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## FRUSTRATION OF CONTRACT— A REJECTED DOCTRINE

ARTHUR ANDERSON

A CAREFUL search has uncovered no instance in which an American court of last resort, in litigation involving a contract, has expressly followed the doctrine of frustration in making its decision. The body of American case law from which citations are made in support of the doctrine will be found on analysis to consist of a few decisions of lower appellate courts, of numerous items of obiter dictum, and of cases in which the opinion makes no mention of the doctrine. The other side of the picture is that many decisions have been rendered by courts of last resort in the last twenty years in which the doctrine was mentioned or discussed but not followed. These statements will come as something new to many readers, since legal literature gives the impression that the doctrine of frustration is an established part of American law.

### I. WHAT THE DOCTRINE OF FRUSTRATION IS

The doctrine of frustration is the doctrine which grew from the *Coronation Cases*. In each of the two principal *Coronation Cases*,<sup>1</sup> the facts involved a contract between the owner of premises situated along the route of the coronation procession, and a hirer, under which the hirer promised to pay a large sum of money to the owner, and, in exchange, the owner promised to allow the hirer to occupy

<sup>1</sup> *Krell v. Henry*, [1903] 2 K.B. 740 (C.A.); *Chandler v. Webster*, [1904] 1 K.B. 493 (C.A.).

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the premises during the time scheduled for the procession. The procession was postponed on account of the illness of the king. In *Krell v. Henry*, the Court of Appeal held that the hirer was discharged of the duty to pay the money, but several months later, in *Chandler v. Webster*, the Court of Appeal held that the hirer remained under a duty to pay.

The two irreconcilable cases led to discussion, largely in law reviews and law schools, and as a result, the doctrine of frustration came to take form, as a view that events such as occurred in the *Coronation Cases* should discharge the party in the position of the hirer from all further duty under the contract.

In considering the *Coronation Cases*, it should be borne clearly in mind that (a) no impossibility of performance was involved to any extent whatever, (b) the owner was prepared to render the whole performance promised by him, (c) the postponement of the procession did not diminish the value of the contract to the owner, (d) the only lament came from the hirer, and (e) the hirer's lament was only that his hopes and plans for benefits to himself from the contract had been shattered.

It is quite an ordinary and common thing for a person to make a contract and then later to see his hopes and plans hurt or shattered by subsequent events. This shattering of hopes and plans is a factual occurrence, and whether there should be, and are, legal consequences is a different matter. The expression "frustration-in-fact" is descriptive of the situation from the point of view of the facts, and it is useful, additionally, because it impliedly accents the idea that it is facts, and not their legal consequences, which are being studied. The expression is very useful for present purposes because the law has seen much frustration-in-fact since the *Coronation Cases*, but, as has been said and as will be seen, the law has given it only slight, and diminishing, legal effect.

There certainly was frustration-in-fact from the point of view of the hirer in the *Coronation Cases*, and to an extreme degree. But frustration-in-fact occurs whenever a buyer buys land or goods or services and thereafter the land or goods or services fall in value or otherwise become less attractive to him; frustration-in-fact occurs to a seller when the price of a thing sold thereafter rises in value; frustration-in-fact occurs to an employer under a fixed-duration contract when he thereafter ceases to need the employee's services; frustration-in-fact occurs to a lessee when the premises thereafter

cease to be usable for his intended purpose; frustration-in-fact occurs to any contracting party when it later develops that the performance for which he contracted is not going to be as desirable to him as it appeared when he made the contract.

The doctrine of frustration, then, is the doctrine that frustration-in-fact has legal consequences: that frustration-in-fact of the requisite severity as to one of the parties to a contract results in the discharge of his duties under the contract.

It is the intention to establish that this doctrine has been rejected in the United States, by showing the minor extent to which courts have applied it to discharge frustrated parties from their contractual duties, and the major extent to which courts have abstained from applying it, even in cases where extreme frustration-in-fact existed. The case law will be presented in three sections:

- (a) the case law in support of the doctrine before the *Restatement* was promulgated in 1932;
- (b) the case law in support of the doctrine since 1932;
- (c) the case law in opposition to the doctrine since 1932.

If it be shown that (a) and (b) are insignificant, and that (c) is commanding, it is considered that the rejection of the doctrine is established.

No attempt will be made to show the state of the English law, and all remaining discussion should be understood as being limited to the law in the United States.

Before proceeding, it will be desirable to mention two usages of the word "frustrate" which appear in the law elsewhere than in connection with the doctrine of frustration of contract. The first of these is to speak of a contract as "frustrated" when what actually has occurred is that performance has become impossible.<sup>2</sup> This

<sup>2</sup> *The Innerton*, 141 F. 2d 931, 932 (C.C.A. 5th, 1944) ("... the charter party was not proved to be impossible of performance by reason of frustration or otherwise..."); *Texas Co. v. Hogarth Shipping Co.*, 265 Fed. 375, 379 (S.D. N.Y., 1919) aff'd 256 U.S. 619 (1921) ("The phrase 'frustration of venture' has obtained much vogue of late... To me it seems only an equivalent for, and no improvement on, 'impossibility of performance'..."); *Nitro Powder Co. v. Agency of Canadian Car & Foundry Co.*, 233 N.Y. 294, 298, 135 N.E. 507, 508 (1922) ("The taking by government completely frustrated the contract..."); *L. N. Jackson & Co. v. Seas Shipping Co.*, 185 N.Y. Misc. 94, 97, 56 N.Y.S. 2d 501, 504 (S.Ct., 1945), aff'd 296 N.Y. 529, 68 N.E. 2d 605 (1946) ("This direct intervention by a government mandate... embodied every element significant and essential for a complete frustration so as to excuse, without question, performance on the part of the defendant.") This case was litigated also in the federal courts, where Circuit Judge Clark said: "Here the parties, the court below, and the

usage is inaccurate because the concepts of frustration of contract and impossibility of performance are mutually in opposition: the situation where a defendant claims the defense of frustration is where performance by him is fully possible but the exchange has become undesirable—exactly as in the *Coronation Cases*.

The other usage is in admiralty cases where it is common to speak of a voyage as “frustrated” when the ship for one reason or another does not complete the intended voyage. Such a frustration of a voyage usually results in a libel (but occasionally in a state court action) in which “the issues are maritime,” and the result is determined by an analysis of the legally efficient cause of “the breaking of the voyage,” and by an interpretation of the charter party, the bill of lading with its general average and restraint of princes clauses, and the marine or war risk insurance policy, and by the application of the specialized principles of maritime law. It is considered that the opinions in these admiralty cases are too remote from the common law of simple contracts properly to be considered in a study of the common law doctrine of frustration of contract. It may be said, also, that even if these opinions were to be weighed, it would be seen that they do not support the doctrine: the controlling influence in these decisions is the language of the charter party or bill of lading or policy, and the fact that a party’s hopes and plans have been shattered by unexpected events does not alter his legal position. This is seen most clearly in those cases where a voyage is frustrated but the ship owner nevertheless is entitled to the full amount of the freight charges, under a standard clause in a marine bill of lading: “full freight to destination . . . and all advance charges . . . are due and payable . . . upon receipt of the goods . . . and any payments made . . . shall be deemed fully earned . . . without deduction . . . or refund in whole or in part . . . goods or vessel lost or not lost, or if the voyage be broken up, . . . .”<sup>3</sup>

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state court have framed the issue in terms of the ‘frustration’ of a contract; but that, as Professor Corbin has said, may be ‘only perpetuating the use of a bad term to state the result.’ . . . the performance itself has become impossible.” *L. N. Jackson & Co. v. Royal Norwegian Government*, 177 F. 2d 694, 697 (C.A. 2d, 1949), cert. denied 339 U.S. 914 (1950).

