[HIGH COURT OF AUSTRALIA.]

SCANLAN'S NEW NEON LIMITED . . APPELLANT;
PLAINTIFF,

AND

TOOHEYS LIMITED . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

CALDWELL . . . . . APPELLANT;
DEFENDANT,

AND

NEON ELECTRIC SIGNS LIMITED . . RESPONDENT.
COMPLAINANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Contract—Frustration—Hire of neon advertising signs—Governmental Order prohibiting illumination—Liability of hirers for rent.

During the currency of the hiring under certain contracts for the construction, installation and hiring for a period of neon advertising signs, Orders were made under the authority of the *National Security Act* 1939-1940 which said Orders operated to prohibit the illumination of the signs.

Held that, having regard to the nature and terms of the contracts and to the surrounding circumstances, the contracts were not frustrated and the hirers' liability to pay rent thereunder continued.

Per Latham C.J. and *McTiernan* J.: The test for determining when a contract is frustrated appearing in *Consolidated Neon (Phillips System) Ltd.* v. *Tooheys Ltd.*, (1942) 42 S.R. (N.S.W.) 152, at p. 160; 59 W.N. 103, at p. 108, is too widely stated.

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SYDNEY, 1942. *Dec.* 3. 4, 7, 8.

MELBOURNE, 1943. *Feb.* 4.

Latham C.J., McTiernan and Williams JJ.

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Decision of the Supreme Court of New South Wales (Full Court): *Scanlon's New Neon Ltd.* v. *Tooheys Ltd.*, (1942) 43 S.R. (N.S.W.) 2; 60 W.N. 4, reversed.

Decision of the Supreme Court of Victoria (Full Court): *Neon Electric Signs Ltd* v. *Caldwell*, (1943) V.L.R. 1, affirmed.

Scanlan's New Neon Ltd. v. *Tooheys Ltd.*

APPEAL from the Supreme Court of New South Wales.

By writ of summons issued out of the Supreme Court of New South Wales, Scanlan's New Neon Ltd. sued Tooheys Ltd. to recover the sum of £173 8s. alleged to be the amount of rental due as at 30th April 1942 under certain neon sign lease agreements made between the plaintiff and the defendant respectively in respect of certain hotel and other premises situate in various parts of New South Wales.

The action was tried by *Halse Rogers* J. as a commercial cause without pleadings and without a jury. The following issues were ordered to be tried:—(*a*) Are the contracts still of full force and effect or has their operation been suspended or terminated owing to the circumstances which have arisen? and (*b*) If the contracts are still operative what sums, if any, are due by the defendant to the plaintiff?

A number of contracts were involved, each relating to a separate sign erected on business premises. The hire was alleged to have become due and payable in April 1942, at a time when the contracts were all current according to their express terms. The contracts were made respectively on 18th September 1937, and subsequent days down to 17th January 1941. The defendant resisted the claim on the ground that all the contracts were frustrated in the legal sense on 19th January 1942, in consequence of a governmental Order which made it illegal to light the signs after that date.

The governmental Order was made by the Premier of New South Wales pursuant to powers conferred upon him by the Commonwealth. It was made as a measure of security after Japan entered the war. The duration of the Order was indefinite. All the contracts were made before Japan entered the war and all, except four, before the outbreak of the present war. The contracts were all current when the Order was made. The part of the Order which affected the contracts was that which prohibited the display of lights used for the purposes of any exterior advertisement or sign or lights connected with any exterior advertisement or sign.

Each contract was in writing and was entitled "Lease and Service Agreement." It described the plaintiff as lessor and the defendant

as lessee and its operation as a lease; but in substance the sign was let out to hire for use by the defendant upon the terms and conditions of the contract. The hiring was expressed to begin after the sign was installed on the premises designated by the defendant. The plaintiff undertook by each contract to construct and instal the sign to which it related at its own expense. The sign was to conform to specifications. These obligations were all performed. It was a term of each contract that the sign was not to be a fixture appurtenant to the realty to which it was attached, but always the personal property of the defendant and free from any right in the plaintiff except such as arose under the contract. The right was reserved to the plaintiff to remove the sign upon the termination of the hiring or any extension of it. The plaintiff agreed to let each sign "for the term, use and rental and upon the conditions hereinafter set forth," and the defendant to pay the rental and perform the terms and conditions set out in the contract. The initial term of each contract was sixty calendar months, with the option to have the sign for an additional twenty-four months. The hiring was expressed to begin on the first day after installation, but the contract itself from its own date. The first month's rental was due upon installation or from a time fixed by the plaintiff if it could not instal the sign because of the defendant's conduct. The rental for the last two-monthly period was payable at the date of the contract and for the rest of the hiring monthly in advance. The obligation to pay hire was subject to the express condition that "if the sign fails to operate" for any reason other than the defendant's fault and the plaintiff failed to repair after notice there was to be a progressive abatement of the rental while the neglect continued. There was an obligation on the plaintiff to "maintain and service" each sign at its own expense. This applied to cleaning, inspection, repainting, replacement of defective transformers and broken and defective tubes and "all other repairs necessary to keep the sign in first-class operating condition at all times during the operation of the agreement." In some of the contracts the plaintiff undertook to bring "feed wires" to the sign, and in these cases the defendant undertook to supply parts of the apparatus. In every contract the defendant agreed to pay for all electrical energy "used by the sign" and to be responsible for the supply of current to it. The plaintiff assumed liability in case of any claim that a patent was infringed by "the use of the sign." In case of default, a term which was given an extensive scope, the plaintiff was entitled to repossess the sign by notice and to accelerate payment of all future hire and if paid the defendant was entitled "to the use of the sign" according to the

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contract for the unexpired period of the hiring. Alternatively, the plaintiff might remove the sign and claim damages. Each contract contained this express term: "It is understood and agreed that the sign is especially constructed for the lessee and for use only at the premises above designated and that it is a material consideration to the lessor in entering into this agreement that the lessee shall continue to use the sign as contemplated." A term bound the defendant not to remove the sign without the plaintiff's consent. The plaintiff was freed from responsibility for radio interference. A further term said that "if during the continuance of the hiring any removal, repairs, renovations or alterations become necessary to the said installation or accessories" the defendant was to notify the plaintiff, and it had the right to carry out the work at the defendant's cost. If the sign was damaged or destroyed, the plaintiff was authorized to rebuild it and add the lost time to the period of the contract or to terminate the contract, the defendant being released from further liability. The defendant was liable for injury or damage caused by its servants or agents. There was an express term excluding any agreement or representation which was not written in the contract.

The trial judge made the following findings:—(1) That the capability of illumination is the essential and distinguishing feature of neon signs. (2) That illumination is possible only when electrical current can be turned on to the sign. (3) That the signs are designed and used for advertising purposes. (4) That they have a value for daylight as well as night-time advertising, but that this value varies in some cases, the value for daylight advertising being substantial. It is obvious, however, that they are not so noticeable by day as when illuminated by night. (5) Since the prohibition Order the defendant has lost the whole of the benefit of the night advertising by means of neon signs. (6) Since the prohibition Order the defendant has had the benefit of advertising by the signs during the whole of the daylight hours. It is not possible to establish a proportion between the benefits lost and the benefits retained on a review of the evidence. On examination of photographs and an examination of some of the actual signs *in situ* I find as I have indicated that the benefit is substantial. (7) On dismantling the only value of the sign is as scrap. (8) The costs of erection in all cases exceed fifty per cent of the total rental over the period of letting and in some cases amounted to eighty per cent or more. (9) The prohibition of illumination occurred without default of either party. (10) Night advertising was the most important benefit which the parties contemplated the defendant would get under the contract. It was an essential

benefit in the sense that the plaintiff was letting and the defendant was hiring signs capable for use for night advertising and intended for such use. (11) Neither party is by reason of the prohibition prevented from performing any essential promise under the contract.

The trial judge held that none of the contracts had been frustrated and entered judgment for the plaintiff for the full amount claimed.

The defendant appealed to the Full Court of the Supreme Court which, by a majority, held that the contracts had been frustrated and ordered judgment to be entered for the defendant: *Scanlon's New Neon Ltd.* v. *Tooheys Ltd.* (1).

From that decision the plaintiff appealed to the High Court.

Caldwell v. *Neon Electric Signs Ltd.*

APPEAL from the Supreme Court of Victoria.

Neon Electric Signs Ltd. sued Clarissa Ann Caldwell in the Court of Petty Sessions, Melbourne, to recover the sum of £22 7s. said to be due to it by the defendant for the use and hire of goods and chattels.

By an agreement between the complainant and one Mrs. McQuie, the assignor of the defendant, Mrs. McQuie, who was the lessee of the Devon Hotel, Bourke Street, Melbourne, agreed to hire from the complainant two electrical advertising signs at a monthly rental from 16th February 1940, the date of installation. The signs were installed and rent was paid monthly up to 16th January 1942. The hiring agreement was for five years.

By an Order made under the *National Security Act* 1939-1940, the use of lighted signs outside any building was prohibited as from 12th December 1941. The Order provided, *inter alia*, that exemption therefrom could, upon application, be granted by the Commissioner of Police. By a subsequent Order the prohibition was relaxed as from 20th February 1942, so as to confine its operation to the hours of darkness only. The signs were designed and constructed to permit of illumination by neon lights.

The subject agreement was substantially the same as the contracts under consideration in *Scanlan's New Neon Ltd.* v. *Tooheys Ltd.*, as set forth above, except that, instead of the corresponding clause in those contracts, the following clause appeared: "It is agreed between the parties that the said sign is being especially constructed for the hirer and for use only at the premises of the hirer and that it is a material consideration for the owner entering into this agreement that the hirer shall continue to use the sign on his premises." The words "as contemplated" did not appear therein.

(1) (1942) 43 S.R. (N.S.W.) 2; 60 W.N. 4.

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The defendant claimed that she was excused from payment of any further rent by reason of the Orders referred to above having deprived her of the benefit of night-time advertisement, which was the main purpose the signs were designed to serve.

The magistrate made an order in favour of the complainant for the full amount claimed.

An order to review the decision on the grounds that the agreement was terminated or frustrated by the said Orders, and that no claim for use and hire of the chattels as alleged was maintainable in the Court of Petty Sessions, inasmuch as on the evidence the signs by installation on the premises had become fixtures and were no longer chattels, was discharged by the Full Court of the Supreme Court of Victoria: *Neon Electric Signs Ltd.* v. *Caldwell* (1).

From that decision the defendant appealed, by special leave, to the High Court.

The appeals were heard together. Upon the suggestion of *Latham* C.J. the Court was first addressed by counsel for the neon companies and then by counsel for the other parties to the appeals.

Menzies K.C. (with him *Reynolds* K.C. and *May*), for the appellant Scanlan's New Neon Ltd. The state of facts in *Consolidated Neon (Phillips System) Pty. Ltd.* v. *Tooheys Ltd.* (2) is different from and not so comprehensive as the facts proved in this case. There cannot be a finding of frustration unless the performance of the contract as a contract has in substance become impossible. In every case in which a supervening event has been held to defeat the purpose the purpose has been extracted from the contract itself. Whenever the court has found a frustration it has done so because in substance it has found after a consideration of the contract a supervening impossibility (*Taylor* v. *Caldwell* (3); *Krell* v. *Henry* (4)), or a total failure of consideration, as in *Horlock* v. *Beal* (5). The essential facts in this case are very similar to the facts in *Herne Bay Steam Boat Co.* v. *Hutton* (6) and *Leiston Gas Co.* v. *Leiston-cum-Sizewell Urban District Council* (7). In each of those cases the court held that there was no frustration. In none of the cases, such as *F. A. Tamplin Steamship Co. Ltd.* v. *Anglo-Mexican Petroleum Products Co. Ltd.* (8), *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.* (9) and *Taylor* v. *Caldwell* (3), where it

(1) (1943) V.L.R. 1.
(2) (1942) 42 S.R. (N.S.W.) 152; 59 W.N. 103.
(3) (1863) 3 B. & S. 826 [122 E.R. 309].
(4) (1903) 2 K.B. 740.
(5) (1916) 1 A.C. 486.
(6) (1903) 2 K.B. 683.
(7) (1916) 2 K.B. 428.
(8) (1916) 2 A.C. 397.
(9) (1942) A.C. 154.

has been held there was a frustration, has the court gone beyond the facts which would normally be before the court in accordance with the ordinary rules of evidence on the interpretation of a contract. It was not an implied term of the contract that in the event of impossibility of performance or failure of consideration not brought about by or beyond the control of either party, the loss should be wholly borne by one or other of the parties. The major proportion of the appellant's obligations under the contract had been performed. The principle enunciated in *Consolidated Neon (Phillips System) Pty. Ltd.* v. *Tooheys Ltd.* (1) is too wide. If the rule is to be extended beyond the actual cases decided it should be a rule of law which must be applied to the facts of each case, that is to say the test should be: Does the change of circumstances from those contractually contemplated by the parties go to the root of the contract in the sense that it renders performance of the obligations of the contract as expressed so substantially worthless that the court is driven to the conclusion that no reasonable man could have agreed otherwise than that in view of the change the contract should without restitution or compensation automatically end? The observations by Lord *Wright* in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* (2) concerning an implication of what is "fair and reasonable" are not binding, and should not be applied.

Reynolds K.C. (with him *May*), for the respondent Neon Electric Signs Ltd. The rule enunciated in *Consolidated Neon (Phillips System) Pty. Ltd.* v. *Tooheys Ltd.* (1) is stated in terms which are far too wide and which are not supported by the decisions of the court. The expression "some essential benefit" is too wide. There is no decided case in which an implied term for the dissolution of the contract has been introduced, unless the supervening event is one which has directly prevented the performance of some express promise in the contract. Nor is there any decided case in which it has been held there has been frustration where the supervening event has merely deprived one of the parties of something which he expected to obtain from the performance of the contract by the other party. The subject contract is not a contract in which it appears from its terms any implication ought to be made. Having regard to the promise to pay in any event it would be difficult to introduce any excuse for the performance of that promise. The extent of the doctrine of frustration appears in *Metropolitan Water*

(1) (1942) 42 S.R. (N.S.W.), at p. 160; 59 W.N., at p. 108.
(2) (1943) A.C. 32, at p. 70.

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Board v. *Dick, Kerr & Co. Ltd.* (1), in which impossibility of performance was produced by a governmental Order. The doctrines of frustration and failure of consideration, and the decided cases thereon, are discussed at length in *Smith's Leading Cases*, 13th ed. (1929), vol. 2, pp. 611, 612, 615, 620, 621, 631. Merely having been deprived of an advantage does not amount to frustration. The common object, or an express term of the contract, must be frustrated and not merely an individual advantage which one party or the other expected or might have gained from the contract (*Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.* (2); *In re Comptoir Commercial Anversois* v. *Power, Son & Co.* (3)). The doctrine of frustration is more directly applicable to charter party cases than to the class of contract now under consideration: See *Law Quarterly Review*, vol. 56, p. 173. The decision in *Krell* v. *Henry* (4) is based on an erroneous view of the decision in *Nickoll & Knight* v. *Ashton, Edridge & Co.* (5). The last-mentioned case is really an application of the rule in *Taylor* v. *Caldwell* (6), extending that rule to a case where the subject matter of the contract is not destroyed; it continues in existence but is unavailable for the purpose of performing the contract. In *Ashmore & Son* v. *C. S. Cox & Co.* (7), *F. A. Tamplin Steamship Co. Ltd.* v. *Anglo-Mexican Petroleum Products Co. Ltd.* (8), *Blackburn Bobbin Co. Ltd.* v. *T. W. Allen & Sons Ltd.* (9), *Larrinaga & Co. Ltd.* v. *Société Franco-Américaine des Phosphates de Medulla, Paris* (10), *Associated Portland Cement Manufacturers* (1900) *Ltd.* v. *William Cory & Son Ltd.* (11), *In re Comptoir Commercial Anversois* v. *Power, Son & Co.* (12), *Leiston Gas Co.* v. *Leiston-cum-Sizewell Urban District Council* (13) and *Maritime National Fish Ltd.* v. *Ocean Trawlers Ltd.* (14) there was a very marked vital change in circumstances which prevented the parties from obtaining the benefits they expected from the contracts or which rendered the performance on their part very difficult and it was held there was no case for frustration made out. In other words, in all those cases the parties were deprived of benefits which they contemplated would accrue to them as the result of performance by the other parties. In view of the decision in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* (15) it would appear that *Krell* v. *Henry* (4) is not a true frustration case, but is a case of failure of consideration, as is

(1) (1918) A.C. 119.
(2) (1926) A.C. 497, at p. 507.
(3) (1920) 1 K.B. 868, at p. 881.
(4) (1903) 2 K.B. 740.
(5) (1901) 2 K.B. 126.
(6) (1863) 3 B. & S. 826 [122 E.R. 309].
(7) (1899) 1 Q.B. 436.
(8) (1916) 2 A.C. 397.
(9) (1918) 1 K.B. 540; 2 K.B. 467.
(10) (1923) 39 T.L.R. 316; 29 Com. Cas. 1.
(11) (1915) 31 T.L.R. 442.
(12) (1920) 1 K.B. 868.
(13) (1916) 2 K.B. 428.
(14) (1935) A.C. 524.
(15) (1943) A.C. 32.

also *Chandler* v. *Webster* (1). In every case, from *Taylor* v. *Caldwell* (2) to *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.* (3) inclusive, in which the doctrine of frustration has been applied the supervening events prevented the performance of some express and essential promise in the contract. Frustration must be absolute and complete. The results of the supervening events could have been avoided by the appellant in this appeal by applying for an exemption as provided for in the governmental Order. There was not that absolute prohibition of the lighting of the sign which is necessary to effect frustration. In all the circumstances, the appellant should not have assumed that the Order would be in force for a very long time (*Andrew Millar & Co. Ltd.* v. *Taylor & Co. Ltd.* (4)). On the implied term theory, see *Halsbury's Laws of England*, 2nd ed., vol. 7, p. 332, *Heimann* v. *Commonwealth of Australia* (5) and the cases there cited, *Larrinaga & Co. Ltd.* v. *Société Franco-Américaine des Phosphates de Medulla, Paris* (6), *F. A. Tamplin Steamship Co. Ltd.* v. *Anglo-Mexican Petroleum Products Co. Ltd.* (7), *Scottish Navigation Co. Ltd.* v. *W. A. Souter & Co.* (8), *Bank Line Ltd.* v. *Arthur Capel & Co.* (9), and *Peters American Delicacy Co. Ltd.* v. *Champion* (10). Whatever view is taken as to the basis on which the court acts, the court should not hold that these contracts or any of them are frustrated. In view of the fact that the lessee was agreeable to pay rent whether the sign was used or not, and undertook the responsibility for the supplying of electric current to the sign, it is inconceivable that the parties would agree that the lessor should forego the whole cost of installation in the event of the lessee being restricted merely in the user of the sign. In view of considerations as to what the parties have actually agreed with regard to the supplying of current to the sign and as to payment whether the sign be used or not, if the theory as propounded by Lord *Wright* in *Fibrosa Spolka Akcyjna* v. *Fairbairn, Lawson, Combe, Barbour Ltd.* (11) is applied it would not be reasonable for the court to impose a " one-sided " condition on the parties which would lead to a termination of the contract. Although the document executed by the parties is described as a lease, the transaction is a form of bailment in which the bailee acquires a legal interest in the sign. On the rights of a bailee, see *The Winkfield* (12) and

(1) (1904) 1 K.B. 493.
(2) (1863) 3 B. & S. 826 [122 E.R. 309].
(3) (1942) A.C. 154.
(4) (1916) 1 K.B. 402.
(5) (1938) 38 S.R. (N.S.W.) 691, at p. 695.
(6) (1923) 39 T.L.R. 316; 29 Com. Cas. 1.
(7) (1916) 2 A.C., at p. 403.
(8) (1917) 1 K.B. 222, at p. 249.
(9) (1919) A.C. 435, at p. 460.
(10) (1928) 41 C.L.R. 316, at p. 323.
(11) (1943) A.C., at p. 70.
(12) (1902) P. 42.

