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Marcia J. Speziale

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*Marcia J. Speziale**

INTRODUCTION

In the nineteenth century, when the individual was all, Herbert Spencer was in vogue, and the best government imposed few restraints, Americans held high this standard: Freedom of Contract.[1] Rarely would a court fail to enforce the literal terms of a private agreement, even in the face of unforeseen circumstances. Judicial heads would bow to the exact terms of a contractual arrangement as a manifestation of individual wills and parties were held to their promises "at all events."[2] Little room was left for judges to innovate or interfere. In the twentieth century, courts still act in the name of contract "freedom," but they have taken a more active role in

* A.B., Trinity College; J.D., University of Connecticut. The author is currently a Teaching Fellow at Stanford Law School and will receive a J.S.M. from Stanford in 1979.

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1. If there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts, when entered into freely and voluntarily, shall be held good and shall be enforced by courts of justice.

Sir George Jessel in Printing Co. v. Sampson, L.R. 19 Eq. 462 (1875), *quoted in* Diamond Match Co. v. Roeber, 106 N.Y. 473, 482 (1887). *See also* Hall Mfg. Co. v. W. Steel & Iron Works, 227 F. 588 (7th Cir. 1915); Styles v. Lyon, 87 Conn. 23, 86 A. 564 (1913); Harbison-Walker Refractories Co. v. Stanton, 227 Pa. 55 (1910).

2. Conlen, *Intervening Impossibility of Performance as Affecting the Obligations of Contracts*, 66 U. PA. L. REV. 28, 29-31 (1917).

contract "interpretation": deciding what the parties meant by asking what they would have provided had they foreseen the contingency; finding what results were within the contemplation of the parties; implying conditions because the parties must have meant to; reallocating the burdens wrought by a surprise outcome, based upon considerations of policy and justice.[3] Interpretation (deviation from express contractual terms) signaled a new active judicial function: injection of socio-economic and political ideas into contract litigation. The turn of the century, then, was the pivotal point in a movement from strict Freedom of Contract to a less literal version of that ideal; judges joined in a general overthrow of the laissez-faire ideology and developed contract theories in the process.

The Nineteenth Century and Freedom of Contract

There are times when interrelations and connections between political philosophy, literary conventions, economic theory, and law are more pronounced than at other times.[4] This is true of the late nineteenth and early twentieth centuries, when a laissez-faire spirit predominated, finding expression in various avenues of thought and in many aspects of life. In a 1921 article, *Freedom of Contract,* Samuel Williston wrote:

> The theorizing in metaphysics, politics and economics, could not fail to have its effect on the law, and the law of contracts was a field in which its application was not difficult. Indeed it was a corollary of the philosophy of freedom and individualism that the law ought to extend the sphere and enforce the obligation.[5]

And so it has been said that in the nineteenth century "contract law reached its zenith . . . as the legal underpinning of a dynamic and expanding free enterprise economy."[6] "'The market took on legal

3. There has, in effect, been a "socialization" of the law of contract, representing in part "an expansion of the scope of social duty implicit in the law of civil obligation at the expense of private autonomy and individual freedom of contract." Comment, *Once More into the Breach: Promissory Estoppel and Traditional Damage Doctrine,* 37 U. Chi. L. Rev. 559, 576 (1970).

4. Williston, *Freedom of Contract,* 6 Cornell L.Q. 365 (1921).

5. *Id.* at 367.

6. Farnsworth, *The Past of Promise: An Historical Introduction to Contract,* 69 Colum. L. Rev. 576, 599 (1969). *See also* G. Gilmore, The Death of Contract 142 n.247 (1974).

definition mainly in the law of contract, and quite naturally in the temper of the time the law of contract dominated the nineteenth century legal order.'"[7] Freedom of Contract was a watchword of the era, and so was judicial non-intervention: the freedom of the parties to compose the terms of their agreement would be abridged if judges were to go beyond enforcement of exact words.[8] And when the economic picture, the prevailing political philosophy, and the national temper changed, there were concomitant changes in the law of contract. That is why contract cases from the turn of the century—particularly cases about unforeseen circumstances—reveal so much about the chameleon concept of Freedom of Contract and its meaning in America.

Impossibility cases are a special breed of contract law. They involve the situation where the parties did not expressly provide in their agreement for a contingency that subsequently rendered performance impossible. Early in the nineteenth century, such a contingency was no ground for an exception to the contract. In the name of Freedom of Contract the exact terms were upheld, on the theory that the written contract was an expression of the mutual intention of the parties.[9] But mutual intent is not always best ho-

7. Farnsworth, *supra* note 6, at 599, *quoting* J. HURST, LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 1836-1915, at 285 (1964). *See also* A. MILLER, THE SUPREME COURT AND AMERICAN CAPITALISM 19 (1968); F. KESSLER & G. GILMORE, CONTRACTS, CASES AND MATERIALS 2-5 (1974); Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract,* 43 COLUM. L. REV. 629, 640 (1943).

8. But few words have exact meanings, and literal enforcement does not necessarily effectuate the parties' intent. Judicial literalness, in the end, seems to reflect a laissez-faire ideology among judges.

> The early common-law view that a party is legally obligated to perform his contract notwithstanding a drastic change of conditions between the time the contract was made and the time that performance was due reflects a high-water mark of freedom of contract of a sort. Parties to an agreement were free to make such promises as they wished, but they did so at the peril of strict enforcement by the courts despite a later unanticipated change of circumstances. The theory was that since the parties had freely made their contract, they must perform it. This "let the chips fall where they may" philosophy is embodied in the ancient Latin maxim *pacta sunt servanda,* i.e., contracts must be performed. Enforcement was always, in theory at least, tempered by the necessity of first interpreting the promise before enforcing it. But in the early law the canons of interpretation of language were literal and rigid, as though words had a single and constant meaning irrespective of the time and context in which they were used.

H. SHEPHERD & B. SHER, LAW IN SOCIETY 450 (1960). *See also* H. HAVIGHURST, THE NATURE OF PRIVATE CONTRACT 95 (1961); Kessler & Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study,* 77 HARV. L. REV. 401, 409 (1964).

9. The general rule was that:

nored by literalism; this theory had another source and served another function: judges steeped in laissez-faire were unwilling to meddle with contracts by bringing in policy considerations. They thereby injected their own "hands off" philosophy into contract decisions.[10] Then there was a "virtual *volte-face* in the law": an exceptive doctrine excusing non-performance of impossible contractual obligations budded and bloomed.[11] Impossibility cases from the turn of the century yield a graphic depiction of law developing; they beat with the pulse of America then. For the doctrine of impossibility has been like a cartilaginous plate persisting between the shaft of bone and its extremities, thickening in conjunction with the bone until entirely replaced by it at adult length.[12]

> To realize that "impossibility" is a word with a background of fixed legalistic responses, and to understand and appreciate its use, by the court and the lawyers alike, as a dialectic instru-

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> [O]ne, who makes a positive agreement to do a lawful act, is not absolved from liability for a failure to fulfill his covenant by a subsequent impossibility of performance . . ., *because he voluntarily contracts* to perform it without any reservation or exception, which, if he desired, he could make in his agreement . . . . [W]hile courts may enforce, they may not avoid, such contracts . . . .

Berg v. Erickson, 234 F. 817, 820 (8th Cir. 1916) (emphasis added). *See also* St. Joseph Hay & Feed Co. v. Brewster, 195 S.W. 71 (1917); Harbison-Walker Refractories Co. v. Stanton, 227 Pa. 55, 63 (1910); Mitchell v. Hancock County, 91 Miss. 414, 45 S. 571, 572 (1908); Cutcliffe v. McAnnally, 88 Ala. 507, 7 S. 331 (1890); Lawing v. Rintles, 97 N.C. 350, 2 S.E. 252, 254 (1887); Adams v. Nichols, 36 Mass. 275, 276 (1837).

> In the nineteenth century the conception of liability as resting on intention was put in metaphysical rather than ethical form. Law was a realization of the idea of liberty, and existed to bring about the widest possible individual liberty. Liberty was the free will in action. Hence it was the business of the legal order to give the widest effect to the declared will and to impose no duties except in order to effectuate the will or to reconcile the will of one with the will of others by a universal law.

R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 79 (rev. ed. 1954). The important institution, Pound explained, "was a right of free exchange and free contract, deduced from the law of equal freedom as a sort of freedom of economic motion and locomotion." *Id.* at 149.

10. Two points can be made here: 1) while literal reading of contracts is consistent with laissez-faire, it does not necessarily best effect the intention of the parties. 2) A judge who tries to keep his own ideas out of people's contracts may in fact be expressing a personal socio-political philosophy of laissez-faire.

11. Comment, *Supervening Impossibility of Performance as a Defense*, 5 FORDHAM L. REV. 322, 323 (1936). *See also* Rothschild, *The Doctrine of Frustration or Implied Condition in the Law of Contracts*, 6 TEMPLE L.Q. 337, 339 (1932); Page, *The Development of the Doctrine of Impossibility of Performance*, 18 MICH. L. REV. 589, 613-14 (1920).

12. Smith, *Some Practical Aspects of the Doctrine of Impossibility*, 32 ILL. L. REV. 672, 684 n.54 (1938).

> ment which promotes the acceptance and unfolding of new concepts demanded by a developing social order, is to recognize its function and to sympathize with the doctrine in all of its cloudy vigor.[13]

We shall monitor judicial responses to impossibility situations in the late nineteenth and early twentieth centuries,[14] to chart the development of contract law as a reflection of those times, and to see what became of the notion of Freedom of Contract.

The Strict Application of Freedom of Contract

An 1859 New Jersey case[15] displays the literal version of Freedom of Contract in full force. Evernham and Hill had covenanted to "build, erect and complete"[16] a school-house on a particular lot for a sum of money. The first time up, the partially erected building could not stand against a gale of wind; the second time, it fell due to a "latent defect in the soil."[17] When the builders refused to try

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13. *Id.* at 684.

14. "Freedom of Contract" typically evokes thoughts of Lochner v. New York, 198 U.S. 45 (1905), and other substantive due process cases involving individual liberty under the fourteenth amendment. Allegeyer v. Louisiana, 165 U.S. 578 (1897), is also cited in this connection. *See* Miller, *supra* note 7, at 60. Our focus, however, will be limited to cases that rarely reached the United States Supreme Court. Traditional constitutional histories generally magnify atypical "great cases" that are "unrepresentative either as intellectual history or as examples of social control." M. Horowitz, The Transformation of American Law 1780-1860, at xii (1977).

> Indeed, constitutional law in America represents episodic legal intervention buttressed by a rhetorical tradition that is often an unreliable guide to the slower (and often more unconscious) processes of legal change in America.
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> But another, more crucial, distortion has been introduced by the excessive equation of constitutional law with "law" . . . . [T]he study of constitutional law focuses historians on the nay-saying function of law and, more specifically, on the rather special circumstances of judicial intervention into statutory control. Yet judicial promulgation and enforcement of common law rules constituted an infinitely more typical pattern of the use of law throughout mot of the nineteenth century. By thus focusing on private law we can study the more regular instances in which law, economy, and society interacted.