<sup>3</sup> In the following cases the ship was entitled to full freight even though the voyage was frustrated: *Allanwilde Transport Corp. v. Vacuum Oil Co.*, 248 U.S. 377 (1919); *Pope & Talbot, Inc. v. Blanchard Lumber Co.*, 159 F. 2d 134 (C.C.A. 9th, 1947); *De La Rama Steamship Co. v. Ellis*, 149 F. 2d 61 (C.C.A. 9th, 1945), cert. denied 326 U.S. 718; *Mitsubishi Shoji Kaisha, Ltd. v. Societe Purfina Maritime*, 133 F. 2d 552 (C.C.A. 9th, 1942), cert. denied 318 U.S. 781 (1943); *Tee Ka Chay v. De La Rama*

II. THE CASE LAW IN SUPPORT OF THE DOCTRINE BEFORE THE  
RESTATEMENT WAS PROMULGATED IN 1932

The point of farthest advance in the development of the doctrine probably was its promulgation as Section 288 of the *Restatement of Contracts* in 1932. Most of the cases which are repeatedly cited in legal literature in its support were decided before that date. It accordingly will be of interest to see how much development occurred in the first thirty years of the doctrine's existence, and to see the extent to which the cases justified its inclusion in the *Restatement*.

The following six sub-paragraphs are the product of an attempt to locate all of the reported cases between 1903 and 1932 in which frustration-in-fact existed and in which the frustrated party was discharged from his duty:

a) the local, state, and national prohibition cases: a tenant who had rented premises for the sale of liquor suffered frustration-in-fact when the sale of liquor therein became unlawful. In the cited cases, the lease restricted the use of the premises to the sale of liquor, and, of course, the degree of in-fact frustration was extreme.<sup>4</sup> The court did not mention the doctrine of frustration in any of them;

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Steamship Co., 55 N.Y.S. 2d 241 (N.Y. City Ct., 1942); *E. Awad & Sons, Inc. v. De La Rama Steamship Co.*, 53 N.Y.S. 2d 900 (S.Ct., 1942) aff'd 265 App. Div. 913, 38 N.Y.S. 2d 897. Accord: *West Street Warehouse, Inc. v. American President Lines, Ltd.*, 186 N.Y. Misc. 238, 58 N.Y.S. 2d 722 (S.Ct., 1945).

Other admiralty cases, which speak, in one way or another, of "frustration of the voyage," and none of which deal with the doctrine of frustration, are: *Calmar Steamship Corp. v. Scott*, 345 U.S. 427 (1953); *Tatsuuma Kisen Kabushiki Kaisha v. Robert Dollar Co.*, 31 F. 2d 401 (C.C.A. 9th, 1929); *Gans Steamship Line v. Wilhelmsen*, 275 Fed. 254 (C.C.A. 2d, 1921), cert. denied 257 U.S. 655; *The Isle of Mull*, 278 Fed. 131 (C.C.A. 4th, 1921), cert. denied 257 U.S. 662 (1922); *Schoonmaker-Conners Co. v. Lambert Transportation Co.*, 269 Fed. 583 (C.C.A. 2d, 1920); *The Claveresk*, 264 Fed. 276 (C.C.A. 2d, 1920); *American Foreign Steamship Corp. v. 9,000 Tons of Manganese Ore*, 109 F. Supp. 765 (D.C. N.J., 1952); *The Louise*, 58 F. Supp. 445 (D.C. Md., 1945); *The Poznan*, 276 Fed. 418 (S.D. N.Y., 1921); *The Frankmere*, 262 Fed. 819 (E.D. Va., 1920), aff'd 278 Fed. 139 (C.C.A. 4th, 1921). Accord: *Silva v. Bankers Commercial Corp.*, 163 F. 2d 602 (C.C.A. 2d, 1947).

<sup>4</sup> *Greil Bros. Co. v. Mabson*, 179 Ala. 444, 60 So. 876 (1912); *Kahn v. Wilhelm*, 118 Ark. 239, 177 S.W. 403 (1915); *Industrial Development & Land Co. v. Goldschmidt*, 56 Cal. App. 507, 206 Pac. 134 (1922); *Levy v. Johnston & Hunt*, 224 Ill. App. 300 (1922); *Schaub v. Wright*, 79 Ind. App. 56, 130 N.E. 143 (1921); *Doherty v. Monroe Eckstein Brewing Co.*, 198 App. Div. 708, 191 N.Y. Supp. 59 (1st Dep't, 1921); *Kaiser v. Zeigler*, 115 N.Y. Misc. 281, 187 N.Y. Supp. 638 (S.Ct., 1921); *Stratford, Inc. v. Seattle Brewing & Malting Co.*, 94 Wash. 125, 162 Pac. 31 (1916); *Brunswick-Balke-Collender Co. v. Seattle Brewing & Malting Co.*, 98 Wash. 12, 167 Pac. 58 (1917). But cf. *Heart v. East Tennessee Brewing Co.*, 121 Tenn. 69, 113 S.W. 364 (1908), where the court said that it was not necessary to determine whether the lease restricted the use to saloon purposes.

b) the exhausted-minerals cases: a tenant who had rented mineral lands on a minimum royalty basis suffered frustration-in-fact when the minerals became exhausted.<sup>5</sup> In none of the cited cases did the court mention the doctrine of frustration, but in the *Virginia Iron* case the court quoted from *Krell v. Henry*, mainly on the subject of impossibility;

c) the forbidden-business cases: a tenant who had rented premises to be used only for a specified business purpose suffered frustration-in-fact when the carrying on of that business was later forbidden by city ordinance or official order.<sup>6</sup> The doctrine was not mentioned in any of the cited cases;

d) the cancelled-yacht-race cases: an advertiser who had promised to pay for the insertion of his advertisement in a souvenir yacht race program suffered frustration-in-fact when the race was cancelled on account of World War I. Two notable opinions by intermediate New York courts discharged the advertisers. In one,<sup>7</sup> the court said that "the situation, as it turns out, has frustrated the entire design on which is grounded the promise"—this being what is believed to be the earliest American opinion, and the only American opinion prior to the *Restatement*, in which the word "frustrate" is used in this sense. In the other,<sup>8</sup> the court spoke in terms of "an implied condition" and cited "particularly" the case of *Krell v. Henry*;

e) the *La Cumbre Golf and Country Club* case:<sup>9</sup> a corporate hotel proprietor, which had promised to pay \$300 per month to a country club for the privilege of allowing hotel guests to play golf at the

<sup>5</sup> *Byrd v. Anderson*, 207 Ky. 317, 269 S.W. 323 (1925); *Virginia Iron, Coal & Coke Co. v. Graham*, 124 Va. 692, 98 S.E. 659 (1919); *Adams v. Washington Brick, Lime & Mfg. Co.*, 38 Wash. 243, 80 Pac. 446 (1905); cf. *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 Pac. 458 (1916).