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Story on *Bailments*, 9th ed. (1878), secs. 370, 385. Here a legal interest is created in the bailee; the closest analogy thereto is the relationship of landlord and tenant (*Keith, Prowse & Co.* v. *National Telephone Co.* (1)). The courts have refused to apply the doctrine of frustration to leases of land (*London and Northern Estates Co.* v. *Schlesinger* (2); *Whitehall Court Ltd.* v. *Ettlinger* (3); *Matthey* v. *Curling* (4)). The right of property having been thus created, the doctrine of frustration cannot be applied because one party, the lessor, has given a consideration which relates to the whole period. The other party has got a special right of property for that period and has received substantial benefit under the contract which is altogether apart from the value of the sign for the purposes of daylight advertising. There is not any failure of consideration going to the root of the contract. The legal interest created in the sign has not been affected by the action of the Government introducing the lighting restrictions. Only the enjoyment of the sign has been affected. The frustrating effect must affect directly the performance of the obligations (*Matthey* v. *Curling* (5)). Alternatively, on Lord *Wright's* theory as stated in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* (6), where such a substantial part of the consideration has been performed and where such a large proportion of the money as rent has been earned, a court should not, in attempting to achieve what is just and reasonable, hold that the contract has in the events been terminated. A sound analogy is to be found in *Leiston Gas Co.* v. *Leiston-cum-Sizewell Urban District Council* (7).

Shand (with him *McKillop*), for the respondent Tooheys Ltd. The judgment of the Chief Justice in *Consolidated Neon* (*Phillips System*) *Pty. Ltd.* v. *Tooheys Ltd.* (8) is incorrect in one aspect only, and that is where it deals with *Krell* v. *Henry* (9) with regard to the admissibility of evidence; the evidence there referred to was properly admitted. The surrounding circumstances may be looked at in order to ascertain what the parties had in mind. The phrase "implied term" in relation to the doctrine of frustration has not the same significance which attaches to that phrase when used with regard to importing a term in commercial contracts: it is a device. It is not suggested that a court has the right to remodel a contract, but in doing justice justice lies between the choice of leaving a

(1) (1894) 2 Ch. 147.
(2) (1916) 1 K.B. 20, at p. 24.
(3) (1920) 1 K.B. 680.
(4) (1922) 2 A.C. 180, at p. 185.
(5) (1922) 2 A.C., at pp. 227-230.
(6) (1943) A.C., at p. 70.
(7) (1916) 2 K.B. 428.
(8) (1942) 42 S.R. (N.S.W.) 152; 59 W.N. 103.
(9) (1903) 2 K.B. 740.

contract as it stands or putting an end to it altogether. There is no scope for any question of modification of a contract, it is either terminated or it remains in full force and the court does not say what the parties in the given circumstances would have been likely to have stipulated but the court does, in the personification of a reasonable man, decide whether in the given circumstances a term should be implied or the contract terminated. Once it has been found that an essential benefit has been lost by either party it follows that the court will hold that the contract is at an end. The fact that the terminating of the contract in the event works hardship on one party or the other is not a relevant consideration. The point of time at which the court considers the question of frustration is at the inception of the contract, at which time the doctrine may, according to the events that happen, work a hardship on either party. If an event happens by reason of which an essential benefit is lost to one party frustration will operate automatically unless express provision has been made in the contract as to the particular event. That the events preventing the operation of the contract, or going to the root of the contract, or preventing the obtaining of an essential benefit, might have been or were contemplated by the parties does not prevent the application of the doctrine of frustration, nor does an express provision as to delay (*Metropolitan Water Board* v. *Dick, Kerr & Co. Ltd.* (1) ; *Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.* (2) ; *The Penelope* (3) ; *Bank Line Ltd.* v. *Arthur Capel & Co.* (4)). The loss of an essential benefit need not be such as to make the contract impossible of performance or to constitute a total failure of consideration (*Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.* (5) ; *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* (6) ; *The Penelope* (7) ; *Bank Line Ltd.* v. *Arthur Capel & Co.* (8)). *Krell* v. *Henry* (9) is not a case in which the contract was partly oral and partly in writing, but is a case where the contract was expressly dealt with as being a written contract ; the court took into consideration what the object was that the parties had in view *dehors* the contract. An interruption resulting from the outbreak of war constitutes an indefinite interruption so as to bring into operation the doctrine of frustration (*Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe*

(1) (1918) A.C., at pp. 133, 134, 137, 138.
(2) (1926) A.C., at p. 509.
(3) (1928) P. 180, at pp. 195, 196.
(4) (1919) A.C., at pp. 441-445.
(5) (1942) A.C., at pp. 163, 164, 172, 182, 183.
(6) (1943) A.C., at pp. 65, 68.
(7) (1928) P. 180.
(8) (1919) A.C., at pp. 436, 443.
(9) (1903) 2 K.B. 740.

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Barbour Ltd. (1); *Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.* (2); *Horlock* v. *Beal* (3); *Bank Line Ltd.* v. *Arthur Capel & Co.* (4)). In view of prior and subsequent decisions of the courts *Leiston Gas Co.* v. *Leiston-cum-Sizewell Urban District Council* (5) was wrongly decided. The question of the indefinite nature of the regulations is similar to a thing directly resulting from war. The fact that all the parties can do everything they were required to do under the contract does not prevent the doctrine of frustration from operating. The war regulations have prevented the actual performance of a contractual obligation, namely the use of the sign "as contemplated," that is as an illuminated sign, and prevented it so as to make its performance illegal. If this feature—although it is not admitted it is necessary for frustration to have something in the nature of a common adventure—were a necessary element, then the obligation is such as to give the subject contracts the nature of a common adventure between the parties. Due to impossibility with regard to that contractual term in particular this case comes within the doctrine of frustration. *Krell* v. *Henry* (6) was not decided on a question of impossibility (*Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* (7)). The rule is correctly stated in *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.* (8). They should not look at the absolute words in each particular case, but at the circumstances, the common intention of the parties (*Lyttelton Times Co. Ltd.* v. *Warners Ltd.* (9); *Birmingham, Dudley and District Banking Co.* v. *Ross* (10); *Pwllbach Colliery Co. Ltd.* v. *Woodman* (11); *Turner* v. *Turner* (12); *Lyall* v. *Edwards* (13)). The principle stated in *Krell* v. *Henry* (6) has been approved and is the law (*Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* (14); *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.* (15); *The Penelope* (16); *F. A. Tamplin Steamship Co. Ltd.* v. *Anglo-Mexican Petroleum Products Co. Ltd.* (17); *Horlock* v. *Beal* (18))—Cf. *Maritime National Fish Ltd.* v. *Ocean Trawlers Ltd.* (19); *Metropolitan Water Board* v. *Dick, Kerr & Co. Ltd.* (20). Other rights were available to the

(1) (1943) A.C., 32.
(2) (1926) A.C., at pp. 506, 507.
(3) (1916) 1 A.C., at pp. 501, 502, 507, 508.
(4) (1919) A.C., at p. 449.
(5) (1916) 2 K.B. 428.
(6) (1903) 2 K.B. 740.
(7) (1943) A.C., at p. 68.
(8) (1942) A.C., at p. 187.
(9) (1907) A.C. 476, at p. 481.
(10) (1888) 38 Ch. D. 295, at pp. 308, 309, 314, 315.
(11) (1915) A.C. 634, at p. 638.
(12) (1880) 14 Ch. D. 829, at p 834.
(13) (1861) 6 H. & N. 337 [158 E.R. 139].
(14) (1943) A.C. 32.
(15) (1942) A.C., at pp. 182, 183, 198, 199.
(16) (1928) P., at p. 194.
(17) (1916) 2 A.C., at pp. 403, 406, 407, 420.
(18) (1916) 1 A.C., at pp. 497, 513.
(19) (1935) A.C., at p. 528.
(20) (1918) A.C., at pp. 127, 131, 137.

lessee in *London and Northern Estates Co.* v. *Schlesinger* (1). The subject contract was a contract to lease an illuminated sign, not merely a sign capable of being illuminated. Upon the question of an implied or devised term, see *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* (2), *Luxor (Eastbourne) Ltd.* v. *Cooper* (3) and *Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.* (4). If an essential benefit or object of the contract has disappeared then it is not fair and reasonable that the contract should continue. All special bailments import the contract to redeliver when the purpose for which the goods were deposited is answered (*Mills* v. *Graham* (5)). The court decides whether or not there is an implied term in a particular case. It does not say what the parties might have stipulated. The fact that hardship may be or is caused to one of the parties is an irrelevant consideration (*Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* (6); *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.* (7); *Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.* (8); *Bank Line Ltd.* v. *Arthur Capel & Co.* (9); *Metropolitan Water Board* v. *Dick, Kerr & Co. Ltd.* (10); *Dahl* v. *Nelson, Donkin & Co.* (11)). If it appears that the contract or the event which happened was such that if the parties had contemplated it they would have modified the contract, then the court must declare the contract at an end as it cannot modify a contract (*In re Badische Co. Ltd.* (12)). In the evolution of the doctrine it appears that the importance that was formerly attached or sought to be attached to a promise which appeared to be absolute is not now attached thereto (*Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.* (13); *W. J. Tatem Ltd.* v. *Gamboa* (14)). Part performance of a contract was dealt with in *F. A. Tamplin Steamship Co. Ltd.* v. *Anglo-Mexican Petroleum Products Co. Ltd.* (15) and *W. J. Tatem Ltd.* v. *Gamboa* (16). The right to retain or remove a structure was discussed in *Stansfeld* v. *Portsmouth Corporation* (17) and *Pugh* v. *Arton* (18). The contract between the parties does not operate as, nor does it have the effect of, a transfer of a legal interest in land.

(1) (1916) 1 K.B. 20.
(2) (1943) A.C., at p. 70.
(3) (1941) A.C. 108, at p. 137.
(4) (1926) A.C., at p. 510.
(5) (1804) 1 Bos. & Pul. (N.R.) 140 [127 E.R. 413].
(6) (1943) A.C. 32.
(7) (1942) A.C., at pp. 185-187.
(8) (1926) A.C., at pp. 506, 509, 510.
(9) (1919) A.C. 435.
(10) (1918) A.C., at p. 139.
(11) (1881) 6 App. Cas. 38.
(12) (1921) 2 Ch. 331, at p. 379.
(13) (1942) A.C., at pp. 183-185, 203-205.
(14) (1939) 1 K.B. 132, at pp. 138, 139.
(15) (1916) 2 A.C., at p. 406.
(16) (1939) 1 K.B., at p. 138.
(17) (1858) 4 C.B. (N.S.) 120, at pp. 131-133 [140 E.R. 1027, at pp. 1032, 1033].
(18) (1869) L.R. 8 Eq. 626, at p. 630.

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Even so, there is no legal reason why the doctrine of frustration should not apply to leases of land (*Firth* v. *Halloran* (1)).

Gunson, for the appellant Caldwell. I adopt the argument just addressed to the Court. The time to apply the test is when the event occurs. If, looking at that event, the future is uncertain then the test has been satisfied and frustration takes place (*Court Line Ltd.* v. *Dant & Russell Inc.* (2)). Where there is a general prohibition the onus is upon the party who seeks to affirm the contract to prove that it could have been performed lawfully and that it was not impossible to comply with the terms and conditions of the contract (*Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.* (3) ; *Esposito* v. *Bowden* (4) ; *Duncan, Fox & Co.* v. *Schrempft & Bonke* (5) ; *In re Shipton, Anderson & Co. and Harrison Brothers & Co.'s Arbitration* (6) ; *Aerial Advertising Co.* v. *Batchelors Peas Ltd.* (*Manchester*) (7) ; *White & Carter Ltd.* v. *Carbis Bay Garage Ltd.* (8) ; *Marshall* v. *Glanvill* (9)). *Andrew Millar & Co. Ltd.* v. *Taylor & Co. Ltd.* (10) was commented upon in *Anglo-Northern Trading Co. Ltd.* v. *Emlyn Jones & Williams* (11).

Reynolds K.C., in reply.

Cur. adv. vult.

1943, Feb. 4.

The following written judgments were delivered :—

LATHAM C.J. 1. The first appeal is an appeal from a judgment of the Full Court of the Supreme Court of New South Wales reversing a judgment of *Halse Rogers* J. by a majority (*Jordan* C.J. and *Roper* J.), *Davidson* J. dissenting. *Halse Rogers* J. gave judgment for the plaintiff in an action brought for payments alleged to be due under contracts relating to neon signs. The payments due under the contracts were described as rentals. The action was brought upon a number of contracts which were made between September 1937 and January 1941. It was admitted that unless the contracts had been " frustrated " the moneys sued for were due.

The second appeal is an appeal from the Full Court of the Supreme Court of Victoria. In this case Neon Electric Signs Ltd. sued Mrs. C. A. Caldwell in a Court of Petty Sessions upon a contract practically identical with that which was under consideration in

(1) (1926) 38 C.L.R. 261, at p. 269.
(2) (1939) 3 All E.R. 314, at p. 318.
(3) (1916) 1 K.B. 495, at p. 514.
(4) (1857) 7 E. & B. 763 [119 E.R. 1430].
(5) (1915) 3 K.B. 355, at p. 364.
(6) (1915) 3 K.B. 676.
(7) (1938) 2 All E.R. 788.
(8) (1941) 2 All E.R. 633.
(9) (1917) 2 K.B. 87.
(10) (1916) 1 K.B. 402.
(11) (1917) 2 K.B. 78, at p. 85.

the first-mentioned case. In the Victorian case, the Full Court, upon an order to review referred to it, decided in favour of the complainant and made an order for the rentals sued for. The defendant has been granted special leave to appeal to this Court. A full argument has been addressed to the Court upon the subject of frustration, which is the only question involved in the appeal.

2. I propose to refer to the terms of the contracts in the New South Wales case. The contracts are in writing. In each contract the plaintiff, Scanlan's New Neon Ltd., is called the lessor and Tooheys Ltd. is called the lessee. The lessor in each case agrees to construct and instal a sign upon a building. The terms of the contract with reference to wiring, electrical current and other matters show plainly that the signs to be installed were neon signs. Neon signs are well known and it is unnecessary to describe them. It is obvious, as the learned trial judge said, that their principal value consists in the fact that they can be illuminated and so be made conspicuous and attractive. At the same time, as the learned judge found, and as is a matter of common knowledge, the signs, even when unilluminated, are visible and legible and have a substantial advertising value.

The contract provides for a term of five years' hiring of the sign at a monthly rental. There is a provision that "rental shall be payable, except as herein otherwise provided, whether or not the sign shall be used or operated by the lessee." The lessor agrees to maintain the sign, and there is a provision that if the sign fails to operate, except through the fault of the lessee, the lessor shall repair the sign within thirty-six hours of notice given by the lessee. If the lessor fails so to repair the sign, there is to be a reduction in the rental for every hour for which the sign fails to operate in excess of the thirty-six hours period. This and other clauses show that the parties plainly expected that the sign would be illuminated.

A clause of the New South Wales contract contains the following provision:—"It is understood and agreed that the sign is specially constructed for the lessee and for use only at the premises above designated, and that it is a material consideration to the lessor in entering into this agreement that the lessee shall continue to use the sign as contemplated."

In the Victorian case, this clause omits the words, "as contemplated." Upon this clause in both cases an argument has been founded that the lessee is bound to illuminate the sign and to keep it illuminated; and, indeed, to do so for every hour of each year. In my opinion, neither of these clauses imposes any such obligation upon the lessee. The provision that the lessee shall continue to

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use the sign (whether with or without the addition of the words "as contemplated") means only, in my opinion, that the lessee is to use the sign as immediately before stated, that is to say, only "at the premises above designated."

Other provisions of the contract refer to wiring and electrical current. It is the responsibility of the lessee to pay for electrical energy used by the sign and to supply current to the sign.

On 19th January 1942, the Premier of New South Wales, acting under powers conferred by regulations made under the *National Security Act* 1939-1940 of the Commonwealth, prohibited the display of external lights. This prohibition operated to prevent the illumination at any time, during either the day or night, of the neon signs which are the subject matter of the New South Wales contracts.