Id. The thought is that dusting off Regional Reporters from the turn of the century will yield greater understanding of contract theories than pouring through casebooks on Constitutional Law.

15. Superintendent and Trustees of Public Schools of Trenton v. Bennett, 3 Dutcher 513, 72 Am. Dec. 373 (1859).

16. *Id.*

17. *Id.*

again, the Superintendent and Trustees of the Public Schools of Trenton sued to recover several pre-paid installments.

Justice Whelpley considered the question of where the loss should fall and applied the "firmly established" rule of *Paradine v. Jane:*[18]

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18. [1647] Aleyn, 26, 82 Eng. Rep. 897. A strict interpretation of the Paradine case has often led to "absurd results" as in Hills v. Sughrue, [1846] 15 M. & W. 252, where the owner of a ship was held liable for breach of a covenant to load guano at Ichaboe, even though his failure to so load was due to a lack of guano in all of Ichaboe. Conlen, *supra* note 2, at 30.

Paradine v. Jane involved a suit in debt, where the plaintiff claimed that three years' back rent was owing. The defense was that a German prince—Rupert, "an alien born, enemy to the King and kingdom,"—had invaded the realm with a hostile army, forcibly seized possession of the leasehold, and expelled the lessee. The court upheld the plaintiff's demurrer "for though the whole army had been alien enemies, yet he ought to pay his rent."

> And this difference was taken, that 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. As in the case of waste, if a house be destroyed by tempest, or by enemies, the lessee is excused . . . . [B]ut 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. And therefore if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it.

[1647] Aleyn, 26, 82 Eng. Rep. at 897. The leasehold arrangement gave rise to obligations at law, which might be discharged by supervening occurrences; however, the duty to pay rent grew out of a covenant between the parties and was thus indissoluble.

It has become something of a sport to pierce the obiter dictum veil of Paradine:

> [T]his well-known case, which has been cited innumerable times is not a case of impossibility of performance at all since the performance of the defendant (paying the rent) was not impossible. Rather, it was a case of frustration of purpose . . . . Yet, the language of the opinion . . ., has been inaccurately applied on occasion to cases involving impossibility. Thus . . . [it] . . . must be considered an unreliable precedent.

J. MURRAY, JR., CASES AND MATERIALS ON CONTRACTS 1017 (1969). *See also* Page, *supra* note 11, at 595-96; 6 A. CORBIN, CORBIN ON CONTRACTS § 1322 (1962); Krause v. Bd. of Trustees of School Town of Crothersville, 162 Ind. 278, 70 N.E. 264, 265 (1904).

Gilmore offers two interpretations of *Paradine*. 1) The seventeenth century court decided the case on a procedural ground, not allowing the tenant to interpose his plea in the landlord's action for rent, but not foreclosing him from bringing an independent action against the landlord to recover damages resulting from his expulsion by Prince Rupert. *See* Monk v. Cooper, 2 Strange, 763, 93 Eng. Rep. 833 (K.B. 1723); 2) The court viewed the leasehold as a fully executed transaction: the landlord had conveyed the leasehold interest to the defendant tenant, who then bore the risk of loss or destruction like a buyer of chattels after delivery. G. GILMORE, THE DEATH OF CONTRACT 45-46 (1974).

Whatever the true intent of the Paradine court, the case had often been cited for the proposition "if a contract was made to perform an act at a future time, and no exception stated, persons so contracting would be liable for non-performance even though an intervening vent [*sic*]—even an act of God—prevented performance . . . ." Conlen, *supra* note 2, at 29. This development of *Paradine* into a principle of absolute contract reflects the "individualistic philosophic" notions of the eighteenth and early nineteenth centuries. Smith, *supra* note 12, at 672-73. *See* SHEPHERD & SHER, *supra* note 8, at 452, where the editors state

one who takes on a contractual duty is bound to make it good, "notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract . . . ."[19] The court endorsed this view, regardless of its occasional harsh or apparently unjust results, for "it has its foundations in good sense and inflexible honesty. He that agrees to do an act should do it unless absolutely impossible."[20] Because people are free to write contracts as they wish, they should not later be excused from performance by an unprovided-for contingency. Justice Whelpley therefore felt that he could do no more than take the contract at face value:

> [T]he law will not insert, for the benefit of one of the parties, by construction, an exception which the parties have not, either by design or neglect, inserted in their engagement. If a party, for sufficient consideration, agrees to erect and complete a building upon a particular spot, and find all the materials and do all the labor, he must erect and complete it, because he has agreed to do so.[21]

The Justice found no impossibility of performance under these facts and shunning "nice philosophical disquisitions, whether the owner or the builder shall bear the loss,"[22] held that the defense of the builders had been properly overruled. The loss was to be borne by the defendants, guarantors of Evernham and Hill.

Strict Freedom of Contract was also championed in *School District No. 1 v. Dauchy*,[23] decided by the high court of Connecticut in

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that the *Paradine* "rule" accurately represents the prevailing legal philosophy of that time: contracting parties alone could provide for subsequent changes of circumstances that would excuse performance; reviewing courts should treat contractual terms as absolute.

19. 72 Am. Dec. at 374.

20. *Id.* at 375.

21. *Id.* at 376. The effect of such a ruling is that the builder would pay damages for not erecting and completing the building. A specific performance decree in such a case was unlikely, and if one were issued, the parties would probably settle the case on the basis of it.

22. *Id.* at 377.

23. 25 Conn. 530, 68 Am. Dec. 371 (1857).

In THE DEATH OF CONTRACT, Gilmore speaks of a "series of American cases" involving building or construction contracts "in which the recurrent situation was that the structure, having been almost completed, was blown down or burnt down or sank into the mud . . . ." GILMORE, *supra* note 18, at 77-78.

Citing *Nichols, Dauchy, Bennett,* and *Stees,* he explains that these were all pre-insurance cases, with the owner suing the builder. *Id.* at 78 & 138 n.200.

> The apparent meaning of the cases is that the unhappy builder must go on building, no matter how many times the structure collapses, all for the originally agreed contract

1857. A school-house being constructed under a contract similar to Bennett's was struck by lightning when nearly completed, and fire consumed it. The contractor rejected the school district's offer of additional time and refused to rebuild, thus incurring a suit in assumpsit. A jury verdict for the defendant was overturned.

The court noted that only in a few instances were departures from exact contractual terms allowable;[24] contractors bind themselves absolutely and unqualifiedly. Even an Act of God would not excuse performance without judicial scrutiny:

> The act of God will excuse the not doing of a thing where the law had created the duty, but never where it is created by the positive and absolute contract of the party. The reason of this distinction is obvious. The law never creates or imposes upon any one a duty to perform what God forbids or what he renders impossible of performance, but it allows people to enter into contracts as they please, provided they do not violate the law.[25]

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price—or pay damages for not doing so. On closer examination, however, it turns out that all that was involved in the cases was the recovery of down payments or progress payments made by the owner in course of construction—a result which might be described as a form of loss-sharing.

Id. at 78. Does insurance then explain these cases? Certainly it did not soften the strict Freedom of Contract judicial rhetoric, nor the impact of this hard-line language on builders about to enter contracts.

24. Justice Ellsworth gave the examples of a marriage agreement which was impliedly conditioned upon continued life for the enfianced couple, or the promise to deliver a horse at a day in the future which was impliedly conditioned on the horse still being alive. The Justice saw these cases as instances where the intention of the parties is "presumed or inferred" from the situation or from the subject matter, rather than as exceptions to the strict rule of literal adherence to contract. 25 Conn. at 536, 68 Am. Dec. at 372.

25. *Id.*

Matousek v. Galligan, 104 Neb. 731, 178 N. W. 510 (1920) offers this definition: An "'act of God' is a part of every contract," and "must be an act or occurrence so extraordinary and unprecedented that human foresight could not foresee or guard against it." *Id.* at 510. In Meriwether v. Lowndes County, 89 Ala. 362 (1889), counsel for the defendant argued that a given flood was an act of God because it was sudden, extraordinary, unexpected and "'greater and more destructive than had ever before happened in the memory of the oldest inhabitant.'" *Id.* at 365. Some courts have distinguished act of God from unavoidable accidents. *See* Berg v. Erickson, 234 F. 817 (8th Cir. 1916).

According to Williston: "The effect of the destruction of the subject-matter of the contract, or of the means of performance, is the same when caused by the voluntary or malicious act of a third person as when caused by act of God." 18 S. WILLISTON, WILLISTON ON CONTRACTS § 1936 (3d ed. 1978). *See* Page, *supra* note 11, at 592-93 (courts have ignored the distinction between human agency and act of God wherever the distinction would have produced any legal consequences).

Thus, people were free to bind themselves by inviolate obligations; no legal duty was any stronger. The court held, under the authority of *Paradine v. Jane,* that parties to a contract must perform "notwithstanding any accident by inevitable necessity."[26]

In *Stees v. Leonard*[27] the banner of Freedom of Contract was likewise unfurled. The defendants had agreed to erect, build and complete a three story business house on a particular spot, for a set price, by a certain date. The structure collapsed just when the de-

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Comment c to § 457 of the RESTATEMENT OF CONTRACTS says that the terms "act of God" and "vis major" (force majeure) are misleading when used in reference to ordinary contractual duties. Their use now is mainly in the law of carriers. Corbin has this to say:

> It may be that in former times men supposed themselves to be able to see the hand of the Almighty in the occurrences about them; today, the phrase is out of fashion as a mode of determining when to throw the risk upon a promisee, rather than a promisor. Other phrases, particularly in a foreign language, have also been used. A promisor has been said to be discharged in case the promised performance was prevented by *vis major* or by *force majeure,* depending upon a preference for Latin or for French. These phrases, too serve no useful purpose as a test of responsibility, although they are catchwords that may occasionally be convenient to describe the facts that lead a court to decide in favor of the promisor.

6 CORBIN ON CONTRACTS § 1324 (1962).

One court has suggested that we cannot hope for more than a fuzzy conception of act of God, noting that it is an event which the parties could not foresee or control, with a changing definition depending upon the nature and construction of the particular contract. Krause v. Bd. of Trustees of School Town of Crothersville, 162 Ind. 278, 70 N.E. 264, 265-66 (1904).

In St. Joseph Hay & Feed Co. v. Brewster, 195 S.W. 71 (1917), Justice Trimble set forth the general rule that those who make agreements are thereby bound regardless of unforeseen circumstances. As an exception to this "old and well-established" rule, he mentioned the situation where particular property is destroyed by "what is commonly called an act of God . . . . [T]hen the destruction of such property excuses performances." (Recall Justice Ellsworth's marriage and horse examples in *Dauchy*). Justice Trimble then went on to state, however, that it was not accurate to say that an unavoidable contingency had absolved the promisor from his obligation; rather it should be said that "the contract was not in reality an absolute contract binding him to performance under all circumstances, but only to perform under certain circumstances and conditions . . . ." *Id.* at 72. Justice Trimble and Justice Ellsworth seem to have been one on this matter, for in *Dauchy,* the Connecticut juror allowed that in some cases an act of God might "render" performance impossible—as when a lessee covenants to leave a wood in a good plight and the trees are blown down in a tempest, or when one covenants to serve another for seven years and dies before the expiration of the term. In both cases, said the Justice, performance is defeated by the act of God. But he could not resist adding: "I should rather say, because it is implied that the thing shall exist or life be prolonged, or else the contract of course can not be broken." 68 Am. Dec. at 373. To nineteenth century courts, flying the standard of Freedom of Contract and concerned with holding people to their promises, an act of God that would relegate a contract to the realm of impossibility was an extreme and extraordinary occurrence which was not at all likely to happen with any regularity.

