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Supervising Impossibility of Performance as a Defense

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leniency. But the postal clause can not be invoked as a source of police power wherever a business makes use of the mails. Universal dependence upon the postal system cannot be made the basis of such an extension of congressional power.

SUPERVENING IMPOSSIBILITY OF PERFORMANCE AS A DEFENSE.—The ever increasing tenseness in international relations, fomented by internal strife, and aggravated by international animosities, may soon eventuate in armed conflict between major powers. One inevitable consequence of any such conflict, because of the extensiveness of modern commercial intercourse, will be a serious interference with the performance of executory contracts throughout the world. Thus the moment is rendered propitious for the examination of an excusatory mechanism created by the courts, through the use of which promisors are relieved from the obligations of their contracts upon the plea that subsequent events have rendered performance impossible.

The General Rule

The civil law recognized supervening impossibility of performance as a complete defense to an action on contract, unless it appeared that the promisor had assumed the risk that performance would remain possible.¹ A diametrically opposed view was adopted by the common law. Thus in *Paradine v. Jane*,² decided in 1647, the court declared, and modern authorities reiterate,³ that where supervening events render performance impossible, the promisor is not excused unless the parties have so provided, notwithstanding such events were beyond his control. The rationale underlying this principle is clear. It is premised on the position that a contractual obligation is one voluntarily undertaken; that the parties are free to determine the precise terms, conditions and limitations of such obligation; that it is within the power of the promisor to qualify his obligation; that an obligation undertaken without qualification must be performed or damages given; and that it is the duty of the court to enforce the contract as made by the parties.⁴ The principle enunciated in *Paradine v.*

1. 1 DOMAT, CIVIL LAW (1850) 174, art. IX; 3 WILLISTON, CONTRACTS (1920) § 1979.

2. Aleyn 26, 82 Eng. Reprints 897 (K. B. 1647). The case is not strictly one of impossibility. See Page, *The Development of the Doctrine of Impossibility of Performance* (1920) 18 MICH. L. REV. 589, 594.

3. The Harriman, 76 U. S. 161 (1869); see Lavigne v. Lavigne, 176 Atl. 282, 284 (N. H. 1935); Cameron-Hawn Realty Co. v. City of Albany, 207 N. Y. 377, 382, 101 N. E. 162, 163 (1913). See also 7 HALSBURY'S, LAWS OF ENGLAND (2d ed. 1932) 209; 3 STEPHENS, COMMENTARIES (19th ed. 1928) 176; Woodward, *Impossibility of Performance as an Excuse for Breach of Contract* (1901) 1 COL. L. REV. 529.

4. The language of the reporter has become classic: ". . . where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him . . . but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." *Paradine v. Jane*, Aleyn 26, 27, 82 Eng. Reprints 897, 897 (K. B. 1647).

Jane, logical and easy to apply, recognizes and preserves the integrity of contracts. Its occasional harshness has been subjected to criticism.⁵ Yet both courts and commentators have recognized its fundamental soundness,⁶ and it undoubtedly possesses the desirable attributes of simplicity and certainty.⁷

In the latter half of the nineteenth century a method for the circumvention of this principle was provided.⁸ Thereafter its validity as a general rule was overshadowed by the creation and growth of an exceptive doctrine, the development of which, a process not yet culminated, has resulted in a virtual *volte-face* in the law.⁹ Unfortunately the change is neither complete nor free from confusion. But the course of its development along two principal avenues affords a basis for the investigation of the extent of the advance. It is clear that the concept of impossibility has been broadened, and that the number of situations wherein the courts have recognized impossibility as a defense has multiplied. Thus the inquiry will be: "What is impossibility?" and "When is impossibility a defense?"

What Is Impossibility?

The term "impossibility" is "unfortunate legal nomenclature."¹⁰ It is loosely applied to a variety of situations. For example, assume that *A* agrees to sell his boat, "The Jolly Roger," to *B* and the latter agrees to pay \$1000 therefor on delivery. Performance by *A* would become impossible if the boat were destroyed either before or after the contract was made. The former would be denominated original impossibility; the latter supervening impossibility. Where original impossibility exists the problem is whether a contract was created. Ordinarily no contract results either on the ground of failure of consideration,¹¹ or because of mistake.¹² But a person may bind himself to perform a contract which is in fact impossible of accomplishment.¹³ Where supervening impossibility occurs the problem is not whether a contract was created, but whether

5. Conlen, *Intervening Impossibility of Performance as Affecting the Obligations of Contracts* (1918) 66 U. OF PA. L. REV. 28, 29 *et seq.*

6. See *Superintendent, etc. v. Bennett*, 27 N. J. L. 513, 519 (1859); *Lorillard v. Clyde*, 142 N. Y. 456, 462, 37 N. E. 489, 491 (1894); 3 STEPHENS, COMMENTARIES (19th ed. 1928) 177.

7. "In short, the first test of the practicability of a rule of law is its certainty and the ease with which it can be stated to parties by counsel, in advising them, in advance of action, upon the legality of their contemplated acts." Beale, *What Law Governs the Validity of a Contract* (1909) 23 HARV. L. REV. 1, 260, 264.

8. *Taylor v. Caldwell*, 3 B. & S. 826, 122 Eng. Reprints 309 (Q. B. 1863). See *infra* p. 326 *et seq.*

9. See Conlen, *supra* note 5, at 38.

10. See 5 PAGE, CONTRACTS (2d ed. 1921) § 2667.

11. 7 HALSBURY'S LAWS OF ENGLAND (2d ed. 1932) 208. See RESTATEMENT, CONTRACTS (1932) § 456.

12. 5 PAGE, CONTRACTS (2d ed. 1921) 4700. Mistake may also be the ground for excusing supervening impossibility. *Richardson Lumber Co. v. Hoey*, 219 Mich. 643, 189 N. W. 923 (1922); see 1 WILLISTON, SALES (2d ed. 1924) 300 *et seq.* But see *VOLD, SALES* (1931) 117 n99; (1923) 32 YALE L. J. 408.

13. 3 WILLISTON, CONTRACTS (1920) 3286, 3287; RESTATEMENT, CONTRACTS (1932) § 456, Comment c. Of course, a promise to do a thing then forbidden by law does not create a contract. *Sage v. Hampe*, 235 U. S. 99 (1914).

the contractual obligation was discharged. Under the general rule the promisor is not discharged. How far this has been changed by the exceptive doctrine will be hereafter considered. Again impossibility is characterized as objective—when due to the nature of the thing to be done, and subjective—when due to the promisor's incapacity to perform. Thus *A*'s inability to deliver the destroyed boat would constitute objective impossibility. *B*'s inability to make payment, assuming tender of the boat were duly made, would constitute subjective impossibility. Unless fused with objective impossibility, as in the case of contracts for personal services, subjective impossibility is never a defense.¹⁴ Finally, the courts classify as impossible a performance rendered merely illegal, as well as one rendered actually impossible by acts of paramount authority. Apart from constitutional questions, a supervening law making the sale of the boat a crime, would illustrate the former. And requisition of *A*'s vessel by the government would illustrate the latter.