<sup>6</sup> *McCullough Realty Co. v. Laemmle Film Service*, 181 Iowa 594, 165 N.W. 33 (1917) (film exchange); *Adler v. Miles*, 69 N.Y. Misc. 601, 126 N.Y. Supp. 135 (S.Ct., 1910) (exhibition of motion pictures); *Magner v. Mills*, 137 N.Y. Misc. 535, 242 N.Y. Supp. 705 (N.Y. City Ct., 1930) (boat landing pier); *O'Neill v. Derderian*, 138 N.Y. Misc. 488, 246 N.Y. Supp. 341 (N.Y. Munic. Ct., 1930) (furnished rooms). Accord: *Economy v. S. B. & L. Building Corp.*, 138 N.Y. Misc. 296, 245 N.Y. Supp. 352 (S.Ct., 1930). See: *Hizington v. Eldred Refining Co.*, 235 App. Div. 486, 257 N.Y. Supp. 464 (4th Dep't, 1932).

<sup>7</sup> *Alfred Marks Realty Co. v. Hotel Hermitage Co.*, 170 App. Div. 484, 156 N.Y. Supp. 179 (2d Dep't, 1915).

<sup>8</sup> *Alfred Marks Realty Co. v. "Churchills"*, 90 N.Y. Misc. 370, 153 N.Y. Supp. 264 (S.Ct., 1915).

<sup>9</sup> *a Cumbre Golf and Country Club v. Santa Barbara Hotel Co.*, 205 Cal. 422, 271 Pac. 476 (1928).

club, suffered frustration-in-fact when the hotel was completely destroyed by fire and not rebuilt. The court discharged the hotel company's duty without mention of the doctrine of frustration;

f) the drafted-tenant case: a tenant who leased an office for a brokerage business suffered frustration-in-fact when he was drafted into the military service.<sup>10</sup> The court discharged the tenant's duty without mention of the doctrine.

Another group of cases which are sometimes cited in discussions of the doctrine actually oppose it. These are cases where frustration-in-fact existed and where the court mentioned the doctrine or cited *Krell v. Henry*, but then held that the frustrated party remained under a duty to perform his promise as made.<sup>11</sup> The only respect in which these cases may be considered to support the doctrine is that they show that the court in each case was aware of its existence.

This completes what is intended to be a presentation of the American case law in support of the doctrine during its thirty years of pre-*Restatement* existence. It consisted of the following:

Nineteen lease cases which relieved the tenant who had suffered frustration-in-fact, but without reliance upon the doctrine except that one of them quoted from *Krell v. Henry* mainly on the subject of impossibility;<sup>12</sup>

The two *Alfred Marks Realty Co.* cases, which were truly in point and actually based upon the doctrine, and which are probably the strongest case law support the doctrine has ever had;<sup>13</sup>

The *La Cumbre* case, which discharged the duty of the party who had suffered frustration-in-fact, but without mention of the doctrine;

Six cases which indicated awareness of the doctrine by mentioning it or which cited *Krell v. Henry*, but in which the decision was in opposition.<sup>14</sup>

<sup>10</sup> *State Realty Co. v. Greenfield*, 110 N.Y. Misc. 270, 181 N.Y. Supp. 511 (N.Y. Munic. Ct., 1920).

<sup>11</sup> Two cases speak of frustration: *United States Trading Corp. v. Newmark Grain Co.*, 56 Cal. App. 176, 205 Pac. 29 (1922); *Straus v. Kazemekas*, 100 Conn. 581, 124 Atl. 234 (1924). Four cases cite *Krell v. Henry*: *Moreland v. Credit Guide Publishing Co.*, 255 Mass. 469, 152 N.E. 62 (1926); *Raner v. Goldberg*, 244 N.Y. 438, 155 N.E. 733 (1927); *Abbaye v. United States Motor Cab Co.*, 71 N.Y. Misc. 454, 128 N.Y. Supp. 697 (S.Ct., 1911); *Retail Merchants' Business Expansion Co. v. Randall*, 103 Vt. 268, 153 Atl. 357 (1931).

<sup>12</sup> *Virginia Iron, Coal & Coke Co. v. Graham*, 124 Va. 692, 98 S.E. 659 (1919).

<sup>13</sup> Cases cited notes 7 and 8 supra.

<sup>14</sup> Cases cited note 11 supra.



III. THE PROMULGATION OF THE DOCTRINE AS SECTION  
288 OF THE RESTATEMENT OF CONTRACTS IN 1932

If those who were responsible for the inclusion of the doctrine of frustration in the *Restatement of Contracts* had allowed themselves to be influenced by the state of the American case law on the subject, they might have omitted the doctrine from the *Restatement*. As a matter of fact, they did omit the doctrine from the early draft which was subjected to section-by-section discussion at the annual meeting of the American Law Institute on May 11, 1929.<sup>15</sup> Section 288 apparently was drafted by the Reporter Samuel Williston and approved by the Council, but it did not appear before an annual meeting of the Institute until May 6, 1932,<sup>16</sup> a few minutes before the work on the *Restatement of Contracts* ended and the meeting adopted the resolution for its publication.<sup>17</sup> At that time, Proposed Final Draft No. 13, mainly a catch-all of amendments to previously considered sections, was taken up.<sup>18</sup> It included Section 288, but the Section was mentioned only by its number, in a series of such numbers, and no discussion was had.

Proposed Final Draft No. 13 gave the following explanation:<sup>19</sup>

“Section 288

“It is suggested that a new Section with comment and illustrations be added after Section 282 (in final numbering 287) as follows:  
[Here appeared Section 288 with Comments and Illustrations as finally published]

“Reasons for the Addition.

“A Section on ‘Frustration of the Object of a Contract’ was originally put in the pamphlet on ‘Impossibility’<sup>20</sup> but such frustration is not strictly ‘Impossibility,’ and the Section was deemed more appropriate in the Chapter on ‘Conditions; and Breach of Promise as an excuse for failure to perform a return promise.’”

<sup>15</sup> Rest., Contracts (tent. draft no. 6, 1929); 7 American Law Institute Proceedings 265 (1929).

<sup>16</sup> 10 American Law Institute Proceedings 173, 174 (1932).

<sup>17</sup> *Ibid.*, at 182.

<sup>18</sup> Rest., Contracts (proposed final draft no. 13, 1932).

<sup>19</sup> *Ibid.*, at 15.

<sup>20</sup> Evidently an early pamphlet—frustration was not mentioned when Proposed Final Draft No. 11, covering Impossibility, was subjected to section-by-section discussion at the annual meeting on May 6, 1932, 10 American Law Institute Proceedings 140 (1932).

Section 288 of the *Restatement* reads as follows:

“§ 288. FRUSTRATION OF THE OBJECT OR EFFECT OF THE CONTRACT.

“Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrated, a promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears.”

IV. THE CASE LAW IN SUPPORT OF THE  
DOCTRINE SINCE 1932

The doctrine now had the prestige afforded by its inclusion in the *Restatement of Contracts*, and soon was to have the benefit of a twenty-year period of depression, attempts at recovery, global war, rationing, allocations, price control, and conflict in Korea—a climate presumably favorable to the growth of a view that contract rights and duties should give way when unexpected events shatter the hopes and plans of one of the contracting parties. All that was needed to make the doctrine an established part of the American law was that it should be accepted by the American judiciary.

In order that the reader may see what happened, all of the decisions and dicta since 1932 in support of the doctrine, which have been found, will be presented herewith, in five subsections.

a) Four decisions which discharged a frustrated party, expressly on the authority of the doctrine or Section 288.

