitted as giving a right of action.

It is obvious that a conflict exists on this second point between *Sinclair* v. *Brougham* and the Fibrosa case. There was, in the latter case, an express recognization of the existence of quasi-contracts in the common law as a cause of action *in personam*. The remedy granted by the House of Lords was not based on the frustrated contract, but arose *dehors* that contract, and entirely through the effect of the law.

It is not for me to say whether a change has been made in the English law in that respect. The reader can of course form his own conclusions.

FRUSTRATION IN THE CIVIL LAW

This article being a study of comparative law, it is entirely proper to finish it by a few words dealing with my subject as it is understood by a civilian of Quebec. This I will do without unduly lengthening this article, because I apprehend that we can, without hesitation, accept the solution of the House of Lords—since it does not bind us in civil law matters—at least as *ratio scripta.*

Of course with us, as well as with other systems of law, a contract must be capable of being carried out. Frustration takes away that capacity. No doubt the contract was good in the beginning, but frustration ends it. If a pre-payment was made during the validity of the contract, it cannot be retained by the payee who will not, because he cannot, carry out his share of the obligations under the contract towards the payer.

I need not insist. Lord Macmillan in the Fibrosa case cited the words of a great civilian of the 18th century, Baron Samuel de Pufendorf, in his celebrated treatise *De Jure Naturae et Gentium.* This would be authority for us in Quebec. Moreover in my other article[3] I quoted a striking passage from the recent work of Louis Josserand: *Cours de droit civil positif francais,* 3rd edition, vol. 2, at Nos. 366 et seq. and pp. 201-203. This also would be followed in Quebec.

It is agreeable for a jurist writing on comparative law to place on record a similarity of views between the great court which presides over the forming and development of the common law[4] and the system of jurisprudence which he inherited from Rome and from France. That pleasure has been mine.

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[3] That article is now printed in *La Revue du Barreau,* vol. p. 387.

[4] In *Robins* v. *National Trust Co.,* [1927] A.C. 511, Lord Dunedin said of the House of Lords:—"This is the supreme tribunal to settle English law."