

# IMPOSSIBILITY OF PERFORMANCE AS AN EXCUSE IN FRENCH LAW: THE DOCTRINE OF FORCE MAJEURE

J. DENSON SMITH†

THE principle of contractual rigidity that was enunciated at an early period by the English courts<sup>1</sup> did not find expression in the French Code Civil. While the principle that contracts have the force of law on those who make them and may be revoked only by mutual consent was written therein, this was qualified by the provision that they might also be revoked for reasons authorized by law.<sup>2</sup> To make this meaningful, the compilers set out that if a certain or determined thing which constituted the subject matter of a contract was lost, was taken out of the channels of trade,<sup>3</sup> or was destroyed, the obligation would be annulled;<sup>4</sup> that the destruction of a thing leased would cause the annulment of the lease,<sup>5</sup> and that the death of the worker, the architect, or the entrepreneur would dissolve the contract for the hire of services.<sup>6</sup> They then provided in a more general way that no damages could be recovered when non-performance was the result of force majeure.<sup>7</sup> But nowhere in the Code did they undertake to define this term.<sup>8</sup> Just how broad it might be, how much it might cover, what the limits of its applicability

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†Professor of Law, Louisiana State University Law School.

1. "When the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract." *Pardine v. Jane*, Aley 26 (1647).

2. CODE CIVIL, art. 1134, lines 1 and 2.

3. See 3 BAUDRY, LACANTINERIE ET BARDE, TRAITÉ DE DROIT CIVIL, DES OBLIGATIONS (3d ed. 1908) n. 1916, where an act of expropriation is given as an example.

4. CODE CIVIL, art. 1302, line 1.

5. Id. art. 1722.

6. Id. art. 1795.

7. Id. art. 1148.

8. Force majeure may be translated as "superior force." The Code also makes use of the term "cas fortuit," (fortuitous event) and while there is some dispute concerning the utility of drawing a distinction between the two, the expression "force majeure" has, in contractual matters, virtually supplanted the former in the jurisprudence and in legal writings. See Esmein, *Le fondement de la responsabilité contractuelle* (1933) REV. TRIB. DE DROIT CIVIL 682; 24 DEMOLOMBE, COURS DE CODE NAPOLÉON (1877) n. 553; 1 BAUDRY, LACANTINERIE ET BARDE, op. cit. *supra* note 3, n. 455; RADOVANT, CAS FORTUIT (1920) 169 et seq.; Bruzin, LA NOTION D'IMPRÉVISION (1922) 22; 2. PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL (1932) n. 231; FIATTE, LES EFFETS DE LA FORCE MAJEURE DANS LES CONTRATS (1932) 15. When tort liability is involved, it appears that a distinction is useful, the term "cas fortuit" signifying an event which arises from some cause which is not external, as is true of an event of force majeure, but internal with respect to the enterprise, or thing, or person involved, such as a fire not resulting from lightning, the explosion of a boiler, or defects in material. It may give rise to liability without fault. See Jossierand, *Force Majeure et Cas Fortuit* (1934) D. H. CHRON. 25; See also, BOURGOIN, ESSAI SUR LA DISTINCTION DU CAS FORTUIT ET DE FORCE MAJEURE (1902).

were, had to be worked out by the French courts very much as Anglo-American courts have worked out, more or less definitely, the proper scope of the doctrine covering the discharge of liability on the grounds of impossibility. Nor has the development of the theory been retarded by a dearth of cases.

Governmental acts and regulations by both the national and local authorities have been held to constitute force majeure;<sup>9</sup> likewise as to actions by foreign powers including governmental decrees and operations of war;<sup>10</sup> natural causes such as a flood,<sup>11</sup> a drought,<sup>12</sup> an unusual freeze,<sup>13</sup> or an epidemic;<sup>14</sup> human agencies such as a strike,<sup>15</sup> a riotous assembly,<sup>16</sup> a doctor's refusal to issue a medical certificate,<sup>17</sup> and a

9. *Way v. Gillain*, Cass. Req., May 14, 1872, S. 1873 I. 224; *Ledellie v. Héricourt*, Cass. Civ., March 24, 1874, S. 1874 I. 428; *Chambre syndicale des employés des tramways à vapeur v. Comp. des chemins de fer à voie étroite de Saint-Étienne*, Cas. Req., July 26, 1909, D. 1911 I. 55; *Dumas v. Mussier*, Cour de Cusset, Jan. 22, 1915, S. 1916 II. 54; *Paraud v. Chadeyras et Knell*, Cour de Montpellier, July 12, 1915, S. 1916 II. 86; *Balland v. Kuhn et Fleichel*, Cour de Nancy, Dec. 6, 1915, D. 1916 II. 103; *Comp. du Chemin de fer souterrain Nord-Sud v. Robert*, Trib. Seine, March 2, 1916, D. 1916 II. 101; *Jay v. Payre-Ficour et Cie*, Cour de Grenoble, July 12, 1916, S. 1916 II. 89, and note by Wahl; *Elgnozi Aboab v. Époux Treille*, Cass. Civ., Dec. 8, 1926, S. 1927 I. 44; *Remy v. Besson*, Cour de Paris, Jan. 11, 1928, S. 1930 II. 1. Nor will the plea be disallowed although the governmental order was improperly and illegally issued. *Marin Le Clainche v. Olive*, Cass. Civ., June 19, 1923, D. 1903 II 94; see also 6 *DEMROGUE, OBLIGATIONS* (1934), at 541, and cases cited.

10. *Jeannisset v. Delamarre*, Cour de Paris, Nov. 26, 1850, D. 1851 II. 43; *Tabet v. Pernot*, Trib. Montbeliard, Oct. 28, 1898, D. 1900 II. 405; *Say v. Schwab et Lebleu*, Cass. Req., Nov. 19, 1872, S. 1872 I. 434; *Chazalon v. Rondon, Plaisant & Co.*, Cass. Req., Oct. 27, 1908, D. 1910 I. 311; *Devaux-Piketty v. Salmon et Forges et Acieries de la Marine*, Cour de Paris, Gaz. Pal. Dec. 31, 1917; cf. *Agélosto v. Waller frères et Cie*, Cass. Req., Nov. 5, 1894, S. 1896 I. 143; *X . . . v. Agence Y . . .*, Trib. Seine, July 9, 1926, D. H. 1926.431.