*Johnson v. Atkins*:<sup>21</sup> a contract for the sale of copra to be delivered to the buyer in Colombia—Colombia later forbade the importation of copra—buyer discharged.

*Ask Mr. Foster Travel Service, Inc. v. Tauck Tours, Inc.*:<sup>22</sup> contract under which defendant was to pay plaintiff for distributing literature which advertised defendant's business—eighteen months later the government forbade defendant from carrying on this business—defendant discharged.

*20th Century Lites, Inc. v. Goodman*:<sup>23</sup> lease of a made-to-order neon advertising sign to a restaurant proprietor for three years on monthly payments—eleven months later the government ordered a

<sup>21</sup> 53 Cal. App. 2d 430, 127 P. 2d 1027 (1942).

<sup>22</sup> 181 N.Y. Misc. 91, 43 N.Y.S. 2d 674 (S.Ct., 1943).

<sup>23</sup> 64 Cal. App. 2d 938, 149 P. 2d 88 (Superior Ct., Los Angeles County, 1944).

wartime blackout at night of all outside lighting—restaurant proprietor excused from making any more payments.

*Patch v. Solar Corp.*:<sup>24</sup> the contract granted an exclusive license to use a patented transmission in a washing machine manufactured by the licensee—the contract required the payment of a stated minimum annual royalty—fifteen years later the government forbade the manufacture of washing machines. The court declared that the licensee was thereby excused, at least for the time being, from making the royalty payments.

Here the copra buyer could not have the copra delivered to him in Colombia, the travel service could not carry on its business, the restaurant proprietor could not illuminate the neon sign at night, and the licensee could not utilize the patent: each of them had clearly suffered frustration-in-fact. Performance by each of these parties was merely the payment of money and no question of impossibility was involved. Since, in each case, the court relieved the frustrated party, and since the court relied upon the doctrine of frustration (and on Section 288 in the copra, neon sign, and washing machine cases), these four cases stand as decisions in support.

The other side of the picture is that there were only four such cases in twenty years, that none of the four was decided by a court of last resort, and that the three state court cases (copra, advertising literature, and neon sign) have probably been overruled, at least in spirit, by later decisions of the respective courts of last resort, in which severe frustration-in-fact existed, in which the courts mentioned or discussed the doctrine, and in which the courts denied the defense.<sup>25</sup>

b) Three decisions which discharged a frustrated party, but without mention of the doctrine or Section 288.

A renter of a neon sign was excused from paying the monthly charge when fire destroyed the building in which he carried on his business,<sup>26</sup> a tenant of a store was excused from paying rent when wartime priority orders prevented him from carrying on his oil burner business,<sup>27</sup> and a lessee who rented premises for a health resort was relieved of liability when it was learned that an existing

<sup>24</sup> 149 F. 2d 558 (C.C.A. 7th, 1945) cert. denied 326 U.S. 741.

<sup>25</sup> *Banks v. Puma*, 37 Cal. 2d 838, 236 P. 2d 369 (1951); *Lloyd v. Murphy*, 25 Cal. 2d 48, 153 P. 2d 47 (1944); *Mitchell v. Ceazan Tires, Ltd.*, 25 Cal. 2d 45, 153 P. 2d 53 (1944); *Kerr Steamship Co. v. Chartered Bank of India, Australia and China*, 292 N.Y. 253, 54 N.E. 2d 813 (1944); *Mohrmann v. Kob*, 291 N.Y. 181, 51 N.E. 2d 921 (1943).

<sup>26</sup> *Claude Neon Federal Co. v. Meyer Bros., Inc.*, 150 So. 410 (La. App., 1933).

<sup>27</sup> *Signal Land Corp. v. Loecher*, 35 N.Y.S. 2d 25 (N.Y. City Ct., 1942).

zoning ordinance forbade such a use.<sup>28</sup> Each of these three parties suffered frustration-in-fact and the three cases therefore stand as decisions in support of the doctrine. On the other hand, none of the courts was of last resort and none mentioned the doctrine or Section 288. Also the oil burner case is the only unreversed case found in the United States, which discharged the liability for rent of a tenant whose business was disturbed by World War II governmental orders. Furthermore, both the oil burner and health resort cases have probably been overruled, in spirit, by two decisions of the Court of Appeals of New York in which severe frustration-in-fact existed and in which the court mentioned, but did not apply, the doctrine.<sup>29</sup>

c) One decision which invalidated a real property restriction on the authority of Section 288.

*Osius v. Barton*:<sup>30</sup> a 1921 deed of land on the ocean at Miami Beach contained a restriction limiting the use of the land to single family dwellings. Later the land took on a commercial character, and the owner attempted to make a commercial use thereof. The court refused to enjoin such commercial use, declaring that equity would not enforce a restriction where, by reason of a change in the character of the neighborhood, it would be "oppressive and inequitable" to do so, and going on to say that this result may be said to rest upon the doctrine of "frustration of contractual object" which has just been "restated as a part of the common law" in *Restatement of Contracts* Section 288. The result reached by the Florida court is certainly supported by the authorities, but they employ real property and equity principles, and make no mention of the doctrine of frustration.<sup>31</sup>

This is believed to be the only case in history in which an American court of last resort has rested its decision expressly on the doctrine of frustration or Section 288.

d) Thirty-seven cases in which the court, in an obiter dictum, mentioned Section 288 or the doctrine of frustration.

<sup>28</sup> *Mariani v. Gold*, 13 N.Y.S. 2d 365 (S.Ct., 1939).

<sup>29</sup> *Kerr Steamship Co. v. Chartered Bank of India, Australia and China*, 292 N.Y. 253, 54 N.E. 2d 813 (1944); *Mohrmann v. Kob*, 291 N.Y. 181, 51 N.E. 2d 921 (1943).

<sup>30</sup> 109 Fla. 556, 147 So. 862 (1933). In later cases, the Florida court spoke of frustration of the object or effect of the restrictions, but gave no other indication that it had the contract doctrine in mind: *Dade County v. Thompson*, 146 Fla. 66, 200 So. 212 (1941); *Barton v. Moline Properties, Inc.*, 121 Fla. 683, 164 So. 551 (1935).

<sup>31</sup> Rest., Property § 554, Comment c, Illustration 1 (1944); 2 American Law of Property § 9.22 (1952); Clark, Real Covenants and Other Interests Which "Run with Land", 184-186 (2d ed., 1947).