26. 68 Am. Dec. at 374.

27. 20 Minn. 448 (1874).

sired height was attained. Rebuilt to the same height, once again it fell, whereupon the defendants abandoned the work and "refused to perform the contract."[28] A jury awarded the plaintiffs return of their progress payments and compensation for lost use of their lot and damage to their adjacent house. The spot was a quagmire, the soil loose, spongy, porous and soft, but that was unimportant to the jury or the court.

The Minnesota appellate court affirmed this jury verdict and enforced "the contract as the parties themselves have made it,"[29] stating that the law would not relieve persons from improvident contracts. Resting its decision on *Bennett* and *Dauchy,* the court held that draining the land (a necessary act for completion of the building) fell to the builders: "Whatever was necessary to be done in order to complete the building, they were bound by the contract to do."[30] Having been free to contract as they pleased, they could not later be heard to deny the absoluteness of their agreement, even to prevent extreme consequences from being visited upon them. Performance was not excused.

These three cases present Freedom of Contract as something sacred—a cherished ideal, which lent emotional fervor to judicial rhetoric. Freedom of Contract in the early nineteenth century, perhaps partially because of its sanctity, was also an inflexible rule of contract enforcement, extremely literal in application, often resulting in harsh[31] (sometimes absurd) consequences. At a time when "hands off" was the accepted official position of government, judges handled contracts almost mechanically—looking only to the words that the parties had chosen. This was, perhaps, not the best way to effectuate what the parties intended, but it was the approach most in keeping with the laissez-faire temper of the age—government and courts alike were to be held at bay. As the parties wrote their contracts, so were they bound; the terms of their agreements, having been freely chosen were to be strictly enforced in the name of Freedom of Contract.

28. *Id.* at 449.
29. *Id.* at 451.
30. *Id.* at 455.
31. *Id.* at 451.

The American Repair Doctrine

The celebrated case of *Butterfield v. Byron*[32] represents a counterpoint to the hard-line Freedom of Contract approach—the American Repair Doctrine. Byron agreed to "make, erect, and finish in a good substantial, and workmanlike manner, a three and one half story frame hotel"[33] by May 20, 1889. Butterfield agreed to pay $8,500 for the structure, and to do the grading, excavating, stonework, brickwork, painting, and plumbing. The time for completion was subsequently extended to June 10, 1889, but on May 25th a bolt of lightning struck the partially completed building, causing it to burn to the ground. Thereafter, no further work was done. Although Butterfield collected insurance to the tune of $6,914.08, he sued on the contract for breach. Verdict was directed in favor of Byron by the trial judge.

Justice Knowlton conceded that it was well-established that when one contracts to build a structure on the land of another, complete with labor and materials, there is no excuse from performance. However, when the building is not wholly the responsibility of the builder—"as where repairs are to be made on the property of another"—there is an implied condition that the building shall continue in existence: "the destruction of it without the fault of either of the parties will excuse performance of the contract, and leave no right of recovery of damages in favor of either against the other."[34] Because Byron had not agreed to build a complete house and furnish all the materials and labor, his contract was "of a very different kind."[35]

> Immediately before the fire, when the house was nearly completed, the defendant's contract, so far as it remained unperformed, was to finish a house on the plaintiff's land, which had been constructed from materials and by labor furnished in part by the plaintiff and in part by himself. He was no more responsible that the house should continue in existence than the plaintiff was. Looking at the situation of the parties at that time, it was like a contract to make repairs on the house of another. His undertaking and duty to go on and finish the work

32. 153 Mass. 517 (1890).
33. *Id.* at 518.
34. *Id.* at 519.
35. *Id.* at 528.

> was upon an implied condition that the house, the product of their joint contributions, should remain in existence. The destruction of it by fire discharged him from his contract.[36]

Accordingly, the court ruled that Butterfield could sue for money had and received (payments already made to Byron), and that Byron could sue on implied assumpsit (for work done and materials supplied). To effect these findings, the verdict was set aside and Byron was given leave to file a declaration in set-off.

This case illustrates the more active role taken by courts in impossibility cases near 1900. Justice Whelpley from *Bennett* would not have gone so far to imply a condition and "interpret" the contract in the way that Justice Knowlton did in *Butterfield.* A Freedom of Contract approach from the early nineteenth century would have required Byron to fulfill the absolute promises to which he had voluntarily bound himself—in spite of thunderbolts from the sky. An 1891 court was not about to force such an interpretation.

The American Repair Doctrine, which flourished in the last decades of the nineteenth century and the early decades of the twentieth, distinguished (on implication, by assumed intent) contracts for the repair of existing structures from those for the erection and completion of totally new structures. Or, more accurately, it distinguished contracts where the owner and the builder were to share the labor from those where the builder assumed full responsibility for the creation of a completed building. Thus, the court in *Goldfarb v. Cohen*[37] said that the rule in *Dauchy* did not apply to a contract for work upon an existing structure that was already the property of the employer; continued existence was essential to the full performance of the work and was, therefore, an implied condition.[38]

Eventually the Repair Doctrine was expanded to include subcontractor's work on structures just being constructed. As technology advanced, the builder who built the whole house disappeared; "the heating contractor, the plumbing contractor; the electrical contrac-

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36. *Id.*

37. 92 Conn. 277, 102 A. 649 (1917).

38. *See* 6 CORBIN ON CONTRACTS § 1337 (1962); 3 WILLISTON ON CONTRACTS § 1965 (1924); Schwartz v. Saunders, 46 Ill. 18, 22-23 (1867); Cook v. McCabe, 53 Wis. 250, 10 N.W. 507, 509 (1881). *See also* Carroll v. Bowerstock, 100 Kan. 270, 164 P. 143, 144 (1917) (rejection of the idea that the owner warrants continued existence of the house); 14 MINN. L. REV. 1038, 104 n.16 (1929) (one court found that owner impliedly agreed to keep structure in existence); 3 WILLISTON ON CONTRACTS § 1976 (1924) (owner under no such obligation).

tor and so on were all safely sheltered under the repair doctrine . . . ."[39] The early nineteenth century absolutist notion of Freedom of Contract had faded too, leaving a trail of disaster cases with harsh outcomes as evidence that it had once been so strict. On into the twentieth century, laissez-faire was no longer the watchword; Freedom of Contract came to mean something other than literal application of contractual language, and the judicial function was more positive than it had been for decades.

The Transformation of Legal Theory

The 1880's and 1890's were a time of ignition for an "Age of Energy."[40] In response to the industrially expansive and politically conservative post-Civil War era, the Populist-Progressive reform spirit came like fresh air, sounding the death knell for the passive Spencerian Social Darwinist ideology. As the "conservative chain of ideas" dissolved, new ideas and new methods emerged.[41] A generation of dreamers and reformers came of age in the last decade of the nineteenth century, opening the way for purposeful, directed action, striving to realize through their efforts the promise of America.

The Social Gospel movement, spearheaded by Walter Rauschenbusch, prompted ministers to organize groups to support peace, temperance, interdenominationalism and political socialism. This emerging religious philosophy preached that human endeavor could aid in the establishment of the Kingdom of God on Earth.[42] Americans of that day read utopian novels with gusto,[43] dreaming of a better nation than they had yet attained; and yet, they were pragmatists as well. William James, the psychologist-philosopher author of *Essays in Pragmatism,* became very popular at the turn of the century. People also listened attentively to Richard Ely's "new economics"—regarding the state as an agency of positive assistance to further human progress.[44] There was general insistence that govern-

39. The Death of Contract, *supra* note 6, at 78-79.

40. H. Jones, The Age of Energy (1970).

41. E. Goldman, Rendezvous with Destiny 66 (1955).

42. *See* W. Rauschenbusch, Christianity and the Social Crisis (1907).

43. *E.g.,* E. Bellamy, Looking Backward (1887); I. Donnally, Caesar's Column (1890); W. D. Howells, A Traveler From Altruria (n.d.).

44. P. Boller, American Thought in Transition: The Impact of Evolutionary Naturalism, 1865-1900, at 84 (1969).

ment be more responsive to social ills and inequalities.[45]

At the turn of the twentieth century, America was poised between ideals of the past—a rural America of community and shared feeling;[46] realities of the present—industrial strikes, economic depressions, entanglements overseas in Manila and elsewhere, increased urbanization; and hopes for the future—to harness a new technology in service of both spiritual and material progress.[47] The myth of American newness, born with the nation, persisted. "With strenuous application of the energy of free men, Americans would get there . . . ."[48]

We have seen that the legal counterpart to political laissez-faire was a literal version of Freedom of Contract.[49] Each of these ideas was a "passionate exhortation to allow the free development of the individual, and to permit production and trade to follow their natural channels unimpeded. It was a cry for freedom."[50] Turn-of-the-century judges reflected the shedding of this ideology in their approach to decision-making, and developments in the law wended the way of the changing dynamic of society:

As we look back on the nineteenth century theories, we are

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45. *See* W. LIPPMANN, DRIFT AND MASTERY (1914); H. CROLY, THE PROMISE OF AMERICAN LIFE (1909).

46. "Industrialism had broken the cake of custom, destroying the old, flexible, local apparatus of community." Brebner, *Laissez-Faire and State Intervention in Nineteenth-Century Britain*, J. ECON. HIST. SUPP. VIII, at 59 (1948).

47. *See* C. SANFORD, THE QUEST FOR PARADISE (1959).

48. R. WALKER, LIFE IN THE AGE OF ENTERPRISE 206 (1967).

49. "Contractualism" in the law is the ideal theory that all obligation would arise out of the will of the individual contracting freely—a theory rested not only on the classical will theory of contract but also on the "political doctrine that all restraint is evil and that the government is best which governs least." Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 558 (1933). According to Cohen, the underpinnings of Freedom of Contract were economic: freedom to make agreements would lead to more individual initiative and greater wealth for the nation; sociophilosophical: each person would contract for that which would bring pleasure and there would be the greatest happiness for the greatest number a la Bentham; biological: the strong would be naturally selected our and the fittest would survive the rigors of life in this world. *Id.* at 562-63. *See* T. GREEN, WORKS, 3 MISCELLANIES AND MEMOIRS, at 372 (1888) (individual freedom would lead to "the liberation of the powers of all men equally for contributions to a common good.")

50. WILLISTON, *supra* note 4, at 366. *See also* Pound, *The End of Law as Developed in Juristic Thought*, 30 HARV. L. REV. 201, 203 (1917):

> Thus the conception of the end of law as an unshackling of individual energy, as an insuring of the maximum of individual free self-assertion, gave rise to a conception of the function of law as a purely negative one of removing or preventing obstacles to such individual self-assertion, not a positive one of directly furthering social progress.