11. *Durr v. Renouard et al*, Trib. Colmar, Nov. 27, 1848, D. 1851 II. 274; *Chemin de fer de Midi v. Cénac*, Cour de Pau, Dec. 15, 1909, S. 1910 II. 13; see also, *Chemin de fer de Midi v. Coste Darousse*, Cour de Montpellier, Nov. 19, 1903, S. 1910 II. 244.

12. *Crédit foncier v. Bollok*, Cass. Civ., Jan. 30, 1923, D. 1924 I. 148.

13. *Société anonyme des Grands Moulins de Corbeil v. Chavanne*, Cass. Civ., Nov. 7, 1893, D. 1894 I. 16; *Cachal-Froc v. Moureau et fils*, Cass. Civ., Nov. 6, 1895, S. 1896 I. 67; see also, *Société Thai-Thong et Cie v. Chemin de fer de l'Indo-Chine*, Cass. Req., Feb. 19, 1924, D. H. 1924.186; cf. *Chemin de fer Paris-Lyon-Méditerranée v. Varaldi*, Cass. Civ., Jan. 3, 1883, S. 1883 I. 419.

14. *Letellier v. Carvalho*, Trib. Seine, April 17, 1869, D. 1869 V. 221.

15. *Depeaux v. Crevel*, Cour de Rennes, June 28, 1894, D. 1895 II. 214; *Prassen v. Roy et Lebreton*, Cour de Rouen, Aug. 9, 1900, D. 1903 II. 389; *Thuillier v. Comp. générale transatlantique*, Cour d'Aix, Nov. 21, 1901, D. 1902 II. 197; *Comp. des Messageries maritimes*, Cons. d'État, Jan. 29, 1909, D. 1910 III. 89; cf. *Comédie française v. Comp. Edison*, Trib. Seine, Aug. 6, 1908, D. 1908 V. 52.

16. *Benoît v. Lamoureux*, Cass. Civ., Dec. 3, 1890, D. 1892 I. 127; see also, *Cremieux et cie v. Cipriotti*, Trib. Seine, Jan. 20, 1915, S. 1916 II. 52 (ransacking and pillaging of a commercial house).

17. *Comp. le Monde v. Veuve Pigoury*, Cour de Paris, Feb. 4, 1891, D. 1891 II. 317;

Bishop's censorship of a book by an ecclesiastic.<sup>18</sup> This breadth of application of the doctrine makes difficult an attempt to formulate a statement of the requisites governing its application. But the difficulty may be largely avoided if the expressions of the courts are used as a basis of departure. Generally the rule is stated that, to constitute force majeure, the event must render performance absolutely impossible. This would appear to follow from the wording of the general codal provision itself which provides that the debtor may be discharged if he is *prevented* from performing by an event of force majeure.<sup>19</sup> In addition, the event must also arise independently of the will of the party who relies upon it and be not subject to his subsequent control, and it must be of such a nature that its occurrence could not reasonably have been foreseen at the time the contract was formed.

In keeping with the foregoing, the fact that performance may be made considerably onerous for one of the parties by governmental acts,<sup>20</sup> natural causes,<sup>21</sup> or human agencies,<sup>22</sup> will generally not operate to excuse such party from the required performance. And the requisitioning or destruction of the goods which a seller has in mind to fulfill a contract will not discharge his obligation where he is not required to deliver those specific goods.<sup>23</sup> Since the event must be shown to be

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see also, *Chenouard*, Cass. Civ., Feb. 29, 1884, S. 1884 I. 358; *Massot v. Dardenne*, Trib. Toulouse, April 2, 1908, S. 1908 II. 255; *Mallet v. Colmet*, Cass. Req., Oct. 19, 1897, S. 1901 I. 503. But see *Kahn v. Société Franco-Belge*, Cass. Req., Jan. 4, 1927, D. H. 1927.65.

18. *Palmé v. Joly*, Trib. Douai, Nov. 3, 1866, D. 1867 III. 22.

19. CODE CIVIL, loc. cit. *supra* note 7.

20. *Hazard v. Leroy et Dubosca*, Nov. 18, 1852, *Cusemberche v. Ravardy*, April 30, 1853, D. 1853 II. 126; *Société Young's Parrafin and Mineral Oil v. Syndic de la Faillite Namslauer*, Cass. Req., Jan. 27, 1875, D. 1875 I. 264; *Vialors v. Lenay*, Cour d'Orléans, June 24, 1915, D. 1916 II. 104; *Bajou Dukon v. Stewart Bross et Cie*, Cass. Civ., Dec. 5, 1927, D. H. 1928.84, rev'g the lower court, which thought a severe increase in customs duties constituted force majeure; see also, *Gruet, Alary et Comp. v. Cusinberche*, Cour de Bordeaux, Aug. 26, 1852, D. 1853 II. 105; *Jallabert v. Jallabert*, Cour de Lyon, April 8, 1853, S. 1853 II. 397; *Société anonyme de carbonization v. Société de Saint-Gobain*, Trib. Seine, June 15, 1915, D. 1916 II. 22; *Devaux-Piketty v. Salmon et Forges et Acières de la Marine*, Trib. Seine, Nov. 16, 1917, Gaz. Pal., Dec. 31, 1917.

21. *Société industrielle des produits alimentaires du Contat v. Tamagno*, Cour de Nîmes, June 13, 1930, D. H. 1930.516; see also *Brandicourt v. Martin*, Cour de Paris, Dec. 30, 1932, D. H. 1935.169.

22. *Époux Begnier v. Légion-Proust*, Trib. Seine, June 7, 1915, D. 1916 II. 84; *Demanche v. Meyer*, Trib. Seine, Feb. 9, 1916, D. 1917 II. 6.