These are cases where the court mentioned Section 288 or the doctrine of frustration, but based its decision on other grounds. In some the court said that the language of the contract controlled the decision, in others there was impossibility, in others the court described as untenable an argument of counsel that the doctrine was applicable, and in others the court just said that the doctrine did not apply to the facts of the case at hand. Whatever the court had to say about the doctrine was not necessary to the decision of the case and therefore stands as obiter dictum, and the most that these cases can be said to contribute to the support of Section 288 or the doctrine is that they show that the court in each case knew of its existence. Nine of the cases mentioned Section 288,<sup>32</sup> while the other twenty-eight mentioned the doctrine of frustration but not Section 288.<sup>33</sup>

<sup>32</sup> In re Laclede Gas Light Co., 57 F. Supp. 997 (E. D. Mo., 1944) aff'd 151 F. 2d 424 (Court followed exact language of the contract); El Rio Oils (Canada) Ltd. v. Pacific Coast Asphalt Co., 95 Cal. App. 2d 186, 213 P. 2d 1 (1949) cert. denied 340 U.S. 850 (1950) (Court held that case was one of subjective impossibility, and said that Section 288 was not in point); Autry v. Republic Productions, Inc., 30 Cal. 2d 144, 180 P. 2d 888 (1947) (main ground of decision was that contract had expired, and court said that doctrine of frustration was not applicable); Aronson v. Gibbs-Inman Co., 283 Ky. 107, 140 S.W. 2d 806 (1940) (Court held that a clause in the contract authorized defendant to terminate it); Green v. Superior Oil Co., 59 So. 2d 100 (Miss., 1952) (Court said that argument of counsel, based on Section 288, was not valid); Edwards v. Leopoldi, 20 N.J. Super. 43, 89 A. 2d 264 (1952) petition for certification denied 10 N.J. 347, 91 A. 2d 671 (Court said that the doctrine of frustration was not applicable in a labor union controversy involving the construction of a local's charter); Petaccia v. Gallian, 16 N.J. Super. 427, 84 A. 2d 748 (1951) (Court dismissed complaint, but suggested that plaintiff's counsel consider whether plaintiff had a cause of action under Section 288); Farrell v. Third National Bank in Nashville, 20 Tenn. App. 540, 101 S.W. 2d 158 (1936) (Settlor of trust benefiting her brother was permitted to revoke her trust when her brother broke his contractual promise to create a trust benefiting her); Van Tassell v. Lewis, 222 P. 2d 350 (Utah, 1950) (Dissenting opinion cites Section 288).

<sup>33</sup> Tillman v. National City Bank of New York, 118 F. 2d 631 (C.C.A. 2d, 1941) cert. denied 314 U.S. 650 (action barred by Statute of Limitations); Vernon Lumber Corp. v. Harcen Construction Co., 60 F. Supp. 555 (E. D. N. Y., 1945) aff'd 155 F. 2d 348 (1946) (an impossibility situation); Goldhill Trading & Shipping Co. v. Caribbean Shipping Co., 56 F. Supp. 31 (S. D. N. Y., 1944); Long Island Structural Steel Co. v. Schiavone-Bonomo Corp., 53 F. Supp. 505 (S. D. N. Y., 1943) aff'd 142 F. 2d 557 (1944) (impossibility by government order); Murphy v. North American Co., 24 F. Supp. 471 (S. D. N. Y., 1938) modified 106 F. 2d 74 (1939) (a question of impossibility); Glens Falls Indemnity Co. v. Perscallo, 96 Cal. App. 2d 799, 216 P. 2d 567 (1950) (an impossibility situation); Meherin v. Meherin, 93 Cal. App. 2d 459, 209 P. 2d 36 (1949); Browne v. Fletcher Aviation Corp., 67 Cal. App. 2d 855, 155 P. 2d 896 (1945) (counsel unsuccessfully urged court to use doctrine to reform the contract); Wicker v. Hampton, 104 Fla. 400, 140 So. 202 (1932) (Court said that defendant had fully performed); London v. Jacobs, 77 Ga. App. 529, 48 S.E. 2d 781 (1948) (an action of trover); Crosby v. Baron-Huot Oil Co., 324 Ill. App. 651, 59 N.E. 2d 520 (1945) (lease clause permitted tenant to cancel); Berline v. Waldschmidt, 159 Kan. 585, 156, P. 2d 865 (1945) (lessee

e) Eight cases in which a ruling on a motion contains an obiter dictum concerning the doctrine of frustration.

In one of these cases the court merely entered an order directing arbitration,<sup>34</sup> and in the other seven the court denied summary judgment and ordered that the case proceed to trial.<sup>35</sup> In each case the court mentioned the doctrine in making its ruling on the motion, but such mention was not required by the ruling as made, and therefore stands as an obiter dictum. The cases contribute no more support to the doctrine than to show that the court, in each case, knew of the doctrine's existence.

The case law of the previous five subsections, plus the pre-*Restatement* case law earlier set forth, is all of the case law which has been found in the United States in support of the doctrine. It may be summarized as follows:

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of oil lands argued unsuccessfully that doctrine entitled him to an extension of the lease); *Mid-Continent Petroleum Corp. v. Barrett*, 297 Ky. 709, 181 S.W. 2d 60 (1944) (lease clause permitted tenant to cancel); *Pacific Trading Co. v. Louisiana State Rice Milling Co.*, 215 La. 1086, 42 S. 2d 855 (1949) (an impossibility situation); *Monite Waterproof Glue Co. v. Sawyer-Cleator Lumber Co.*, 234 Minn. 89, 48 N.W. 2d 333 (1951) (an impossibility situation); *Village of Minneota v. Fairbanks, Morse & Co.*, 226 Minn. 1, 31 N.W. 2d 920 (1948) (promisor discharged by temporary impossibility); *Orme v. Atlas Gas & Oil Co.*, 217 Minn. 27, 13 N.W. 2d 757 (1944) (lease clause permitted tenant to cancel); *In re Kramer & Uchitelle, Inc.*, 288 N.Y. 467, 43 N.E. 2d 493 (1942) (seller's performance became impossible by government order); *Syroma Realty Corp. v. Finkelstein*, 98 N.Y.S. 2d 908 (S.Ct., 1950) (an impossibility situation); *General Aniline & Film Corp. v. Bayer Co.*, 188 N.Y. Misc. 929, 64 N.Y.S. 2d 492 (S.Ct., 1946); *Henjes Marine, Inc. v. White Construction Co.*, 58 N.Y.S. 2d 384 (S.Ct., 1945); *Hamilton Rubber Mfg. Co. v. Greater New York Carpet House, Inc.*, 47 N.Y.S. 2d 210 (S.Ct., 1944) aff'd 269 App. Div. 681, 53 N.Y.S. 2d 954 (1945) (seller's performance impossible by government order); *Gunze Silk Corp. v. Charles Rudolph Corp.*, 266 App. Div. 541, 43 N.Y.S. 2d 175 (1st Dep't, 1943) (performance impossible by government order); *Application of Kahn & Feldman, Inc.*, 265 App. Div. 470, 39 N.Y.S. 2d 481 (1st Dep't, 1943) aff'd 290 N.Y. 781, 50 N.E. 2d 107 (dissenting judge mentioned doctrine); *Federated Textiles, Inc. v. Glamour Girl, Inc.*, 265 App. Div. 252, 38 N.Y.S. 2d 493 (1st Dep't, 1942) (an impossibility situation); *Dorsey v. Oregon Motor Stages*, 183 Ore. 494, 194 P. 2d 967 (1948); *Greek Catholic Congregation of Olyphant Borough v. Plummer*, 338 Pa. 373, 12 A. 2d 435 (1940); *Takahashi v. Pepper Tank & Contracting Co.*, 58 Wyo. 330, 131 P. 2d 339 (1942).

<sup>34</sup> *Petition of Prouvost Lefebvre of Rhode Island, Inc.*, 105 F. Supp. 757 (S. D. N. Y., 1952).