> struck most of all, I think, by the narrow scope of social duty which they implicitly assumed. No man is his brother's keeper; the race is to the swift; let the devil take the hindmost. For good or ill, we have changed all that . . . . The decline and fall of the general theory of contract and, in most quarters, of laissez-faire economics may be taken as remote reflections of the transition from nineteenth century individualism to the welfare state and beyond.[51]

This transformation is also seen in legal theory. In 1908, Roscoe Pound was calling for a "pragmatic, a sociological legal science" which would bring pragmatism into law so that human conditions would govern legal conceptions and logic would be relegated to its "true position as an instrument."[52] And Oliver Wendell Holmes' prediction theory of law emphasized the role of the judge as law maker.[53] By that time, it was undisputed that courts should do more than keep their hands off by enforcing the literal terms of contractual arrangements. As judges accepted the spirit of their age, they created new tools for intervention. In the contract law of impossibility, they expanded use of implied conditions, loosely tied not only to intent, but also to equity and justice.

The Early Twentieth Century

That the period from 1880 to 1920 was an Age of Energy is borne out by the impossibility cases of that era. The very idea of impossibility was transformed, and creative theories were forged on the anvil of Freedom of Contract. *Mineral Park Land Co. v. Howard*[54] is important for the light it sheds on these changes. The Mineral Park Land Company had made a contract with public authorities to construct a concrete bridge across a ravine. To that end, the Land Company entered into a contract with Howard, who owned land nearby. Howard was to grant the right to haul gravel and earth from his land; the Land Company was to take from his land all of the gravel and earth needed for fill and cement work on the bridge,

51. The Death of Contract, *supra* note 6, at 95-96.

52. Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605, 609-10 (1908). *See also* Pound, *supra* note 50, at 225.

53. *See* Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897).

54. 172 Cal. 289 (1916).

estimated at approximately 114,000 cubic yards. As it happened, the Land Company took only 50,131 cubic yards from Howard's land (and 50,869 from another place). Howard brought suit to recover the balance for the gravel and earth taken and to recover damages for failure to take the rest. The defendant responded that it had taken all the earth and gravel "available for the work mentioned"[55]—all that was above water level. The trial court found the contract absolute and held the Land Company to performance, but the California Supreme Court reversed, based upon an expanded definition of impossibility.

According to the appellate court, the parties had contracted "for the right to take earth and gravel to be used in the construction of the bridge:"[56]

> When they stipulated that all of the earth and gravel needed for this purpose should be taken from plaintiff's land, they contemplated and assumed that the land contained the requisite quantity available for use. The defendants were not binding themselves to take what was not there. And, in determining whether the earth and gravel were "available" we must view the conditions in a practical and reasonable way. Although there was gravel on the land, it was so situated that the defendants could not take it by ordinary means, nor except at a prohibitive cost. To all fair intents then, it was impossible for the defendants to take it.[57]

Thus, the California court in 1916 invoked a somewhat softer rule than that dictated by a strict Freedom of Contract approach; even if gravel were present, it had to be "available for use" or performance was deemed impossible.[58] Impossibility, formerly such an extreme circumstance that not even an Act of God would qualify, now occurred where a promisor had to employ extraordinary means and confronted prohibitive costs.[59]

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55. *Id.* at 291.

56. *Id.* at 293.

57. *Id.*

58. Recovery was accordingly denied on the damages count. On the count for the balance of money owed, judgment for the plaintiff, Howard, was summarily upheld.

As to the significance of the "available gravel" extension, see 4 CALIF. L. REV. 407, 409 (1916). *See also* WILLISTON ON CONTRACTS § 1963 (1920).

59. Traditionally, increased costs have been no ground for excuse of performance. In the case of Leavitt v. Dover, 67 N.H. 94, 32 A. 156 (1892), the plaintiff had agreed to construct

two wells for the defendant for the sum of $10,500. But after the well had been sunk to the depth required, which was accomplished with difficulty because of quicksand a short distance below the surface and the moist condition of the ground itself, the curb gave way and the ground caved in, rendering valueless all that had been done up to that time. Finding that the contract had been voluntarily made and that the caving-in of earth had only rendered performance more expensive, not impossible, the court required the defendant to make the contract good.

See also International Paper Co. v. Rockefeller, 161 App. Div. 180, 146 N.Y.S. 371 (1914) ("The defendant is not excused from delivering the live spruce suitable for pulpwood which survived the fire by the mere fact that its location upon the tract is such that it would be very expensive for him to deliver it."); Straus v. Kazemekas, 100 Conn. 581, 594, 124 A. 234, 239 (1924) (if nature of performance is not impossible, the new fact that it has become difficult or unprofitable is no defense).

> No American case has apparently considered the question of increased cost as in any degree an available defense, *no matter how* enormous or extravagant, and in the consideration of what may defeat the objects of the parties, the pendulum would seem to swing backward and forward.

Conlen, *supra* note 2, at 92 (emphasis added).

Williston agreed that increased expense or difficulty caused supervening circumstances, or decrease in value of counterperformance, will not ordinarily excuse the promisor. He questioned the correctness of this principle, since a very great increase in expense may involve something very different from what the parties contemplated. 3 WILLISTON ON CONTRACTS § 1963 (1920). Corbin mentioned a few cases indicating that unexpected difficulty or expense may be so extreme that a court will discharge the parties on the ground of practical impossibility. 6 CORBIN ON CONTRACTS § 1333 (1962).

Recently, courts have been more amenable to viewing extreme hardship as an excuse of performance. *See* Berman, *Excuse for Non-performance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413, 1418 (1963); Savage v. Peter Kiewit Sons' Co., 432 P.2d 519 (Ore. 1967); Whelan v. Griffith Consumers Co., 170 A.2d 229 (1961); Schmeltzer v. Gregory, 72 Cal. Rptr. 194 (1968).

The Uniform Commercial Code has adopted the doctrine of commercial impracticability rather than strict impossibility with regard to contracts involving sales of goods.

> Except so far as a seller may have assumed a greater obligation . . . (a) Delay in delivery or non-delivery in whole or in part by a seller . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic government regulation or order whether or not it later proves to be invalid.

U.C.C. § 2-615.

Comment 4 of § 2-615 leaves room for liberalization:

> Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance. Neither is a rise or a collapse in the market itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover.

See Comment, *Commercial Impracticability and Intent in UCC Section 2-615: A Reconciliation*, 9 CONN. L. REV. 266 (1977), and Joskow, *Commercial Impossibility, The Uranium Market and the Westinghouse Case*, 6 J. LEGAL STUDIES 119 (1977) for insightful analysis of commercial impracticability under the U.C.C.

RESTATEMENT (SECOND) OF CONTRACTS takes the U.C.C. impracticability approach:

> The rationale behind the doctrines of impracticability and frustration is sometimes said to be that there is an "implied term" of the contract that such extraordinary

Mineral Park Land Co. v. Howard declared: "'A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost.'"[60] The case reveals a widening of the exceptive doctrine. To the *Bennett, Dauchy,* and *Stees* courts, "impossible" meant that a thing could not by any means be accomplished; to the *Howard* court of 1916, it meant that performance would be difficult.[61] The concept of impossibility had opened to include impracticability as an unexpungeable facet.

When the first Restatement of Contracts was drafted in 1932, the American Law Institute embraced this more liberal notion of impossibility, defining it as "not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, in-

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circumstances will not occur. This Restatement rejects this analysis in favor of that of the Uniform Commercial Code § 2-615, under which the central inquiry is whether the non-occurrence of the circumstances was a "basic assumption on which the contract was made" . . . .

Determining whether the non-occurrence of a particular event was or was not a basic assumption involves a judgment as to which party assumed the risk of its occurrence . . . . If . . . a disaster results in an abrupt tenfold increase in cost to the seller, a court might determine that the seller did not assume this risk by concluding that the non-occurrence of the disaster was a "basic assumption" on which the contract was made. In making such determinations, a court will look to all circumstances, including the terms of the contract.

RESTATEMENT (SECOND) OF CONTRACTS, Introductory Note, 40-45 (Tent. Draft No. 9, 1974).

60. 172 Cal. at 293. Schmeltzer v. Gregory, 72 Cal. Rptr. 194 (1968), states that *Howard* sets the modern trend relative to the definition of impracticability. *But see* Annot., 84 A.L.R. 2d 12, 62 (1962) to the effect that a survey of representative cases suggests that extreme impracticability as amounting to impossibility "seems not to have been adopted very extensively." *Cf.* C. KNAPP, PROBLEMS IN CONTRACT LAW 530 n.2 (1976). For a criticism of the unreasonably and excessively expensive—impracticable—impossible syllogism set forth in *Howard*, see 4 CALIF L. REV. 407, 409 (1916).

61. In *Bennett*, the court said that if the covenant "be within the range of possibility, however absurd or improbable the idea of execution may be, it will be upheld . . . ." *See also* Schwartz v. Saunders, 46 Ill. 18, 22 (1967); Krause v. Bd. of Trustees of School Town of Crothersville, 162 Ind. 278, 70 N.E. 246, 247 (1904).

In Vogt v. Hecker, 118 Wis. 306, 95 N.W. 90 (1903), the construction of a barn of prescribed dimension was deemed delayed but possible when a violent storm blew it to the ground, leaving only a few uprights standing. The court said that the contract called for a barn of specific dimensions and characteristics, not "that barn of which the framework was blown down, nor indeed, any particular barn." *Id.* at 91. But in Perlee v. Jeffcott, 89 N. J. Law 34, 97 A. 789 (1916), performance of a contract to convey a farm and premises was held to have been made impossible by destruction of a barn because "both parties undoubtedly contemplated the conveyance of the buildings as an essential part of the premises." *Id.* at 36. As Americans entered the twentieth century, the scope had expanded of things "impossible" enough to excuse fulfillment of contractual obligations.

jury or loss involved."[62] In a comment, the drafters suggested that "impossible" be given a practical, rather than a scientifically exact, meaning. "[I]mpracticability rather than absolute impossibility is enough" but "[m]ere unanticipated difficulty . . . not amounting to impracticability is not within the scope of this definition."[63] This step was hailed in a 1936 law review comment:

> Under a literal interpretation of the term it has been said that impossibility exists when "the thing cannot by any means be effected." This definition is too narrow. The broader definition adopted by the American Law Institute, including impracticablility, is far more accurate under the decided cases. What constitutes impracticability is a matter of degree.[64]

The concept of impossibility had lost its absoluteness; courts had more grounds on which to excuse performance.

It has been said that by the third decade of the twentieth century, only a mere "husk of the rule" of *Paradine v. Jane* remained.[65] Cases from the turn of the century increasingly mentioned impractica-

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62. RESTATEMENT OF CONTRACTS § 454 (1932). Benjamin Cardozo had this to say about the work of the American Law Institute:

> The existence of this Institute is a declaration to the world that "laissez faire" in law is going or has gone the way of "laissez faire" in economics.
>
> A gospel of effort takes the place of a gospel that has vacillated between inaction and despair. We will not sit by and refuse to do anything because the voice of pessimism may remind us with labored demonstration that try as hard as we may, we shall be unable to do everything. The changing mood reveals a changing outlook upon law, and the processes and methods that develop and perfect it. Throw yourself back, they used to tell us, upon the broad currents of history, and let the tide of the centuries sweep you to your goal. This was comforting doctrine, and doctrine that the inertia native to most of us made it pleasurable to follow, if only tide and current could be trusted to do their share. The wisdom of the precept was not doubted till we found ourselves sinking when the program required us to be floating, and doubt deepened into certainty upon the discovery that instead of moving to a haven, we were sprawling on the rocks. In one of these moments of discomfiture, this Institute was formed.