23. *Delvaille et Attias v. Carbonnel*, Cour de Paris, Dec. 12, 1874, D. 1877 II. 219; *Vialors v. Lenay*, Cour d'Orléans, June 24, 1915, D. 1916 II. 104; *Dumas et Merle v. Tourmann*, Cour de Nancy, July 15, 1916, Gaz. Trib. 1916 II. 453; *Meyer v. Miravet*, Cour de Paris, Nov. 8, 1916, cited *RADOUANT*, op. cit. *supra* note 8, at 47 (there was a contract to sell 700 casks of red Algerian wine. Before delivery could be made the cellar which the vendor had acquired for the purpose of fulfilling the contract was requisitioned by the government); *Morel et Saulou v. Bardon*, Cour de Paris, Dec. 21, 1916, D. 1917 II. 33;

insurmountable in its nature to support an application of the theory, it has been held that, although a strike may result in a failure of performance by a seller, he must succeed in avoiding the presumption that it is subject to his control by a showing that it is not confined to his establishment, and that he is prevented from employing others by violence or threats.<sup>24</sup> Likewise, if performance may reasonably be completed in some other fashion than that contemplated, but not required, the prevention of the anticipated mode of performance will not justify a failure to perform.<sup>25</sup> The requirement that the event be beyond the control of the obligor borders closely on the requirement of absolute impossibility. If a seller may be able to control a strike by making the concessions demanded, may it be successfully contended that performance has been rendered impossible by this occurrence? Or if performance can be rendered in some other fashion than that contemplated and which has been prevented, can it be said that impossibility exists? Under such circumstances, however, the courts will apply the test of reasonableness. An employer will not be required to make every concession demanded by his employees in order to escape contractual duty to third persons because this would often subject him to an undue hardship.<sup>26</sup> And if it would be unreasonable, under the circumstances, to compel an obligor to resort to some other mode of performance, the plea may be allowed. Thus it may be said that, when it is made to appear that the party has been reasonably diligent in attempting to overcome the obstacle, and the court is convinced of his good faith, the requirement that the event be beyond the control of the party bound may be treated as satisfied.<sup>27</sup>

Although there is authority for the view that if the event should have been foreseen as possible the plea will not be allowed,<sup>28</sup> the better view

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Philippet-Harley v. Barraux, Cass. Req., April 19, 1918, Gaz. Pal., Oct. 12, 1918; Simon v. Steverlynck, Trib. Seine, June 26, 1918, Gaz. Trib. 1917 II. 427; see also Le Boadet v. Gosselin, Cour de Caen, Feb. 24, 1916, D. 1916 II. 22 (denying plea of buyer that war had deprived him of foreign customers to whom he had contracted to sell goods ordered from the plaintiff). But the rule may apply if the event prevents the debtor from obtaining anywhere the kind of goods contracted to be sold. Way v. Gillain, Cass. Req., May 14, 1872, S. 1873 I. 224; Camuset, Heina et Comp. v. Way, Cass. Civ., March 24, 1874, S. 1874 I. 429.

24. Rivière v. Comp. La Seine, Cour de Paris, Nov. 13, 1903, D. 1904 II. 73 (followed by an excellent note by Ambroise Colin).

25. Lempreur, Lamouroux et Cie v. Gaxier et Theux, Cass. Civ., June 16, 1900, D. 1905 I. 336; see also Maurel et From v. Société Commerciale du Soudan français, Cass. Req., Feb. 22, 1910, S. 1910 I. 448; Roos v. Éliazon, Trib. Marseilles, Feb. 27, 1925, D. H. 1925.344; Kahn v. Franco-Belge et autre, Cass. Req., Jan. 4, 1927, D. H. 1927.65.

26. See note by Colin cited *supra* note 24.

27. In general, see FIATTE, *op. cit. supra* note 8, at 34.

28. See Chazalon v. Rondon, Plaisant et Cie, Cass. Req., Oct. 27, 1908, D. 1910 I. 311; see also RADOUANT, *op. cit. supra* note 8, at 157.

would seem to be that no more is required than that it should not have been foreseen as probable.<sup>29</sup> For example, since it may be foreseen as probable that a ship will be delayed for sanitary inspection, the plea will not be sustained on this basis.<sup>30</sup> There has also been a refusal to apply the doctrine to a strike in a coal mine because strikes were known to be of very frequent occurrence in the coal mining industry.<sup>31</sup> Of course, if the facts are strong enough to indicate that the obligor has undertaken the risk of performance, regardless of possible obstacles, he may not claim force majeure.<sup>32</sup>

But notwithstanding the fact that the general rule requires objective impossibility of performance, the courts have been constrained to accept within the scope of the theory, cases where the reasons for applying the rule were very compelling, although no impossibility of performance of the contract in fact existed. It has been applied to cases where further performance, although possible, would have resulted in serious danger to the life or health of the party required to perform,<sup>33</sup> and where mental or physical incapacity served to prevent personal fulfillment of a contractual provision although the contract did not require personal action by the incapacitated party in such connection.<sup>34</sup> The doctrine has also been found applicable to cases where the foundation on which the contract was based had ceased to exist. In a case which arose during the war of 1870, certain parties had taken out a lease on land in a rural section of the country with a view to using it for hunting pur-

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29. 24 LAROMBIÈRE, THÉORIE ET PRATIQUE, DES OBLIGATIONS (New ed. 1885) art. 1146, n. 6; 6 DEMOGUE, *op. cit. supra* note 9, at 537, and cases cited.

30. *Comp. d'escompte de Paris v. Hambro*, Cour de Paris, April 25, 1863, D. 1863 I. 80; see also *Poissonet et cons. v. Barroult et Comp.*, and *Lagrange Virely v. de Jouffroy-Goussans*, Cass. Civ., March 11, 1856, D. 1856 I. 100; *Ouest v. Loutrel*, Cass. Civ., Feb. 17, 1874, D. 1874 I. 302.

31. *Decroix v. Taffin-Ledieu*, Trib. Hazebrouck, Jan. 18, 1890, D. 1891 III. 24; *cf. Chemin de fer de l'État v. Deluen*, Cour de Paris, Dec. 22, 1910, S. 1911 II. 149.

32. *Mirard v. Vacher et cons.*, Cass. Civ., Jan. 9, 1856, D. 1856 I. 33, and six other cases; *Rosel v. Société anonyme d'importation de transports*, Trib. Seine, March 30, 1915; see also *Flageollet frères v. Florin et Requillort*, Cass. Req., Jan. 26, 1874, D. 1875 I. 172; *Comp. du secteur électrique des Champs Élysées v. Hamel*, Cass. Req., April 24, 1901, S. 1901 I. 344.