<sup>35</sup> *Gardiner Properties, Inc. v. Samuel Leider & Son, Inc.*, 279 App. Div. 470, 111 N.Y.S. 2d 88 (1st Dep't, 1952); *119 Fifth Avenue, Inc. v. Taiyo Trading Co.*, 190 N.Y. Misc. 123, 73 N.Y.S. 2d 774 (S.Ct., 1947) aff'd 275 App. Div. 695, 87 N.Y.S. 2d 430 (1949); *Neuberg v. Avery F. Payne Co.*, 37 N.Y.S. 2d 366 (S.Ct., 1942) reversed and motion for summary judgment denied 265 App. Div. 1052, 41 N.Y.S. 2d 195 (1st Dep't, 1943); *Jefferson Estates, Inc. v. Wilson*, 39 N.Y.S. 2d 502 (S.Ct., 1943); *Port Chester Central Corp. v. Leibert*, 179 N.Y. Misc. 839, 39 N.Y.S. 2d 41 (Westchester County Ct., 1943); *Canrock Realty Corp. v. Vim Electric Co.*, 179 N.Y. Misc. 391, 37 N.Y.S. 2d 139 (S.Ct., 1942); *Schantz v. American Auto Supply Co.*, 178 N.Y. Misc. 909, 36 N.Y.S. 2d 747 (S.Ct., 1942).

Forty-five cases in which the court mentioned the doctrine in an obiter dictum;<sup>36</sup>

Twenty-one lease cases (nineteen before 1932 and two after) which are in accord with the doctrine, but which made no mention of it, except that one of them quoted *Krell v. Henry* on the subject mainly of impossibility;<sup>37</sup>

Two non-lease cases which are in accord with the doctrine but which made no mention of it and which may have been decided without reliance upon it;<sup>38</sup>

Six lower appellate court decisions which expressly followed the doctrine,<sup>39</sup> of which five are from California and New York and may have been weakened in authority by later decisions contrary to the doctrine rendered by the Supreme Court of California and the Court of Appeals of New York;<sup>40</sup>

Six cases in which frustration-in-fact was present and in which the court mentioned the doctrine or cited *Krell v. Henry*, but where the decision was that the frustrated party remained bound by his promise as made;<sup>41</sup>

One decision which terminated a real property restrictive covenant on the authority of Section 288.<sup>42</sup>

It should be observed in particular that apparently no American court of last resort has ever decided a contracts case expressly in reliance upon the doctrine or Section 288.

The foregoing case law shows the lack of affirmative support for, or the non-acceptance of, the doctrine. Decisions in opposition, constituting the rejection of the doctrine, will be presented in the next section.

#### V. THE REJECTION OF THE DOCTRINE AS SHOWN BY DECISIONS IN OPPOSITION SINCE 1932

The rejection of the doctrine will be attempted to be shown by decisions in thirty-four cases since 1932, each of which makes some

<sup>36</sup> Cases cited notes 32, 33, 34, and 35 supra.

<sup>37</sup> Cases cited notes 4, 5, 6, 10, 27, and 28 supra; the exceptional case was *Virginia Iron, Coal & Coke Co. v. Graham*, 124 Va. 692, 98 S.E. 659 (1919).

<sup>38</sup> Cases cited notes 9 and 26 supra.

<sup>39</sup> Cases cited notes 7, 8, 21, 22, 23 and 24 supra.

<sup>40</sup> The cases are cited in note 25 supra and are discussed in the text infra.

<sup>41</sup> Cases cited note 11 supra.

<sup>42</sup> *Osius v. Barton*, 109 Fla. 556, 147 So. 862 (1933).

reference to Section 288 or to the doctrine of frustration, including thirteen decisions by the courts of last resort of ten states: California, Illinois, Kansas, Kentucky, Massachusetts, Missouri, Nebraska, New Jersey, New Mexico, and New York. Nineteen of the decisions are in lease cases, supporting the statement that the doctrine of frustration does not apply to leases; the other fifteen decisions involve various situations other than leases, showing what apparently has not been understood heretofore, namely, that the doctrine does not apply to non-lease cases either.

In each of the thirty-four cases one of the parties to the contract was affected by an unexpected event which did not render his performance impossible, but which did shatter his hopes and plans for benefits to himself from the contract, and which did subject him to a disappointment approaching or equaling or exceeding the disappointment suffered by the hirer in the *Coronation Cases*: in other words, in each of these cases one of the parties suffered frustration-in-fact. Furthermore, in each of these cases the court discussed or at least referred to the doctrine of frustration, but nevertheless held that the frustrated party must perform as he had promised, and thereby the court, in effect, held that the frustration-in-fact had no legal consequences, and, in effect, rejected the doctrine.

The lease cases will be presented in three subsections.

a) The World War II salesroom and filling station cases: the best known of the post-*Restatement* cases involving the doctrine of frustration are the World War II cases where a tenant of a salesroom or filling station sought to be relieved from the obligation to pay rent when governmental orders interfered with his business, usually by greatly restricting the amount of merchandise available for sale. Although some of the earlier decisions of lower appellate courts did relieve the tenant, the current of decision soon changed, and by the end of the War, all of such cases had been reversed, with one exception,<sup>43</sup> and the uniform holding was that the tenant must pay the agreed rent.<sup>44</sup>

<sup>43</sup> *Signal Land Corp. v. Loecher*, 35 N.Y.S. 2d 25 (N.Y. City Ct., 1942) (selling and installing oil burners; no appeal was taken).

<sup>44</sup> *Lloyd v. Murphy*, 25 Cal. 2d 48, 153 P. 2d 47 (1944) (automobile salesroom); *Mitchell v. Ceazan Tires, Ltd.*, 25 Cal. 2d 45, 153 P. 2d 53 (1944) (tires); *Davidson v. Goldstein*, 58 Cal. App. 2d 909, 136 P. 2d 665 (Super. Ct., 1943) (tires); *Frazier v. Collins*, 300 Ky. 18, 187 S.W. 2d 816 (1945) (filling station); *Nickolopoulos v. Lehr*, 132 N.J.L. 461, 40 A. 2d 794 (1945) cert. denied 325 U.S. 876 (automobiles, radios, electrical appliances); *Wood v. Bartolino*, 48 N.M. 175, 146 P. 2d 883 (1944) (filling station); *Direct Realty Co. v. Birnbaum*, 46 N.Y.S. 2d 435 (N.Y. City Ct., 1944)



b) Non-salesroom lease cases arising out of World War II: the War produced a group of cases where the lessee of real property other than a salesroom or filling station suffered frustration-in-fact when a government order seriously interfered with his plans, but where he nevertheless was held to be bound by the terms of the lease. The following summaries will give an idea of the situations involved: a Japanese lessee of a hotel in the Japanese section of Los Angeles was held bound by the lease even though he and the other Japanese population were excluded from the city by governmental order;<sup>45</sup> a lessee remained liable for rent even though the government condemned its leasehold interest for a temporary period;<sup>46</sup> a lessee of an apartment for the use of himself and family remained liable for the rent even though he was interned as an enemy alien;<sup>47</sup> a lessee who had rented a building for the purpose of manufacturing sextants for the government remained liable on the lease even though the government cancelled the sextant contract;<sup>48</sup> and an affiliate of a department store, which had rented vacant land for twenty-one years with the privilege of erecting a department store or apartment building on the site, remained liable on the lease even though the War Production Board had denied its application to build a department store.<sup>49</sup>

c) Lease cases not arising out of World War II: the following summaries will give an idea of situations involved: a lessee of oil lands had promised to pay a royalty based on the true market value of the oil, and was held obliged to do so even though a rigged market caused it to receive a lower price;<sup>50</sup> a lessee of a grain elevator remained liable for the agreed rent even though changes in freight rates

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(radios); *Fisher v. Lohse*, 181 N.Y. Misc. 149, 42 N.Y.S. 2d 121 (S.Ct., 1943) (road-side restaurant); *Robitzek Investing Co. v. Colonial Beacon Oil Co.*, 265 App. Div. 749, 40 N.Y.S. 2d 819 (1st Dep't, 1943) (filling station); *Colonial Operating Corp. v. Hannan Sales & Service, Inc.*, 265 App. Div. 411, 39 N.Y.S. 2d 217 (2d Dep't, 1943) (automobile showroom); *Knorr v. Jack & Al., Inc.*, 179 N.Y. Misc. 603, 38 N.Y.S. 2d 406 (S.Ct., 1942).