Confining the inquiry to supervening impossibility, what constitutes such impossibility? Under a literal interpretation of the term it has been said that impossibility exists when "the thing cannot by any means be effected."¹⁵ This definition is too narrow. The broader definition adopted by the American Law Institute,¹⁶ including impracticability as well as strict impossibility, is far more accurate under the decided cases.¹⁷ What constitutes impracticability is a matter of degree. Yet there are certain elements which may give a clue as to when impracticability approximates impossibility.

Where the specific subject matter of the contract is destroyed, solution is simple. The same is true in the case of the death, incapacitating illness or insanity of a person who has contracted to perform personal services.¹⁸ But once past these familiar landmarks the road becomes obscured. The mere fact that performance has become more difficult does not render it legally impossible.¹⁹ For example, the breakdown of machinery;²⁰ the inability to obtain

14. 3 WILLISTON, CONTRACTS (1920) § 1932. For a criticism of this position see, Patterson, *The Apportionment of Business Risks Through Legal Devices* (1924) 24 COL. L. REV. 335, 349.

15. Cameron-Hawn Realty Co. v. City of Albany, 207 N. Y. 377, 381, 101 N. E. 162, 163 (1913).

16. RESTATEMENT, CONTRACTS (1932) § 454.

17. Mineral Park Land Co. v. Howard, 172 Cal. 289, 156 Pac. 458 (1916); Krell v. Henry, [1903] 2 K. B. 740; Comment (1899) 12 HARV. L. REV. 501; (1900) 13 HARV. L. REV. 605. See also cases cited notes 50, 89-101, *infra*.

18. In connection with contracts to marry, illness of the promisor, although serious, is not treated as impossibility [Shepler v. Chamberlain, 226 Mich. 112, 197 N. W. 372 (1924); Hall v. Wright, E. B. & E. 765, 120 Eng. Reprints 605 (Q. B. 1859)] unless marriage will hasten death. Sanders v. Coleman, 97 Va. 690, 34 S. E. 621 (1899); (1900) 13 HARV. L. REV. 605.

19. International Trading & Rice Corp. v. Benscheidt, 141 Kan. 416, 41 P. (2d) 737 (1935); Isaacson v. Starrett, 56 Wash. 18, 104 Pac. 1115 (1909); Anon., *Effect of Intervening Impossibility Upon Contract to Repair Another's Building* (1929) 14 MINN. L. REV. 51.

20. Booth v. Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487 (1875); Summers v. Hibbard, 153 Ill. 102, 38 N. E. 899 (1894).

freight cars;²¹ the failure of a third person to perform his contract;²² the levelling of a building by a gale;²³ a general financial stringency;²⁴ and a general stagnation of business²⁵ have been held insufficient. Yet as to the effect of strikes the courts have differed widely. It has been held that a strike is not sufficient;²⁶ but a distinction has been made where the strike was accompanied by violence.²⁷ Performance that has become more expensive or less profitable is not generally regarded as an impossibility.²⁸ Yet in an extreme case the court relieved the promisor.²⁹ Where an element of danger has been injected into the situation the courts have treated further performance as impossible. Thus an employee is justified in quitting his job when cholera imperils the vicinage,³⁰ and also when he is threatened with bodily injury by strikers.³¹ Moreover, where war is imminent, a vessel need not continue its voyage to the port of a prospective enemy,³² and after the outbreak of war, a sailor is justified in leaving a vessel which is to sail through the war zone.³³

It is apparent that the courts, influenced by collateral factors imposing hardship on the promisor, have sometimes treated as impossible that which in fact remained possible of performance. But the effect of collateral factors in particular cases is conjectural. Furthermore, the extension of the exceptive doctrine to the frustration of the object or purpose of the parties or of the

21. *Graham v. United States*, 231 U. S. 474 (1913); *Eppens v. Littlejohn*, 164 N. Y. 187, 58 N. E. 19 (1900).

22. *Marsh v. Johnston*, 125 App. Div. 597, 109 N. Y. Supp. 1106 (2d Dep't 1903), *aff'd*, 196 N. Y. 511, 89 N. E. 1104 (1909).

23. *Board of Education v. Townsend*, 63 Ohio St. 514, 59 N. E. 223 (1900).

24. *Ingham Lumber Co. v. Ingersoll & Co.*, 93 Ark. 447, 125 S. W. 139 (1910); *Marionneaux v. Smith*, 163 So. 206 (La. App. 1935); *Locker v. Heisermah*, 123 Misc. 157, 204 N. Y. Supp. 803 (Sup. Ct. 1924). But see *Patterson*, *loc. cit. supra* note 14.

25. *McCreery v. Green*, 38 Mich. 172 (1878); *Anspach v. Bast*, 52 Pa. 356 (1863).

26. *Barry v. United States*, 229 U. S. 47 (1913); *Blackstock v. The N. Y. & E. R. R.*, 20 N. Y. 48 (1859); *cf. Barnum v. Williams*, 115 App. Div. 694, 102 N. Y. Supp. 874 (2d Dep't 1906), *aff'd*, 190 N. Y. 537, 83 N. E. 1122 (1907). See Comment (1919) 19 COL. L. REV. 224. *Contra: The Richland Queen*, 254 Fed. 668 (C. C. A. 2d, 1918), *cert. denied*, 248 U. S. 582 (1918).

27. *Geismer v. Lake Shore & Mich. So. Ry.*, 102 N. Y. 563, 7 N. E. 828 (1886). "We do not appreciate the distinction made in these cases, thinking that the difference between a peaceable and a violent strike as a defense is one of degree only, a strike with violence being more likely to be a good defense than a peaceable strike." *The Richland Queen*, 254 Fed. 668, 670 (C. C. A. 2d, 1918). See *supra* note 26.

28. See *Parkinson, Excuse of Performance by Existence of Condition Causing Unforeseen Expense* (1916) 4 CALIF. L. REV. 407.

29. *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 Pac. 458 (1916).

30. *Lakeman v. Pollard*, 43 Me. 463 (1857).

31. *Fischer v. Walsh*, 102 Wis. 172, 78 N. W. 437 (1899).

32. *The Kronprinzessin Cecilie*, 244 U. S. 12 (1917). But the charter of a neutral vessel is not discharged, although submarine warfare imperils its voyage, so long as commerce is continued despite this hazard. *Piaggio v. Somerville*, 119 Misc. 6, 80 So. 342 (1919).

33. *The Epsom*, 227 Fed. 158 (D. Wash. 1915); *Liston v. The Steamship Carpathian*, [1915] 2 K. B. 42.

commercial adventure has considerably increased the difficulty of determining when impossibility exists.³⁴

When Is Impossibility A Defense?

A—Exemptions Based on Implied Condition

In 1863, the famous case of *Taylor v. Caldwell*³⁵ was decided. The court professed adherence to the principle that supervening impossibility was not a defense, but restricted its applicability to contracts "positive and absolute, and not subject to any condition either express or implied." It then announced that in contracts the performance of which depended upon the continued existence of a particular person or thing, a condition is "*by law implied*," that the perishing of such person or thing will excuse the promisor. The importance of this case lies in its novel use of the implied condition as a device for the circumvention of the general rule. Upon the application and extension of this device is built the major portion of the exceptive doctrine. It is said that the implied condition is but a method of injecting equitable principles into the common law.³⁶ Yet its use is susceptible to criticism on the ground that it is a fiction applied regardless of the intent of the parties,³⁷ and that the courts are remaking the contract.³⁸ Its immediate effect has been to promote uncertainty and increase litigation.