In Victoria the Premier made a similar Order under similar powers on 12th December 1941. This Order prevented the emission of light from any sign or other device which was not inside an enclosed building, and prevented the illumination at any time of the neon sign which was the subject matter of the contract in Victoria. Later, on 20th February, this Order was modified, and it became lawful to illuminate the neon sign in the daytime.

The second Victorian Order is, in my opinion, irrelevant to the questions which arise in the case. The question of frustration or no frustration must be decided at the time when the relevant alleged event happens, that is, upon probabilities and not upon a certainty arrived at after the event (*Court Line Ltd.* v. *Dant & Russell Inc.* (1)). Accordingly, if the Order of 12th December 1941 frustrated the contract, the contract was at an end and the Order of 20th February 1942 certainly did not operate to revive it. If, on the other hand, the drastic Order of December did not frustrate the contract, it is difficult to see how the much less drastic Order of February could frustrate it.

3. Apart from the possible application of some doctrine of frustration, the case is a simple one. The lessor agreed to construct, instal and service a neon sign. The lessee agreed to pay a monthly rent. The lessor has constructed and installed, and is ready and willing to service the sign. The lessee declines to pay the rent. The lessor made no promise that the sign should be illuminated. The lessor performed his contract when he provided a sign in accordance with the specifications which was capable of being illuminated. The lessee did not obtain any warranty as to the illuminability of the sign and the risk of disappointment to the lessee in failing to obtain the full benefit of the contract would appear to be a risk

(1) (1939) 3 All E.R. 314.

which the lessee clearly undertook. It is, however, contended that the doctrine of frustration shows that this is not the case and that the true position is that the contracts were automatically terminated upon the making of the governmental Order, so that the lessee is thereafter released from any obligation to pay rent, but with the possible result (though not contended for by the lessee) that the lessee may retain the sign, because the clause in the contract giving a right to remove the sign has itself been terminated with all the other clauses of the contract. In the view which I take it is unnecessary for me to express an opinion upon this latter question.

4. The subject of frustration of contract has been associated, or confused, with various subjects, such as mistake, impossibility of performance, breach of contract, failure of consideration, illegality, failure of what is referred to as a common venture, and general considerations said to depend on reason and justice. In the present cases, it is possible at the outset to exclude certain of these matters from consideration.

Here there is no mistake of either party, much less of both parties, as to anything affecting the subject matter of the contract. Disappointment or failure to receive an expected benefit does not constitute mistake in any sense relevant to the law of contract.

All the terms of the contract can be performed. There is no impossibility of performance in any sense. Neither party can point to any provision of the contract which the party who is bound by it is unable to carry out.

There has been no breach of contract by the lessor companies. They have performed all the obligations which they were bound by the contract to perform. The defendants in the actions are not in a position to claim that they are entitled to be discharged from liability under the contract by reason of any breach of contract by the other contracting party.

A substantial part of the consideration has been received in each case by each party. The lessor companies have erected the signs and it is not suggested that they have not maintained them as required by the contract. The lessees have had the full benefit of the signs as illuminated signs for substantial periods and, at the time of action brought, were receiving some benefit from them as unilluminated signs. The learned trial judge in the New South Wales case found that the costs of erection of the signs in all cases exceeded fifty per cent of the total rental over the period of letting and, in some cases, amounted to eighty per cent or more. Thus the present cases cannot be determined upon the basis of failure of consideration.

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The governmental Orders which have prevented the illumination of the signs do not make performance of any part of any of the contracts illegal. They do prevent the lessees from obtaining the full benefit which they expected from the installation of the signs, but both parties are able to perform fully the contracts which they chose to make.

5. According to the terms of the contracts, the lessees are liable to pay the rentals demanded. It is contended, however, that this liability has disappeared, because the contracts are at an end. In the present case, the frustration is said to arise from the fact that the lessees will not receive the degree of benefit from the performance of the contract which both parties expected them to receive, the benefit lost being called " an essential benefit." If this failure to receive expected benefit had resulted from some act of the lessee, it is conceded that the defence of frustration would not apply. In this connection reference may be made to statements in some authorities that frustration cannot result from the " default " or " the fault " of a party to a contract. I should have thought that strictly there could be no default or fault in relation to any contract without a breach of the contract. The true principle, I suggest, is that a state of facts brought about by the act of a party cannot be used as an excuse for failure to perform a contractual obligation (*Maritime National Fish Ltd.* v. *Ocean Trawlers Ltd.* (1)).

6. The doctrine of frustration is difficult to state. In *Bank Line Ltd.* v. *Arthur Capel & Co.* (2) Lord *Sumner* referred to what he described as the " terms used in different cases." As stated by his Lordship, these terms may be arranged (in a very summary form) under the following headings, some of which, it will be observed, depend upon quite distinct principles :—(i) Frustration of commercial object. (ii) Delay (or other matter) going to the root of the contract. (iii) Adventure nugatory (possibly the same as (i)). (iv) Impossibility. (v) Delay, entitling one party to determine " the adventure "—which may be the same as (ii), although (ii) does not suggest breach and (v) does. (vi) Unexpected delay. (vii) Contract should not be held to apply " to the state of things to which the " (parties) " had imagined that it did." (viii) Destruction of identity of work or service contracted for. (ix) Unreasonable to require the parties to go on with the contract.

The theories behind the doctrine of frustration are indicated by some of the expressions which Lord *Sumner* quotes and which I have summarized. Mr. *A. D. McNair*, in an article on *Frustration of Contract by War* in *Law Quarterly Review*, vol. 56, p. 173, arranges

(1) (1935) A.C., at p. 530.

(2) (1919) A.C., at pp. 457, 458.

the theories under three heads. I take them in the reverse order to that in which he sets them out :—

(*a*) Lord *Wright's* theory that the courts simply determine what is fair and just. Lord *Wright* takes the view that, while what he evidently regards as the unconvincing fiction of an implied term may be relied upon as a basis in theory for the doctrine of frustration, what the court is really doing when it decides that a contract is frustrated is to exercise its powers "in order to achieve a result which is just and reasonable" : See *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.* (1)—See also *Legal Essays and Addresses* (Lord *Wright*), at p. 258, quoted in *Law Quarterly Review*, vol. 56, p. 180 :—"This whole doctrine of frustration has been described as a reading into the contract of implied terms to give effect to the intention of the parties. It would be truer to say that the court in the absence of express intentions of the parties determines what is just." This view really abandons the theory of an implied term and simply states that it is the law that in particular circumstances the contract shall come to an end. The description of the circumstances which will produce this result is not included in the rule as stated, except in so far as the termination of the contract is believed by the court to be a fair and just result in all the circumstances of the case.

This view appears to me to be indistinguishable from that expressed by Lord *Atkinson* in *Metropolitan Water Board* v. *Dick, Kerr & Co. Ltd.* (2) that in some circumstances it would be unreasonable to require the parties to go on with the adventure. It is associated with the doctrine of the implied term by the observation of Lord *Atkinson* that reasonable men could not be supposed to intend the contract to be binding on them under unreasonable conditions.

Upon this view it is left to the court to determine whether in all the circumstances it is fair and reasonable that the parties should be held to a contract which they have expressly made. A general application of such a principle would make it very difficult indeed to rely with certainty upon any contract, because it often happens that unexpected circumstances produce the result that the enforcement of a contract which originally appeared to be probably profitable may involve serious loss to or even the ruin of one of the contracting parties. It might be thought by a wise and kindly superior authority that the other contracting party should submit to a termination of the contract in such a case, but, up to the present, the law of England and of Australia has not adopted any such proposition, which would

(1) (1942) A.C., at p. 186.

(2) (1918) A.C., at p. 131.

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introduce much uncertainty into the realm of contractual obligations. The theory that a court is entitled to do what it thinks is just and reasonable in relation to the termination of contracts, even in completely unexpected circumstances, has not yet received the imprint of binding authority.

But if such a principle were applied in the present cases I see no ground for saying that it is just and reasonable that, the lessors having provided, except for future possible maintenance, the whole of the consideration, and the lessees having received substantial consideration and being still in receipt of substantial consideration, the lessees should be completely freed from the obligation to pay rentals. Some adjustment of rents payable under the contract might be fair and just, but the ordinary courts have no power to make such adjustments. Where there is a subsisting contract, adjustments are now possible under the *National Security* (*Contracts Adjustment*) *Regulations* (Statutory Rules 1942 No. 65).

(*b*) The doctrine of frustration has also been based upon a theory of the disappearance of the basis or foundation of the contract. This theory, like the other theories, except in the cases which are founded upon the physical impossibility of performing a term of the contract, as in *Taylor* v. *Caldwell* (1), present in an acute form the conflict between the two maxims *pacta sunt servanda* and *non haec in foedera veni*.

The theory of the disappearance or destruction of the basis of a contract goes back through *Nickoll & Knight* v. *Ashton, Edridge & Co.* (2) to *Taylor* v. *Caldwell* (1). It reached its full development in *Krell* v. *Henry* (3), to which many of the subsequent frustration cases may, more or less clearly, be traced. The decision in *Krell* v. *Henry* (3) has perhaps aroused as much difference of legal opinion as any decision given by English courts during this century. The two views of the case may be studied in *Law Quarterly Review*, vol. 52, pp. 168 et seq., and 324 et seq. It is interesting to observe that in the article by Mr. *A. D. McNair* in *Law Quarterly Review*, vol. 56, p. 173, to which reference has already been made, the case of *Krell* v. *Henry* (3) is mentioned only incidentally in quotations (pp. 193, 206). In *Maritime National Fish Ltd.* v. *Ocean Trawlers Ltd.* (4), Lord *Wright* quotes Lord *Finlay's* criticism of the case in *Larrinaga & Co. Ltd.* v. *Société Franco-Américaine des Phosphates de Medulla, Paris* (5), and says that " the authority is certainly not one to be extended." In *Joseph Constantine Steamship Line Ltd.*

(1) (1863) 3 B. & S. 826 [122 E.R. 309].
(2) (1901) 2 K.B. 126.
(3) (1903) 2 K.B. 740.
(4) (1935) A.C., at pp. 528, 529.
(5) (1922) 29 Com. Cas., at p. 7.

v. *Imperial Smelting Corporation Ltd.* (1) Viscount *Maugham* was particular to express no opinion about *Krell* v. *Henry* (2), though Viscount *Simon* L.C. (3) pointedly said that *Krell* v. *Henry* (2) is not to be placed in the category of impossibility, though the case was expressly decided upon that basis: see the report (4).

In *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* (5) *Krell* v. *Henry* (2) is mentioned several times. Lord *Simon* L.C. (6) is dealing with cases of failure of consideration, and he says "as *Vaughan Williams* L.J.'s judgment in *Krell* v. *Henry* (7) explained, the same doctrine applies 'to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things, going to the root of the contract, and essential to its performance.'" A passage which immediately follows the quoted passage shows that the phrase "an *express* condition or state of things" refers to "a condition or state of things, present or anticipated, which is expressly mentioned in the contract." The citation of the passage, accordingly, does not show that Lord *Simon* approved the decision of *Krell* v. *Henry* (2) with respect to a condition or state of things "not . . . expressly specified" (8). Lord *Atkin* (9) and Lord *Wright* (10) make similar references to *Krell* v. *Henry* (2). In each case reference is made to interference with the performance of the contract or to a failure of consideration—i.e., *Krell* v. *Henry* (2) is treated as a case where an essential part of the contract was not performed. If *Krell* v. *Henry* (2) means no more than this, it creates no difficulty as to the principles of the law of contract, though it does raise important questions as to what evidence is admissible for the purpose of ascertaining the terms of a contract. Lord *Porter* (11) says of *Krell* v. *Henry* (2) that it "merely decided that money not due when the frustration took place was not in law payable." It cannot yet be said that the actual reasoning in *Krell* v. *Henry* (2) has definitely received the approval of higher courts.

In *Krell* v. *Henry* (2) the action was for the purpose of recovering the hire of rooms in Pall Mall on two dates under a contract constituted by correspondence between the parties. Evidence was admitted to show that it had been announced that on those dates the coronation procession of King Edward VII. would take place, and would pass along Pall Mall. The coronation was postponed

(1) (1942) A.C., at p. 172.
(2) (1903) 2 K.B. 740.
(3) (1942) A.C., at p. 164.
(4) (1903) 2 K.B., at pp. 749, 752.
(5) (1943) A.C. 32.
(6) (1943) A.C., at p. 49.
(7) (1903) 2 K.B., at p. 748.
(8) (1903) 2 K.B., at p. 749.
(9) (1943) A.C., at p. 50.
(10) (1943) A.C., at p. 68.
(11) (1943) A.C., at p. 80.

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and the defendant declined to pay a balance due under the contract. It was held that the contract was no longer binding upon the parties.

The reasoning in the judgment of *Vaughan Williams* L.J. (1) begins by reference to the principle of the Roman law which determined an agreement between the parties *de certo corpore* when the *certum corpus* without the knowledge of the contracting parties had ceased to exist. The reasoning proceeds through *Taylor* v. *Caldwell* (2), a case of the destruction by accidental fire of a music hall which had been let for concerts to take place in the music hall, to *Nickoll & Knight* v. *Ashton, Edridge & Co.* (3). In that case the defendants had contracted to ship a cargo by the S.S. *Orlando* at Alexandria in the month of January. The *Orlando* became stranded before the date of the contract and it was held that the ship no longer existed as a cargo carrying ship, and that the contract was accordingly at an end. The principle of *Taylor* v. *Caldwell* (2) was extended from the destruction of something the existence of which was necessary to the performance of the actual terms of the contract, to a case where a thing, namely a ship, required, according to the terms of the contract, to be used in carrying out the contract, though still in existence, was no longer available for the purposes of the contract. *Vaughan Williams* L.J. (4) dissented in this case. He pointed out that the defendant had entered into an absolute contract, that he could have made his contract conditional, and that he could have insured himself against the risk of the ship being damaged so as not to be available at the port at the time fixed under the contract.

In *Krell* v. *Henry* (5) *Vaughan Williams* L.J. applied the principle involved in the judgment of the majority in *Nickoll & Knight* v. *Ashton, Edridge & Co.* (6), from which he had so strongly dissented, and extended it so as really to found what is known as the modern doctrine of frustration. I propose to refer to what is perhaps the most important passage in the judgment for the purpose of inquiring how far it can be used as a guide in deciding other cases. *Vaughan Williams* L.J. says :—" I do not think that the principle of the civil law as introduced into the English law is limited to cases in which the event causing the impossibility of performance is the destruction or non-existence of some thing which is the subject matter of the contract or of some condition or state of things expressly specified as a condition of it. I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from

(1) (1903) 2 K.B., at p. 747.
(2) (1863) 3 B. & S. 826 [122 E.R. 309].
(3) (1901) 2 K.B. 126.
(4) (1901) 2 K.B., at pp. 134 et seq.
(5) (1903) 2 K.B. 740.
(6) (1901) 2 K.B. 126.

necessary inferences, drawn from surrounding circumstances recognized by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things. If it does, this will limit the operation of the general words, and in such case, if the contract becomes impossible of performance by reason of the non-existence of the state of things assumed by both contracting parties as the foundation of the contract, there will be no breach of the contract thus limited " (1).

Legal principles upon which this statement appears to be founded are, or include, the following :—

(i) It is proper to consider when a party is sued upon a contract what is the " substance of the contract."

(ii) The substance of the contract is to be ascertained " not necessarily from the terms of the contract," but, " if required," from other material. No indication of the significance or scope of application of the words " if required " is given.

(iii) This other material includes " necessary inferences, drawn from surrounding circumstances recognized by both contracting parties." This is a very far-reaching principle if it is to be applied, as apparently is intended, for determining what are the obligations of the parties under a contract. Whenever a man takes a lease of premises, he and his lessor expect that he will be able to use the premises, but it is well established that he is not excused from paying rent because the premises are destroyed. When a man agrees to buy a pair of boots for himself, both parties expect that he will be able to wear them. If he has an accident, so that he can no longer wear boots, he nevertheless still has to pay for them. If a man buys or hires a motor car, both parties know that he expects to be able to drive it. The stoppage of the sale of petrol, which would make it impossible for him to drive it, does not excuse him from his obligation to pay the purchase money or the hire for the agreed period. I am unable to find in the statement of the law actually made in *Krell* v. *Henry* (2) (whatever may have been intended) any principle which would prevent a party to any of the contracts mentioned from successfully relying upon the defence of frustration.

It will perhaps be said that nobody would ever think of applying *Krell* v. *Henry* (2) in such cases. I agree. But why ? Simply because the general rule is applied, viz. that a man who makes a promise is bound to perform it or to pay damages if he fails to do so, and that he cannot excuse himself by relying upon circumstances *dehors* the contract for the purpose of showing that he did

(1) (1903) 2 K.B., at p. 749. (2) (1903) 2 K.B. 740.

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not mean what he clearly said, or that he should be excused from performance because the contract did not work out in the manner expected by one or even by both of the parties.

(iv) That which is to be ascertained, not necessarily from the terms of the contract, but from any surrounding circumstances of which the parties were aware, is "the substance of the contract." I am not sure whether the substance of the contract, when ascertained, is a kind of basis or foundation upon which the contract stands, or whether, on the other hand, it is something which is imported into the contract as one of its terms. If the former is the true meaning of what is said, then though a contract consists of (and only of) the terms upon which the parties have chosen to agree, there is or may be something else, *dehors* the contract, which is the "foundation" of the contract; if the foundation of the contract fails, then the whole of the contract, which stands upon the pedestal provided by such a foundation, is thereafter completely destroyed. If, on the other hand, the meaning of the expression is that another "substantial" term, derived from consideration of "surrounding circumstances," may in some cases properly be implied by a court, then the "basis of the contract" theory of frustration is indistinguishable from the "implied term" theory—to which I refer hereafter.

(v) When the "substance" of the contract is ascertained, it is then necessary to ask the question "whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things." Such a "foundation" is not to be discovered in the terms of the contract in which the parties have expressed their intentions. It is to be ascertained by the court, presumably as a "necessary" inference from "surrounding circumstances."