The American Law Institute, Address by B. N. Cardozo, Third Annual Meeting (May 1, 1925) *reprinted in* LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES (1931).

63. RESTATEMENT OF CONTRACTS § 454, Comment a (1932).

64. 5 FORDHAM L. REV. 322, 324 (1936).

> 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.

Id. at 325. *See also* Smith, *supra* note 12, at 676.

65. 34 YALE L.J. 91, 96 (1924). *See also* THE DEATH OF CONTRACT, *supra* note 6. "[I]t is probable that the tendency of the law is toward an enlargement of the defense of impossibility," wrote Williston in 1920. 3 WILLISTON ON CONTRACTS § 1952 (1920).

bility where parties claimed excuse from contractual obligations because they could not perform.[66] Reflecting this, Corbin noted in his 1933 casebook that the term impossibility "is so loosely used that it often means one or more of the following: Physical impossibility (objective); personal inability (subjective); legal prohibition; economic unprofitableness; difficulty and hardship; danger to life or health."[67] The first of these, physical impossibility, had survived from the early nineteenth century; but economic unprofitableness and difficulty and hardship were definitely of twentieth century vintage.[68] In more cases than before, judges were deliberately allocating the burdens caused by the happening of unexpected circumstances.[69]

Exceptions to the Strict Enforcement Theory

Early on, there were three exceptions to the *pacta sunt servanda* (contracts must be performed) rule of contract law:

1) the death or illness of a person whose personal services were promised;[70]

66. *See, e.g.,* Cosden Oil & Gas Co. v. Moss, 267 P. 855 (Okla. Supr. Ct. 1928) (statement that if literal performance becomes impracticable or impossible due to nonexistence of an essential thing, performance will be excused, the terms "impracticable" and "impossible" being of equal legal effect); Paxton Lumber Co. v. Panther Coal Co., 83 W. Va. 341, 98 S.E. 563 (1919) (noting an increasing tendency to afford promisors relief where great hardship would ensue by forcing performance that is practically impossible); Isaacson v. Starrett, 56 Wash. 18, 104 P. 1115, 1116 (1909) (parties are bound to perform "unless the matter was at the time manifestly and essentially impracticable). *See also* Bergman v. Parker, 216 A.2d 581 (D.C. Ct. App. 1965); Lloyd v. Murphy, 25 Cal. 2d 48, 153 P.2d 47 (1944).

67. A. Corbin, Cases on Contracts 690 n.18 (1933). *See also* 6 Corbin on Contracts §§ 1320, 1325 (1962); Smith, *supra* note 12, at 675-76.

68. Shepherd & Sher, *supra* note 8, at 450-51. "Impossibility" is a misnomer when equated with physical impossibility, since changed circumstances rarely make performance impossible in a literal sense. The more modern phrase "frustration of purpose" "reflects merely an expanding concept of a common doctrine: the amelioration of hardship through judicial allocation of unanticipated risk." *Id.* at 451. *See also* C. Knapp, Problems in Contract Law 524 (1976) (pure impossibility connotes an inability to perform; impracticability combines or falls between the notions of frustration and impossibility).

69. The true distinction is not between difficulty and impossibility. As had been seen a man may contract to do what is impossible, as well as what is difficult. The important question is whether an unanticipated circumstance, the risk of which should not fairly be thrown upon the promisor, has made performance of the promise vitally different from what was reasonably to be expected.

3 Williston on Contracts § 1963 (1920).

70. The person may be the promisor or an agreed third person. 3 Williston on Contracts § 1940 (1920). *See* Lorillard v. Clyde, 142 N.Y. 456, 37 N.E. 489 (1894); Spalding v. Ross, 71

2) change in the law by legislation or other official means, rendering performance illegal;[71]

3) non-existence, destruction, or impairment of a specific thing essential to performance.[72]

N.Y. 40, 27 Am. Rep. 7 (1877). Death of the employer or master would excuse performance if a service was to be strictly personal to him. A. CORBIN, CASES ON CONTRACTS 704-05 n.22 (2d ed. 1921). *See* Lacy v. Getman, 119 N.Y. 109, 23 N.E. 452 (1890); 3 WILLISTON ON CONTRACTS § 1941 (1920).

71. "Nonperformance creates no right to damages in case performance has been made illegal by a change in the domestic law." CORBIN, *supra* note 70, at 709 n.24. *See, e.g.*, Louisville & N.R. Co. v. Crowe, 156 Ky. 27, 160 S.W. 759 (1913); Baily v. De Crespigny, L. R. 4 Q.B. 180 (1869). Corbin notes that a contractor takes the risk of impossibility due to foreign law, Barker v. Hodgson, 105 Eng. Rep. 612 (K.B. 1814), but cites in opposition Texas v. Hogarth Shipping Co., 256 U.S. 619 (1921). But the Uniform Commercial Code has dispensed with the distinction between foreign and domestic law. U.C.C. § 2-615(a).

72. This could be the subject matter of the contract or the means of performance:

> Not only where a specific thing is itself to be sold or transferred, but wherever a contract requires for its performance the existence of a specific thing, the fortuitous destruction of that thing, or such impairment of it as makes it unavailable excuses the promisor unless he has clearly assumed the risk of its continued existence. A contract to manufacture goods in a particular factory is discharged by the destruction of the factory; a contract to do work on a specific building is discharged by the destruction of that building . . . .

3 WILLISTON ON CONTRACTS § 1946 (1920).

See, e.g., Nitro Powder Co. v. Agency of Canadian Car & Foundry Co., 233 N.Y. 294, 135 N.E. 507 (1922); Gouled v. Holwitz, 95 N.J.L. 277, 113 A. 323 (1921); Krause v. Bd. of Trustees of School Town of Crothersville, 162 Ind. 278, 70 N.E. 264 (1904); Pinkham v. Libbey, 93 Me. 575 (1900); Shear v. Wright, 60 Mich. 159, 26 N.W. 871 (1886); Cook v. McCabe, 53 Wis. 250, 10 N.W. 507 (1881).

But see Perea v. Ilfeld, 33 N.M. 445, 270 P. 884 (1928) (the undertaking of the parties was absolute, but the subject matter of the contract was not the delivery of specific sheep which were lost in a snowstorm; it was the delivery of "sheep of specific ages, sex and quality"); Vogt v. Hecker, 118 Wis. 396, 95 N.W. 90, 91 (1903) ("It was not that barn of which the framework was blown down, nor indeed, any particular barn, which the plaintiff had contracted to build, but a barn of specified description."); Jones v. United States, 96 U.S. 24 (1877) (contract could be satisfied by goods from any factory, so destruction of seller's factory held to be no excuse). *See* 3 WILLISTON ON CONTRACTS § 1952 at 3314 & n.45 (1920).

The "specific thing" essential to the performance of the contract need not be yet in existence at the time of agreement between the parties. There is a line of crop cases in which this is true. *See, e.g.*, Squillante v. Calif. Lands, Inc., 5 Cal. App. 2d 89, 42 P.2d 81 (1935) (contract for 10 carloads of Zinfandel grapes of good quality, color, sugar content, from specific vineyards); Gibbs v. Hersman, 73 Cal. 732, 239 P. 350, 351 (1st Dist. Cal. 1925) (contracts for purchase and sale of wine grapes "suitable for Eastern shipment"); St. Joseph Hay & Feed Co. v. Brewster, 195 S.W. 71 (Mo. App. 1917) (contract entered "with sole reference to the defendant's crop"). *See also* Howell v. Coupland, [1876] 1 A.B. 258 (contract for purchase and sale of 200 tons of regent potatoes grown on land owned by the defendant at Shaplode); Matousek v. Galligan, 104 Neb. 731, 178 N. W. 510 (1920) (contract for sale of specific, good, No. 1, merchantable, hay on defendant's land). However, an agreement to sell a specified quantity of produce is not excused when the seller expected to fulfill the contract

By the first decades of the twentieth century, there was a "fourth class of cases . . . [with] impossibility . . . due to the failure of some means of performance, contemplated but not contracted for."[73] In *Straus v. Kazemekas*,[74] Justice Curtis recognized this

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out of particular land but was disappointed in this expectation. 3 WILLISTON ON CONTRACTS § 1949 (1920). *See, e.g.*, Anderson v. May, 50 Minn. 280, 52 N.W. 530 (1892).

73. 3 WILLISTON ON CONTRACTS § 1935 (1920).

74. 100 Conn. 581, 124 A. 234 (1924).

In *Straus*, the plaintiff agreed to sell, and the defendant to buy 20,000 rubles at "$22.75 per hundred rubles on 'future delivery,' same to be delivered as soon as practicable after importation of Russian currency is permitted . . . ." *Id.* at 583. The plaintiff complained that his offer of performance had not been accepted; the defendant specially defended and counterclaimed that the "objects of the contract" had been commercially frustrated by an embargo upon the importation of Russian currency which had continued for a longer time than the parties had contemplated. A directed verdict and a judgment for the plaintiff were affirmed, but only because there was an express provision in the contract concerning the effect of the embargo then in existence.

The case comments upon the state of the law of impossibility in 1924: "The law as to implied conditions in a contract excusing performance on the ground of impossibility, actual or in a commercial sense, as implied by law, is of recent origin." *Id.* at 591. Under Paradine v. Jane, impossibility would not excuse performance unless the parties had so provided in their contract. But,

> [s]ince the middle of the last century at least, the courts in England and in this country have modified the rigid rule, upon the theory that the event which rendered the performance impossible should be *implied as a matter of law*, as a condition excusing performance.

Id. (emphasis added.)

The court ruled that the facts in *Straus* presented only a claim of impossibility in a commercial sense implied by law and not an actual impossibility (physical performance of the sale of the rubles could have taken place had the defendant been so disposed). And the court found that the parties had agreed that the rubles should be delivered as soon as practicable after the embargo on the importation of Russian currency was lifted. The parties having thus provided for a certain contingency, it was not for the court "to import into the contract some other and different provision for the same contingency." Thus, the defendant's claim was held untenable. Since "the existence of an embargo of indefinite duration was not only reasonably to have been anticipated, but was known to the parties to exist and the contingency of its continuance provided for in the contract," it was held that the trial court committed no error in directing a verdict for the plaintiff. But the court left the distinct impression that another case with another set of facts might go the other way on the basis of the new principles and conceptions articulated in Straus v. Kazemakas.

See Anderson v. Yaworski, 120 Conn. 390, 181 A. 205 (1935), where the "rule" of *Straus* was applied to the sale of land.