33. *Letellier v. Carvalho*, Trib. Seine, April 17, 1869, D. 1869 V. 221; *Millet-Masson et Cie v. Ville de Pont-a-Mousson*, Cour de Nancy, June 7, 1873, D. 1874 II. 159. But see *Carayon v. Grouard*, Cour de Paris, Jan. 27, 1871, D. 1871 III. 6; *Hatton v. Adobet*, Cour d'Orléans, July 14, 1871, S. 1872 II. 237; *Bretin v. Dame Cuvillier*, Trib. Seine, Dec. 6, 1915, D. 1916 II. 85 (fear not justified objectively); Trib. marit. comm. Boulogne, Nov. 29, 1915, Gaz. Trib., 1915 II. 407 (where contract involved risk). An interesting application of the theory of force majeure was made by an Italian court in discharging a troupe of actors from a contract to appear in America because of a fear of submarine attacks on the trip across. *Milan*, April 26, 1918, *Giur. Ital.* 1918 II. 429.

34. *Bertrand v. Junot*, Trib. Seine, Feb. 3, 1905, Gaz. Trib. 1905 II. 2; *Veuve Isnard v. Comp. l'Utrecht*, Trib. Draguignan, Oct. 27, 1933, Gaz. Pal., 1933 II. 924.

poses. Thereafter a promulgation of the government prohibited the firing of guns in the region. This was held to constitute force majeure which discharged the obligation to pay rent.<sup>35</sup> So thoroughly schooled are the French in the principle that the enjoyment of the thing leased is the correlative of the rental contracted to be paid, that such an application of the rule does not seem surprising.<sup>36</sup> The Code Civil gives to the lessee the right to the peaceful enjoyment of the leased premises, and the court found no difficulty in considering the destruction of the privilege of firing guns as the destruction of the right of enjoyment.

In a decision rendered by the Tribunal of Commerce of Toulouse in 1915 the doctrine was employed although the case involved only hardship, as contrasted with actual impossibility. There the plaintiff was a tailor in the employ of the defendant tailoring establishment at 350 francs per month. The contract was for a period of years and had some years yet to run when the plaintiff's services were terminated by the employer, who catered to a very select clientele which was practically entirely lost as a result of the war. The dismissal followed the refusal of the plaintiff to submit to a suspension of the contract. In support of its decision that the contract was discharged, the court reasoned that it was the intention of the parties that performance of the contract would be rendered under normal economic circumstances such as existed at the time the contract was entered into, and that the war, in destroying the original basis of the contract, constituted force majeure.<sup>37</sup> This decision received both criticism and praise. Those who adhere strictly to the principle of contractual rigidity see no legal basis for it, and insist that it rests solely on vague equity.<sup>38</sup> On the other hand, the case has been viewed by certain writers as a decidedly desirable application of sound legal principle. Some of the proponents of this latter viewpoint have labelled their view the theory of *imprévision*.<sup>39</sup> They have drawn upon writings of the Canonists and the post-glossators, and have urged that it would be in keeping with the intention of the parties to dissolve the

35. *Aguado v. de Bearn et Consorts*, Cour de Paris, May 1, 1875, D. 1875 II. 204 ("The exercise of this right was the essential object of the lease entered into by the Viscount Aguado and the Marchioness of Valciere.")

36. For a more recent, similar decision, see *Daburon et Ruel v. de Touchet et autres*, Trib. Seine, March 25, 1916, D. 1917 II. 6.

37. *Estève v. Dubois, et Lacoste*, Trib. Toulouse, June 1, 1915, D. 1916 II. 112, S. 1916 II. 29.

38. See note by Capitant, D. 1917 II. 33; and note to S. 1916 II. 29.

39. "It (*imprévision*) implies that the debtor has not foreseen the occurrences of an event, whatever be its nature, which renders performance of the contract either absolutely impossible or very burdensome." ZAKI, *L'IMPRÉVISION EN DROIT ANGLAIS* (1930) 186; see also 4 LAROMBIÈRE, *op. cit. supra* note 29, art. 1234; BRUZIN, *op. cit. supra* note 8; MAGNAN DE BORNIER, *ESSAI SUR LA THÉORIE DE L'IMPRÉVISION* (1924).

contract in those cases where it appears that they contracted in view of a certain status of affairs which, as a consequence of events beyond their control, is essentially changed.<sup>40</sup>

But these theorists have received scant comfort from the Court of Cassation. In a case very similar to the foregoing, although distinguishable in that the contract was somewhat less burdensome upon the defendant obligor, the plea of force majeure was denied and the employee was allowed to recover his salary in keeping with the contract.<sup>41</sup> It has been suggested that the Court of Cassation has held to the traditional view because, in the first place, contracts covering a long period of time and therefore peculiarly susceptible to changed conditions are relatively rare; in the second place, those which would occasion virtual ruin for the party forced to perform, were complete performance required, are likewise rare; and, in the third place, because a strict application of the codal articles appears to the courts to be their first duty.

That arguments on the ground of public policy will affect construction of the code is shown by the decisions of the Conseil d'Etat applying the theory of force majeure to public utility rate contracts. This body has frequently found the presence of force majeure in cases having to do with such contracts where, although no impossibility in fact was involved, a serious change in the circumstances necessitated higher rates than those agreed upon at the time the contract was formed.<sup>42</sup> It is generally agreed that this extension of the theory of force majeure results from the fact that the welfare of the public is paramount, and that the provisions of a contract of such a nature should not be rigidly enforced where the result might be a failure of the service rendered as a consequence of the inability of the company to survive under the old rates. What the increasing complexity of social existence will yet require is open to speculation. In the light of the jurisprudence of the Conseil d'Etat, the conclusion may not be unjustified that when and if it does appear imperative to the courts to deal more liberally with the enforcement of contracts, they may not find it necessary to go beyond the limits of the CODE CIVIL to find authority for such action.

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40. Cf. note by Wahl, S. 1916 I. 17. Cf. MAGNAN DE BORNIER, *op. cit. supra* note 39, at 143.

41. Société anonyme Maison Agnès v. Dlle. Maalderinck, Cass. Civ., Aug. 4, 1915, S. 1916 I. 17.

42. Comp. générale d'éclairage de Bordeaux v. Ville de Bordeaux, Cons. d'État, March 30, 1916, D. 1916 III. 24 (the court reasoned that the great increase in the price of coal was beyond anything foreseen by the parties). Compagnies réunies de gaz et électricité v. Ville de Besançon, Cons. d'État, July 16, 1926, D. 1927 III. 17 (with an exhaustive note by Pierre Closset); Cie des Tramways de Cherbourg, Cons. d'État, Dec. 9, 1932, D. 1933 III. 17 (with note by Robert Pelloux who denominates the principle "force majeure administrative").