(vi) The result of all these considerations is to "limit the operation of the general words." The consequence, therefore, is that the words in the contract must be treated as meaning something other than that which they appear to mean, because they are subject to some unexpressed limitation or condition.

(vii) If the operation of the general words is limited by reason of the foregoing considerations, then "if the contract becomes impossible of performance by reason of the non-existence of the state of things assumed by both contracting parties as the foundation of the contract" a certain result happens. Thus impossibility of performing the contract is regarded as the crucial consideration.

Impossibility of performing a contract according to its expressed terms is a very common case. As a rule, when two persons make

a contract, they assume that each of them will be able to carry it out; but it often happens that it becomes quite impossible for one party to perform it: e.g., if he has no money he cannot pay a debt. In general the courts refuse to pay any attention to any "assumptions" of contracting parties if those assumptions are not included in the contract. In the instance which I have given, both parties assume that the debtor will be able to pay. But the fulfilment of that assumption is irrelevant to his obligation. If he promised absolutely, he is so bound.

But the impossibility of performance referred to doubtless is an impossibility of performing some unexpressed ("substantial") term. The reference therefore is not really to the neglect or failure of a party to perform the said term (which would involve a breach of contract) but to the non-fulfilment, without any breach of contract, of a condition to which the continued existence of the contract is subject. This view of *Krell* v. *Henry* (1) appears to me to be more intelligible than others which have been presented—it is that the whole contract is subject to a condition that, if a certain event occurs or a certain state of affairs exists (or, it may be, unless a certain event occurs or a certain state of affairs exists) the parties are to be released from further obligations under the contract. Unless the raising of a contention relating to frustration makes evidence admissible which would otherwise be inadmissible, little guidance has yet been given by decided cases with respect to the rules according to which evidence is admissible to show that a contract, unambiguous and absolute in its terms, is subject to such a condition. It may further be observed that, in most if not all cases of alleged frustration, one party at least, and (in the absence of knowledge of the future) generally both parties, would most certainly, if the matter had been brought to their notice, have refused to agree to the incorporation of such a condition in the contract.

(viii) The final result in *Krell* v. *Henry* (1) as stated, is: "there will be no breach of the contract thus limited." Thus the result is not stated to be that the contract is terminated, automatically or otherwise. The result is that there is no breach of the contract. The case therefore appears ultimately to resolve itself into the introduction by inference into a contract of a provision that an obligation to pay money was conditional upon a procession taking place. The procession did not take place; so the money did not become due according to the terms of the contract. This view of the case is different from that which I have just stated, but, in practice, it produces the same result. The difference between the two views is

(1) (1903) 2 K.B. 740.

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that, upon one view, the contract has ceased to exist; upon the other view, the contract has not been destroyed, but there has been no breach of contract.

I suggest that an analysis of *Krell* v. *Henry* (1) shows that it is very difficult indeed to determine with certainty the principle upon which the decision proceeded, and it is hardly a matter for surprise that subsequent authorities have treated it as illustrating the law of impossibility, or the law of failure of consideration, or the law with respect to evidence which is admissible for the purpose of interpreting or applying a contract, or as formulating a new branch of law with respect to a basis or foundation of a contract which is to be determined, not by looking at the terms of the contract, but at something outside the contract, namely, the expectations of the parties when they entered into the contract.

If, however, the "basis of the contract" theory is applied in the present cases, there is no evidence which takes the court beyond the terms of the contracts. From those terms it is clear without further evidence that the parties expected that the signs would be used as illuminated signs. But they made an express provision that rent was to be paid whether the signs were used or not. The court, therefore, would not be justified in holding that the basis of the contract was that no rent should be paid if the signs were not used. It may, however, be urged that this express provision does not apply to non-user of the signs due to governmental prohibition. I do not agree with this construction of the provision, because the words in which it is expressed are general and are clear. But, even if this provision does not bear the meaning which I have suggested, the result is, in my opinion, the same. The lessees promised to pay the rent, in absolute terms. The lessors did not warrant that the signs could be illuminated during the term of the contracts. Both parties assumed that that would be the case. But an assumption which is not incorporated in a contract and which relates only to what I may call "uncovenanted benefits" has no significance in relation to the extent of the obligations of the parties under the contract. There are in the present cases no circumstances which can be relied upon to displace the application of this general rule.

(*c*) The third principal theory of frustration is to be found in the doctrine of the implied term, which can be distinguished only with some difficulty from the basis or substratum theory.

The rule as to the implication of terms in contracts which was stated by *Bowen* L.J. in *The Moorcock* (2) has not caused any serious difficulty in the law. It is clear and intelligible. As put by *Jordan*

(1) (1903) 2 K.B. 740.

(2) (1889) 14 P.D. 64.

C.J. in *Heimann* v. *Commonwealth of Australia* (1), terms are to be implied only when the matter to which they relate is not covered by the express terms of the contract, and if not annexed by usage, statute or otherwise, is such that it is clearly necessary to imply the term, in order to make the contract operative according to the intention of the parties as indicated by the express terms. *Jordan* C.J. said in that case :—" It is not sufficient that it would be reasonable to imply the term (*Bell* v. *Lever Bros. Ltd.* (2)). It must be clearly necessary. And the test of whether it is clearly necessary is whether the express terms of the contract are such that both parties, treating them as reasonable men—and they cannot be heard to say that they are not—must clearly have intended the term, or, if they have not adverted to it, would certainly have included it, if the contingency involving the term had suggested itself to their minds."

In relation to the doctrine of frustration, however, there are some statements which go to show that the courts do not concern themselves with the question whether the parties as reasonable men would certainly have included the term if the contingency involving the term had suggested itself to their minds. Indeed (I repeat) in many of the cases where the doctrine of frustration has been applied, it is perfectly obvious that one of the parties would never have made the contract if he had thought that, upon the happening of a particular event, he would be left to bear the loss and the other party would go partly or wholly free.

What is called an objective test has been stated to be the proper test by Lord *Sumner* in the case of *Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.* (3). In that case his Lordship, dealing with the question of implication of terms, said : " What the parties say and do is only evidence, and not necessarily weighty evidence, of the view to be taken of the event by informed and experienced minds " (4). The term is to be applied by law *ab initio* (5). In this case (5) Lord *Sumner*, after referring to discharge of contract arising from rescission by one party after breach by the other, says :—" Frustration, on the other hand, is explained in theory as a condition or term of the contract, implied by the law *ab initio*, in order to supply what the parties would have inserted had the matter occurred to them, on the basis of what is fair and reasonable, having regard to the mutual interests concerned and of the main objects of the contract : see per Lord *Watson* in *Dahl* v. *Nelson*, *Donkin & Co.* (6). It is irrespective of the individuals concerned,

(1) (1938) 38 S.R. (N.S.W.), at p. 695.
(2) (1932) A.C. 161, at p. 226.
(3) (1926) A.C. 497.
(4) (1926) A.C., at p. 509.
(5) (1926) A.C., at p. 510.
(6) (1881) 6 App. Cas., at p. 59.

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their temperaments and failings, their interest and circumstances. It is really a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands."

The latter portion of this statement appears to me to involve the creation of a "legal man," corresponding in some measure to the "economic man" who was so well known to economists of the last century. The legal man is an individual without any relevant temperaments or failings, without any relevant interests, and apparently not surrounded by any relevant circumstances. He is different from the business man of *Bowen* L.J. (1) and from the reasonable man of whom we hear so much in the law of negligence. Those men are persons who can readily be assumed to exist. A court which applies the "objective" test is confronted with the difficult problem of implying a term upon the basis that each of the parties is the same sort of legal man, and, while ignoring their interests, determining what is "fair and reasonable, having regard to the mutual interests concerned." I have difficulty in forming the conception of a legal man by abstracting him from his interests and then determining what such a legal man would be likely to do, having regard to his interests.

The reference is to the "mutual interests concerned." This is in line with the doctrine which has appeared in some cases based upon the view that a contract is a common venture of the contracting parties. I refer to the quotations already made from Lord *Sumner's* judgment in *Bank Line Ltd.* v. *Arthur Capel & Co.* (2), and also to *Hirji Mulji's Case* (3) :—"Evidently it is their common object that has to be frustrated, not merely the individual advantage which one party or the other might have gained from the contract."

There is some difficulty in specifying the "common object" of the parties to a contract, as distinct from the "individual advantages" which one party or the other might have gained from the contract. Contracting parties as such are not partners. They are engaged in a common venture only in a popular sense. They do not share profits or losses. There is no one particular thing to be selected from the various objects of the parties which can be fairly described as the common object of both parties. Each party expects certain individual advantages from the performance of the contract. The person who agrees to sell goods expects to deliver the goods and to get the price. The man who agrees to buy them expects to get the goods and to pay the price. The acquisition of the goods is no more and no less a common object than the receipt of the price.

(1) (1889) 14 P.D. 64.
(2) (1919) A.C. 435.
(3) (1926) A.C., at p. 507.

The idea of a contract as constituting a common venture comes from charter party cases. A charter party is a contract with characteristics peculiar to itself. In the case of a charter party by way of demise of a ship only, it is difficult to discover a common venture. But when the charterer has the right to the services of the master and crew employed by the owner—whether the charter party is by way of demise or not—the owner and charterer may be said to have a common interest in a single venture which is absent in other cases. In the case of an ordinary contract, it is difficult to say that there is any common object other than the sum total of the individual advantages which the parties hope to obtain by virtue of the performance of the contract on both sides. But such a specification of "the common object" of a contract affords no assistance towards determining the obligations to which the contract gives rise. The object of a contract can be determined only after the obligations of the contract have been ascertained—not vice versa.

In the present cases the object of one party was to get a neon sign installed on a building, the sign to be kept in working order; the object of the other party was to obtain payment of money by way of rental. There was nothing which can be said to be the common object or adventure of the parties. The lessees therefore cannot, in my opinion, rely upon any defence based upon frustration of a common adventure.

If, in the present cases, a term is to be implied and the court is to speculate as to what the parties would probably have agreed upon if the possibility of a limitation or prohibition of illumination had been present to their minds, then, it appears to me, a company whose business it is to provide neon signs would be most unwilling and unlikely to agree to any contract which deprived it of all rent if illumination were limited or prohibited. Doubtless hirers of such signs would be very willing to agree to such a contract, but there is no reason to believe that any person or company whose business it was to supply such signs would have agreed, in effect, to commit commercial suicide if the use of the signs were limited or even prohibited.

If, on the other hand, the court is not allowed to speculate as to what the parties would probably have agreed upon if they had considered the possibility of the event which in fact has happened, then one is remitted to the doctrine of the legal man who appears to be devoid of all human qualities. It is sufficient to say that the defendant lessees have not satisfied me that such a hypothetical person representing the lessor would have made an agreement containing

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a condition which would have exposed him, after incurring considerable expense, to the loss of all rental payments. However far the practice of implying terms for the purpose of applying a doctrine of frustration may go, it must always be subject, I should think, to the condition that no term can be implied if reasonable men could have entered into the contract without such a term. I refer to what was said by *A. T. Lawrence* J. in *Scottish Navigation Co. Ltd.* v. *W. A. Souter & Co.* (1): "No such condition should be implied when it is possible to hold that reasonable men could have contemplated the circumstances as they exist and yet have entered into the bargain expressed in the document." In the present cases there is no difficulty whatever in holding that a person wanting a neon sign, dealing with a company supplying such signs, could have seen the risk of war and of lighting restrictions and yet (in order to get the sign) have agreed to a five-year contract under which he would pay rent throughout notwithstanding the restrictions.

7. It appears to me, therefore, that none of the principles which are invoked for the purpose of supporting the proposition that the contracts have been frustrated can be applied to the present cases. There is no reason why what *McCardie* J., in *Blackburn Bobbin Co. Ltd.* v. *T. W. Allen & Sons Ltd.* (2), described as the original rule of English law should not be applied to the contracts in question, namely: "Where a party by his own contract creates a duty or charge upon himself he is bound to make it good notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract: see per curiam (*Paradine* v. *Jane* (3))." This decision was affirmed in the Court of Appeal (4). Following the example of *McCardie* J., I refer to *Leake* on *Contracts*, 6th ed. (1911), pp. 494-498, where many cases can be found where unexpected things had happened which deprived a party of the benefit expected from the contract, and where, nevertheless, he was held to the obligations which he had expressly undertaken. In my opinion, an undertaking absolute in form should be construed according to its words, and not as being subject to any general principle that it is to be limited by unexpressed conditions relating to events which may unexpectedly happen in the future.

Accordingly I find difficulty in accepting the contrary view of the Full Court of New South Wales, expressed by *Jordan* C.J., in *Consolidated Neon (Phillips System) Pty. Ltd.* v. *Tooheys Ltd.* (5)—where a principle was declared which was applied in the first case now

(1) (1917) 1 K.B., at p. 249.
(2) (1918) 1 K.B., at p. 543.
(3) (1647) Aleyn 26 [82 E.R. 897].
(4) (1918) 2 K.B. 467.
(5) (1942) 42 S.R. (N.S.W.), at p. 160; 59 W.N., at p. 108.

under appeal, but which was not adopted by the Full Court of Victoria in the second case now under appeal. The rule as stated by *Jordan* C.J. is as follows:—"In the absence of something in a contract to the contrary, a term must be implied for its automatic termination on the happening of a subsequent event, if the event occurs without the default of either party, is of such a kind that the risk of its occurrence is something which one of them could not be supposed to be undertaking, and has the effect (wholly or substantially) either of preventing that party from getting some essential benefit which the contract expressly promises him or which, although not expressly promised, is, by the express terms of the contract, manifestly contemplated by both parties as obtainable by him as the result of the performance by the other party of his express promises, or on the other hand of preventing him from performing some essential promise of the contract."

As I understand the view of the Full Court, it is that the words which I have just quoted should be regarded as added to every contract that is made with reference to any matter whatever. It will be observed that the clause is introduced by the words: "In the absence of something in a contract to the contrary." Thus this clause, as set out with this qualification, is to be implied in every contract that is ever made. With a full appreciation of the difficulties of the subject, and with great respect for the learned judges who have agreed in the statement of the principle mentioned, I find myself unable to accept it as a term which should be implied in every contract, and I venture to make the following comments.

The phrase "if the event occurs without the default of either party" should refer to something which is a default in a legal sense, which, in relation to a contract, can only be a breach of contract. I presume, however, that the phrase is intended to exclude what has been called self-induced frustration.

The most important part of the proposition laid down by the Full Court appears to me to be found in the sentence which refers to an event as being "of such a kind that the risk of its occurrence is something which one of them could not be supposed to be undertaking." I have sought in vain for some definite criterion which would make it possible to identify events of the kind mentioned. Men take all kinds of risks when they make contracts. A business man chooses his risks and takes them. He may be said to buy a chance of making a profit, rather than to secure a certainty of not making a loss. A court appears to me to be in a poor position to determine, as a matter of law and apart from the terms of the contract, whether a particular risk is to be deemed to have been taken

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in a particular case. If, however, this test is to be applied in the present cases, it appears to me to be much easier to believe that the party hiring the neon sign was prepared (in order to get the sign which he wanted) to take the risk of illumination being limited or prohibited, even though he would have to go on paying a few pounds a month, than to believe that the other party, whose business consisted in supplying neon signs, took the risk of losing all its business in the event of such a prohibition or limitation. Some of the cases appear to me to fail to recognize the fact that, when it is said that one party cannot be supposed to take a certain risk, it is assumed in an arbitrary manner that the other party *is* prepared to take the risk so far as loss may fall upon him. I can see no reason why such an assumption should be made. I suggest, with respect, that it is much safer, when parties have chosen to contract in absolute terms, to hold them to the terms of their contract. If they desire the contract to be conditional, they can readily so provide in express terms.

In the proposition stated by the Full Court, reference is made to an event preventing a party "from getting some essential benefit which the contract expressly promises him." I read this as referring to some essential benefit which the other contracting party has expressly promised him. Prima facie a promisor takes the risk of an event happening which prevents him from performing his promise. If he fails to perform it, he must pay damages and the other party may, if the promise goes to the root of the contract, elect to determine the contract. If, however, on the true construction of the contract (including both express and implied terms) the obligation to perform the promise did not arise unless some subsequent event occurred, there is no breach of contract unless that event has occurred. In the determination of such a case it is not necessary to apply any doctrine relating to frustration.

The proposition further refers to some essential benefit, which "although not expressly promised, is, by the expressed terms of the contract, manifestly contemplated by both parties as obtainable by him as a result of the performance by the other party of his express promise." This proposition appears to regard the existence of contracts as subject to the successful attainment by one party of something which he expected to obtain from the performance of the contract, and which the other party also expected him to obtain, if the terms of the contract manifestly show that this is the case, though there is no term of the contract which promises the attainment of such a benefit. A simple case, which appears to me to fall completely within the proposition as stated, would be the case of

a lady going to a dressmaker and ordering a dress as a wedding dress, both the intending bride and the dressmaker being aware that the dress was required for, and only for, the purposes of a wedding between the customer and a particular man. The dress is made and delivered. The wedding goes off without "default" by the lady. No-one would suggest that the lady is under no liability to pay for the dress, or even that she was entitled to cancel the order if the dress was only partly made. But surely the wearing of the dress at the wedding was, by the expressed terms of the contract, an essential benefit manifestly contemplated by both parties as obtainable by the lady as the result of the performance of the dressmaker's promise. The true position, all would agree, is that the promise to pay is absolute and that it is enforceable notwithstanding any deprivation of essential benefit, however manifest it may be, even from the terms of the contract, that such benefit was contemplated as something to be obtained by the performance of the promise expressly made. With great respect, I suggest that the proposition of the Full Court is too widely stated.