See S. WILLISTON, CASES ON CONTRACTS 767 (1930), and S. WILLISTON, CASES ON CONTRACTS 724-25 (1937), concerning the question of whether a government embargo placed upon the exportation of a commodity would be a defense to an action upon the contract involving the commodity. Gray & Co., Inc. v. Cavalliotis, 276 F. 565 (E.D.N.Y. 1921) is quoted to the effect that an embargo by the government of the country in which the contract was made and in which it was to be performed was such a defense, while foreign embargoes were ordinarily not an excuse for nonperformance.

fourth, broader, exception to the strict theory of contract enforcement:

> 4) the cessation of continuation of the existence of some thing or state of things upon the continuation or cessation of which the contract was known to depend, provided such cessation or continuation arises without fault in either contracting party . . .[75]

The Justice noted the trend since the middle of the nineteenth century for courts in England and America to imply a condition excusing performance when a contingency arose that the parties had not provided for in the contract.[76] The court cited *Taylor v. Caldwell*[77] for the proposition that when the nature and circumstances of the contract indicate that the parties "must have known that it could not be fulfilled unless . . . some particular thing or condition of things continued to exist," the parties will be deemed to have contemplated this continued existence "as the foundation of what was to be done."[78]

Williston commented that this class of cases stood on "more debatable ground"[79] and Justice Curtis confessed that the fourth exception was "difficult of a satisfactory statement."[80] Perhaps these

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75. 100 Conn. at 592.

76. The court in *Straus* referred to four "implied conditions" which would excuse a party before breach. *Id.* at 592. Other courts as well have used "implied condition" rather than "exception" when dealing with these matters. *See, e.g.*, Cosden Oil & Gas Co. v. Moss, 131 Okla. 48, 267 P. 855, 859 (1928); Gouled v. Holwitz, 95 N.J.L. 277, 113 A. 323, 324 (1921); Cohen v. Morneault, 120 Me. 358, 114 A. 307, 308 (1921).

In Lorillard v. Clyde, 142 N.Y. 456, 37 N.E. 489 (1894), the court said that excuse by death from performance of a personal service contract was not an exception to the rule that contracts voluntarily made are to be enforced; instead, courts "in accordance with the manifest intention, construe the contract as subject to an implied condition that the person or thing shall be in existence when the time of performance arrives." *Id.* at 491. *See* 15 HARV. L. REV. 63, 64 (1901): "The exceptions to the general rule that impossibility of performance is not a defence have crept into the law, not as excuses, but under the cover of implied conditions." *See also* Woodward, *Impossibility of Performance, As An Excuse for Breach of Contract*, 1 COLUM. L. REV. 529, 530 (1901).

77. 122 Eng. Rep. 309 (Q.B. 1863).

78. 100 Conn. at 592, 124 A. at 238.

79. 3 WILLISTON ON CONTRACTS § 1935 (1920).

80. 100 Conn. at 592, 124 A. at 238.

See also Cosden Oil & Gas Co. v. Moss, 131 Okla. 49, 267 P. 855 (1928).

> [W]here it is apparent that a contract was entered into on the basis of the existence of something essential to its execution, there is the implied condition of contract that if literal performance becomes impracticable or impossible by reason of the nonexist-

reservations stem from the fact that the new type of implied condition referred to things or states or actions not specified in the written contract. Implying a condition so would have been totally unacceptable in the days of strict Freedom of Contract, when the explicit words of the contract were the entire contract and what the parties said was all of what they meant.

This fourth exception to *pacta sunt servanda* was invoked in *International Paper Co. v. Rockefeller,*[81] involving a contract for delivery of a large amount of spruce wood for use in making pulp. After the defendant's timberland was almost totally destroyed by fire, he was excused from providing more wood than he could provide from his land. The court ruled that performance should be excused where the contract, read in connection with the known facts, shows the source from which the parties contemplated the wood should be furnished, and later the source is destroyed. Likewise, *Kinser Construction Co. v. State*[82] used this expanded exceptive doctrine. The contract was for construction of a portion of the New York State barge canal, pursuant to the Barge Canal Acts. After a series of mud slides of "slippery, greasy clay,"[83] the state

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ence of the essential thing, to the extent of the nonexistence performance will be excused . . . .

See also Woodward, *supra* note 76, at 533:

> 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.

Id.

This approach not only asks what the parties meant to happen, but also what the parties would have meant had they contemplated a particular contingency. *See also* Chicago, Milwaukee & St. Paul Ry. v. Hoyt, 149 U.S. 1 (1892):

> [W]here the event is of such character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be bound by general words, which though large enough to include were not used with reference to the possibility of the particular contingency which afterwards happens.

The case marked the beginning of a manifest tendency of United States courts to construe contracts with more liberality. Conlen, *supra* note 2, at 31. The *Hoyt* test has a reasonableness element, as does the following formulation: "Would the parties, as reasonable men, if their attention had been called to the contingency, have provided for it in their contract?" Woodward, *supra* note 76, at 533.

See Patterson, *Constructive Conditions in Contracts,* 42 COLUM. L. REV. 903, 946-47. (1942) and Conlen, *supra* note 2, for a comparison of the various tests.

81. 161 N.Y. App. Div. 180, 146 N.Y.S. 371 (1914).

82. 204 N.Y. 381, 97 N.E. 872 (1912).

83. *Id.* at 872.

issued a stop order. The court held that this was not a breach and that the contractor was not entitled to recover profits lost by reason of the stop order: "in a work of this magnitude the highest engineering skill, even when exercised with the utmost care, could not learn in advance all the physical conditions to be met with during the progress of the work."[84] The trouble was not with the plan, but with the earth, "which refused the support relied upon by both parties . . . ."[85] The contract was therefore discharged; the court declined

84. *Id.* at 875.

85. *Id.* at 876.

The general rule was that a contract ought to provide for all contingencies reasonably within the anticipation of the parties "else the impossibility of performance resulting therefrom will not excuse either party from carrying out the contract." 100 Conn. at 594. If a supervening event is foreseeable, contractual obligations must be qualified or later be held absolute. "Foreseeability, however, is possible in almost every case." 5 FORDHAM L. REV. 322, 331 (1936).

The foreseeability test descended from an earlier time when excuse from contract by impossibility was rare:

> Any kind of impossibility is more or less capable of anticipation. The question is one of degree, and, if anticipated, any circumstance whatever may be guarded against in the contract. In a contract for personal service, the contingency of possible illness or death is very easily anticipated, and the possible destruction of the subject matter to which a contract relates is also not difficult to anticipate, yet these kinds of impossibility excuse a promisor from liability.

3 WILLISTON ON CONTRACTS § 1953 (1920).

Williston goes on to suggest a slight modification to make foreseeability helpful where the contemplated means of performance fail. If the event that created the impossibility both could have been anticipated and could have been guarded against by the promisor, one may reasonably assume that the promisor assumed the risk of impossibility. This is also said to be true if he has superior knowledge concerning the degree of risk.

In Berg v. Erickson, 234 F. 817 (8th Cir. 1916), Erickson, a resident of Kansas, was held to his agreement to furnish "plenty of good grass" during the grazing season of 1913 in spite of "the most severe drought which had been known in that part of Kansas . . . ." *Id.* at 818-19. Berg knew nothing about the productive capacity of Kansas pastures and Erickson "knew all about it," and he might have provided for such a contingency in the contract. *Id.* at 824. The court read the contract as absolute because Erickson had not inserted a provision exempting himself from liability in the event of severe drought.

See Savage v. Peter Kiewit Sons' Co., 249 Or. 147, 432 P.2d 519, 522 (1967) ("To operate a discharge . . . the hardship must be so extreme as to be outside any reasonable contemplation of the parties"). *But see* Bennett, 72 Am. Dec. 373: "The cases make no distinction between accidents that could be foreseen . . . . [T]hey all rest upon the simple principle—such is the agreement, clear and unqualified, and it must be performed, no matter what the cost, if performance be not absolutely impossible." *Id.* at 376.

Berman notes that liberalization has taken place by expanding the definition of "unforeseeable" to include what is merely improbable. Berman, *supra* note 59, at 1414. *See* Kinser Const. Co. v. State, 204 N.Y. 381 (N.Y. Ct. App. 1912). The logical outcome of such liberalization is that more performances are declared impossible; contracts after the turn of the century have been less "absolute" than those before.

to apply literal Freedom of Contract and would not hold the parties to it at all events.

The Frustration of Purpose Standard

There is a fifth class of cases representing a way to get around the strict (Freedom of Contract, so you must keep it) rule in impossibility cases:

> 5) [p]erformance remains entirely possible, but the whole value of the performance to one of the parties at least, and the basic reason recognized as such by both parties, for entering into the contract has been destroyed by such supervening accident.[86]

Williston wrote that there had been "little clear recognition of this class" by 1920, "but its adoption seems involved in some decisions, and their justice is plain."[87] These cases involve "frustration of purpose": performance, still possible, is rendered undesirable due to supervening events.[88] Shortly after the turn of the century, "frustration" started to come in as a substitute for "impossibility."

> As a term of art, "frustration" never acquired much precision or clarity of meaning; most of the time it was used as a sort of loose synonym for what had earlier been called "impossibility." And yet, from the beginning, there was a general understand-

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A related test is the contemplation of the parties test, which has been said to ask: What would the parties have done had they anticipated the events which indeed happened? *See* 6 Corbin on Contracts § 1331 at 356-57 (1962). If their attention had been brought to the event which subsequently happened, would the parties have thought it obvious that the contract would then dissolve? Patterson, *supra* note 80, at 946. *See* Woodward, *supra* note 76, at 533; Smith, *supra* note 12, at 681; 5 Fordham L. Rev. 322, 331 (1936); Conlen, *supra* note 2, at 33.

Contemplation is akin to foreseeability. For example, in The Tornado, Ellis v. Atlantic Mutual Insurance Co., 108 U.S. 342 (1883), a ship moored at wharf in New Orleans, bound on a voyage to Liverpool "before she had broken ground for said voyage, was discovered to be on fire in her hold." *Id.* at 343. The court held that the "circumstances with reference to which the contract of affreightment was entered into were so altered by the supervening of occurrences which it cannot be intended were within the contemplation of the parties in entering into the contract, that the shipper and the underwriters were absolved from all liability . . . ." *Id.* at 349. Alternatively, the court might have said that the burning of the ship at the wharf was an unforeseeable event which dissolved the contract. *See also* Krause v. Bd. of Trustees of School Town of Crothersville, 162 Ind. 278, 70 N.E. 264, 266 (1904).

86. 3 Willison on Contracts § 1935 (1920).

87. *Id., quoted in* Perea v. Ilfeld, 33 N.M. 445, 270 P. 884-85 (1928).

88. 6 Corbin on Contracts § 1322 (1962).

> ing that the old theory of absolute—or almost absolute—liability was in process of dissolution . . . . [T]here has been a liberalization of excuse . . . .[89]

The whole notion of frustration of contract is said to have started with the English case of *Krell v. Henry*.[90] Henry agreed to hire from Krell a flat in Pall Mall for June 26th and 27th, the days announced for the coronation procession of King Edward VII. However, the agreement contained no explicit reference to the coronation or the processions, and Henry declined to pay the balance of the rent after learning that the serious illness of the King had occasioned the cancellation of these events. The court ruled that both parties were discharged from performance, since the coronation procession was the foundation of the contract and since the illness of the King could not reasonably be supposed to have been in the contemplation of the parties. It was still possible for Henry to occupy Krell's flat on June 26th and 27th, but a supervening event (the King's sickness) had destroyed the value of the flat for Henry. He was not made to pay for a room that did not have a view of Edward VII's coronation procession.[91]

Krell is typically viewed as a shift from an objective impossibility requirement to a frustration standard, the foundation of the agree-

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89. DEATH OF CONTRACT, *supra* note 18, at 80.