The exceptions based upon implied condition may be classified as follows:³⁹

1. Where the performance of a contract depends upon the future⁴⁰ or continued⁴¹ existence of a specific thing, its failure to materialize or its destruction, without the fault of the promisor, excuses non-performance.⁴² But where the subject matter of the contract is not specific, the promisor is not excused, although without his fault, the thing with which he intended to fulfill his obligation, fails to materialize or is destroyed.⁴³

34. See notes 50, 84-101, *infra*.

35. 3 B. & S. 826, 122 Eng. Reprints 309 (Q. B. 1863).

36. Comment (1901) 15 HARV. L. REV. 63; Comment (1926) 12 CORN. L. Q. 72, 76.

37. 3 WILLISTON, CONTRACTS (1920) § 1937.

38. "The interweaving of 'implied terms' is a mere euphemism for the power which the courts have usurped of supplementing, adding to and subtracting from the bargain which the parties have made." Mayers, *The Need of Law Reform—The Doctrine of the Frustration of the Adventure* (1918) 38 CAN. L. T. 86, 92. See also, Page, *Development of the Doctrine of Impossibility of Performance* (1920) 18 MICH. L. REV. 589, 598 *et seq.*

39. It is well to note that in America the doctrine is usually spoken of as impossibility of performance, while in England it is referred to as the doctrine of frustration. See LEAKE, CONTRACTS (8th ed. 1931) 531; SALMOND & WINFIELD, CONTRACTS (1927) 290 *et seq.*

40. *C. G. Davis & Co. v. Bishop*, 139 Ark. 273, 213 S. W. 744 (1919); *Ontario Deciduous Fruit Growers Ass'n v. Cutting Fruit Packing Co.*, 134 Cal. 21, 66 Pac. 28 (1901); *Squillante v. California Lands Inc.*, 42 P. (2d) 81 (Cal. App. 1935); *Howell v. Coupland*, L. R. 9 Q. B. 462 (1874).

41. *Pinkham v. Libby*, 93 Me. 575, 45 Atl. 823 (1900); *Dexter v. Norton*, 47 N. Y. 62 (1871); *Taylor v. Caldwell*, 3 B. & S. 826, 122 Eng. Reprints 309 (Q. B. 1863).

42. See RESTATEMENT, CONTRACTS (1932) § 457.

43. *Pacific Sheet Metal Works v. California Canneries Co.*, 164 Fed. 980 (C. C. A. 9th, 1908); *Anderson v. May*, 50 Minn. 280, 52 N. W. 530 (1892). But in at least one

2. Where death or incapacity of the promisor,⁴⁴ or of a person whose services he has undertaken to procure,⁴⁵ prevents the performance of a contract for personal services, the promisor is ordinarily discharged.⁴⁶ But the death or incapacity of the party for whom the services were to be performed does not necessarily terminate the contract.⁴⁷

3. Where under the circumstances it is fair to presume that the parties contemplate that specific means will be used to effect performance, the failure of such means, without the fault of the promisor, is an excuse.⁴⁸ The bounds of this exception are nebulous. Yet it is clear that failure of the means of performance which the promisor alone can be said to have contemplated, will not be a defense.⁴⁹

4. Where the contract is made on the basis that a particular state of things will exist at the time of performance, the non-existence of such state of things, without the fault of the promisor, frustrates the object or purpose of the contract, and the promisor is excused.⁵⁰ It should be noted that in this class of exceptions the promisor is excused, although performance of his promise remains possible.

B—Exceptions Based On Public Policy

The remaining portion of the exceptive doctrine is concerned with situations

case the promisor has been excused although the subject matter was not specific. *In re Badische*, [1921] 2 Ch. 331.

44. *Smith v. Preston*, 170 Ill. 179, 48 N. E. 688 (1897); *Marvel v. Phillips*, 162 Mass. 399, 38 N. E. 1117 (1894); *Blakely v. Sousa*, 197 Pa. 305, 47 Atl. 286 (1900).

45. *Caden v. Farwell*, 98 Mass. 137 (1867); *Spalding v. Rosa*, 71 N. Y. 40 (1877).

46. Where the promisor has died, in the absence of a contrary intention, his personal representative is not obligated to perform. Comment (1922) 70 U. OF PA. L. REV. 203, 209. In the following cases the contract was held to survive the death of the promisor. *MacDonald v. O'Shea*, 58 Wash. 169, 108 Pac. 436 (1910); *Volk v. Stowell*, 98 Wis. 385, 74 N. W. 118 (1898).

47. Thus it has been held that the insanity of an employer did not terminate a contract for personal services, *Sands v. Potter*, 165 Ill. 397, 46 N. E. 282 (1896). But New York has held that such a contract is terminated by the employer's death. *Lacy v. Getman*, 119 N. Y. 109, 23 N. E. 452 (1890); *Matter of Daly*, 58 App. Div. 49, 68 N. Y. Supp. 596 (1st Dep't 1901); *Arming v. Steinway*, 35 Misc. 220, 71 N. Y. Supp. 810 (Sup. Ct. 1901); *cf. People v. Globe Mut. Life Ins. Co.*, 91 N. Y. 174 (1883) ("death" of corporation via dissolution discharges liability on pre-existing contract for services of an agent).

48. *Hackfeld & Co. v. Castle*, 186 Cal. 53, 198 Pac. 1041 (1921); *Clarksville Land Co. v. Harriman*, 68 N. H. 374, 44 Atl. 527 (1895); *Stewart v. Stone*, 127 N. Y. 500, 28 N. E. 595 (1891); *Buffalo & L. Land Co. v. Bellevue L. & I. Co.*, 165 N. Y. 247, 59 N. E. 5 (1901); *Nickoll & Knight v. Ashton, Eldridge & Co.*, [1900] 2 Q. B. 298. See also cases cited note 40, *supra*.

49. *Summers v. Hibbard*, 153 Ill. 102, 38 N. E. 899 (1894); *Anderson v. May*, 50 Minn. 280, 52 N. W. 530 (1892); *Harmony v. Bingham*, 12 N. Y. 99 (1854).