8. I summarize my opinion by reference to the statement of the law as to frustration by *Russell* J. in *In re Badische Co. Ltd.* (1) :— "The doctrine of dissolution of a contract by the frustration of its commercial object rests on an implication arising from the presumed common intention of the parties. If the supervening events or circumstances are such that it is impossible to hold that reasonable men could have contemplated that event or those circumstances and yet have entered into the bargain expressed in the document, a term should be implied dissolving the contract upon the happening of the event or circumstances. The dissolution lies not in the choice of one or other of the parties, but results automatically from a term of the contract. The term to be implied must not be inconsistent with any express term of the contract. These general statements are, I conceive, justified by the language used, and the views expressed, by Lord *Sumner* in *Bank Line Ltd.* v. *Arthur Capel & Co.* (2) and by the Lords before whom was argued the *Tamplin Case* (3)."—See also *In re Comptoir Commercial Anversois* v. *Power, Son & Co.* (4).

9. What I have said is, in my opinion, sufficient to decide the case, but I refer, without explaining in detail the similarities which exist between them and the present case, to the following authorities:— *Leiston Gas Co.* v. *Leiston-cum-Sizewell Urban District Council* (5)—

(1) (1921) 2 Ch., at p. 379.
(2) (1919) A.C. 435.
(3) (1916) 2 A.C. 397.
(4) (1920) 1 K.B., at pp. 878, 879.
(5) (1916) 2 K.B. 428.

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a case of a contract for illumination interfered with by a military order prohibiting lighting, held not to be frustrated; *Egham & Staines Electricity Co. Ltd.* v. *Egham Urban District Council* (1)—a similar case to the *Leiston Case* (2); *Walton Harvey Ltd.* v. *Walker & Homfrays Ltd.* (3)—the case of a contract for the placing of electrically illuminated advertisements upon the roof of a hotel. The local authority took possession of the hotel and the electric sign was removed. The advertising agents sued for breach of contract. It was held that it could not be said that the parties had made their bargain upon the fact that if the hotel were taken over the contracts were to be discharged, and the defendants were held liable.

I have not found it necessary to consider whether the agreements in this case were only licences, or whether they created some interest in land. I have treated them merely as contracts. If they created interests in land, the position of the defendants would be still more difficult than I have held it to be: see *Matthey* v. *Curling* (4).

10. I have, therefore, come to the conclusion that there is no ground in either case for holding that the contracts were frustrated by reason of the making of the Orders prohibiting or restricting illumination. This conclusion renders it unnecessary for me to consider a further argument based upon the fact that in the Victorian Order there was provision for exemptions from the Order to be granted by the Commissioner of Police. It was urged that the defendant in that case should have applied for exemption and that the contract could not be regarded as frustrated until such an application had failed. Reference may be made upon this matter to the case of *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.* (5), to *J. W. Taylor & Co.* v. *Landauer & Co.* (6), and to *Law Quarterly Review*, vol. 56, pp. 204, 205. In the view which I take, however, that the contracts were not frustrated by the making of the Orders, it is unnecessary for me to consider this argument.

In my opinion, the appeal in the New South Wales case should be allowed with costs, and the judgment of the trial judge should be restored.

In the Victorian case the appeal should be dismissed with costs.

(1) (1942) 2 All E.R. 154.
(2) (1916) 2 K.B. 428.
(3) (1931) 1 Ch. D. 145; and, in the Court of Appeal, (1931) 1 Ch. D. 274.
(4) (1922) 2 A.C. 180.
(5) (1916) 1 K.B., at pp. 515, 516.
(6) (1940) 4 All E.R. 335, at p. 338.

McTIERNAN J. *Scanlan's New Neon Ltd.* v. *Tooheys Ltd.*—This was an action in which the appellant sued the respondent on a number of contracts for the hire of neon signs displayed on business premises. There was a contract for each sign. The hire was alleged to have become due and payable in April 1942, at a time when the contracts were all current according to their express terms. The contracts were made respectively on 18th September 1937 and subsequent days down to 17th January 1941. The respondent resisted the claim on the ground that all the contracts were frustrated in the legal sense on 19th January 1942 in consequence of a governmental Order which made it illegal to light the signs after that date.

The action was tried in the Supreme Court of New South Wales as a commercial cause without pleadings and without a jury by *Halse Rogers* J., who decided the issue raised by the defence in the appellant's favour and gave judgment for the amount claimed, £178 8s. There was no dispute as to the amount payable if the contracts did not come to an end on 19th January 1942. The judgment was reversed by the Full Court (*Jordan* C.J. and *Roper* J., *Davidson* J. dissenting), and this appeal is from their judgment. The question to be decided is whether the contracts were all frustrated in the legal sense on 19th January 1942 in consequence of the governmental Order. The meaning of the issue is that the question raised for decision is whether, from the express terms of each contract and its circumstances, a further term should be implied that if the lighting of the sign were prohibited, the contract would come to an end. In the *Joseph Constantine Steamship Line Case* (1) Viscount *Simon* L.C. said: "The most satisfactory basis, I think, on which the doctrine" (the frustration of contracts) "can be put is that it depends on an implied term in the contract of the parties." If the further term should be implied, its conditions were fulfilled and the contracts came to an end on 19th January 1942. The meaning of the issue is not whether the respondent was entitled to rescind the contract on that date or whether the Court should dispense the respondent from its obligation if there were jurisdiction to do so. The question is whether the contract was automatically terminated when the governmental Order was made.

The Order was made by the Premier of New South Wales pursuant to powers conferred on him by the Commonwealth of Australia. It was made as a measure of security after Japan entered the war. The duration of the Order is indefinite. All the contracts were made

(1) (1942) A.C., at p. 163.

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before Japan entered the war and all, except four, before the outbreak of the present war. The contracts were all current when the Order was made. The part of the Order which affects the contracts is that which prohibits the display of lights used for the purposes of any exterior advertisement or sign or lights connected with an exterior advertisement or sign.

The evidence shows that each contract, which was in writing, is entitled " Lease and Service Agreement " and that it describes the appellant as lessor and the respondent as lessee and its operation as a lease : but in substance the sign is let out to hire for use by the respondent upon the terms and conditions of the contract. The hiring is expressed to begin after the sign is installed on premises designated by the respondent. The appellant undertakes by each contract to construct and instal the sign to which it relates at its own expense. The sign is to conform to specifications. These obligations were all performed. It is a term of each contract that the sign is not to be a fixture appurtenant to the realty to which it is attached, but always the personal property of the respondent and free from any right in the appellant except such as arises under the contract. The right is reserved to the appellant to remove the sign upon the termination of the hiring or any extension of it. The appellant agrees to let each sign " for the term, use and rental and upon the conditions hereinafter set forth," and the respondent to pay the rental and perform the terms and conditions set out in the contract. The initial term of each contract is sixty calendar months with an option to have the sign for an additional twenty-four months. The hiring is expressed to begin on the first day after installation, but the contract itself from its own date.

The first month's rental is due upon installation or from a time fixed by the appellant if it cannot instal the sign because of the respondent's conduct. The rental for the last two-monthly period is payable at the date of the contract and for the rest of the hiring monthly in advance. The obligation to pay hire is subject to the express condition that " if the sign fails to operate " for any reason other than the respondent's fault and the appellant fails to repair after notice, there is to be a progressive abatement of the rental while the neglect continues. There is an obligation on the appellant to " maintain and service " each sign at its own expense. This applies to cleaning, inspection, repainting, replacement of defective transformers and broken and defective tubes and " all other repairs necessary to keep the sign in first class operating condition at all times during the period of the agreement." In some of the contracts the appellant undertakes to bring " feed wires " to the sign, and in these cases

the respondent undertakes to supply parts of the apparatus. In every contract the respondent agrees to pay for all electrical energy "used by the sign" and to be responsible for the supply of current to it. The appellant assumes liability in case of any claim that a patent is infringed by "the use of the sign." In case of default, a term which is given an extensive scope, the appellant is entitled to repossess the sign by notice and to accelerate payment of all future hire and if paid the respondent is entitled "to the use of the sign" according to the contract for the unexpired period of the hiring. Alternatively the appellant may remove the sign and claim damages. Each contract contains this express term: "It is understood and agreed that the sign is especially constructed for the lessee and for use only at the premises above designated and that it is a material consideration to the lessor in entering into this agreement that the lessee shall continue to use the sign as contemplated." A term binds the respondent not to remove the sign without the appellant's consent. The appellant is freed from responsibility for radio interference. A further term says that "if during the continuance of the hiring any removal, repairs, renovations or alterations become necessary to the said installation or accessories" the respondent is to notify the appellant and it has the right to carry out the work at the respondent's cost.

If the sign is damaged or destroyed, the appellant is authorized to rebuild it and add the lost time to the period of the contract or to terminate the contract, the respondent being released from further liability. The respondent is liable for injury or damage caused by its servants or agents.

There is an express term excluding any agreement or representation which is not written in the contract. But this term would not prevent the express terms of the contract being supplemented by any term which the law would imply in the contract.

This analysis of the express terms of each contract shows that its effect is that after the sign is constructed and installed the appellant lets it to the respondent for use only at the place where it is installed or at any other place to which it is removed with the appellant's consent. The terms of the contract do not say or mean that the subject of the hiring is a neon sign in a state of illumination, or that it is a neon sign which is to be operated by the appellant. The thing which is hired is an apparatus which is fit to be operated as a neon sign. The apparatus is to be kept fit for that purpose by the appellant, and to be operated by the respondent. It was contended on behalf of the respondent that each contract casts on the respondent the obligation to operate the sign to which it relates, and the term which

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contains the expression that " the lessee shall continue to use the sign as contemplated " is used to support this contention. In my opinion this provision is intended to make it an essential condition of the contract that the neon sign shall not be used except in the position where it is installed in the first place or to which it is removed with the appellant's consent. I do not read the words " as contemplated " as referring to an express or implied undertaking by the respondent to keep the sign lighted. Such an undertaking is not expressly made and there is no ground for implying it. The term for the progressive abatement of the rent while the apparatus is out of order would, according to the respondent's calculation, relieve the respondent of any liability for rent after the expiration of thirty days. The basis of the calculation is that the neon sign was out of action for twenty-four hours each day. This term might show that the appellant is under an obligation to maintain the apparatus in a condition which would enable the respondent to get an advertising service from it for twenty-four hours every day, but the term provides no ground for concluding that the intention of the contract is to impose an obligation on one party or the other to operate the neon sign for any daily or other period or at all. Extrinsic evidence was adduced at the trial showing the nature and use of a neon sign. In *Burges* v. *Wickham* (1) *Blackburn* J. said: " It is always permitted to give extrinsic evidence to apply a written contract, and show what was the subject-matter to which it refers." The trial judge made findings of fact on this evidence. First he accepted the evidence of a witness who described the " neon sign " or neon light. He was asked: " Q. Would you describe to his Honour what actually is the principle on which they operate? A. The neon light is a tube filled with a rare gas " (which the witness described) " and there is a terminal called an electrode on each end of the tube and an electric discharge takes place through the gas in the tubing and sets up luminous rays which is the source of light." To his Honour's question: " I take it that without illumination a sign with a neon installation is not visible at night? " the witness replied: " Not at night, no." And to his Honour's further question: " It loses its visibility practically? " he answered: " Yes, without the electrical current passing through."

Secondly, the trial judge made the following findings:—(1) That the capability of illumination is the essential and distinguishing feature of neon signs. (2) That illumination is possible only when electrical current can be turned on to the sign. (3) That the signs are designed and used for advertising purposes. (4) That they have

(1) (1863) 3 B. & S. 668, at p. 698 [122 E.R. 251, at p. 261].

a value for daylight as well as night-time advertising, but that this value varies in some cases, the value for daylight advertising being substantial. It is obvious, however, that they are not so noticeable by day as when illuminated by night. (5) Since the prohibition Order the defendant has lost the whole of the benefit of the night advertising by means of neon signs. (6) Since the prohibition the defendant company has had the benefit of advertising by the signs during the whole of the daylight hours. His Honour added on this matter: "It is not possible to establish a proportion between the benefits lost and the benefits retained on a review of the evidence. On examination of photographs and an examination of some of the actual signs *in situ* I find as I have indicated that the benefit is substantial." (7) On dismantling the only value of the sign is as scrap. (8) The costs of erection in all cases exceed fifty per cent of the total rental over the period of letting and in some cases amounted to sixty per cent or more. (9) The prohibition of illumination occurred without the default of either party. (10) Night advertising was the most important benefit which the parties contemplated the defendant would get under the contract. It was an essential benefit in the sense that the plaintiffs were letting and the defendants were hiring signs capable for use for night advertising and intended for such use. (11) Neither party is by reason of the prohibition prevented from performing any essential promise under the contract.

No disagreement was expressed with any of these findings in the Full Court of the Supreme Court. The Act regulating the appeal from *Halse Rogers* J. gave the judges power to decide questions both of fact and law. The majority of the Full Court reached its decision by applying the criterion which *Jordan* C.J. formulated in the previous case of *Consolidated Neon (Phillips System) Pty. Ltd.* v. *Tooheys Ltd.* (1). That criterion is in these terms:— "In the absence of something in a contract to the contrary, a term must be implied for its automatic termination on the happening of a subsequent event, if the event occurs without the default of either party, is of such a kind that the risk of its occurrence is something which one of them could not be supposed to be undertaking, and has the effect (wholly or substantially) either" (1) "of preventing that party from getting some essential benefit which the contract expressly promises him or which, although not expressly promised, is, by the express terms of the contract, manifestly contemplated by both parties as obtainable by him as a result of the performance by the

(1) (1942) 42 S.R. (N.S.W.), at p. 160; 59 W.N., at p. 108.

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other party of his express promises, or " (2) " on the other hand of preventing him from performing some essential promise of the contract." In the present case *Jordan* C.J. stated which of the questions involved in the criterion were questions of law. The majority of the Full Court differed from the conclusions of the trial judge on these questions. The reasons of the Chief Justice were :—" In the present case, I am of opinion that the Premier's Order did prevent the defendant from getting an essential benefit—the use of the signs as illuminated signs—which, although not expressly promised by the contracts, was, by their express terms, manifestly contemplated by both parties as obtainable by the defendant company as the result of the performance by the plaintiff company of its express promises. I am unable to see any special circumstances which would prevent the application of the general rule that a party cannot be supposed to be undertaking the risk of the making of a governmental Order producing this effect. In my opinion, none of the matters relied upon by his Honour as distinguishing this case from the *Consolidated Neon Case* (1) constitutes such a special circumstance. The fact that the signs are still capable of supplying substantial benefits as daytime advertisements does not do so : the doctrine of frustration is not based upon total failure of consideration. Nor, in my opinion, do the greatness of the cost of installation or the smallness of the value to the plaintiff of the material of the signs after their removal : there is nothing in the contracts to show that the parties contracted with reference to either of these matters. I venture to think that the keynote to his Honour's conclusion is to be found in his statement that he could not find that either party contemplated that the whole of the risk of the prohibition of illumination should fall on the plaintiff. If this case had fallen to be decided at the close of the nineteenth century, and the law of frustration should be treated as based upon an actual rather than ostensible application of the principle of implication, I should find great difficulty in coming to any other conclusion than that of his Honour. But the judgments of the House of Lords leave no room for applying subjective tests where the implication involved is one of frustration. Here one must wear one's rue with a difference " (2). The dissenting justice, *Davidson* J., said in effect that the criterion should receive this gloss, namely that the subsequent event " must be of such a nature as to go to the root and substance of the contract or venture " (3). As the Premier's Order did not do so, his Honour thought that the contracts were not frustrated.

(1) (1942) 42 S.R. (N.S.W.) 152 ; 59 W.N. 103.

(2) (1942) 43 S.R. (N.S.W.), at p. 8 ; 60 W.N., at p. 6.

(3) (1942) 43 S.R. (N.S.W.), at p. 16.

The central question in the argument in this Court was whether the criterion formulated in *Consolidated Neon (Phillips System) Pty. Ltd.* v. *Tooheys Ltd.* (1) is sound. It is formulated as a rule of general application. The plan which it follows is to describe an event which would frustrate a contract, not the nature of a contract which would be frustrated by a subsequent event. The inquiry is centred not on the nature and circumstances of the contract but on the effect of the subsequent event. Has it prevented the realization of the benefits promised by the contract or its performance? According to the criterion every case of frustration is characterized either by supervening loss of benefit or supervening impossibility of performance. Its soundness as a device for deciding every case must depend on its consistency with the doctrine of frustration.

The doctrine in its modern form was first stated in *Taylor* v. *Caldwell* (2). The principle which the court applied in that case was stated by *Blackburn* J. in these words: "Where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without the default of the contractor" (3). *Blackburn* J. amended this statement in *Appleby* v. *Myers* (4) by substituting for the words "without default of the contractor" the words "without fault upon either side": See the *Joseph Constantine Steamship Line Case* (5). It is to be noted that the implied condition is that "the parties" shall be excused. In applying this principle to the circumstances of that case *Blackburn* J. said: "In the present case, looking at the whole contract, we find that the parties contracted on the basis of the continued existence of the Music Hall at the time when the concerts were to be given; that being essential to their performance. We think, therefore, that the Music Hall having ceased to exist, without fault of either party, both parties are excused, the plaintiffs from taking the Gardens and paying the money, the defendants

(1) (1942) 42 S.R. (N.S.W.), at p. 160; 59 W.N., at p. 108.
(2) (1863) 3 B. & S. 826 [122 E.R. 309].
(3) (1863) 3 B. & S., at pp. 833, 834 [122 E.R., at p. 312].
(4) (1867) L.R. 2 C.P. 651.
(5) (1942) A.C., at p. 168.

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from performing their promise to give the use of the Hall and Gardens and other things " (1).

The principle which was applied in *Taylor* v. *Caldwell* (2) is obviously not wide enough to apply to every case where " the subsequent event " has the effect described in the criterion which was applied by the Full Court of New South Wales.

The Premier's Order has not prevented either party from performing its part of any one of the contracts. None of the contracts contains an express condition applying to the prohibition imposed by the Order. The majority of the Full Court decided that the Order has a frustrating effect in that it prevents the respondent from getting an essential benefit promised by each contract (that is, the use as a neon sign of the apparatus hired to the respondent); and it could not be supposed that the respondent undertook the risk of such a prohibition being made.

The question then is whether the criterion adopted by the Full Court is consistent with the doctrine of frustration which was applied in cases subsequent to *Taylor* v. *Caldwell* (2).