## II

The Code Civil describes a conditional obligation as one which is made to depend upon a future and fortuitous operative fact.<sup>43</sup> The condition is denominated as "suspensive" if its effect is to suspend the obligation until the designated event has occurred,<sup>44</sup> and "resolutive" if its occurrence will operate to discharge the obligation and return the parties to their original positions.<sup>45</sup> Conditions are further classified as casual, potestative, and mixed. The casual condition is defined as one the occurrence of which is not within the power of the creditor or debtor to bring about.<sup>46</sup> Potestative and mixed conditions, on the contrary, depend for their occurrence upon action by either of the parties, and, in the case of the latter, the action also of a third party.<sup>47</sup>

The general force majeure article of the Code, as has been previously noticed,<sup>48</sup> provides that no damages may be allowed when the debtor is prevented by force majeure from giving or doing that which he is bound to give or do. If the use of the phrase "no damages may be allowed" and the words "debtor" and "bound" is accepted as meaning that the principle applies only to one who is under a legal duty with respect to the act involved, a literal application of this article would seem necessarily to limit the effect of force majeure to obligatory matters, the non-performance of which would, in the absence of the doctrine, render the obligor liable to suit. If the theory were thus held not applicable to conditions, force majeure would never operate to excuse a condition and thereby render absolute the conditional right. But this view has not been taken by the courts. The doctrine is as readily applied to stipulations that are true conditions, that is, terms of a contract, the non-occurrence of which will not render the party liable for breach of contract.<sup>49</sup>

It is also noticeable that this article makes no mention of the effect of force majeure on the debtor's right to a promised counter performance, where the debtor's own performance has been excused by force majeure. While there is no codal provision which specifically covers this problem, the Court of Cassation has approved the application thereto of article 1184 which provides that the resolutive condition is implied in every bilateral contract where one of the parties does not perform his obligation. This use of the article has been roundly criticized for rea-

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43. CODE CIVIL, art. 1168.

44. Id. art. 1181.

45. Id. art. 1183.

46. Id. art. 1169.

47. Id. arts. 1170 and 1171.

48. *Supra* page 1 and loc. cit. *supra* note 7.

49. 6 DEMOGUE, op. cit. *supra* note 9, at 531; see also as illustrative, *Her. Wild v. Parent et Schaken*, Cass. Civ., March 16, 1864, D. 1864 I. 159; *Caisse syndicale d'assurances mutuelles des Forges de France v. Linzalle*, Cour de Nancy, July 10, 1909, D. 1911, 2 II. 61 (postal and telegraphic strike prevented a plaintiff from taking an appeal within the time allowed. The delay was excused on the basis of force majeure. Article 1148 was cited.)



sons based on the history of the provision which has been traced to the *lex commissoria* of the Romans, and because it is claimed that the proper interpretation of the language used would limit its application to cases where the failure of performance results from the fault of the party bound.<sup>50</sup> This argument is, in effect, that the words "does not perform," in article 1184, do not include "cannot perform." But whether or not the article should be applied to such cases, the rule is well established that *force majeure*, which destroys the obligation of one of the parties, destroys at the same time the obligation of the other.

There have been various explanations of the foregoing rule. Planiol, who objects to the use of article 1184, maintains that each performance is the "condition" of the other, so that non-performance by one party constitutes a failure of a condition on which his right to the return performance depends.<sup>51</sup> Another writer bases the result on the notion of equivalence between the respective promises.<sup>52</sup> And it is also claimed by some authorities that such non-performance constitutes a failure of *causa* with respect to the obligation of the other party.<sup>53</sup> All, however, agree that one party should not be compelled to perform when he cannot receive the performance promised in return. When the question comes before the courts they seem to find no necessity to resort to the condition analysis. The holding is supported by reference to article 1184 without any attempt to explain the underlying theory; the notion of *causa* is employed;<sup>54</sup> or the case is treated simply as if the *force majeure* has prevented performance by the defendant.<sup>55</sup>

In cases concerning the effect of impossibility on contract stipulations that are not promissory in nature, the lack of condition analysis is strikingly noticeable. It is interesting to find that certain of the early commentators who touched upon the problem seem not to have been in accord. Pothier held that a contractual obligation qualified by a potestative or mixed condition would be discharged if the condition were not

50. 2 PLANIOL, *op. cit. supra* note 8, n. 1339; note by Planiol, D. 1891 I. 329.

51. 2 PLANIOL, *op. cit. supra* note 8, n. 1337.

52. MAURY, *NOTION D'ÉQUIVALENCE* (1920) 31, "Equivalence is nothing more than the equality of value between the two correlative exchanges."

53. 2 CAPITANT, *COURS DE DROIT CIVIL* (1924) 299; CAPITANT, *DE LA CAUSE DES OBLIGATIONS* (1927) 30 (citing Domat who is considered as the father of the modern doctrine of *causa*); FIATTE, *op. cit. supra* note 8, at 103; LÉPARGNEUR, *LA PROROGATION DES CONTRATS À EXÉCUTION SUCCESSIVE* (1920) 23; Notes by Esmein, S. 1913 I. 49 and S. 1931 II. 1. For a thorough examination and evaluation of the notion, see Lorenzen, *Causa and Consideration in the Law of Contracts* (1919) 28 *YALE L. J.* 621.

54. *Conjoints Ceccaldi v. Albertini*, Cass. Civ., April 14, 1891, D. 1891 I. 329. Cf. *Cerf-Schmer v. Delobel*, Cass. Civ., Aug. 3, 1875, D. 1875 I. 409; *Fornier v. Gros*, Cass. Civ., May 5, 1920, S. 1921 I. 298.