<sup>45</sup> *Brown v. Oshiro*, 68 Cal. App. 2d 393, 156 P. 2d 976 (1945).

<sup>46</sup> *Leonard v. Autocar Sales & Service Co.*, 392 Ill. 182, 64 N.E. 2d 477 (1945) cert. denied 327 U.S. 804 (1946).

<sup>47</sup> *Kollsman v. Detzel*, 184 N.Y. Misc. 1048, 55 N.Y.S. 2d 491 (N.Y. City Ct., 1945).

<sup>48</sup> *State Mutual Life Assurance Co. v. Gruber*, 269 App. Div. 170, 54 N.Y.S. 2d 729 (1st Dep't, 1945).

<sup>49</sup> *Farlou Realty Corp. v. Woodsam Associates, Inc.*, 49 N.Y.S. 2d 367 (S.Ct., 1944) aff'd 294 N.Y. 846, 62 N.E. 2d 396 (1945).

<sup>50</sup> *Continental Oil Co. v. United States*, 184 F. 2d 802 (C.A. 9th, 1950).

had caused the business to become unprofitable;<sup>51</sup> and a lessee of a tearoom, which could not be used as such because the city building department had declared the premises to be unsafe, remained liable for the rent, she having allowed her store fixtures to remain.<sup>52</sup>

The importance of these nineteen lease cases may be diminished by the common law real property rule that the destruction of a building on the leased premises does not end the tenant's liability for rent. If a tenant remains liable for rent after the building has been destroyed, it would seem obvious that he should remain liable where he suffers some other and lesser casualty.

But the doctrine of frustration had its origin in a situation very similar to that of a lease: in the *Coronation Cases* no tenancy was created, but the hirer did agree to pay a sum of money for the use of a certain piece of real property for a certain time and for a purpose clear in his own mind. This is substantially what a lessee does in a lease for a month or a year or ten years. In the *Coronation Cases* and in the foregoing lease cases the laments of the hirer and lessee are identical: each is being asked to pay what he had agreed to pay for the use of certain real property, even though an unexpected event has caused the value of his use to diminish or disappear.

The doctrine certainly stands on weaker ground with these nineteen cases in opposition. A large part of what support the doctrine has ever had consists of the pre-*Restatement* lease cases, but after 1932, the lease cases do not support the doctrine: they oppose it.

The non-lease cases in opposition to the doctrine will be presented in twelve subsections, each of which will carry a title indicating the sort of a case where the frustration-in-fact occurred.

a) Purchase of goods: the three cases cited illustrate the typical situation where a buyer of goods suffers frustration-in-fact, that is, where an unexpected event causes the goods to lose their appeal to him, as did the premises in the *Coronation Cases* to the hirer. In the Massachusetts case, the place of delivery of the molasses was Puerto Rico, but the shortage of tankers and the submarine danger meant that the buyer could not move the molasses to Massachusetts where the buyer had its alcohol factory.<sup>53</sup> In the Nebraska case, a garageman

<sup>51</sup> *Megan v. Updike Grain Corp.*, 94 F. 2d 551 (C.C.A. 8th, 1938) cert. dismissed 305 U.S. 663.

<sup>52</sup> *140 West Thirty-Fourth Street Corp. v. Davis*, 158 N.Y. Misc. 470, 285 N.Y. Supp. 957 (S.Ct., 1936).

<sup>53</sup> *Baetjer v. New England Alcohol Co.*, 319 Mass. 592, 66 N.E. 2d 798 (1946).

contracted to buy automobile testing equipment in order to qualify under a recently enacted automobile testing law, but the law was never enforced and very soon repealed.<sup>54</sup> In the *Popper* case, a manufacturer of fireplace accessories contracted to buy glass coal, but the coal lost its appeal when wartime restrictions prevented him from obtaining the metals he needed.<sup>55</sup> In each of the cases the court held that the buyer remained under a duty to accept and pay for the goods.

b) Sale of goods: these two cases illustrate the typical frustration-in-fact suffered by a seller of goods when the market price of the goods rises sharply after the contract is made, and the exchange of his goods for the buyer's money thereby becomes severely unfavorable to the seller, just as the exchange of the hirer's money for the premises in the *Coronation Cases* became unfavorable to the hirer. In the case before the Court of Appeals,<sup>56</sup> involving rice, the contract price was about 4½¢ per pound, but after Pearl Harbor, the market price rose to about 7¢ per pound; in the Missouri case,<sup>57</sup> involving carloads of corn, the contract price was \$1.22½ per bushel, but after price ceilings were removed, the market price rose to \$2.35 per bushel. Each seller remained bound by the contract.

c) Patent license agreement: here the licensee had promised to pay a minimum royalty of \$3,600 per annum, and it suffered frustration-in-fact when a government order forbade the manufacture of the patented article. The court held that the licensee continued to be bound by the agreement.<sup>58</sup>

d) Sale of land: when the seller made the contract in question, he intended to build a new home and to move into it after closing the present deal. He suffered frustration-in-fact when the Veterans' Emergency Housing Act prevented him from building the new home, but the court held that he remained bound by the contract.<sup>59</sup>

e) Frustration-in-fact was suffered by a landlord, who had promised in February, 1946, to erect a building for a tenant and rent it to him for \$125 per month, when post-war shortages made such a build-

<sup>54</sup> *Kunkel Auto Supply Co. v. Leech*, 139 Neb. 516, 298 N.W. 150 (1941).

<sup>55</sup> *Popper v. Centre Brass Works, Inc.*, 180 N.Y. Misc. 1028, 43 N.Y.S. 2d 107 (N.Y. City Ct., 1943).

<sup>56</sup> *Pacific Trading Co. v. Mouton Rice Milling Co.*, 184 F. 2d 141 (C.A. 8th, 1950).

<sup>57</sup> *Ellis Gray Milling Co. v. Sheppard*, 359 Mo. 505, 222 S.W. 2d 742 (1949).

<sup>58</sup> *Ohio Citizens Trust Co. v. Air-way Electric Appliance Corp.*, 56 F. Supp. 1010 (N.D. Ohio, 1944).