Lord *Shaw* said in *Horlock* v. *Beal* (3) that the ratio underlying the decision in *Taylor* v. *Caldwell* (2) is " the failure of something which was at the basis of the contract in the mind and intention of the contracting parties." His Lordship expressed the opinion that it was a proper development of the ratio to apply it to the cases where the existence of a corporeal thing was not essential for the fulfilment of the contract. He expressed his agreement with the explanation which *Vaughan Williams* L.J. made in *Krell* v. *Henry* (4) of the case of *Nickoll & Knight* v. *Ashton, Edridge & Co.* (5), where it was said that the common law applies the ratio to cases " where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things going to the root of the contract " (6). Lord *Shaw* added that the view expressed by *Vaughan Williams* L.J. was in entire accord with the doctrine of the frustration of the voyage which was laid down in *Jackson* v. *Union Marine Insurance Co. Ltd.* (7), with the doctrine of *Taylor* v. *Caldwell* (2), and legal principle.

In *Tamplin's Case* (8) Lord *Loreburn* said that in order to decide the question in that case, which was whether a charter party came to an end when the ship was requisitioned by the Admiralty, it was necessary to ascertain the principle of law underlying the authorities.

(1) (1863) 3 B. & S., at pp. 839, 840 [122 E.R., at pp. 314, 315].
(2) (1863) 3 B. & S. 826 [122 E.R. 309].
(3) (1916) 1 A.C., at p. 512.
(4) (1903) 2 K.B., at p. 748.
(5) (1901) 2 K.B. 126.
(6) (1916) 1 A.C., at p. 513.
(7) (1874) L.R. 10 C.P. 125.
(8) (1916) 2 A.C. 397.

His Lordship made a statement of the principle based mainly on the decisions reviewed in *Horlock* v. *Beal* (1), and referred especially to Lord *Atkinson's* review of the cases. Lord *Atkinson* said that the principle in *Taylor* v. *Caldwell* (2) was applied to the case of *Krell* v. *Henry* (3). He said of this case: "The contract of hiring did not contain any express reference to the procession, but it was held that the proper inference to be drawn from the surrounding circumstances was that both parties to the contract contemplated the taking place of the procession along the proclaimed route as the foundation of the contract" (4). The following statement of the principle made by Lord *Loreburn* shows the development which had taken place in the principle applied in *Taylor* v. *Caldwell* (2): "When a lawful contract has been made and there is no default, a court of law has no power to discharge either party from the performance of it unless either the rights of someone else or some Act of Parliament give the necessary jurisdiction. But a court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract. In applying this rule it is manifest that such a term can rarely be implied except where the discontinuance is such as to upset altogether the purpose of the contract. Some delay or some change is very common in all human affairs, and it cannot be supposed that any bargain has been made on the tacit condition that such a thing will not happen in any degree. . . . In most of the cases it is said that there was an implied condition in the contract which operated to release the parties from performing it. . . . It is in my opinion the true principle, for no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted" (*Tamplin's Case* (5)). His Lordship added that this principle was applicable to commercial contracts and was applied in such cases under the name "frustration of the adventure." Lord *Loreburn's* statement closely adheres to the statement of the principle made by *Blackburn* J. What it adds is that the law applies the principle to a contract where it is apparent from its nature that the parties when entering into it must have

(1) (1916) 1 A.C. 486.
(2) (1863) 3 B. & S. 826 [122 E.R. 309].
(3) (1903) 2 K.B. 740.
(4) (1916) 1 A.C., at p. 497.
(5) (1916) 2 A.C., at pp. 403, 404.

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contemplated the continuance of a particular state of things as the foundation of what was to be done. The only other addition is consequential upon this development of the rule, for, unlike a *certum corpus*, circumstances do not remain constant.

One ground on which Lord *Atkinson* thought that *Metropolitan Water Board* v. *Dick, Kerr & Co. Ltd.* (1) could be decided in favour of the firm of contractors was that it was "manifest" from the nature of the contract that the parties "must" have contemplated as "the very foundation of the contract" that each of them should continue to be free to perform it. It was this particular state of affairs to which he referred as "the very foundation of the contract." Lord *Atkinson* was of the opinion that a term should be implied that if the parties were deprived to a very substantial extent of this freedom, the contract would come to an end. His Lordship added that the action of the Executive Government had made it illegal and impossible for the contractors to perform the contract. The Premier's Order has not made it illegal or impossible for the appellant or the respondent to perform its respective parts of any of the contracts.

In *Blackburn Bobbin Co. Ltd.* v. *T.W. Allen & Sons Ltd.* (2) *McCardie* J., in an exhaustive judgment which was affirmed on appeal, asked a question which is the same as that which the criterion formulated by the Full Court of New South Wales professes to answer. The question was: "When will a change of circumstances (not due to the fault of either party) cause a dissolution of a contract?" His Honour reviewed the decisions from *Paradine* v. *Jane* (3) to *Metropolitan Water Board* v. *Dick, Kerr & Co. Ltd.* (1), observing that the principle in the former case was applied with full severity in the eighteenth century (the cases referred to in *Leake* on *Contracts*, 6th ed. (1911), pp. 494-498, bearing witness to that fact); that the rule was first modified by the cases considered in *Jackson* v. *Union Marine Insurance Co. Ltd.* (4), which applied the doctrine of commercial frustration; and that *Taylor* v. *Caldwell* (5) created another modification of that rule. Coming to *Nickoll & Knight* v. *Ashton, Edridge & Co.* (6) and *Krell* v. *Henry* (7), *McCardie* J. said these cases "strikingly enlarged" the doctrine of *Taylor* v. *Caldwell* (5). His explanation of *Krell* v. *Henry* (7) was that the Court decided that "a collateral, though important, circumstance was the basis of the contract between the parties, and that when the basis ceased it followed that the contract was dissolved." After referring to

(1) (1918) A.C. 119.
(2) (1918) 1 K.B. 540.
(3) (1647) Aleyn 26 [82 E.R. 897].
(4) (1873) L.R. 8 C.P. 572; (1874) L.R. 10 C.P. 125.
(5) (1863) 3 B. & S. 826 [122 E.R. 309].
(6) (1901) 2 K.B. 126.
(7) (1903) 2 K.B. 740.

Lord *Shaw's* judgment in *Horlock* v. *Beal* (1) as placing *Jackson* v. *Marine Insurance Co. Ltd.* (2) and *Krell* v. *Henry* (3) on a common ratio, his Honour asks the question : " But by what tests and subject to what limitations is the *Krell* v. *Henry* (3) rule to be applied ? " He thought that the destruction of a state of peace or the supervening difficulty which a vendor encountered in procuring goods to fulfil a contract would not be in itself " a destruction of any specific state of facts within the *Krell* v. *Henry* (3) rule." For the purpose of answering the question his Honour classified the cases which he thought were true exemplifications of the rule. It is important to compare this classification with the criterion applied by the Full Court of New South Wales in the present case. Such cases were (*a*) when the actual and specific subject matter of the contract has ceased to exist apart from British State intervention (*Taylor* v. *Caldwell* (4) and *Horlock* v. *Beal* (5)); (*b*) where a specific set of facts directly affecting a specific subject matter has ceased to exist, e.g., a ship (*Jackson* v. *Union Marine Insurance Co. Ltd.* (2)); (*c*) where a specific set of facts collaterally only affecting a specific subject matter but yet constituting the basis of the contract has ceased to exist (*Nickoll & Knight* v. *Ashton, Edridge & Co.* (6) and *Krell* v. *Henry* (3) itself) ; (*d*) where British administrative intervention has so directly operated upon the fulfilment of a contract for a specific work as to transform the contemplated condition of performance (*Metropolitan Water Board* v. *Dick, Kerr & Co. Ltd.* (7)). In setting out these categories I have mainly used the language of the learned judge. The criterion adopted by the Full Court of New South Wales in the present case is obviously wider than these categories. If the present case does not come within class *b* it stands outside all of these classes. The point decided by *McCardie* J. was that " in the absence of any question as to trading with the enemy, and in the absence also of any administrative intervention by the British Government authorities, a bare and unqualified contract for the sale of unascertained goods will not (unless some special facts compel an opposite implication) be dissolved by the operation of the principle of *Krell* v. *Henry* (3), even though there has been so grave and unforeseen a change of circumstance as to render it impossible for the vendor to fulfil his bargain " (8).

(1) (1916) 1 A.C. 486.
(2) (1873) L.R. 8 C.P. 572 ; (1874) L.R. 10 C.P. 125.
(3) (1903) 2 K.B. 740.
(4) (1863) 3 B. & S. 826 [122 E.R. 309].
(5) (1916) 1 A.C. 486.
(6) (1901) 2 K.B. 126.
(7) (1918) A.C. 119.
(8) (1918) 1 K.B., at p. 550.

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In the *Joseph Constantine Steamship Line Case* (1) Viscount *Maugham* affirmed that the principle in *Taylor* v. *Caldwell* (2) applied both to contracts *de certo corpore* and to contracts in which the existence or non-existence of some specific thing is not involved and divided the cases in which frustration may occur into four classes. The present case does not fit into any one of those classes. His Lordship added: "There may be other categories, and I have not forgotten the coronation and the review cases, of which *Krell* v. *Henry* (3) is the leading example, but they do not come within the same principle of impossibility, and I do not desire to express any opinion about them" (4). Lord *Wright* said that the phrase "impossibility of performance" used by *Blackburn* J. has been replaced by the phrase "frustration of the contract" and this means "frustration of the adventure or of the commercial or practical purpose of the contract" (5). He said that under that name the principle stated by *Blackburn* J. has a wider application than to contracts *de certo corpore* and added: "If the question is still open in English law, I should prefer to rest the principle simply on the true meaning of the contract as it appears to the court. The essential feature of the rule is that the court construes the contract, having regard both to its language, its nature and the circumstances, as meaning that it depended for its operation on the existence or occurrence of a particular object or state of things, as its basis or foundation. If that is gone, the life of the contract in law goes with it, at least as regards future performance" (6). *Blackburn* J., it may be added, said in *Taylor* v. *Caldwell* (7): "There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfil the intention of those who entered into the contract. For in the course of affairs men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition." Lord *Porter* said that "frustration is the term now in common use in cases in which the performance of a contract becomes impossible because its subject-matter has ceased to be available for the purpose for which both parties intended it to be used" (8). The destruction of the subject matter or its requisition by the State are given as instances. None of these cases is typical of the present one. His Lordship said that such cases as *Krell* v. *Henry* (3) are also within the principle. He described them as cases where the subject matter of the contract could have been used and paid for,

(1) (1942) A.C. 154.
(2) (1863) 3 B. & S. 826 [122 E.R. 309].
(3) (1903) 2 K.B. 740.
(4) (1942) A.C., at p. 172.
(5) (1942) A.C., at p. 182.
(6) (1942) A.C., at pp. 186, 187.
(7) (1863) 3 B. & S., at p. 834 [122 E.R., at p. 312].
(8) (1942) A.C., at p. 198.

but were brought within the principle because of the "underlying object" for which the parties entered into the contract. "But impossibility of performance by destruction of the subject matter of the contract, whether that subject matter be, as it originally was, a person, or later a thing, or later still the object for which that thing was by the intention of the parties to be used, is the foundation on which the doctrine depends" (1). This statement compendiously describes the development of the principle from the cases applied by *Blackburn* J. in *Taylor* v. *Caldwell* (2) to its modern proportions.

I have referred to but few of the cases on frustration; they are so numerous that it would be impossible to refer to even a large proportion of them. It seems to me with respect that the criterion adopted by the Full Court of New South Wales is too wide. One defect is that according to that criterion the implication of the term for the termination of the contract is to be made without ascertaining what is the basis of the contract and is to be made irrespective of the effect of the supervening event on the basis of the contract.

It was an express term of the agreement in *Taylor* v. *Caldwell* (2) that the premises were to be let and taken "for the purpose of giving" a series of concerts. The effect of the terms of the contract, the court said, was to show that the existence of the hall in a fit state for a concert was essential for the fulfilment of the contract. The express terms as to the purpose for which the hall was to be used showed what had to be done to fulfil the contract: the defendants were to give the use of the premises to the plaintiffs in a fit state for a concert. It was not essential for the fulfilment of the contract that the plaintiffs should give a concert. If the defendant gave the use of the hall to the plaintiffs, but they were prevented by unforeseen circumstances, such as a governmental Order, or an epidemic, from giving the concert, the plaintiffs would have lost "a benefit" which would appear to answer the description of that mentioned in the criterion adopted by the Full Court of New South Wales. But it could not be said that the contract was frustrated according to the rules in *Taylor* v. *Caldwell* (2) or according to the modern doctrine of frustration unless it was apparent from the terms of the contract and the surrounding circumstances that the parties when entering into the contract must have contemplated that the absence of governmental interference or of an epidemic was a foundation of what they were to do to fulfil the contract. The proof of the purpose for which the hall was let and taken would in itself be insufficient to justify such a conclusion. Where the purpose for which a thing is hired or sold is made to appear the hirer or seller may be bound to

(1) (1942) A.C., at p. 199. (2) (1863) 3 B. & S. 826 [122 E.R. 309].

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hand over or sell a thing fit for that purpose, but the hirer or buyer is not bound to use it for that purpose, although the hirer may not be entitled to use it for any other purpose. But it is not essential for the fulfilment of the contract of hiring or sale that the hirer or buyer should actually apply the thing to that purpose. It is the concern of the party who hires or buys a thing whether he will make use of it or not.

The question is illustrated by *Vaughan Williams* L.J. in *Krell* v. *Henry* (1). His Lordship supposes these facts. A person hires a cab to take him to Epsom on Derby Day at a suitable enhanced price, but the race becomes impossible for some reason. Would he be discharged from liability to pay the price? His Lordship said he would not be discharged as he did not think that the happening of the race would be the foundation of the contract. He said: "No doubt the purpose of the engager would be to go to see the Derby, and the price would be proportionately high; but the cab had no special qualifications for the purpose which led to the selection of the cab for this particular occasion. Any other cab would have done as well." His Lordship, however, based his answer to the question which he raised on other grounds, at the same time showing the material distinction between the case of the hiring of the cab and the hiring of the rooms to see the procession. The main distinction was that under the cab contract the hirer could say to the cabman that the cabman had nothing to do with the purpose for which he hired the cab, whereas in the other case "there is not merely the purpose of the hirer to see the coronation procession, but it is the coronation procession and the relative position of the rooms which is the basis of the contract as much for the lessor as the hirer"—See also *Herne Bay Steam Boat Co.* v. *Hutton* (2). In *Pearce* v. *Brooks* (3) *Bramwell* B. said *in arguendo*: "The purpose of the seller in selling is, that he may obtain the profit, not that the buyer shall put the thing sold to any particular use; it is for the buyer to determine how he shall use it." In the present case the respondent hired the neon sign for the purpose of lighting it. The respondent was liable under the terms of each contract to pay for the electricity consumed by the sign and was entitled to switch the current on or off whenever it saw fit. It was for the respondent to determine for what periods the apparatus should be used as a lighted sign. In my opinion it is impossible to draw the conclusion that the lighting of the neon sign was the basis of any of the contracts for both parties or that the parties contracted on the basis of any particular state of affairs

(1) (1903) 2 K.B., at pp. 750, 751.
(2) (1903) 2 K.B. 683.
(3) (1866) L.R. 1 Ex. 213, at p. 216.

which has been substantially altered in consequence of the Premier's Order. In my opinion none of the contracts was frustrated and the appellant is entitled to recover the moneys claimed in respect of the hire of the signs.

I agree that the appeal should be allowed.

Caldwell v. *Neon Electric Signs Ltd.*—In my opinion no material distinction can be drawn between this case and the case of *Scanlan's New Neon Ltd.* v. *Tooheys Ltd.* and it follows from the reasons given in the latter case that this appeal should be dismissed.

WILLIAMS J. *Scanlan's New Neon Ltd.* v. *Tooheys Ltd.*—This is an appeal by the plaintiff against an order made by the Full Court of New South Wales in an action which the plaintiff brought at common law against the defendant to recover money described as rent alleged to be due by the defendant to the plaintiff in respect of twelve contracts made between the plaintiff and the defendant whereby the plaintiff agreed to instal neon signs for use on certain hotels owned by the defendant.

The action was heard by *Halse Rogers* J. as a commercial cause. Pleadings were dispensed with and the following issues ordered to be tried:—(*a*) are the contracts still of full force and effect or has their operation been suspended or terminated owing to the circumstances which have arisen? (*b*) if the contracts are still operative, what sums, if any, are due from the defendant to the plaintiff?

The learned trial judge held that none of the contracts had been frustrated and entered judgment for the plaintiff for the full amount claimed. The defendant appealed to the Full Supreme Court of New South Wales which, by a majority, held that the contracts had been frustrated and ordered judgment to be entered for the defendant. The plaintiff has now appealed to this Court against the order of the Full Supreme Court.