50. *Buffalo Union Furnace v. United States Shipping Board*, 283 Fed. 673 (W. D. N. Y. 1922), *aff'd*, 291 Fed. 23 (C. C. A. 2d, 1923), *appeal dismissed*, 268 U. S. 707 (1925); *Alfred Marks Realty Co. v. Hotel Hermitage Co.*, 170 App. Div. 484, 156 N. Y. Supp. 179 (2d Dep't 1915); *Alfred Marks Realty Co. v. "Churchills"*, 90 Misc. 370, 153 N. Y. Supp. 264 (Sup. Ct. 1915); *Krell v. Henry*, [1903] 2 K. B. 740; *cf. Federal Sign System v. Palmer*, 176 N. Y. Supp. 565 (Sup. Ct. 1919); *Leiston Gas Co. v. Leiston-cum-Sizewell Urban Dist. Council*, [1916] 2 K. B. 428. See RESTATEMENT, CONTRACTS (1932) § 288.

wherein, after the contract is made, performance is rendered impossible or illegal by paramount authority. This includes changes in statutes or organic law, the decrees of courts, and the executive acts of states or their political subdivisions. In the leading case of *Baily v. DeCrespigny*,⁵¹ decided in 1869, it was held that the promisor was discharged from his covenant by a subsequent act of Parliament which deprived him of his power to perform it. The court based its decision on the premise that where performance is rendered impossible by a subsequent event which the parties could not reasonably be said to have anticipated, the promisor is discharged, although his promise was unqualified. In cases where the right of the promisor to perform has been subsequently destroyed by change of law, he has been excused on the ground that performance would involve the doing of illegal acts.⁵² But the better explanation of the rationale underlying this portion of the exceptive doctrine seems to be that to require the promisor to pay damages where the law itself has taken from him either the power or the right to perform would contravene public policy.⁵³

The exception may be simply stated as follows: Where performance of a contract is prevented by a supervening change of law, the promisor is excused. It should be noted that under this exception are grouped three distinct classes of cases. The first involves changes in the *lex scripta*. Thus where performance is rendered impossible⁵⁴ or illegal⁵⁵ by a subsequent change in domestic statute or organic law, the promisor is discharged. The second group of cases involves prevention of performance by the acts of a state. Thus where the interdiction of the executive branch of the government prevents performance, the promisor is usually discharged. For example, the arrest and imprisonment of the principal preventing his appearance in another court, discharges the sureties on an appearance bail bond;⁵⁶ compulsory military service discharges the further performance of a contract for personal services,⁵⁷ and terminates liability on an office lease;⁵⁸ and the requisition of specific goods is a defense in an action brought against the seller.⁵⁹ But a temporary exercise of public authority suspends, and does not discharge a contract.⁶⁰ However, where impossibility

51. L. R. 4 Q. B. 180 (1869).

52. *Louisville & Nashville Ry. v. Mottley*, 219 U. S. 467 (1910); *Doherty v. Monroe Eckstein Brewing Co.*, 198 App. Div. 708, 191 N. Y. Supp. 59 (1st Dep't 1921).

53. See Comment (1905) 19 HARV. L. REV. 134.

54. *Baily v. De Crespigny*, L. R. 4 Q. B. 180 (1869).

55. *Louisville & Nashville Ry. v. Mottley*, 219 U. S. 467 (1910); *American Mercantile Exchange v. Blunt*, 102 Me. 128, 66 Atl. 212 (1906); *Doherty v. Monroe Eckstein Browning Co.*, 198 App. Div. 708, 191 N. Y. Supp. 59 (1st Dep't 1921); *Cowley v. Northern Pac. Ry.*, 68 Wash. 558, 123 Pac. 998 (1912).

56. *State v. Herber*, 70 Okla. 153, 173 Pac. 651 (1918).

57. *Marshall v. Glanvill*, [1917] 2 K. B. 87.

58. *State Realty Co. v. Greenfield*, 110 Misc. 270, 181 N. Y. Supp. 511 (N. Y. Mun. Ct. 1920).

59. *Shipton, Anderson, & Co. v. Harrison*, [1915] 3 K. B. 676.

60. *Baylies v. Fettyplace*, 7 Mass. 325; see *School District v. Howard*, 5 Neb. (Unof.) 340, 98 N. W. 666, 667 (1904). So too on the theory that the inhibition is temporary, an embargo is usually held to suspend a contract. *Andrew Millar & Co. v. Taylor & Co.*, [1916] 1 K. B. 402. See also cases cited note 109, *infra*.

is caused by the executive acts of a foreign state,⁶¹ if the contract is neither made in such state nor governed by its laws, the promisor is not discharged. The third group of cases involves prevention of performance by decree of court. In this group the authorities are in conflict. Thus it has been held that where performance of a contract is forbidden by an injunction obtained by a third person, the promisor is excused.⁶² But there is equally good authority for the position that such injunction is not a defense.⁶³ The appointment of a receiver of the property of the promisor has been held to discharge his executory contracts.⁶⁴ But here too there is equally good, if not better authority to the contrary.⁶⁵ Again as to the effect of corporate dissolution there are divergent views. Thus upon analogy to the death of natural persons, which event, in the absence of a statute of administration, terminated all contractual rights and liabilities, it has been held that the executory contracts of a corporation are discharged by its dissolution.⁶⁶ But under the view that corporate assets are a trust fund for the benefit of creditors, the modern cases hold that the executory contracts of a corporation are not discharged by its dissolution.⁶⁷

C—Is the Exceptive Doctrine Applicable?

It is clear from the foregoing that the general rule that impossibility is not a defense has been impaired to such an extent that it can no longer truly be called a general rule. Yet it survives, in a more or less decrepit condition, side by side, with the vigorous and ever expanding exceptive doctrine, the co-existence of such divergent approaches giving convenient latitude to the courts, but being often productive of immeasurable confusion.⁶⁸ Where impossibility re-

61. *Tweedie Trading Co. v. James P. Macdonald Co.*, 114 Fed. 985 (S. D. N. Y. 1902); *Richards & Co. v. Wreschner*, 156 N. Y. Supp. 1054 (Sup. Ct. 1915), *aff'd on opinion below*, 174 App. Div. 484, 156 N. Y. Supp. 1129 (1st Dep't 1916). For a criticism of this rule see Conlen, *supra* note 5, at 38. It has been suggested that impossibility induced by the executive acts of a foreign state may come within the exception excusing the promisor when the contemplated means of performance have failed. 2 WILLISTON, SALES (2d ed. 1924) 1652. In *Sokoloff v. National City Bank*, 250 N. Y. 69, 164 N. E. 745 (1928), defendant contracted to pay rubles to plaintiff at Petrograd on demand. The Soviet government confiscated defendant's property in Moscow. It was held that as the United States had not recognized the Soviet government, the confiscation was not an act of government, and hence defendant was liable for damages for non-performance.

62. *Kansas Union Life Ins. Co. v. Burman*, 141 Fed. 835 (C. C. A. 8th, 1905); *De Forest Radio T. & T. Co. v. Standard Oil Co.*, 238 Fed. 346 (C. C. A. 2d, 1916); *Burkhardt v. Georgia School Tp.*, 9 S. D. 315, 69 N. W. 16 (1896).

63. *South Memphis Land Co. v. McLean Hardwood Lumber Co.*, 179 Fed. 417 (C. C. A. 6th, 1910); *Sample v. Irrigation Co.*, 129 Cal. 222, 61 Pac. 1085 (1900); *Willinson v. First Nat. Fire Ins. Co.*, 72 N. Y. 499 (1878).

64. *Moller v. Herring*, 255 Fed. 670 (C. C. A. 5th, 1919); *Law v. Waldron*, 230 Pa. 458, 79 Atl. 647 (1911).

65. *Curtis v. Walpole Fire & Rubber Co.*, 227 Fed. 698 (D. Mass. 1915); *Wells v. Hartford Manilla Co.*, 76 Conn. 27, 55 Atl. 599 (1903); *Commercial Pub. Co. v. Beckwith*, 167 N. Y. 329, 60 N. E. 642 (1901).

66. See 5 PAGE, CONTRACTS (2d ed. 1921) § 2687.

67. *Id.* § 2688.