90. [1903] L.R. 2 K.B. 740. Another of the coronation cases is Chandler v. Webster, 1 K.B. 493 (1904).

91. *See* Smith, *supra* note 12, at 674, to the effect that Krell is the first extension of the implied condition into the area of nonmaterialization of a state of affairs which had served as the foundation of a contract.

For history of the development of Krell in England, see Blackburn Bobbin Co., Ltd. v. T.W. Allen & Sons, Ltd., [1918] 1 K.B. 540. *See also* The Texas Co. v. Hogarth Shipping Co., 256 U.S. 619 (1921), where Mr. Justice Van Devanter began the opinion of the Court with these words:

> It long has been settled in the English courts and in those of this country, federal and state, that where parties enter into a contract on the assumption that some particular thing essential to its performance will continue to exist and be available for the purpose and neither agrees to be responsible for its continued existence and availability, the contract must be regarded as subject to an implied condition that, if before the time for performance and without the default of either party the particular thing ceases to exist or be available for the purpose, the contract shall be dissolved and the parties excused from performing it.

The parties were absolved from liability (although a chartered ship still existed and was considered seaworthy) on the ground of an implied condition that the contract should end if "before the time of the voyage the ship was rendered unavailable" by such a supervening act as the requisition.

ment having disappeared.[92] But the coronation procession did not only supply the purpose of the contract (for Henry) or the foundation of the contract (for Krell and Henry), it was also part of the subject of the contract. Krell and Henry made a deal concerning a room with a view of the King's coronation procession. Performance was not still possible after the supervening illness, for there was no such room. Thus, it appears that frustration is but "a greater contemplation of impossibility,"[93] and this fifth exception to *pacta sunt servanda* (a la Krell) seems collapsible into the fourth or third.

The seeds planted in *Krell,* however, sprouted as the doctrine of the frustration of the commercial adventure, particularly after the outbreak of World War I, when English and American courts confronted total disruption of commercial affairs.[94] Recent years have seen an expansion of this doctrine to many different kinds of contracts.[95] Clearly, this and the other exceptions to the strict Freedom of Contract approach indicate a continued liberalization of impossi-

92. 34 YALE L.J. 91, 93 (1924).

93. Rothschild, *The Doctrine of Frustration or Implied Condition in the Law of Contracts,* 6 TEMPLE L.Q. 337 (1932). *But see* Conlen, *supra* note 2, at 89-90: the word "frustration" does not connote impossibility and the cases in the United States where the rule has been applied "are not all cases where performance of the contract was rendered actually impossible, but only rendered so difficult of performance as to be regarded as not possible in the eyes of the law, that is to say, not required to be done because impliedly not undertaken to be done." Departing from *Paradine,* courts will decide the question of frustration with a view to the facts that determine business judgment and action depending upon it. *Id.* at 94. *See, e.g.,* Justice Holmes' opinion in The Kronprinzessin Cecilie, 244 U.S. 12 (1917), holding that the master of a ship was perfectly justified in turning back from a voyage to England on the eve of the outbreak of World War I, thus failing to transfer kegs of gold. The master was not to be put in the wrong "by nice calculations that if all went well he might have delivered the gold and escaped capture by the margin of a few hours." The case ends with a Holmesian flourish: "Business contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs." *Id.* at 24.

94. *See generally* 5 FORDHAM L. REV. 322, 322-37 (1936).

It has been suggested that the doctrine of frustration of the venture arose in a group of cases in which the parties had, in fact, contemplated the occurrence of certain events and the "question presented for decision was not one of impossibility, but of the true meaning and intent of the parties." Page, *supra* note 11, at 604. This doctrine has been applied to many different classes of contracts, *id.* at 610, and has been articulated more frequently in recent decisions.

95. *See, e.g.,* Lloyd v. Murphy, 25 Cal. 2d 48, 153 P.2d 47 (1944), Leonard v. Autocar Sales & Services Co., 392 Ill. 182, 64 N.E.2d 477 (1945); Perry v. Champlain Oil Co., 101 N.H. 97, 134 A.2d 65 (1957). *But see* Knapp, *supra* note 60, at 473, for the suggestion that the doctrine of commercial frustration has been honored more in the breach than in the observance in the United States. *See also,* Anderson, *Frustration of Contract—A Rejected Doctrine,* 3 DEPAUL L. REV. 1 (1953); Comment, 59 MICH. L. REV. 98 (1960).

bility, and increased judicial involvement during the twentieth century in private contracts that is consonant with the abandonment of the old hands off policy in all aspects of American life.

Implied Conditions and Freedom of Contract

Judges at the turn of the century who more actively interpreted contracts did not do so in their own right, or as a matter of law; rather they invoked the "intention" of the parties and used the theory of implied condition. Typical paths of inquiry were: What did the parties mean? What would they have agreed to had they thought of this contingency? What should they have meant were they only reasonable? This way of reasoning was a response to the earlier nineteenth century preoccupation with "meeting of the minds"—the will theory of contract.[96] Thus it was that a new generation of judges, with different philosophic and economic views, still clung to the authority of previous decisions and previous grounds of decision.[97]

> So thoroughly have we been schooled in the theory of freedom of contract that not happily would we countenance judicial action which seemed expressly to disregard the binding character of the contractual relationship as expressed by those who created it. In order to avoid the consequences of a literal application and enforcement of the terms of a contract and yet to forsake the support of the principle of contractual freedom, the courts adopted the expedient of finding an implied intent of the parties to excuse performance if and when performance became impossible.[98]

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96. Implied condition was a bridge from a literal reading of contracts to a more interpretive reading, with both techniques under the cloak of the maxim that courts do not make contracts for parties. Farnsworth, *Disputes Over Omission in Contracts*, 68 Colum. L. Rev. 860, 862 (1968).

97. Williston, *Freedom of Contract*, *supra* note 4, at 369.

98. Smith, *supra* note 12, at 673. When a court implies a condition, it reflects the forces and subcurrents of society.

> You can always imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can

With the implied condition technique, judges paid deference to Freedom of Contract, while providing an opening for judicial interpretation of contracts and excuse from performance on liberal grounds of impossibility.

The court in *Bennett* would not insert for the benefit of one of the parties "an exception which the parties have not, either by design or neglect, inserted in their engagement."[99] In *Vogt v. Hecker*[100] the principle of implied condition was recognized, but not applied, since the contract was to erect a barn, rather than to repair one. Later courts were more willing to imply a condition, and an illustration is the 1916 case of *Perlee v. Jeffcott.*[101] Perlee gave Jeffcott the option to purchase a farm and premises, but the barn was struck by lightning and with the other outbuildings was utterly destroyed before performance had taken place. The court implied the condition that if the barn burnt down the parties would be excused because they had both "undoubtedly contemplated" the conveyance of the buildings and this was now impossible. A condition could be implied for nearly any contract.[102] Said Justice Curtis in *Straus:* "The question

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do no more than embody the preference of a given body in a given time and place. We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind.

Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 465 (1897). *See* Corbin, *Conditions in the Law of Contract,* 28 YALE L.J. 739, 746 (1919), where the growth of implied and constructive conditions in the law is described as the process of courts finding "supposed" intentions of the parties and construing conditions in order to do justice according to the mores of the time.

99. 72 Am. Dec. at 376.

100. 118 Wis. 306, 95 N.W. 90 (1903).

101. 89 N.J. L. 34, 97 A. 789 (1916).

102. 3 WILLISTON ON CONTRACTS § 1937 (1920).

The implication of conditions has been criticized for the uncertainty and confusion that it breeds. Woodward, *supra* note 76, at 532-33; Smith, *supra* note 12; Page, *supra* note 11, at 599-600; 27 CAL. L. REV. 460, 461 (1939); 5 FORDHAM L. REV., *supra* note 94, at 326, 326 n.38. *But see* Conlen, *supra* note 2, at 39.

It is Corbin's position that it is better not to talk in terms of implied conditions if there are no expressions in the contract justifying the court in finding that a promise is conditional (if the "interpretative process involves no more than factual inference of probable intention in the light of all relevant facts").

> Justice is more likely to be done if the court is conscious that it is filling a gap that the parties have left and uses language in its opinion that is not language of interpretation only . . . . In some instances, the court has recognized the fact that the parties did not give any thought to the possibility of death or destruction. Judges have held promises to be conditional expressly upon the ground that they believe that the parties would have made them conditional in express terms if they had thought about it. They are aware that they are holding the promise to be conditional because they think that

is, was any condition, vital to the continued validity of this contract, to be implied by law as a part of this contract from the circumstances surrounding the transaction and the condition of the parties?"[103]

The idea of implied condition allowed judges to add things into contracts, or provide for unprovided-for contingencies without denouncing the absoluteness of contracts. Implying a condition merely redefined the scope of the risks and duties under the contract—which was still absolute (within new outlines):

> One who makes a contract can never be absolutely certain that he will be able to perform it when the time comes, and the very essence of it is that he takes the risk withing the limits of his undertaking. The modern cases may have abated somewhat the absoluteness of the older ones in determining the scope of the undertaking by the literal meaning of the words alone . . . . But when the scope of the undertaking is fixed, that is merely that the contractor takes the risk of the obstacles to that extent.[104]

In the same vein, the court in *St. Joseph Hay & Feed Co. v. Brewster*[105] said that a promisor was absolved not because the un-

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justice so requires, justice based upon custom, business practices, the mores of the community.

6 CORBIN ON CONTRACTS § 1331 (1962).

Therefore, Corbin suggests that all generalizations should be regarded as tentative working rules to be continually re-examined in light of customs, business practices, the prevailing mores of the time and place. *Id.*

103. 100 Conn. at 592. *See also* Hanford v. The Connecticut Fair Association, Inc., 92 Conn. 621, 103 A. 838 (1918); Cook v. McCabe, 53 Wis. 250, 10 N.W. 507 (1881); 3 WILLISTON ON CONTRACTS § 1938 at 329 n.45.

"But the composition of an implied term is not an inevitable judicial response in the face of silence." Farnsworth, *supra* note 96, at 861. Farnsworth points out that implying conditions in the name of intention is peculiar to common law jurisdictions:

> The civil law lawyer tends to think not of specific terms "implied" in the particular case but of generalized rules which apply to all such cases unless the parties provide otherwise. In France he calls these rules *facultative, interpretative* or *suppletive as* opposed to those that are *imperative* and which he is powerless to alter. In Germany he calls them *ius dispositivum* as opposed to *ius cogens.* Perhaps the happiest English equivalents are "suppletive" and "mandatory." Since the civil law lawyer is accustomed to finding them spelled out in a code in advance of controversy—the result of a legislative rather than a judicial pronouncement—he is not tempted to attribute them to the supposed "intentions" of the parties.