I shall quote the following passages from the judgment of the learned trial judge:—" The contracts sued upon are twelve in number and bear dates from 30th September 1937 to 17th January 1941. The contracts are, with minor exceptions, in identical terms and provide that the plaintiff company (the lessor) agrees to construct and instal at its own cost one Scanlan New Neon Sign in conformity with certain specifications and conditions. 'The lessor agrees to and does hereby lease unto the lessee the sign for the term, use and rental and upon and subject to the conditions hereinafter set out and the lessee agrees to pay the said rental and to comply with all the terms and provisions hereof on his part to be performed. (*a*) The

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term of this agreement shall be sixty calendar months commencing upon the first day immediately following the installation of the sign; provided the terms of this agreement shall be effective from the date hereof. (*d*) *Payment of rentals*: Rental for the first month or balance thereof shall be due and payable upon installation of the sign. All rental thereafter shall be due and payable in advance upon the first day of each calendar month. The rental shall be payable, except as herein otherwise provided, whether or not the sign shall be used or operated by the lessee. (*e*) *Maintenance*: The lessor at its expense agrees to maintain and service the sign including such services as inspection, cleaning, repainting, replacement of defective transformers, replacement of any broken or defective tubes and all other repairs necessary to keep the sign in first-class operating condition at all times during the period of this agreement. If the sign fails to operate for any reason except through the fault of the lessee or his agents upon notice by the lessee the lessor shall repair the sign within thirty-six hours. If the lessor fails to do so the lessee shall receive credit of one 720th of the calendar monthly rental for every hour the sign fails to operate in whole or in part in excess of the thirty-six hours period, but shall be entitled to no other claim for damages. (*f*) *Wiring and Electrical Current*: The lessor shall at his own cost bring feed wires of suitable capacity to the sign; in the case of outlining, to the individual transformer. The lessee shall instal rotary converter where necessary whether rotary is the property of lessee or leased from lessor. The lessee shall pay for all electrical energy used by the said sign, and the lessee shall be responsible for the supply of current to the sign. (N.B.—In certain of the contracts only the last clause of this condition is included.) (*i*) *Breach of Agreement*: Under this clause is included the following:—It is understood and agreed that the sign is specially constructed for the lessee and for use only at the premises above designated and that it is a material consideration to the lessor in entering into this agreement that the lessee shall continue to use the sign as contemplated. The sign shall not be removed from the above-designated location without the consent in writing of the lessor first had and obtained. (*o*) *Delivery*: The lessor shall promptly commence the construction of the sign and prosecute the work thereon with all due diligence until completion, provided that performance by the lessor shall be subject to delay by strikes, breakages, fires, unforeseen commercial delays, acts of God or permission of public authorities. (*j*) *Removal or Alterations of Sign*: The sign shall at all times be deemed personal property and shall not by reason of attachment or connection to any realty become or be deemed a

fixture or appurtenant to such realty, and shall at all times be severable therefrom and shall be and remain at all times the property of the lessor, free of any claim or right of the lessee except as set forth herein. Upon the termination of this agreement or any extension hereof the lessor shall have and retain the right to remove the sign from the premises upon which it is installed. If during the continuance of the hiring any removal, repairs or renovations or alterations become necessary to the installation or accessories the lessee shall immediately notify the lessor of same, and shall employ the lessor exclusively to carry out any such removal, repairs, renovations and alterations, and it is further agreed that the cost of these shall be borne by the lessee. (*k*) *Damage to Sign*: In the event of damage to or destruction of the sign by any cause the lessor shall have the right to either rebuild the sign, extending the term of this agreement for such period of time as may be necessary to make up the full term thereof or terminate this agreement, in which event the lessor shall not be under any obligation to pay further rental for the sign. Provided, however, that the lessee shall be responsible for injury or damage to or destruction of the sign caused by or resulting from any act of the lessee, his agents or employees. (*p*) *Permits*: The lessee shall (failing which the lessor may if it thinks fit) obtain the necessary permission or consents from the owners or others whose permission is requisite for the installation, maintenance or removal of the sign, and shall be responsible that such permission or consents once obtained shall not be revoked (whether in fact in any case obtained by the lessor or the lessee). Any fees or expenses payable in connection with the granting or otherwise of such permission or consents shall be borne by the lessee.'

A description was given of neon signs by Edward Harold Julian. He was asked: 'Q. Would you describe to his Honour what actually is the principle on which they operate? A. The neon light is a tube filled with a rare gas, sometimes mercury vapour and neon or helium or sodium, and there is a terminal called the electrode on each end of the tube and an electric discharge takes place through the gas in the tubing and sets up luminous rays which is the source of light.' To me he said in answer to a question: 'Q. I take it that without illumination a sign with a neon installation is not visible at night? A. Not at night, no. Q. It loses its visibility practically? A. Yes, without the electrical current passing through.' Mr. *Shand* on behalf of the defendant endeavoured to prove that illumination as distinguished from capability of illumination is *the* essential feature of such signs; one witness without objection gave evidence to that effect, but on a consideration of the whole of his evidence

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I find that illumination is a feature of neon signs and that capability of illumination is an essential feature. The witness referred to admitted that certain neon signs in particular locations had a substantial value as advertising media during the daytime. Defendant's counsel put in evidence certain Orders under the *National Security Regulations*; the result of these was the prohibition of illumination whether by day or night of any of the signs in question in this case and it is common ground that none of the signs about which the dispute arises has been illuminated since the date of the final Order on 19th January 1942. Up to that date, however, I find that they served as signs both by day and by night, some of them certainly and apparently all of them are still in position and have varying degrees of value as daylight signs. I find :—(1) That capability of illumination is the essential and distinguishing feature of neon signs. (2) That illumination is possible only when electrical current can be turned on to the sign. (3) That the signs are designed and used for advertising purposes. (4) That they have a value for daylight as well as night-time advertising, but that this value varies, in some cases the value for daylight advertising being substantial. It is obvious, however, that they are not so noticeable by day as when illuminated by night. (5) Since the prohibition Order the defendant company has lost the whole of the benefit of the night advertising by means of the neon signs. (6) Since the prohibition the defendant company has had the benefit of advertising by the signs during the whole of the daylight hours. It is not possible to establish a proportion between the benefits lost and the benefits retained but on a review of the evidence, an examination of the photographs, and an examination of some of the actual signs *in situ* I find as I have indicated that the benefit retained is substantial. (7) On dismantling the only value of the sign is as scrap. (8) The costs of erection in all cases exceed fifty per cent of the total rental over the period of letting and in some cases amounted to eighty per cent or more. (9) The prohibition of illumination occurred without the default of either party. (10) Night advertising was the most important benefit which the parties contemplated that the defendant would get under the contract. It was an essential benefit in the sense that the plaintiffs were letting and the defendants were hiring signs capable of use for night advertising and intended for such use. (11) Neither party is, by reason of the prohibition, prevented from performing any essential promise under the contract."

Many aspects of the law of frustration have been recently discussed by the House of Lords in *Joseph Constantine Steamship Line Ltd.* v.

Imperial Smelting Corporation Ltd. (1) and *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* (2), and the speeches of their Lordships in these cases contain many important statements of general application relating to this difficult subject. In the *Joseph Constantine Steamship Line Case* (1) Viscount *Maugham* said: "Frustration may occur . . . in very different circumstances. First, in cases resembling the present where there has been the destruction of a specific thing necessary for the performance of the contract. Secondly, where performance becomes virtually impossible owing to a change in the law. Thirdly, where circumstances arise which make the performance of the contract impossible in the manner and at the time contemplated. Fourthly, where performance becomes impossible by reason of the death or incapacity of a party whose continued good health was essential to the carrying out of the contract. There may be other categories, and I have not forgotten the coronation and the review cases, of which *Krell* v. *Henry* (3) is the leading example, but they do not come within the same principle of impossibility, and I do not desire to express any opinion about them" (4).

The respondent contends that the present case is in the same category as the coronation cases. Dealing with this type of frustration Lord *Wright* said in the *Joseph Constantine Steamship Line Case* (5): "Yet another illustration is where the actual object still exists and is available, but the object of the contract as contemplated by both parties was its employment for a particular purpose, which has become impossible, as in the coronation cases. In these and similar cases, where there is not in the strict sense impossibility by some casual happening, there has been so vital a change in the circumstances as to defeat the contract. What *Willes* J. described as substantial performance is no longer possible. The common object of the parties is frustrated". Many learned articles have been written on the subject whether or not *Krell* v. *Henry* (3) was rightly decided. I can only conclude after reading the speeches in the House of Lords in the *Joseph Constantine Steamship Line Case* (1) and the *Fibrosa Case* (6), that the House now considers as sound law the statement of *Vaughan Williams* L.J. in *Krell* v. *Henry* (3) to which Lord *Shaw* in *Horlock* v. *Beal* (7) said "he desired to attach his respectful and pointed concurrence" that "whatever may have been the limits of the Roman law, the case of *Nickoll & Knight* v. *Ashton, Edridge & Co.* (8) makes it plain that the English law applies

(1) (1942) A.C. 154.
(2) (1943) A.C. 32.
(3) (1903) 2 K.B. 740.
(4) (1942) A.C., at p. 172.
(5) (1942) A.C., at p. 183.
(6) (1943) A.C. 32.
(7) (1916) 1 A.C., at p. 513.
(8) (1901) 2 K.B. 126.

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the principle not only to cases where the performance of the contract becomes impossible by the cessation of existence of the thing which is the subject matter of the contract, but also to cases where the event which renders the contract incapable of performance *is the cessation or non-existence of an express condition or state of things, going to the root of the contract, and essential to its performance*" (1).

In these articles the question has been raised whether the Court of Appeal was right in admitting oral evidence of the surrounding circumstances to show that the rooms were let and taken for the particular underlying purpose of viewing the Royal procession. To the layman at least it would seem a strange result if those contracts relating to rooms to view the coronation which expressly referred to the event were held to have been frustrated by the King's illness, while the contract in *Krell* v. *Henry* (2) which did not contain such a reference was held to be still enforceable although entered into solely for the same purpose. It is difficult to see why evidence of the surrounding circumstances with respect to which a contract was entered into should not be just as admissible as the evidence of the supervening circumstances in order to place the court in as advantageous a position as possible to judge whether, upon the whole of the relevant material, it is apparent that the parties contracted on the basis that "its validity shall depend on the continued existence of some thing, or state of facts or law" (per *Scrutton* L.J. in *Kursell* v. *Timber Operators and Contractors Ltd.* (3)) so that it can be predicated with certainty that the subsequent change of circumstances has been of so vital and unexpected a nature as to make it impossible to perform the contract in the manner in which performance would have taken place if those things or state of facts or law had, as contemplated by the parties, continued to exist. The supervening event must frustrate the performance in fact (*Krell* v. *Henry* (4); *Countess of Warwick Steamship Co.* v. *Le Nickel Societe Anonyme* (5); *Blackburn Bobbin Co.* v. *T. W. Allen & Sons Ltd.* (6); *Bank Line Ltd.* v. *Arthur Capel & Co.* (7); *Kursell* v. *Timber Operators and Contractors Ltd.* (8); *First Russian Insurance Co.* v. *London and Lancashire Insurance Co. Ltd.* (9); *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* (10); *Scrutton* on *Charter Parties and Bills of Lading*, 9th ed. (1919), p. 96). Generally there is no contest as to the facts, but, if there is a contest, and the case is tried before a judge and jury, the jury must find the facts

(1) (1903) 2 K.B., at p. 748.
(2) (1903) 2 K.B. 740.
(3) (1927) 1 K.B. 298, at p. 312.
(4) (1903) 2 K.B., at p. 757.
(5) (1918) 1 K.B. 372, at p. 378.
(6) (1918) 2 K.B. 467.
(7) (1919) A.C., at pp. 447, 459.
(8) (1927) 1 K.B., at p. 312.
(9) (1928) Ch. 922, at p. 943.
(10) (1943) A.C. 32.

and it will then be a question of law for the judge to determine whether the law should imply an intention that if the parties considered objectively as "fair dealers" had foreseen the possibility of such a change, they would have agreed, at the time of making the contract, that its further performance should be subject to a condition that, if this event happened, the contract should thereupon be automatically discharged (*In re Comptoir Commercial Anversois* v. *Power, Son & Co.* (1)). But, whatever doubts may have previously existed, it is clear, to my mind, that the House has now decided finally that, in order to ascertain the true meaning of the contract for this purpose, "the court construes the contract, having regard both to its language, its nature and the circumstances, as meaning that it depended for its operation on the existence or occurrence of a particular object or state of things, as its basis or foundation" (per Lord *Wright* in *Joseph Constantine Steamship Line Case* (2)).

In determining whether such a term, which is really, as Lord *Sumner* said in *Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.* (3), "a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands," should be implied, the following considerations must be borne in mind:—(1) That, as *Lawrence* J. said in *Scottish Navigation Co. Ltd.* v. *W. A. Souter & Co.* (4) (quoted with approval by Lord *Sumner* in the *Bank Line Case* (5)) "no such condition should be implied when it is possible to hold that reasonable men could have contemplated the circumstances as they exist and yet have entered into the bargain expressed in the document". (2) That it is the performance of a common object which has to be frustrated, and not merely the individual advantage which one party or the other might have gained from the contract (*In re Comptoir Commercial Anversois* v. *Power, Son & Co.* (6); *Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.* (7)). In *Krell* v. *Henry* (8) the contract vanished upon the King's illness, because, in the words of *Vaughan Williams* L.J. (9), "the coronation procession and the relative position of the rooms" was "the basis of the contract *as much for the lessor as the hirer*", so that after that date neither party was able to perform a common purpose which went to the root of the contract; that is to say, the plaintiff was unable to hire to the defendant and the defendant was unable to obtain from the plaintiff the use of rooms from which the coronation could be

(1) (1920) 1 K.B. 868.
(2) (1942) A.C., at p. 187.
(3) (1926) A.C., at p. 510.
(4) (1917) 1 K.B., at p. 249.
(5) (1919) A.C., at p. 460.
(6) (1920) 1 K.B., at pp. 881, 882, 902.
(7) (1926) A.C., at p. 507.
(8) (1903) 2 K.B. 740.
(9) (1903) 2 K.B., at p. 751.

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viewed. In *In re Comptoir Commercial Anversois* v. *Power, Son & Co.* (1) *Bailhache* J. in a judgment (with which *Scrutton* L.J. (2) stated that, with one or two small exceptions, he entirely agreed) said : " I notice that the arbitrators do not find that the commercial purpose of the adventure was frustrated, but limit themselves to saying ' so far as the sellers were concerned.' I do not see how they could do otherwise, but a finding so limited does not go far enough ; it is necessary that there should be frustration of the common purpose of the adventure. I know of no case where the doctrine of frustration has been applied where the event relied on as frustration has related to a purpose or object which one of the contracting parties had in mind as necessary to the fulfilment of his contract to the knowledge of the other, but whose attainment was no part of the contract to the performance of which both parties had expressly bound themselves ; and the attainment or non-attainment of which purpose would not in any material respect alter any of the obligations which the parties had *inter se* mutually undertaken, but would leave the performance of the contract as between the parties to it essentially unchanged." Once a specific chattel has been delivered into the possession of one party to a contract for his sole use, it would be difficult to hold that the other party could have a common interest with him in that use whether the delivery was by way of sale or bailment. In the case of bailments common purposes under the contract which could be frustrated would include the performance of the mutual promises to deliver and accept delivery of the chattel at the commencement of the bailment and to give and accept redelivery on its determination. It would generally (though not invariably : *Kursell* v. *Timber Operators and Contractors Ltd.* (3)) be the case that the purchaser or bailee as an incident of his ownership or possession of the chattel would have to take the risk that for some reason he might be unable to exploit the advantages he expected to derive from his bargain. In this connection it must be remembered in considering the charter party cases that the modern time charter, although often expressed to be a " lease " of the ship, does not provide for the transfer of the possession of the ship to a charterer who engages his own crew to navigate her, but for the placing of the ship complete with officers and crew at his disposal, so that the owner retains throughout the possession of the vessel through the officers and crew (per Viscount *Haldane* in *Tamplin's Case* (4) ; *Herne Bay Steam Boat Co.* v. *Hutton* (5)). This is made clear in *Sea &*

(1) (1920) 1 K.B., at pp. 881, 882.
(2) (1920) 1 K.B., at p. 895.
(3) (1927) 1 K.B., at p. 312.
(4) (1916) 2 A.C., at pp. 408, 409.
(5) (1903) 2 K.B., at p. 689.

Land Securities Ltd. v. *William Dickinson & Co. Ltd.* (1), where *MacKinnon* L.J. pointed out that " between the old and the modern form of contract there is all the difference between the contract which a man makes when he hires a boat in which to row himself about and the contract he makes with a boatman that he shall take him for a row " (2). In the charter party cases therefore, there is, throughout the time of the charter, a common interest, because the shipowner remains liable for the navigation of the ship in order to earn the hire and the charterer requires the ship to be navigated in order to earn the freight with which to pay for the hire. (3) That, although the fact that the contract has been partly executed is not crucial, nevertheless, as Lord *Parker*, in whose speech the Lord Chancellor concurred, said in *Tamplin's Case* (3): " Some conditions can be more readily implied than others. Speaking generally, it seems to me easier to imply a condition precedent defeating a contract before its execution has commenced than a condition subsequent defeating the contract when it is part performed. A contract under which A is to have the use of B's horse for two days' hunting might well be defeated by the death of the horse before the two days commenced. It would be easy to imply a condition precedent to that effect. But the case would be *very different* if the horse died at the end of the first day, and it was sought to imply a condition subsequent relieving A. in that event of liability to pay the sum agreed for the hire."

The circumstances surrounding the making of the present contracts, though admissible in evidence for the reasons already given, are not of much assistance in determining whether the effect of the Order of 19th January 1942 was to frustrate their further performance. Several of the contracts were entered into after the outbreak of war with Germany and at a time when it was common knowledge that the impositions of restrictions upon lighting at night was a normal incident of war in countries that were liable to be bombed or shelled. On the other hand the fighting was at the time remote from Australia, and no such restrictions had been or were likely to be imposed in this country unless the war came to the Pacific. But it is important to note that the plaintiff incurred the greater part of its expenditure in manufacturing and installing the signs at the defendant's premises before it became entitled to any payment of rent, so that, since the signs on the termination of the contracts will have only scrap value, each payment of rent constitutes in part a return of capital and in part an instalment of profit. Turning to

(1) (1942) 167 L.T. 173. (2) (1942) 167 L.T., at p. 174.
(3) (1916) 2 A.C., at p. 423.