68. In *Leiston Gas. Co. v. Leiston-cum-Sizewell Urban Dist. Council*, [1916] 2 K. B.

sults from the acts or omissions of the promisor, it is clear that the exceptive doctrine is inapplicable.⁶⁹ Conversely, the rule that a person cannot take advantage of his own wrong, excuses the promisor where performance is rendered impossible through the fault of the promisee.⁷⁰ But more frequently neither party is at fault, and then the question arises whether the general rule or the exceptive doctrine is applicable. In *Taylor v. Caldwell*,⁷¹ the applicability of the general rule was restricted to contracts "positive and absolute and not subject to any condition either express or implied." But when, in the absence of an express condition,⁷² is a contract "positive and absolute"? The best, and frequently the only evidence of the nature of the obligation undertaken by the parties to an express contract, is the language employed. Yet a reading of the cases conclusively shows that this is not a reliable test. In a few cases the courts have squarely decided that the contract was absolute.⁷³ But these decisions offer little aid as a universal solution. In another group of cases it is said that where the subsequent event which caused the impossibility was foreseeable at the time the contract was made, and the promisor neglected to

428, 432, Lord Reading, C. J., freely admits that "It is often difficult . . . to determine on which side of the line the particular case falls". In *Stewart v. Stone*, 127 N. Y. 500, 28 N. E. 595 (1891), a manufacturer who had contracted to make cheese at his factory was discharged by its destruction. Yet in a recent case a dealer who contracted to sell a specified quantity of molasses from a particular refinery was compelled to pay damages, although a reduction in the output of such refinery made his performance impossible. *Canadian Industrial Alcohol Co. v. Dunbar*, 258 N. Y. 194, 179 N. E. 383 (1932). For a criticism of this case see (1932) 1 BROOKLYN L. REV. 82.

69. *Buchanan v. Louisiana Exposition Co.*, 245 Mo. 337, 149 S. W. 26 (1912); (1904) 18 HARV. L. REV. 64.

70. *Vandergrift v. Cowles Engineering Co.*, 161 N. Y. 455, 55 N. E. 941 (1900). The promisor is excused whether performance is prevented by the promisee's lack of cooperation, where required, or by his hindrance. See Comment (1907) 20 HARV. L. REV. 643; Comment (1926) 12 CORN. L. Q. 72.

71. 2 B. & S. 826, 122 Eng. Reprints 309 (Q. B. 1863).

72. It is customary to insert excusatory clauses in contracts. Generally the courts have construed such clauses strictly. See 5 PAGE, CONTRACTS (2d ed. 1921) § 2678; 3 WILLISTON, CONTRACTS (1920) § 1968; 2 WILLISTON, SALES (2d ed. 1924) § 661-c; Comment (1920) 20 COL. L. REV. 776.

73. In *Hale v. Rawson*, 4 C. B. N. S. 84, 140 Eng. Reprints 1013 (1858), defendant agreed to deliver 50 cases of tallow on the safe arrival of the "Countess of Elgin." The defendant was held liable although upon arrival of the vessel it was discovered that the tallow had not been loaded. Williams, J., writes at 95, 140 Eng. Reprints 1017, "But where the agreement is absolute, or conditioned on an event which happens, the vendor will be liable for a breach, although he could not help the non-performance; for it is his own heedlessness, if he runs the risk of undertaking to perform an impossibility, when he might have provided against it by his own contract." In *Ashmore & Son v. Cox & Co.*, [1899] 1 Q. B. 436, defendants agreed to ship Manila hemp from the Philippines. The Spanish-American War prevented such shipments. The court held the contract absolute, refusing to follow *Howell v. Coupland*, L. R. 9 Q. B. 462 (1874), upon which defendants relied. This case is criticized in 3 WILLISTON, CONTRACTS (1920) 3312. Where the promisor, but not the promisee, knows that performance is impossible, his promise is deemed absolute. Thus in an action for breach of contract to marry, defendant cannot plead his prior marriage as a defense. *Wild v. Harris*, 7 C. B. 999, 133 Eng. Reprints 395 (1849).

qualify his obligation, his promise will be deemed absolute.⁷⁴ Foreseeability, however, is possible in almost every case.⁷⁵ The answer seems to be that whether a particular contract is absolute depends upon all the circumstances of the case and the attitude of the court.

Various attempts have been made to formulate a basis for the solution of the problem as to when the exceptive doctrine should be applied.⁷⁶ The best suggestion seems to be Professor Woodward's: "If the contingency which makes the contract impossible of performance is such that the parties to the contract, had they actually contemplated it, would probably have regarded it as so obviously terminating the obligation as not to require expression, failure of performance should be excused."⁷⁷

Impossibility Induced by War

A—In General

The outbreak of war has grave repercussions in all nations, whether they be combatants or non-combatants, because of modern economic interdependence coupled with extensive commercial intercourse. Thus it is readily comprehensible that a conflict of such magnitude as the World War which tremendously increased the burdens of obligations undertaken while peace prevailed, pre-

74. *Berg v. Erickson*, 234 Fed. 817 (C. C. A. 8th, 1916); *Rowe v. Town of Peabody*, 207 Mass. 226, 93 N. E. 604 (1911); *City of Minneapolis v. Republic Creaming Co.*, 161 Minn. 178, 201 N. W. 414 (1924); *Raner v. Goldberg*, 244 N. Y. 438, 155 N. E. 733 (1927); see Comment (1922) 8 CORN. L. Q. 62, 64. Where a subsequent change of law is foreseeable the promisor is not excused. *Houston Ice & Brewing Co. v. Keenan*, 99 Tex. 79, 88 S. W. 197 (1905); (1905) 19 HARV. L. REV. 134.

Climatic conditions are generally regarded as foreseeable, e.g., a drought, although of unprecedented severity. *Berg v. Erickson*, 234 Fed. 817 (C. C. A. 8th, 1916). Consequently interference by a flood is not a defense. *Mitchell v. Hancock County*, 91 Miss. 414, 45 So. 571 (1908); *Pengra v. Wheeler*, 24 Ore. 532, 34 Pac. 354 (1893); see *United States v. Lewis*, 237 Fed. 80, 81 (C. C. A. 8th, 1916). But some courts have excused the promisor where performance was prevented by unusual climatic conditions. *Ontario Deciduous Fruit Growers Ass'n v. Cutting Fruit Packing Co.*, 134 Cal. 21, 66 Pac. 28 (1901) (drought); *Squillante v. California Lands Inc.*, 42 P. (2d) 81 (Cal. App. 1935) (unusual heat); *Buffalo & L. Land Co. v. Bellevue L. & I. Co.*, 165 N. Y. 247, 28 N. E. 595 (1901) (snow and ice); *Lovering v. Buck Mountain Coal Co.*, 54 Pa. 291 (1867) (flood); *Howell v. Coupland*, L. R. 9 Q. B. 462 (1874) (blight).