<sup>59</sup> *Dorn v. Goetz*, 85 Cal. App. 2d 407, 193 P. 2d 121 (1948).

ing worth \$225 per month, but the tenant recovered the damages caused by the landlord's failure to erect and furnish the building.<sup>60</sup>

f) Hiring of a hall: the plaintiff hired Madison Square Garden for the night of May 11, 1941, for a concert sponsored by a certain Italian Federation, and suffered frustration-in-fact when the concert was cancelled because the State Department had revoked the Federation's registration on the ground that it was an agency of the Italian Government. Plaintiff failed in its action to recover the "rent" paid in advance.<sup>61</sup>

g) Purchase of a draft: plaintiff bought a draft for \$18,437 from defendant bank for the purpose of making a remittance to a creditor in Manila, and suffered frustration-in-fact when the Japanese occupation prevented plaintiff from delivering the draft to its creditor or otherwise making use of it. Plaintiff sought to rescind the purchase, return the draft to defendant bank, and recover the price paid. The Court of Appeals of New York said that the plaintiff's intention had been "frustrated" but held that it nevertheless was not entitled to rescind: the Court handled the case as if it merely involved the purchase of a thing which had lost its appeal to the buyer.<sup>62</sup>

h) Failure of a joint venture: the parties planned to buy houses and vacant lots and then move the houses to the lots, and the defendants went so far as to buy the vacant lots. The venture failed and the defendants suffered frustration-in-fact when the government cancelled the eviction notices to the tenants in the houses, but the Supreme Court of California held that the joint venture agreement was not discharged, and that the defendants must therefore account to the plaintiffs for the profits made when the defendants later resold the vacant lots.<sup>63</sup>

i) Charitable subscription: frustration-in-fact was suffered by a subscriber when the project toward which he had subscribed could not be completed because of increased costs, but the court held that the balance of his subscription must be paid.<sup>64</sup>

j) Separation agreement: a husband promised in a separation agree-

<sup>60</sup> *McCulloch v. Liguori*, 88 Cal. App. 2d 366, 199 P. 2d 25 (1948).

<sup>61</sup> *United Societies Committee v. Madison Square Garden Corporation*, 186 N.Y. Misc. 516, 59 N.Y.S. 2d 475 (S.Ct., 1946).

<sup>62</sup> *Kerr Steamship Co. v. Chartered Bank of India, Australia and China*, 292 N.Y. 253, 54 N.E. 2d 813 (1944).

<sup>63</sup> *Banks v. Puma*, 37 Cal. 2d 838, 236 P. 2d 369 (1951).

<sup>64</sup> *In re Metz' Estate*, 262 App. Div. 508, 30 N.Y.S. 2d 502 (1st Dep't, 1941).

ment to make monthly payments to his wife, with the reservation that the payments would end if his wife gave him grounds for, and if he obtained, a divorce. Soon after, the wife commenced to live in adultery, and later the husband became insane. The present action was brought by the wife to recover unpaid monthly payments, and the husband's committee counterclaimed for divorce on the ground of adultery. The court held that the committee could not maintain the divorce action, but that the wife should nevertheless recover the payments.<sup>65</sup> The frustration-in-fact which occurred here was of an unusual type: in the separation agreement the husband in effect promised and bound himself to pay the monthly sums so long as his wife remained chaste, and in effect his payments were exchanged for her chastity—his wife then failed to remain chaste, but his insanity prevented him from obtaining the divorce and ending the payments. Performance by the husband of his promise continued to be possible, but he did not get the benefit to himself which he had in mind when he made the contract—just as the hirer in the *Coronation Cases* failed to get the contemplated benefit to himself. The dissenting opinion quoted Section 288 and argued that the frustration existed. It is considered that the dissenting opinion was right in arguing that the frustration existed, and that therefore the majority holding constitutes a decision in opposition to the doctrine.

k) Employment of an attorney: frustration-in-fact was suffered by a client, who had engaged attorneys to secure federal rent increase certificates, when a local rent control law was enacted requiring additionally a certificate of the local rent commission. The court held that the client must pay the agreed attorneys' fees, even though the client might not be able to collect increased rents.<sup>66</sup>

l) Road building contract: frustration-in-fact was suffered by state road contractors when the outbreak of World War II increased their costs and the difficulties of performance and produced a great amount of more profitable war business, but the Supreme Court of Kansas held that they must nevertheless perform their state contracts as agreed.<sup>67</sup>

This completes the presentation of the thirty-four cases decided since 1932 where the court made a decision in opposition to the doc-

<sup>65</sup> *Mohrmann v. Kob*, 291 N.Y. 181, 51 N.E. 2d 921 (1943).

<sup>66</sup> *Wald v. Lenox Ave. & 140th Street Corp.*, 197 N.Y. Misc. 773, 94 N.Y.S. 2d 793 (N.Y. Munic. Ct., 1950) aff'd 198 N.Y. Misc. 527, 102 N.Y.S. 2d 200 (S.Ct., 1950).

<sup>67</sup> *Freeto v. State Highway Commission*, 161 Kan. 7, 166 P. 2d 728 (1946).

trine. In each one frustration-in-fact existed and in each one the court had the doctrine in mind, and each one therefore stands as a case in point and contrary to the doctrine: together they may be considered to establish that the doctrine has not merely not been accepted but in fact has been rejected.

In fairness to the doctrine, however, it should be explained that the judges in these cases did not in terms base their decisions upon the unworthiness of the doctrine, but instead they declared in effect that it was not applicable to the facts of the case at hand. The judicial language most closely approaching a disapproval of the doctrine is found, not unexpectedly, in the opinion of the Supreme Judicial Court of Massachusetts previously mentioned:

Even if we were to go beyond the alleged defence of impossibility of performance on the part of the defendant and were to consider the case with reference to the modern doctrine of so called 'frustration,'<sup>68</sup> a doctrine little discussed as yet in this Commonwealth, the result would be the same. Whatever may be the extent and validity of that doctrine, and apart from any other reasons for not applying it in this case, a contracting party cannot be excused where the only 'frustration' consists in the fact that known risks assumed by him have turned out to his disadvantage.<sup>69</sup>

#### VI. CONCLUSION

The doctrine of frustration originated in the *Coronation Cases* of 1903 and 1904, but received very little judicial support in the United States during the thirty year period which intervened between them and the promulgation of the *Restatement of Contracts* in 1932.

At the time when the *Restatement* was being written, the case law did not justify the recognition of the doctrine as a part of the American common law, but those responsible for the *Restatement* nevertheless included it as Section 288. The doctrine's weakness at the time was shown by its omission from the early draft of the chapter where it finally appeared.

The twenty years which followed the *Restatement's* promulgation included depression and war and presented many opportunities for urging the application of the doctrine, but acceptance still has not occurred: during the entire fifty years of its history, it is believed, no

<sup>68</sup> "This doctrine is explained in Williston on Contracts, Rev. Ed., § 1954. See Krell v. Henry, [1903] 2 K.B. 740; The Claveresk, 2 Cir., 264 F. 276, 282-284; Field v. Woodmancy, 10 Cush. 427."

<sup>69</sup> Baetjer v. New England Alcohol Co., 319 Mass. 592, 602, 66 N.E. 2d 798, 803 (1946).

American court of last resort has based its decision, in litigation involving a contract, expressly on the doctrine of frustration or Section 288 of the *Restatement of Contracts*.

Instead of being accepted, the doctrine has been rejected, as is seen in the fact that the courts of last resort of ten states, in a variety of cases of frustration-in-fact, have rendered decisions contrary to the doctrine. The decisions referred to are squarely in point because the opinion in each case refers to the doctrine and thereby demonstrates that it was not overlooked in the reasoning.

The doctrine of frustration is not likely to be needed by anyone except a party whose contract was unwisely made or inadequately drafted. Its rejection means that careful thought in the making and drafting of a contract continues to be necessary.