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the nature and express terms of the contracts, it is apparent that the parties have expressed a clear intention, so far as it lies in their power, to assimilate their contractual relationship with respect to the signs to that of landlord and tenant. The plaintiff, described as lessor, is obliged to construct and instal the sign and to maintain it in first-class operating condition at all times during the period of the agreement; while the defendant, described as lessee, is obliged to instal a rotary converter where necessary, to be responsible for the supply of current to the sign, and to pay for all electric energy which it uses. Clause *d* provides that the rentals shall be payable whether or not the sign shall be used or operated by the lessee; clause *i* that the sign is specially constructed for the lessee *and for use only at the premises demised*, and that it is a material consideration to the lessor in entering into the agreement that the lessee shall continue to use the sign as contemplated, and that the sign shall not be removed from the premises without the consent in writing of the lessor first had and obtained. The "use" of the sign in this collocation refers, I think, to the use contemplated by the contract, that is to say, to its installation and abidance in the position agreed upon, while the "operation" of the sign refers to the right of the lessee to connect it to the electrical supply and to operate it as an illuminated sign. The contracts do not place any obligation upon the lessee to consume any electric current in illuminating the signs. The defendant company has an absolute discretion as to the extent to which it will operate the sign in this way; but, whether it illuminates the sign or not, the company will still be liable to pay the rent, except where it is excused from doing so by the contract. The Order against illuminating the signs is of a general undiscriminatory application and is not aimed at neon signs in particular. It affects many other kinds of lights in addition to the illumination of advertisements. It undoubtedly deprives the defendant of the right to make an important use of the chattel he has leased, but it does not make the installation or abidance of the sign in the positions contemplated by the contracts or the performance of any obligation in the contracts impossible or illegal. The defendant leased the sign in order to use it for advertising purposes. The danger that restrictions might be placed upon that use during the period of the lease is a risk which the defendant must be deemed to have assumed as an incident of his lease of the chattel. Restrictions on illuminating advertisements at night might well be imposed by government or civic authorities in times of peace, or the lighting might prove to be a nuisance to a neighbour and be restrained by an injunction. The risk is of the same quality in times of war or peace.

There is no evidence that the contracts entered into prior to the war were made on the basis that there would be peace, that the contracts entered into after the outbreak of war with Germany were made on the basis that there would be peace in the Pacific, or generally that the parties had impliedly contracted on the footing that the right of the defendant to use the sign would only be subject to such restrictions as existed at the date it was made, or alternatively to such risks only as were incidental to government or civic or private interference with its use in peace-time or during peace in the Pacific (*Associated Portland Cement Manufacturers* (1900) *Ltd.* v. *William Cory & Son Ltd.* (1)).

" The occurrence of war makes a difference to the performance of most contracts, but there is no general implication that contracts are at an end if any war affects their performance " : per *Scrutton* L.J. in *In re Comptoir Commercial Anversois* v. *Power, Son & Co.* (2). This is illustrated by several cases.

In *McMaster & Co.* v. *Cox, McEuen & Co.* (3) a firm of jute manufacturers in 1917 contracted to sell jute goods packed in a manner suitable for export. Between the date of the contract and the date of delivery, the Jute (Export) Order came into force prohibiting the manufacture and delivery of jute goods for export without a permit for which the purchasers unsuccessfully applied. The purchasers then purported to cancel the contract and the manufacturers sued for damages for breach of contract. The House of Lords held that, as the contracts contained no conditions relating to the markets in which the goods were to be disposed of by the purchasers, but were ordinary contracts of sale, the fact that the purchasers were prevented by the Order from exporting the goods did not affect their obligation to accept the goods and pay the price. Lord *Dunedin* said : " The duties of the respondents under this contract were only two, namely, to accept the goods and to pay the price ; and nothing that the Government did with respect to preventing goods going abroad, or imposing conditions on their going abroad, interfered with either of those duties " (4). Lord *Shaw of Dunfermline* said : " And if there was a restriction in freedom of disposal of the goods, I agree with all your Lordships that that restriction had no operation in the annulment of the contract entered into, but was only a restriction on the liberty of action of the buyer as and when he became owner of the goods sold. How freedom to dispose in one particular manner of goods contracted for can give, not both parties to the contract, but one party to it, the right of declaring the contract

(1) (1915) 31 T.L.R. 442.
(2) (1920) 1 K.B., at p. 902.
(3) (1921) S.C. (H.L.) 24.
(4) (1921) S.C. (H.L.), at p. 28.

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at an end, passes my comprehension. In the course of legislation many restrictions may be made upon the possessors of goods or the owners of property, but why the consequence should be that there is thereby annulled, or permitted to be annulled, all current contracts at the time of that legislation, unless the legislation expressly bears that that result shall happen,—that I cannot understand. If the supervenient legislation declares the annulment, or forbids the execution of, contracts as between the parties, then, of course, these contracts fall; otherwise the presumption is all to enable the commercial business of the country to proceed without interruption" (1).

In *Williams* v. *Mercer* (2), by an agreement made in 1937 the plaintiff granted the defendant for a term of five years a licence to erect a neon advertising sign upon the wall of a building owned by the plaintiff at a yearly rental of £45 payable quarterly. The agreement provided, *inter alia*, clause 4, that if the local authority or any other authority lawfully empowered to do so should require the sign after erection to be taken down, removed, altered, or amended the defendant should have the right to determine the agreement on giving one month's notice. The Lighting Restrictions Order 1939 provided that no person should for purposes of advertisement or display cause or permit any sky-sign, facia, or advertisement to be illuminated or any light to be displayed outside or at the entrance to any premises or on any hoarding or similar structure. On 15th December 1939, the defendant purported to determine the agreement under this clause. The Court of Appeal held that the Order was not an alteration of the sign but an alteration in the method of its use. All the members of the Court thought it was a hardship on the defendant that he had to continue to pay the full rent when he could not get the full benefit of the sign, and that the plaintiff ought to make some concession; but it does not appear to have occurred to counsel or to the Court that the supervening facts, which closely resembled the present facts, could have had the effect of frustrating the contract.

The doctrine applies to leases where the event happens prior to the lessee taking possession (*Taylor* v. *Caldwell* (3); *Krell* v. *Henry* (4)). The agreement in *Taylor* v. *Caldwell* (3) was for a licence to use and not for a lease of the music hall, but *Blackburn* J. pointed out that nothing, in the opinion of the court, depended on this. After the lessee has entered into possession, the courts have always held the lessee's covenants to be absolute: See the authorities

(1) (1921) S.C. (H.L.), at p. 30.
(2) (1940) 3 All E.R. 292.
(3) (1863) 3 B. & S. 826 [122 E.R. 309].
(4) (1903) 2 K.B. 740.

collected in *Swift* v. *Macbean* (1)—see also *Leightons Investment Trust Ltd.* v. *Cricklewood Property and Investment Trust Ltd.* (2). In *Redmond* v. *Dainton* (3) the demised property was damaged by a bomb discharged from an enemy aeroplane. It was held the lessee was liable to repair the damage. So that, during the present war, the Imperial Parliament has found it necessary to provide for such damage by legislation: *Landlord and Tenant* (*War Damage*) *Act* 1939. And it is interesting to note that similar legislation has been passed in the case of bailments: *Liability for War Damage* (*Miscellaneous Provisions*) *Act* 1939.

The doctrine applies to the sale of land (*Horlock* v. *Beal* (4)), but it does not apply where the land is requisitioned between the date of making the contract and the due date for completion (*In re Winslow Hall Estates Co. and United Glass Bottle Manufacturers Ltd.'s Contract* (5); *Cook* v. *Taylor* (6)). This is, presumably, because the equitable interest in the land, and therefore the risk, to the extent to which a court of equity would, under all the circumstances, order the contract to be specifically performed, passes to the purchaser at the date of the contract. In the *Winslow Hall Case* (5), a notice was given after the date of the contract that the Government intended to requisition the land. The vendors were in a position to complete before the Government took possession, but possession was taken before actual completion. *Bennett* J. held the purchaser must complete. He said: "Anybody's land in this country to-day is liable to be taken under the provisions of this regulation, and the notice does not place on the land in respect of which it is served any burden additional to that to which all land in England is subjected at the present time" (7).

In *Hadley* v. *Clarke* (8) the defendants contracted to carry the plaintiff's goods from Liverpool to Leghorn. On the vessel's arriving at Falmouth in the course of her voyage, an embargo was laid on her "until the further Order of council"; it was held that such an embargo only suspended, but did not dissolve, the contract between the parties; and that even after two years, when the embargo was taken off, the defendants were answerable to the plaintiff in damages for the non-performance of their contract. The modern law is plain that an event which may cause an indefinite delay can be sufficient to frustrate a contract, and that the parties are entitled to assume that an event of an indefinite character such as war, and I think that the Order of 19th January 1942 is in the same category, will continue

(1) (1942) 1 K.B. 375.
(2) (1942) 59 T.L.R. 27.
(3) (1920) 2 K.B. 256.
(4) (1916) 1 A.C., at p. 514.
(5) (1941) Ch. 503.
(6) (1942) 167 L.T. 87.
(7) (1941) Ch., at p. 507.
(8) (1799) 8 T.R. 259 [101 E.R. 1377].

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for an indefinite period. In *Metropolitan Water Board* v. *Dick, Kerr & Co. Ltd.* (1) Lord *Finlay* L.C. said that *Hadley* v. *Clarke* (2) cannot be relied on as an authority. By this I assume his Lordship meant as an authority that the whole character of the contract cannot be revolutionized by indefinite delay. But in *Dahl* v. *Nelson, Donkin & Co.* (3) Lord *Blackburn*, who had, of course, delivered the judgment of the Court in *Taylor* v. *Caldwell* (4) said: "I said in *Geipel* v. *Smith* (5), 'Very different considerations arise where the cargo is already on board, or, as in *Hadley* v. *Clarke* (6), is already on the voyage before the obstacle intervenes. But whilst the contract still remains altogether executory, I think time is so far of the essence of the contract as that matter which arises to cause unavoidable but unreasonable delay is sufficient excuse for refusing to perform it.' I still think that there is a distinction between the cases, for when the shipowner has got the merchant's cargo on board, he cannot simply put an end to his contract; *he must do something with the cargo.*" A statement which strongly supports Lord *Parker's* view that it is more difficult to operate the "device" so as to imply a condition subsequent than a condition precedent.

In the present case the defendant had taken delivery of the signs under the one continuous hiring (*French Marine* v. *Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz* (7)) before their illumination was prohibited, so that the term to be implied must be a condition subsequent. Taking into consideration the surrounding circumstances already mentioned, the nature of the contracts and their express terms, I am unable to construe the contracts so as to imply such a term. As the rent only commenced to be payable when the signs were constructed and installed, the contracts were, I think, subject to the implied term that, prior to this date, they would be automatically discharged, if without default of either party some event such as the destruction of the hotel by fire or a change in legislation making the installation of such signs illegal, happened to prevent them from being installed. But the imposition of restrictions upon the use of the signs when installed would not prevent the plaintiff erecting the sign and so performing the contract any more than the imposition of an embargo upon the export of goods would prevent a seller performing his contract to deliver the goods to a purchaser.

The plaintiff had no common interest in the extent to which the defendant could and would illuminate the signs during the lease: its

(1) (1918) A.C., at p. 127.
(2) (1799) 8 T.R. 259 [101 E.R. 1377].
(3) (1881) 6 App. Cas., at p. 53.
(4) (1863) 3 B. & S. 826 [122 E.R. 309].
(5) (1872) L.R. 7 Q.B. 404, at p. 414
(6) (1799) 8 T.R. 259 [101 E.R. 1377].
(7) (1921) 2 A.C. 494, at p. 520.

interest was to receive in full the rent, a substantial portion of which had to be paid before it would be recouped for its initial expenditure. At the date of the contracts the risk of restrictions was a fair business risk, so that it is possible to hold that reasonable men could have contemplated the circumstances as they existed and yet have entered into the bargain. In fact I find it impossible to believe that the plaintiff would have agreed to take the risk that *all* its contracts should be terminated in the event of the illumination of the signs being prohibited or restricted, when the other party to each separate contract only took the risk of the use of a particular sign being affected so that, having regard to the amount of the pecuniary risk, the plaintiff would have to carry in respect of all its contracts compared to the small amount of rent involved in each individual contract, it would not be reasonable, in my opinion, for the lessees as "fair dealers" to expect the plaintiff to make such a contract. In short, in so far as the signs, while in the possession of the defendant, become liable to disabilities in their use due to the exigencies of the war, they are in the same position as the houses in the cases referred to in *Swift* v. *Macbean* (1), the land in the *Winslow Hall Estates Case* (2) and *Cook* v. *Taylor* (3), the goods in *McMaster & Co.* v. *Cox, McEuen & Co.* (4), and the neon sign in *Williams* v. *Mercer* (5). In its facts, so far as cases can be alike on their facts, the present case is in line with such cases as *Herne Bay Steam Boat Co.* v. *Hutton* (6) (stated in *Scrutton* on *Charter Parties and Bills of Lading*, 9th ed. (1919), at p. 101, to differ from *Krell* v. *Henry* (7), not as to the principle but as to its application to the facts); *Leiston Gas Co.* v. *Leiston-cum-Sizewell Urban District Council* (8); *Tamplin's Case* (9); *Walton Harvey Ltd.* v. *Walker & Homfrays Ltd.* (10); *New System Private Telephones (London) Ltd.* v. *Hughes & Co.* (11); and *Egham & Staines Electricity Co. Ltd.* v. *Egham Urban District Council* (12) (in which the correctness of the decision in the *Leiston Case* (8) was not questioned).

The defendant's obligations under the contracts to pay the rent in accordance with the terms of the contracts became, in my opinion, absolute upon the installation of the signs, so that the evidence establishes at most a case of hardship and not of frustration. The defendant's remedy, if any, is to apply, if so advised, to have the contracts modified under the provisions of the *National Security (Contracts Adjustment) Regulations*.

(1) (1942) 1 K.B. 375.
(2) (1941) 1 Ch. 503.
(3) (1942) 167 L.T. 87.
(4) (1921) S.C. (H.L.) 24.
(5) (1940) 3 All E.R. 292.
(6) (1903) 2 K.B. 683.
(7) (1903) 2 K.B. 740.
(8) (1916) 2 K.B. 428.
(9) (1916) 2 A.C. 397.
(10) (1931) 1 Ch. 274.
(11) (1939) 2 All E.R. 844.
(12) (1942) 2 All E.R. 154.

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I have assumed for the purpose of this judgment that the signs can be considered as chattels. A hire of a chattel does not create any proprietary interest in the chattel (*Broad* v. *Parish* (1)). But if, as appears to be likely, in spite of the intention of the parties, the signs became attached to and formed part of the realty during the lease (*Australian Provincial Assurance Co. Ltd.* v. *Coroneo* (2); *North Shore Gas Co. Ltd.* v. *Commissioner of Stamp Duties* (*N.S.W.*) (3); *Commissioner of Stamps* (*W.A.*) v. *L. Whiteman Ltd.* (4)), the contracts would then create equitable interests in the land (*In re Samuel Allen & Sons Ltd.* (5); *In re Morrison, Jones & Taylor Ltd.*; *Cookes* v. *Morrison, Jones & Taylor Ltd.* (6); *Hamer* v. *London City and Midland Bank Ltd.* (7)). The desire on the part of the parties to preserve the signs as chattels would not prevent the creation of the equitable interests if the contracts on their true construction had that effect in law (*In re Gillott's Settlement*; *Chattock* v. *Reid* (8); *In re F. B. Warren*; *Ex parte A. M. Wheeler* v. *Trustee in Bankruptcy* (9); *Perpetual Trustee Co. Ltd.* v. *Smith* (10)). If the contracts were registered under the *Registration of Deeds Act* 1897 where the land is held under common law title, these equitable interests would acquire the priority provided by sec. 12 of that Act. Where the land is held under the *Real Property Act*, they could be protected by lodging a caveat on the certificate of title. If the order restricting illumination could cause a contract to dissolve, and, "like this insubstantial pageant faded, leave not a rack behind," the plaintiff would be thereby deprived of this equitable interest so that, supposing a mortgagee under a mortgage given subsequently to the contract had entered into possession of the land, or the land had been subsequently sold and conveyed to a purchaser, the plaintiff would be deprived of its equitable right to enter upon the land and remove the sign. If, therefore, the signs are fixtures, this is an additional reason for concluding that the defendant's obligations became absolute on their installation. In many cases the owner could, no doubt, upon the discharge of the contract by frustration, simply retake possession of his goods (*Scrutton* on *Charter Parties and Bills of Lading*, 9th ed. (1919), at p. 95, note *a*), but it would not be possible, in my opinion, to imply or impose by law a new proprietary interest upon the dissolution of the equitable interest created by the

(1) (1941) 64 C.L.R. 588, at p. 609.
(2) (1938) 38 S.R. (N.S.W.) 700, at p. 712.
(3) (1940) 63 C.L.R. 52.
(4) (1940) 64 C.L.R. 407.
(5) (1907) 1 Ch. 575.
(6) (1914) 1 Ch. 50.
(7) (1918) 118 L.T. 571.
(8) (1934) Ch. 97, at p. 111.
(9) (1938) Ch. 725.
(10) (1938) 39 S.R. (N.S.W.) 19, at p. 39.

contract sufficient to enable the plaintiff to enter upon the land against such a mortgagee or purchaser, reconvert the sign into a chattel and remove it. With great deference to Lord *Finlay* I cannot help thinking that his Lordship in *Hadley's Case* (1) would have had considerable difficulty in determining the legal rights of the parties with respect to the goods on the S.S. *Pomona* if the contract of carriage did not become absolute after the ship had embarked on the voyage, but was, as he implied, subsequently frustrated upon the making of the Order in Council.

The appeal should in my opinion be allowed.

Caldwell v. *Neon Electric Signs Ltd.*—The result of this appeal depends upon facts and questions of law similar in all material respects to those involved in *Scanlan's New Neon Ltd.* v. *Tooheys Ltd.* For the reasons contained in my judgment in that case, I am of opinion that this appeal should be dismissed.

Scanlan's New Neon Ltd. v. *Tooheys Ltd.*—*Appeal allowed.*

Caldwell v. *Neon Electric Signs Ltd.*—*Appeal dismissed.*

Solicitors for the appellant Scanlan's New Neon Ltd., *Ernest Cohen & Linton*; for the appellant Caldwell, *Luke Murphy & Co.*, Melbourne.

Solicitors for the respondent Tooheys Ltd., *Parish, Patience & McIntyre*; for the respondent Neon Electric Signs Ltd., *Walter D. Sykes*, Melbourne.

J. B.

(1) (1799) 8 T.R. 259 [101 E.R. 1377].