75. See 3 WILLISTON, CONTRACTS (1920) 3317.

76. See *Bailey v. De Crespigny*, L. R. 4 Q. B. 180, 185 (1869); Comment (1922) 8 CORN. L. Q. 62, 64.

77. Woodward, *Impossibility of Performance as an Excuse for Breach of Contract* (1901) 1 COL. L. REV. 529, 533. This suggestion has been characterized as too narrow. Conlen, *supra* note 5, at 32. On the other hand it has been characterized as the "most warrantable generalization that has yet been made on this question as to when, upon the doctrine of implied conditions, performance should be excused by impossibility." Woodruff, *Book Review* (1927) 12 CORN. L. Q. 553, 554. An observation made in reference to conditions in contracts would seem helpful in this connection: "The court . . . asks what would have been the intention of the parties if the unprovided for contingency to be met had suggested itself to their minds and if they had been actuated by just motives." COSTIGAN, *THE PERFORMANCE OF CONTRACTS* (2d ed. 1927) 9, n 23.

disposed the courts towards indulgence,⁷⁸ and resulted in further expansions of the exceptive doctrine.

Such a frequently recurring phenomenon as war soon developed its own peculiar body of law defining the rights, liabilities and obligations of contractees resident in opposing belligerent nations. In reference to such contracts the courts have apparently acted on the theory that warfare is conducted upon an economic as well as a military plane. Thus the rights of an alien enemy under a contract fully executed on his part survive,⁷⁹ but the enforcement of such right is suspended for the duration of the war.⁸⁰ Where the contract is executory, if performance was prevented by domestic war measures,⁸¹ or if performance would aid the enemy,⁸² the promisor is discharged. In reference to executory contracts between parties who are not alien enemies, where performance becomes impossible or illegal, the exceptive doctrine, though somewhat more relaxed, is applied.⁸³

B—The Doctrine of the Frustration of the Commercial Adventure

Shortly after the outbreak of the World War, the English courts were brought face to face with problems resulting from unprecedented conditions which completely disrupted the commercial affairs of that nation. Under pressure of such conditions the House of Lords developed the doctrine of the frustration

78. "The war has in a different degree, perhaps, affected the performance of many, if not the larger part, of outstanding and unexecuted contracts between citizens of the United States. . . ." *Columbus Ry. Power & Light Co. v. City of Columbus*, 253 Fed. 499, 507 (S. D. Ohio 1918). "After all, the class of cases to which this belongs is incidental to the Great War. The world has not seen anything like it for 100 years. Everyone everywhere is praying and planning that it shall be the last great clash of arms. Nevertheless it is not unreasonable to hope that a century may pass before we have another. *No great harm may come if we do fail to lay down a general rule for the determination of controversies which seldom arise, except when a cataclysmic disturbance engulfs the world.*" (Italics supplied.) *The Isle of Mull*, 257 Fed. 798, 809 (D. Md. 1919).

79. E.g., debts owing to alien enemies. *Brown v. Hiatts*, 82 U. S. 177 (1872); *Rothbarth v. Herzfield*, 100 Misc. 470, 166 N. Y. Supp. 744 (Sup. Ct. 1917).

80. *Brown v. Hiatts*, 82 U. S. 177 (1872); see *Janson v. Dreifontein Consolidated Mines*, [1902] A. C. 484, 493. The Statute of Limitations does not run against an alien enemy while the war lasts. *The Protector*, 79 U. S. 700 (1871); *Brown v. Hiatts*, *supra*. *Contra*: *Nathan v. Equitable Trust Co.*, 250 N. Y. 250, 165 N. E. 282 (1929).

81. Hand, *The Trading with the Enemy Act* (1919) 19 COL. L. REV. 112, 126, 127 n 26.

82. *Esposito v. Bowden*, 7 E. & B. 763, 119 Eng. Reprints 1430 (Q. B. 1857); *Karberg & Co. v. Blythe, Green Jourdain & Co.*, [1916] 1 K. B. 495; *Zinc Corp., Ltd. v. Hirsch*, [1916] 1 K. B. 541; *In re Halsey v. Lovenfield*, [1916] 2 K. B. 707, it was held that the war did not dissolve a theatre lease, although the lessee was an alien enemy. Moreover, since the alien enemy's remedies are suspended during war, it was held that the lessee could not bring in a party to whom he had assigned the lease.

83. In this connection see 5 PAGE, *CONTRACTS* (2d ed. 1921) § 2759 *et seq.*; Blair, *Breach of Contract Due to War* (1920) 20 COL. L. REV. 413; Dodd, *Impossibility of Performance of Contract Due to War Time Regulations* (1919) 32 HARV. L. REV. 789; Hall, *The Effect of War on Contracts* (1918) 18 COL. L. REV. 325; Hand, *supra* note 81; McNair, *War Time Impossibility of Performance of Contract* (1919) 35 L. Q. REV. 84; Comment (1924) 34 YALE L. J. 91.

of the commercial adventure.⁸⁴ This doctrine was not entirely new but resulted from the synthesis of two distinct lines of cases, the first being *Taylor v. Caldwell* and its extensions,⁸⁵ the second involving marine contracts.⁸⁶ In this latter group the cases were not concerned with the question of impossibility. They raised the question whether a charterer had the right to repudiate a charter party and refuse to load the chartered vessel after its delayed arrival, the test being, was the delay of such a nature as to frustrate the original voyage contemplated by the charterer. Thus the courts arrived at the conclusion that where a supervening event, beyond the control of either party, rendered further performance of a contract commercially impracticable, a condition should be implied that the parties be discharged.⁸⁷ "The underlying ratio [decidendi] is the failure of something which was at the basis of the contract in the mind and intention of the contracting parties."⁸⁸

This frustration doctrine was developed in a group of cases which came before the House of Lords shortly after the war began, of which *Horlock v. Beal*,⁸⁹ decided in 1916, was the first. In this case it was held that the detention of a British vessel at Hamburg following the outbreak of war, frustrated the contemplated adventure, and terminated the owners' liability for wages to the crew. Within a few months thereafter the *Tamplin* case⁹⁰ was decided. The question involved the effect of the requisition of a chartered vessel at a time when the charter had three more years to run. The court, influenced by the fact that the charterer was desirous of continuing the contract, reaffirmed the doctrine, but held it inapplicable. Whatever doubts followed this decision were dispelled when the doctrine was again applied in the *Metropolitan Water Board* case⁹¹ wherein it was held that a pre-war contract to construct a reservoir within six years from August, 1914, was terminated by a government order to cease work in February, 1916, because conditions had

84. "It is really a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands." Lord Sumner in *Hirji Mulji v. Cheong Yue Steamship Co.*, [1926] A. C. 497, 510.

85. See p. 326, *supra et seq.* See the opinion of Lord Shaw in *Horlock v. Beal*, [1916] 1 A. C. 486, 512, 513, wherein he unifies the two classes of cases. See criticism 5 PAGE, CONTRACTS (2d ed. 1921) 4880.

86. *Jackson v. Union Marine Ins. Co.*, 10 C. P. 125 (1874). See also, *Freeman v. Taylor*, 8 Bing. 124, 131 Eng. Reprints 348 (C. P. 1831); *McAndrew v. Chapple*, 1 C. P. 643 (1866); *Geipel v. Smith*, L. R. 7 Q. B. 404 (1872).