55. As illustrative, *Cremieux et Cie v. Cipriotti*, Trib. Seine, Jan. 20, 1915, S. 1916 II. 52 and the note thereto; *Mouet v. Samuel et autres*, Cass. Req., May 7, 1872, D. 1872 I. 456, where the Court of Cassation approved the lower court's application of article 1148.

fulfilled, even though the non-fulfillment was due to force majeure.<sup>56</sup> This view was opposed by Larombiere, who reasoned that, since potestative and mixed conditions depend for their fulfillment upon the will and ability of the party who is charged therewith, it may be supposed, without doing violence to the intention of the parties, that the one who stipulated the condition intended not to require strict performance if force majeure intervened.<sup>57</sup> The implication seems to be that if the stipulator attaches a casual condition to his promise he is not interested in the other party's good faith, but intends to be bound only if the condition precedent to creation of his own duty occurs, irrespective of the fact that occurrence of that condition may be prevented by force majeure. At first glance a distinction on this latter basis seems plausible, but, in fact, it would appear difficult to justify. It does not take into consideration a case where no mere liberality is intended, and the performance of the potestative or mixed condition represents the only equivalent, or a material part thereof, which the promisor has bargained for in return for his promise.

The subject of insurance affords some examples of how the question has been treated by the courts. The payment of premiums in life insurance is optional with the insured,<sup>58</sup> and the normal result of a failure to pay at the appointed time is a forfeiture of the policy. But the rule that, if such payment is prevented by force majeure, no forfeiture will be incurred, appears definitely settled. The cases are in conflict as to whether or not physical or mental incapacity will constitute force majeure in this connection.<sup>59</sup> By accepting the definition of *causa* as the material end which a party is seeking to attain,<sup>60</sup> it would seem that the receipt of the stipulated premium at the time agreed upon is the *causa* of the company's promise to pay the amount of the policy upon the death of the insured. Although the courts have not, when recovery has been denied, employed this analysis, the fact that the prompt payment of premium is the equivalent for the insurer's promise to pay a large sum upon the occurrence of the event insured against undoubted-

56. POTHIER, *TRAITÉ DES OBLIGATIONS* (Evans 3d Am. ed. 1853) n. 213. There is no suggestion concerning the effect of force majeure on a casual condition.

57. 24 LAROMBIÈRE, *op. cit. supra* note 29, art. 1178.

58. 1 LEFORT, *L'ASSURANCE SUR LA VIE* (1920) 487; DUPUICH, *L'ASSURANCE-VIE* (1922) § 147.

59. *Comp. le Gresham v. Lachaussée et Bizet*, Cass. Req., Nov. 24, 1874, D. 1875 I. 64; *Société the Mutual Life Insurance v. Dlle. Detchessary et de Saint-Légor*, Cass. Civ., April 11, 1922, S. 1923 I. 20; *Veuve Isnard v. Comp. l'Utrecht, Trib. Draguignan*, Oct. 27, 1933, Gaz. Pal. 1933 II. 924. This case is discussed by René Demogue in *REVUE TRIMESTRIELLE DE DROIT CIVIL* (1934) 178. *Contra: Veuve Bounan v. la New York*, Cass. Req., June 15, 1911, D. 1912 I. 181 (denying the existence of force majeure); cf. *Her. Wild v. Parent et Schaken*, Cass. Civ., March 16, 1864, D. 1864 I. 159.

60. See authorities cited *supra* note 53.

ly has had some bearing on the decisions. In cases where the condition does not involve the equivalent which the promisor contemplates receiving in return for his promise, as where there is a failure to send notice of a loss, there is unanimity in holding that physical or mental incapacity of the insured does constitute force majeure.<sup>61</sup> Conflicting decisions have been rendered concerning the effect of the beneficiary's ignorance of the existence of the policy as an excuse for the failure to send notice of the insured's death within the time allowed by the policy.<sup>62</sup> This has probably resulted from a difference in emphasis placed on the probable fault of the insured in failing to notify the beneficiary of his possession of the policy. In these cases the question of good faith and diligent conduct is important and it is particularly true that there must be no failure to comply with the provision after the force majeure has ceased, if forfeiture is to be avoided.<sup>63</sup>

### III

It is well settled that where an event of force majeure prevents performance of an obligation only partially, resolution may be denied, and a proportional diminution allowed in the performance promised in return.<sup>64</sup> The extension of this principle to permit of a denial of resolution where the obstacle to performance is only temporary has become known as the theory of suspension. This theory reached full acceptance only through the pressure occasioned by the late war. The effort to sustain a contract in the presence of force majeure of only a temporary nature dates back to before the war of 1870. The courts, in some of the early cases, allowed a suspension under such circumstances through a finding of intention.<sup>65</sup> The theory of suspension started, however, dur-

61. *Société d'assurances mutuelles La Martinique v. Knight*, Cass. Req., Dec. 27, 1887, D. 1888 I. 384; *Comp. d'assurances contre les accidents le Patrimoine v. Faillitte Glaser*, Cass. Req., Dec. 9, 1903, D. 1904 I. 524. This rule has been adopted by statute. See Law of July 13, 1930, art. 15, n. 4. In the absence of force majeure, a stipulation requiring notice within a limited period is valid and binding. *Veuve Hurpin v. Comp. le Secours*, Cass. Req., Jan. 15, 1900, D. 1900 I. 104.

62. *Succ. Varaigne v. Comp. Internationale d'assurances*, Cour de Grenoble, Jan. 30, 1906, D. 1906 V. 41. *Contra*: *Comp. d'assurances l'Africaine v. Veuve Besseyre*, Cour de Alger, Nov. 19, 1907, D. 1908 II. 244; see also *Veuve Lougier v. Consortium Français*, Cour d'Aix, June 10, 1929, D.H. 1930 II.; *Mahieu Delangre v. Gobin*, Cass. Civ., July 1, 1857, D. 1857 I. 307; *Comp. la providence v. Lacaze et Avinien*, Cass. Req. Feb. 12, 1900, D. 1904 I. 467; *L'Egide v. Brousse*, Cour de Montpellier, Oct. 28, 1930. It should not be overlooked that personal action by the insured or beneficiary in sending notice is usually not required.

63. *La Continentale v. Dupuis*, Cour de Caen, Jan. 13, 1909, D. 1911 II. 63; see also *Jeannisset v. Delamarre*, Cour de Paris, Nov. 26, 1850, D. 1851 II. 43.

64. See notes by Planiol, D. 1891 I. 329, and D. 1892 II. 137, citing many cases; 4 AUBRY ET RAU, COURS DE DROIT CIVIL FRANÇAIS (5th ed. 1902) 126.