Id. at 861 n.7.

104. 'Day v. United States, 245 U.S. 159 (1917).

105. 195 S.W. 71 (1917).

foreseen or unavoidable contingency excused him, but because the contract bound him absolutely "only to perform under certain circumstances and conditions . . . ."[106] No judge of the twentieth century would even hint at sagging enthusiasm for Freedom of Contract; that sacred value however, no longer dictates the same harsh results in impossibility cases. The content of the concept has changed with the times, as have prevailing socio-politico philosophies.

CONCLUSION

> A tiger has escaped from a travelling menagerie. The milkgirl fails to deliver the milk. Possibily the milkman may be exonerated from any breach of the contract; but even so, it would hardly be reasonâble to base that exoneration on the ground that 'tiger days excepted' must be held as if written into the milk contract.[107]

And so it has been said that the use of implied conditions in impossibility cases is a pious fiction—a "fiction because it does not correspond with anything that was in the minds of parties at the time; pious because it seeks to do homage to a very sacred legal principle, the sanctity of contract."[108] Further, some say that the faction is harmful, for it cripples clearness of thought by bringing in false notions of intention.[109]

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106. *Id.* at 72.

107. Lord Sands, Lord Ordinary of the Court of Sessions, in Scott & Sons v. Del Sol, 1922 S.C. [Session Cases] 592, 596-97, *aff'd*, 1923 S.C. (H.L.) 37, *quoted in* E. FARNSWORTH, CONTRACTS CASES AND MATERIALS 822-23 (1972).

108. *Id. See also* 5 FORDHAM L. REV. 322, 337 (1936):

> 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.

109. "[C]learness of thought would be increased if it were plainly recognized that the qualification or defense is not based on any expression of intention by the parties." 3 WILLISTON ON CONTRACTS § 1937 (1920). It is harmful for courts to talk "as if impossibility of performance were a question of the actual intention of the parties, instead of operating only when the parties had no intention as to the effect of the combination of facts which has arisen

Some suggest that judges ought to avoid intervention beyond the actual intention of the parties.[110] Such an idea is easy to endorse, yet difficult to effect. "Intention" is not easily definable or discernible, as we can see from this example by Wittgenstein:

> Someone says to me: "Show the children a game." I teach them gaming with dice, and the other says, "I didn't mean that sort of game." Must the exclusion of the game with dice have come before his mind when he gave me the order?[111]

This is the judge's dilemma when faced with a contract not expressly providing for certain events which did happen. Dissolution of strict adherence to the words of an agreement is the beginning of inquiry about intention.[112]

> [The use of implied conditions] only pushes back the problem a single stage. It leaves the question what is the reason for implying a term . . . . The doctrine is invented by the court in order to supplement the defects of the actual contract. The parties did not anticipate fully and completely, if at all, or provide for what actually happened. It is not possible . . . to say that if they had thought of it they would have said: "Well,

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after the contract was made, and which prevents performance." Page, *supra* note 11, at 600.

Farnsworth advocates the overthrow of implied condition because where there are no expectations, it masks the real issues by encouraging courts to rationalize by means of fictitious intention and where there are real expectations of the parties, it distorts them by casting them in contractual terms. Farnsworth, *supra* note 96, at 867-68. As an alternative, he suggests that courts assume that "parties form expectations with respect to only a limited number of situations and that only some of these expectations, are, in turn, formulated as terms and reduced to contractual language." *Id.* at 862.

> It would be a significant contribution to clarity of thought in this important area of contract law if courts would abandon the facade of the implied term and expose the process of inference that lies behind it. To the extent that the process is premised on the actual expectations of the parties, those expectations should be made clear. To the extent that it is premised on a rule of fairness or justice, that rule should be articulated. If, in Justice Holmes' words, courts decide as they do "because of some belief as to the practice of a community or of a class, or because of some opinion as to policy, or in short because of some attitude . . . upon a matter not capable of exact qualitative measurement," it is not too much to ask that a court disclose the fact.

Id. at 879.

110. Smith, *supra* note 12, at 681.

111. L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 33 (1953).

112. Perhaps parole evidence can be admitted to show what the agreement really was, as in St. Joseph Hay & Feed Co. v. Brewster, 195 S.W. 71-73 (1917), and Berg v. Erickson, 234 F. 817, 823 (8th Cir. 1916). But what if there is no such evidence? What should a court do when it appears that the contingency never crossed the minds of the parties?

> if that happens, all is over between us." On the contrary, they would almost certainly on the one side or the other have sought to introduce reservations or qualifications or compensations. As to that the court cannot guess. What it can say is that the contract either binds or does not bind.[113]

The question then, is not what the parties intended but rather, how the losses should be allocated, given this contingency under these circumstances. The judicial function becomes one of weighing equities and balancing interests.

Williston has suggested that the true issue is whether unanticipated events have made performance of a contract vitally different from what was reasonably expected.[114] If so, the court's focus should not be the supposed original intentions of the parties, but the circumstances then existing. The task is to allocate "the burden of unreasonably excessive risks which the parties have encountered but which they did not, at the time the contract was made, foresee or provide for and by reason of which a greatly increased burden is placed upon the promisor at the time of performance."[115] It is clear that the allocation of unanticipated hardships caused by extraordinary circumstances was the basic issue underlying the implication

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113. Lord Wright, in Denny Mott & D.V. Fraser & Co., 1944 1 All Eng. 678, 171 L.T. 345, 113 L.J.P.C. 37, *quoted in* 6 CORBIN ON CONTRACTS § 1331 (1962). *See also* Williston, *Freedom of Contract*, *supra* note 4, at 365.

114. 3 WILLISTON ON CONTRACTS § 1963 (1920).

115. Powers v. Siats, 244 Minn. 515, 70 N.W.2d 344 (1955). *See also* Carroll v. Bowersock, 100 Kan. 270, 164 P. 143, 144 (1917) (the law must deal with the new situation of the parties created by a fire); Krause v. Bd. of Trustees of School Town of Crothersville, 162 Ind. 278, 70 N.E. 264 (1904) (the question is on which side the burden should fall). Law must go beyond intentions of parties to settle controversies as to the distribution of gains and losses that the parties did not anticipate. Cohen, *supra* note 49, at 591. The basic issue is how the law should allocate unanticipated risks caused by extraordinary circumstances. SHEPHERD & SHER, *supra* note 8, at 451.

The most famous recent illustration of loss distribution is the Westinghouse case. Having contracted to supply utility companies with 70 million pounds of uranium, Westinghouse Electric Corporation found itself with only 15 million pounds to supply. Total fulfillment of the contracts would cost about $2 billion and would virtually bankrupt Westinghouse. Fourteen separate actions by utility companies are currently pending. The United States District Court for the Eastern District of Virginia has held that Westinghouse is liable but that the plaintiffs will not be entitled to full damages. Virginia Elec. and Power Co. v. Westinghouse Elec. Corp., No. 75-0514-R (E.D. Va., Oct. 27, 1978), at 22,320-32. How the losses should be allocated is the question that remains. It is interesting, however, that the court is not tending toward a decision under Comment 6 of the U.C.C. § 2-615, but may decide the issue of damages on anticipatory repudiation grounds—using the date of breach as the loss divider. *Id.*

of many a condition by judges at the turn of the century and later.[116]

Allocation might be accomplished by a judicial decree modifying the contract that had been rendered impossible. Although this flies in the face of the old adage that courts do not make contracts for people, something of the sort has been done for over one hundred years through use of the quasi-contract theory.[117]

> In recent years suggestions for loss-splitting and for contract modifications, as techniques that should be recognized and openly applied by courts, have come to the surface in what appears to be increasing frequency. The future course of the law may well be set in this direction although it is too early to tell whether the course will be marked by the meandering confusion of a case law development or by the more channeled line of statutory reform.[118]

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116. "[C]onstructions are to be with equity and moderation, to moderate the rigor of the law." Grounds of Law and Equity, 38 Ca. 49, quoted in Krause v. Bd. of Trustees of School Town of Crothersville, 162 Ind. 278, 70 N.E. 264, 267 (1904). Around 1919, there appeared an increasing tendency to found relief upon equitable principles, where great hardship would result from holding the parties to a contract which had become practically impossible. *See* Paxton Lumber Co. v. Panther Coal Co., 83 W.Va. 341, 98 S.E. 563 (1919).

In England, also, courts have been turning away from a *Taylor v. Caldwell* type of implied condition, and are "determining what they believe the justice of the time requires with respect to events unforeseen by the parties and not provided for by agreement." 6 CORBIN ON CONTRACTS § 1331 at 358 n.61 (1962).

117. F. KESSLER & G. GILMORE, CONTRACTS, CASES AND MATERIALS 744 (1974).

Losses ought to be allocated based upon reason informed by custom, business practice, common feeling, the mores of the community. Corbin, *Recent Developments in Contracts,* 50 HARV. L. REV. 449, 465-66 (1937). *Cf.* Berman, *supra* note 59, at 1418 n.11; Patterson, *supra* note 80, at 905; Conlen, *supra* note 2, at 94.

> The recognition is gaining ground that where constructive conditions of exchange and of cooperation are implied, courts, instead of finding the intention of the parties, apply considerations of equity and justice, and that supplementation of a contract is by no means a novel judicial activity.

Smit, *Frustration of Contract: A Comparative Attempt at Consolidation,* 58 COLUM. L. REV. 287, 312 (1958).

Pound speaks of the rise of "a humanitarian idea of lifting or shifting burdens and losses so as to put them upon those better able to bear them. Belief in the obligatory force of contracts and respect for the given word are going, if not in some spots actually gone, in the law of today [1954]." Pound, *supra* note 9, at 163.

118. KESSLER & GILMORE, *supra* note 116, at 744.

> The one-time general proposition that courts cannot make contracts over for the parties, that freedom of contract implies the possibility of contracting foolishly, is giving way to a power of the service state to act as guardian of persons of age, sound mind, and discretion, and relieve them by judicial action from their contracts, or make their contracts over for them, or make their promises easier for them.

Pound, *supra* note 9, at 167.

Such an observation could only have been made at a time when laissez-faire had been toppled from its nineteenth century place of honor—a time when judges no longer feel constrained to cloak their opinions in phrases having to do with the intention, wills, contemplation, of the parties and when freedom of contract is no longer the strict, literal, laissez-faire concept that it was once.

Pound was less than enthusiastic about this development:

> If letting people of full age and sound mind contract freely and holding them rigidly to the contracts they made was carried to an extreme in the last century, a system of restricting free contract and relaxing the olbigation of contract may be carried quite as far in reaction, and the spirit of the time seems to be pushing everywhere to that other extreme.
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> . . .
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> We are told that the meaning is distilled from the words. It might be suggested that distilling is often illicit and the product moonshine.

Pound, *supra* note 117, at 116, 167.

It may indeed be true that "the tendency of every body of law which rests upon precedent is to develop into a chaotic mass of formless pseudo-equity." *The Need of Law Reform, The Doctrine of Frustration of Adventure,* 38 CAN. L. TIMES 86, 86, 151, 223, *quoted in* Page, *supra* note 11, at 613.