87. *Horlock v. Beal*, [1916] 1 A. C. 486. Earl Loreburn writes, "In my view the first question to be decided is whether or not . . . the performance of this contract of service became impossible, which means impracticable in a commercial sense." (p. 492). "I think it was an implied term of this service . . . that it should be practicable for the ship to sail on this voyage, in that sense which disregards minor interruptions and takes notice only of what substantially ends the possibility of the service contemplated being fulfilled. Both employer and employed made their bargain on the footing that, whatever temporary interruption might supervene, the ship and crew would be available to carry out the adventure." (p. 494).

88. *Horlock v. Beal*, [1916] 1 A. C. 486, 512, *per* Lord Shaw.

89. [1916] 1 A. C. 486.

90. *Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.*, [1916] 2 A. C. 397.

91. *Metropolitan Water Board v. Dick, Kerr & Co., Ltd.*, [1918] A. C. 119.

so changed that to hold otherwise would be to impose a new and wholly different contract upon the parties. Meanwhile the same doctrine was being developed in the United States. The *Kronprinzessin Cecilie*,⁹² decided by the Supreme Court, although it does not speak of frustration of the commercial adventure, can be justified on no other ground. There it was held that the master of a German vessel en route to Plymouth, was justified in abandoning his voyage when war seemed imminent, although it appeared that he could safely have landed the freight and could have departed within a few hours before the actual declaration of war. Subsequent decisions fully accepted the language and reasoning of the English precedents.⁹³

The doctrine of the frustration of the commercial adventure is applicable to all types of commercial contracts.⁹⁴ But in the course of applying the doctrine to specific cases the courts have sensed the necessity of limiting its scope. Thus it has been held that the doctrine is inapplicable where performance has merely been rendered more difficult,⁹⁵ or more costly,⁹⁶ or temporarily impossible.⁹⁷ The doctrine will not be applied where the failure of the adventure is not the result of an unexpected supervening cause,⁹⁸ and war, of itself, is not such a supervening cause as will justify its application.⁹⁹ Whether or not a contract has been frustrated is a question of law for the court to decide.¹⁰⁰ Ultimately, "the frustration of an adventure depends on the facts of each case."¹⁰¹

C—Applications of the Exceptive Doctrine

War may interfere either directly or indirectly with the performance of pre-existing executory contracts. Indirect interference is usually the result

92. 244 U. S. 12 (1917) (also reported under the name of *North German Lloyd v. Guaranty Trust Co.*). See *The Poznan*, 276 Fed. 418, 425 (S. D. N. Y. 1921), wherein it is referred to as a frustration case and is coupled with the English precedents. See Conlen, *supra* note 5, at 37. "No decision has been found which goes farther in excusing non-performance occasioned by war. . . ." Hall, *supra* note 83, at 340.

93. *Allanwilde Transport Corp. v. Vacuum Oil Co.*, 248 U. S. 377 (1919); *Texas Co. v. Hogarth Shipping Co.*, 256 U. S. 619 (1921); *The Isle of Mull*, 278 Fed. 131 (C. C. A. 4th, 1921), *cert. denied*, 257 U. S. 662 (1922); *The Claveresk*, 264 Fed. 276 (C. C. A. 2d, 1920); *The Frankmere*, 278 Fed. 139 (C. C. A. 4th, 1921), *cert. denied*, 257 U. S. 662 (1921). See Conlen, *The Doctrine of Frustration as Applied to Contracts* (1922) 70 U. OF PA. L. REV. 87, 93.

94. See Notes (1919) 3 A. L. R. 21; (1920) 9 A. L. R. 1509; (1921) 15 A. L. R. 1512; (1925) 37 A. L. R. 1499. In *Whitehall Court, Ltd. v. Ettliger*, [1920] 1 K. B. 680, the court refused to apply the doctrine to a lease.

95. *Blackburn Bobbin Co., Ltd. v. Allen & Sons*, [1918] 2 K. B. 467; see *Texas Co. v. Hogarth Shipping Co.*, 256 U. S. 619, 630 (1921).

96. *Columbus Ry., Power & Light Co. v. City of Columbus*, 249 U. S. 399 (1919); see *Texas Co. v. Hogarth Shipping Co.*, 256 U. S. 619, 630 (1921).

97. *Leiston Gas Co. v. Leiston-cum-Sizewell Urban Dist. Council*, [1916] 2 K. B. 428.

98. *The Poznan*, 276 Fed. 418 (S. D. N. Y. 1921). See also *Brevard Tannin Co. v. J. F. Mosser Co.*, 288 Fed. 725 (C. C. A. 4th, 1923).

99. *Hulton & Co. v. Chadwick & Taylor*, 34 T. L. R. 230 (C. A. 1918), *aff'd*, 35 T. L. R. 620 (H. L. 1919).

100. *Comptoir Commercial Anversoise v. Power, Son & Co.*, [1920] 1 K. B. 868.

101. See *Bank Line, Ltd. v. Arthur Capel & Co.*, [1919] A. C. 435, 439.

of the disturbance of the economic balance. As in cases where war is not a factor, it is generally held that a mere increase in the difficulty¹⁰² or cost¹⁰³ of performance is not a defense. But again the question is one of degree. Thus in some cases where a shortage of goods or raw materials ensued, and the promisor was unable to complete his contract, he has been discharged.¹⁰⁴ So too where performance would entail exposure of person¹⁰⁵ or property¹⁰⁶ to the dangers of war, the promisor has been excused. However, where a foreign war has prevented performance, the courts have refused to excuse the promisor.¹⁰⁷

In a great number of cases the interference is direct. Thus an embargo may effect a discharge of the contract.¹⁰⁸ But it is usually held to be suspensive only,¹⁰⁹ and the promisor must wait a reasonable time before he can treat the contract as terminated.¹¹⁰ A contract for the carriage of goods to a specific port is discharged if such port is blockaded,¹¹¹ unless the blockade is ineffective.¹¹² The requisition of a vessel does not terminate the contract of charter as a matter of law.¹¹³ But if the charter has only a short time to run,

102. *Coal Dist. Power Co. v. Katy Coal Co.*, 141 Ark. 337, 217 S. W. 449 (1920); *Ducas Co. v. Bayer Co.*, 163 N. Y. Supp. 32 (Sup. Ct. 1916); *North Hempstead v. Public Serv. Corp.*, 107 Misc. 19, 176 N. Y. Supp. 621 (Sup. Ct. 1919), *aff'd*, 192 App. Div. 924, 182 N. Y. Supp. 954 (2d Dep't 1920); *Blackburn Bobbin Co., Ltd. v. Allen & Son*, [1918] 2 K. B. 467.

103. *Columbus Ry., Power & Light Co. v. City of Columbus*, 249 U. S. 399 (1919); *Furness, Withy & Co. v. Muller & Co.*, 232 Fed. 186 (D. Md. 1916); *The Themis*, 244 Fed. 545 (S. D. N. Y. 1917); *City of Moorehead v. Union Lt. Heat & Power Co.*, 255 Fed. 920 (D. Minn. 1918).

104. *Davison Chem. Co. v. Baugh Chem. Co.*, 133 Md. 203, 104 Atl. 404 (1918); *Tennants Ltd. v. Wilson & Co.*, [1917] A. C. 495.

105. *The Epsom*, 227 Fed. 158 (D. Wash. 1915); *Liston v. The Steamship Carpathian*, [1915] 2 K. B. 42.