65. *Santa Maria v. Clavand*, Cour de Bordeaux, Aug. 8, 1929, Dalloz, Vente, n. 668.

ing the early part of the war of 1870;<sup>66</sup> but, with the end of hostilities bringing a more normal movement in the affairs of business, the Court of Cassation definitely decided against it.<sup>67</sup> With the exception of a few apparent applications of the principle,<sup>68</sup> the law so remained until the period of the World War. In view of the firm stand taken by the Court of Cassation, the cases that arose during the war period, but before the higher court had spoken again in favor of the theory, gave evidence of a decided effort on the part of the courts once more to support their decisions by a finding of intention.<sup>69</sup> But with such cases increasing in number, and the need for a less rigorous application of the theory of force majeure becoming more manifest, the Court of Cassation finally gave full recognition to the principle that a contract is not necessarily destroyed by temporary impossibility of performance.<sup>70</sup>

The theory of suspension is primarily applicable to contracts for so-called "successive" performance, such as contracts of employment and of lease. Thus, where an employee is mobilized by the government, the employer is not discharged from the contract of employment.<sup>71</sup> Performance on both sides is suspended. Since the agreement is dormant, the employer, if the contract is one for an indeterminate period, is deprived of his power to terminate the employment by notice. When performance may again be resumed, the employer must accept the employee back into his service, and he is not privileged to discharge him if he has no reason other than the interruption of employment. If the employer refuses to take him back,<sup>72</sup> or cannot justify his action in dismissing the employee upon his return,<sup>73</sup> the latter is entitled to dam-

66. *Rungeard et Cottard v. Gaillard et Cie*, Cass. Civ., June 26, 1871, D. 1871 II. 177; *Milon v. Tillay, Delaune et Cie*, Cour de Rouen, June 5, 1871, D. 1871 II. 178; *Dechamps v. Dans*, Cour de Rennes, May 2, 1871, D. 1872 II. 111.

67. *Way v. Gillain*, Cass. Civ., May 14, 1872, D. 1873 I. 78. The Conseil d'État took the same view. *Lamble*, Cons. d'État, Nov. 18, 1872, D. 1874 III. 49; *Faist*, Cons. d'État, Nov. 18, 1872, D. 1874 III. 49; *Faist*, Cons. d'État, May 7, 1874, D. 1875 III. 48.

68. See *Comp. d'assurances mutuelles le Languedoc v. Guilhem*, Cass. Civ., Feb. 15, 1888, S. 1888 I. 546. *Leduc v. Burlot*, Cass. Civ., June 7, 1905, D. 1908 I. 74.

69. *Le Goadet v. Gosselin*, Cour de Caen, Feb. 23, 1915, D. 1916 II. 22; *Société anonyme de carbonisation v. Société de Saint Gobain*, Trib. Seine, June 15, 1915, D. 1916 II. 22; *Haener v. Marteau*, Trib. Carcassonne, March 5, 1917, Gaz. Trib. 1917 II. 323. Cf. *Paul Malinen v. Calm et calm*, Cour de Nancy, June 20, 1918, Gaz. Pal. 1918. 735; *Cie Nord-Sud v. Robert*, Trib. Seine, March 2, 1915, Gaz. Trib. 1916 II. 101.

70. *Grande Cidrerie de Cormeille v. Legrand*, Cass. Civ., Nov. 15, 1921, Gaz. Pal. 1922 I. 69; *Same v. Poullain*, Cass. Civ., Dec. 12, 1922, D. 1924 I. 186; *Consorts Seligman v. Mellerie et autres*, Cass. Civ., Oct. 24, 1923, D. 1924 I. 8.

71. In the absence of the theory of suspension it seems to have been well established that the employer might consider the employment terminated upon the mobilization of his employee. See *LÉARGNEUR*, op. cit. *supra* note 53, at 24.

72. *Cremieux et Cie v. Cipriotti*, Trib. Seine, Jan. 20, 1915, S. 1916 II. 52.

73. *Renault v. Salatche*, Cass. Civ., July 28, 1897, D. 1898 I. 16; *Comp. générale d'éclairage et de force v. La Varenne*, Cass. Civ., March 2, 1898, D. 1898 I. 330; *Legendre*

ages. On the other hand, the employee may not be compelled under pain of judicial sanction to resume his employment. If the contract is for a definite period which has not expired when the obstacle to performance is removed, the contract should resume its normal course. However, if the period has expired in the meantime, the contract is at an end.<sup>74</sup> In contracts of lease, a lessee who has paid his rent in advance will be entitled to reclaim any amount paid for enjoyment that he does not receive,<sup>75</sup> but may lose his right to reimbursement if he continues to pay without complaint.<sup>76</sup>

In applying the principle to contracts for the sale of goods, the intention of the parties concerning the materiality of the time for performance becomes important. As a general rule, where a definite time has been fixed, the contract will come to an end with the expiration of such time even if performance is then prevented by force majeure.<sup>77</sup> If the agreement calls for deliveries in instalments, only such deliveries may be made or required as remain executory upon the termination of the supervening event. If time appears to be of the essence, any instalments that have failed in the meantime are discharged. Likewise, where full payment has been made in advance, the buyer may demand restitution of the amounts paid for which he has received no equivalent. If no definite time for performance has been fixed, the circumstances surrounding the transaction must be considered to determine the materiality of the delay. Obviously, where the contract involves the sale of a commodity the price of which fluctuates greatly, suspension should not be allowed.<sup>78</sup> The same is true where, from the nature of the contract, performance may be profitably rendered only within a certain period.<sup>79</sup> Although it appears that under the influence of Article 1184 the courts are inclined to give the creditor a choice of requiring performance when possible, or claiming the resolution of the contract, this will not be allowed where

v. Walck, Cass. Civ., Jan. 28, 1908, D. 1908 I. 195. But the burden of proving an abuse of right is on the employee. Leduc v. Burlot, Cass. Civ., June 7, 1905, D. 1908 I. 74.

74. Jonat v. Société du Jardin d'Acclimation, Cass. Civ., June 10, 1929, S. 1929 I. 267. This has been criticized on the basis that the result is to favor the employee who has been engaged for an indeterminate period over the trusted employee who has been long in the service of his employer and who has therefore been given a definite contract. See LÉPARGNEUR, *op. cit. supra* note 53, at 33.