106. *The Kronprinzessin Cecilie*, 244 U. S. 12 (1917); *cf. Piaggio v. Somerville*, 119 Miss. 6, 80 So. 342 (1919). See note 32, *supra*.

107. *Standard Silk Dyeing Co. v. Roessler & Hasslacher Chem. Co.*, 244 Fed. 250 (S. D. N. Y. 1917); *Ducas Co. v. Bayer Co.*, 163 N. Y. Supp. 32 (Sup. Ct. 1916); *Richards & Co. v. Wreschner*, 174 App. Div. 484, 156 N. Y. Supp. 1054 (Sup. Ct. 1915); *Jacobs, Marcus & Co. v. Credit Lyonnais*, 12 Q. B. D. 589 (1884); *Ashmore & Son v. Cox & Co.*, [1899] 1 Q. B. 436.

108. *Foster v. Compagnie Française*, 237 Fed. 858 (E. D. N. Y. 1916).

109. *Odlin v. Insurance Co.*, Fed. Cas. No. 10,433 (C. C. Pa. 1808); *Baylies v. Fettyplace*, 7 Mass. 325 (1811); *Washington Mfg. Co. v. Midland Lumber Co.*, 113 Wash. 593, 194 Pac. 777 (1921); *Andrew Millar & Co. v. Taylor & Co.*, [1916] 1 K. B. 402; *Jaeger v. Tolme, etc.*, [1916] 1 K. B. 939; *Smith v. Becker, Grey & Co.*, [1916] 2 Ch. 86.

110. *Andrew Millar & Co. v. Taylor & Co.*, [1916] 1 K. B. 402. It is pointed out that this rule is based on hindsight rather than foresight and that it is of little value as a rule for the governance of future conduct. *Blair, supra* note 83, at 422.

111. *The Spartan*, 25 Fed. 44 (S. D. N. Y. 1885). In some early cases it was held that a blockade was merely suspensive. *Palmer v. Lorillard*, 16 Johns. 348 (N. Y. 1819); *Ogden v. Barker*, 18 Johns. 87 (N. Y. 1820).

112. *Balfour, Guthrie & Co. v. Portland & Asiatic S. S. Co.*, 167 Fed. 1010 (D. Ore. 1909).

113. *Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.*, [1916] 2 A. C.

and will probably expire before the war ends, the parties are discharged.¹¹⁴ So too the requisition of specific goods contracted to be sold excuses the seller.¹¹⁵ Yet it has been held that the requisition of an apartment for the accommodation of a governmental bureau, did not relieve the tenant from his covenant to pay rent.¹¹⁶ Frequently the government finds it expedient to prohibit the performance of certain contracts for the purpose of conserving war materials. Where performance is prevented by such order the promisor is discharged,¹¹⁷ but if only a part of the contract was affected by such order, and it can be partly performed, the contract is not terminated.¹¹⁸ Again the government may find it necessary to provide that its orders for war materials shall be filled in preference to all other orders. In such a case if the promisor's plant is unable to fulfill prior contracts due to such preference, he is discharged;¹¹⁹ even if he voluntarily solicits such preferential orders.¹²⁰ The curtailment of the personal freedom of one of the parties may terminate the contract.¹²¹ Thus the detention of their employees by the enemy has been held to relieve the employer from liability for wages.¹²²

Conclusion

The value of the exceptive doctrine is controversial. On the one hand it has gained approbation as a natural and salutary growth of the law.¹²³ On the other hand it has been strongly condemned as a deleterious and corrosive attack upon the very concept of contract.¹²⁴ Its proponents laud its equitable qualities,¹²⁵ apparently overlooking the plight of the party injured by non-

397; *Modern Transport Co. v. Dunerich Steamship Co.*, [1917] 1 K. B. 370; *Chinese Mining & Engineering Co. v. Sale & Co.*, [1917] 2 K. B. 599; *cf. The Claveresk*, 264 Fed. 276 (C. C. A. 2d, 1920); *Bank Line Ltd. v. Arthur Capel & Co.*, [1919] A. C. 435. In *Graves v. Miami Steamship Co.*, 29 Misc. 645, 61 N. Y. Supp. 115 (Sup. Ct. 1899), the owner voluntarily relinquished the vessel to the government for war use. It was held that this was not a defense to an action on a pre-existing contract for the carriage of freight.

114. *Anglo-Northern Trading Co. v. Emlyn*, [1917] 2 K. B. 78 (4 months to expiration); *Countess of Warwick Steamship Co. v. Le Nichel Société Anonyme*, [1918] 1 K. B. 372 (5 months to expiration).

115. *Shipton, Anderson Co. v. Harrison*, [1915] 3 K. B. 676.

116. *Whitehall Court Ltd. v. Ettlinger*, [1920] 1 K. B. 680.

117. *Metropolitan Water Board v. Dick, Kerr & Co. Ltd.*, [1918] A. C. 119.

118. *Federal Sign System v. Palmer*, 176 N. Y. Supp. 565 (Sup. Ct. 1919); *Lelston Gas. Co. v. Lelston-cum-Sizewell Urban Dist. Council*, [1916] 2 K. B. 428. But compare cases cited note 50, *supra*.

119. *Roxford Knitting Co. v. Moore & Tierney, Inc.*, 265 Fed. 177 (C. C. A. 2d, 1920); *Mawhinney v. Millbrook Woolen Mills*, 231 N. Y. 290, 132 N. E. 93 (1921), *explained in s. c.*, 234 N. Y. 244, 137 N. E. 318 (1922).

120. *Ibid.*; *cf. Graves v. Miami Steamship Co.*, 29 Misc. 645, 61 N. Y. Supp. 115 (Sup. Ct. 1899), cited note 113, *supra*.

121. *State Realty Co. v. Greenfield*, 110 Misc. 270, 181 N. Y. Supp. 511 (N. Y. Mun. Ct. 1920); *Marshall v. Glanville*, [1917] 2 K. B. 87.

122. *Horlock v. Beal*, [1916] 1 A. C. 486.

123. See Conlen, *loc. cit. supra* note 5; McNair, *loc. cit. supra* note 83.

124. Mayers, *supra* note 38. See also 5 PAGE, CONTRACTS (2d ed. 1921) 4881; Comment (1924) 34 YALE L. J. 91.

125. Conlen, *supra* note 125, at 28.

performance. Some courts have sensed this defect, and have not hesitated to warn against further encroachment upon the concept of contractual obligation.¹²⁶ On the other hand were the law crystallized in its present state, the result would be highly unsatisfactory. The coexistence of two basically opposed principles, the one demanding unswerving adherence to obligations voluntarily undertaken, the other seeking to alleviate from the burdens of unforeseen consequences despite the terms of the contract, either of which the courts may very easily follow in a particular case, destroys certainty and tends to increase litigation. Perhaps the courts have gone too far to retreat. It would seem preferable to go the whole way and adopt outright the single principle that impossibility of performance is always a defense, unless the promisor has expressly undertaken to perform at all events.

126. See *Bank Line Ltd. v. Arthur Capel & Co.*, [1919] A. C. 435, 459; *Blackburn Bobbin Co. v. Allen & Sons*, [1918] 1 K. B. 540, 550, 552, *aff'd*, [1918] 2 K. B. 467.