75. Bassot v. Basset, Cour de Paris, Oct. 19, 1916, Gaz. Trib. 1916 II. 530.

76. Société d'encouragements pour l'amélioration du Cheval français de Demi-Sang v. Edmond Blanc, Nov. 16, 1916, Gaz. Trib. 1917 II. 29; Jay v. Payre, Ficoud et Cie, Cour de Grenoble, July 12, 1916, S. 1916 II. 89.

77. Bour v. Hertz et Coquelin, Trib. Seine, Dec. 14, 1916, Gaz. Trib. 1916 II. 4; see also, Levy v. Despretz, Cass. Civ., June 3, 1929, S. 1929 I. 365.

78. Devaux, Pichetty v. Salmon et Forges et Acieries de la Marine, Trib. Seine, March 16, 1917, Gaz. Pal. Dec. 31, 1917.

79. Lamble, Cons. d'État, Nov. 15, 1872, D. 1874 III. 49, and other cases.

delayed performance would be prejudicial to the debtor.<sup>80</sup> Nor will resolution be allowed on the claim of the creditor of the performance that has been temporarily prevented if the debtor would be unduly injured thereby. It has been suggested that the courts should permit a reduction in the amount to be paid by the creditor where performance has been delayed, through an assimilation of tardy performance with partial performance, but the jurisprudence is opposed to this view.<sup>81</sup>

In all of these cases, after performance again becomes possible, no modifications in the contract are allowed. The employer must pay the same salary to the employee, nor can he be compelled to pay more. The lessee must pay, and the lessor receive, the rental stipulated in the contract of lease, and the buyer must pay and the seller accept the price stipulated for the goods.<sup>82</sup>

#### IV

In the term, force majeure, the French courts were given a symbol of legal excuse, and they have applied it to practically every event that may result in the prevention of performance of a contractual stipulation, extending from an act of God to that of a Bishop and from the ravages of war to a threatened breach of the public peace. From the general principle that a supervening event of force majeure would discharge the debtor, we have seen that the courts have developed a theory that has been employed in cases where the purpose underlying the contract had been destroyed, where further performance would have been unduly hazardous to the life or health of one of the parties, and where further performance would have been extremely difficult and burdensome.

Through the device of an implied condition purporting to represent the intention of the parties, the emasculation, by Anglo-American courts, of the principle maintaining the rigidity of the contractual relationship despite the supervention of unforeseen events of whatever nature has, in general, followed the same lines.<sup>83</sup> It has been suggested that the English courts in the celebrated Coronation Cases applied the theory of legal excuse more liberally than would be acceptable under the doctrine of force majeure as it obtains in France.<sup>84</sup> But it appears that the French courts went about as far in the hunting land cases.<sup>85</sup> In

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80. *Ledellie v. Héricourt*, Cass. Civ., March 24, 1874, S. 1874 I. 428; *Camuset, Heina et Comp v. Way*, March 24, 1874, S. 1874 I. 429.

81. See *FIATTE*, op. cit. *supra* note 8, at 142, and cases cited.

82. *Id.* at 137.

83. Consult *RESTATEMENT, CONTRACTS* (1932) §§ 457-461.

84. *ZAKI*, op. cit. *supra* note 39, at 236, 285.

85. See cases cited *supra* notes 35 and 36.

both types of cases the parties had in mind the underlying purpose of their contract which could no longer be consummated as a consequence of the supervening event.<sup>86</sup> While Anglo-American courts would hardly grant a discharge because a contract had merely become more burdensome financially for one of the parties, a discharge might be allowed where, because of unforeseen circumstances, performance became impracticable, although not impossible.<sup>87</sup> There is a striking absence of cases of the latter sort in the French reports, but it appears that the doctrine of force majeure might be found applicable under such circumstances.<sup>88</sup>

As to excuse of a condition because of impossibility, the French courts, in the limited number of cases found, seem somewhat more lenient than the majority of American courts. If the condition represents the only equivalent, or a material part thereof, which the promisor has bargained for in return for his promise, most of our courts would disallow recovery by the plaintiff who fails to perform the condition,<sup>89</sup> whereas it appears that such circumstance would not prevent the application of the principle of force majeure.<sup>90</sup> On the other hand, the courts in both jurisdictions are liberal in the application of the theory of impossibility where non-performance of the condition does not deprive the promisor of the equivalent he has bargained for.<sup>91</sup> By and large, it seems that the courts under both systems are guided by like considerations in the disposition of analogous cases and that facts which would appeal to a French court as justifying an application of the theory of force majeure would likely persuade an Anglo-American court to apply one of the several exceptions to the early rule.

In view of the fact that both Anglo-American and French courts have not adhered closely to the common requirement of absolute impossibility of performance to justify the granting of a discharge, an accurate prediction of the ultimate scope of the principle of legal excuse in the presence of supervening events is hardly possible in either case. As the affairs of men become more complex and interdependence more pro-

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86. For historical reasons, Anglo-American courts treat actual leases somewhat differently. RESTATEMENT, CONTRACTS (1932) § 290 and comment.

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

88. See *Ville de Paris v. Michon*, Cons. d'État, Feb. 3, 1905, Lebon, 105; *Olmart et Hesbert*, Cons. d'État, Nov. 14, 1902, D. 1904 III. 37; *Comp. Marseillaise de navigation à vapeur*, Cons. d'État, May 20, 1904, D. 1906 III. 17; *Société veuve Chabrat et Cie*, Cons. d'État, June 28, 1922, Rec. Cons. d'État, 588.

89. *New York Life Insurance Co. v. Statham*, 93 U. S. 24 (1876); *Abell v. Penn Mutual Life Insurance Co.*, 18 W. Va. 40 (1881). *Contra*: *Mutual Benefit Life Insurance Co. v. Hillyard*, 37 N. J. L. 444 (1874).

90. See cases cited *supra* note 59.

91. See Corbin, *Supervening Impossibility of Performing Conditions Precedent* (1922) 22 COL. L. REV. 422, 426; and cases cited *supra* note 61.

nounced, the courts in both jurisdictions may be led to take a stronger position in eliminating or more completely balancing the risks of enterprise. Perhaps the safer guide to their future developments would be, not the present status of the principle under either system, but its susceptibility to judicial development as demonstrated by the past. Whatever one's views concerning the proper limits to judicial action along this line, the possibilities afforded by the lack of precise delimitations of the doctrines of impossibility and force majeure should not be overlooked.