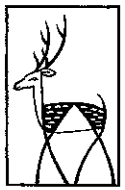
Landmark Cases in the Law of Contract

Edited by

Charles Mitchell and Paul Mitchell



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Preface

The essays in this collection, like the essays in the companion volume, *Landmark Cases in the Law of Restitution* (2006), grew out of papers presented at a symposium held at the School of Law, King's College London. We gratefully acknowledge the School's financial assistance.

As with the earlier collection, we gave authors a free choice of case, and complete freedom of method in how to approach their material. The results are predictably diverse: the cases range from the early 18th- to the late 20th-centuries, and deal with an array of contractual doctrines. Some of them call for their case to be stripped of its landmark status (*Smith v Hughes*), whilst others argue that it has more to offer than we have previously appreciated (*Suisse Atlantique*, among others).

But the essays also, perhaps surprisingly, share several common themes. Thus, mundane factual situations have frequently triggered elaborate legal responses (as, for instance, in *Coggs v Barnard*, *Pillans v Van Meirop* and *Johnson v Agnew*). Similarly, otherwise unremarkable transactions such as taking out an insurance policy (*Carter v Boehm*), hiring a theatre (*Taylor v Caldwell*), or a boat (*The Diana Prosperity*) can be thrust into the legal spotlight by external events. There is no need for the parties to be trying to achieve something novel for their contract to become the start of a landmark case.

Another striking theme is the influence of judicial personality and technique. In several cases, what made the decision a landmark was that individual judges had chosen to go beyond the arguments of counsel and develop the law as they felt appropriate. They might carry their brethren along with them (as in *Hochster v De La Tour*) or they might not (*Coggs v Barnard*). There was also a similarity about the kind of arguments used as catalysts for change. Appeals to 'reason' have flourished, perhaps inspired by Lord Mansfield's example, as have invocations of the Civil law (*Taylor v Caldwell*), even if they did not make it to the final draft of the judgment (*Coggs v Barnard*).

A further recurrent and fundamental argument, which has not been universally successful, concerns the role of contract law in facilitating commercial transactions. Some of our cases expressly acknowledge that contract law should fit commercial expectations: Lord Mansfield was probably the most famous exponent of this view (*Pillans v Van Mierop*, *Carter v Boehm*, *Da Costa v Jones*), but Lord Campbell, inspired by Mansfield, took the same line (*Hochster v De La Tour*). On the other hand, Lord Mansfield's innovative approach in *Pillans v Van Mierop* was short-lived, and the House of Lords in *Foakes v Beer* acknowledged that its decision was at odds with commercial expectations. The Court of Appeal's decision in *The Hongkong Fir* prioritised justice over

certainty, despite the commercial preference for the latter. On this fundamental question of policy the judges have been, and, we expect, shall continue to be, fundamentally divided. There can be little doubt that, as the courts continue to wrestle with this problem, the contract landscape will continue to change, and new landmarks will appear.

CHARLES MITCHELL
PAUL MITCHELL

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man.[126] Even then there was no end of the controversy. A letter to *The Times* four months later alleged that they 'were deceived, and certified in error'.[127] D'Eon was buried in St Pancras Old Church. In a sad coda to the story his grave was destroyed when some of the churchyard was lost to an expansion of the nearby Midland Railway.[128] As for *Da Costa v Jones*, the decision is a monument to the difficulties that judges encounter when the law of contract runs up against public policy.

[126] *The Times*, 25 May 1810.
[127] *The Times*, 5 Sept 1810.
[128] An account of the work around St Pancras in 1865, records that the main excavation came to be supervised by the novelist, then architect, Thomas Hardy, whose job it was to prevent a repeat of the year before, when in a smaller excavation, bones had been carried off by navvies and sold to the bone-mills. See: T Coleman, *The Railway Navvies* (Harmondsworth, Penguin, 1968) 167–8. I am grateful to my father Mr CM Swain for drawing this passage to my attention.

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Hochster v De La Tour (1853)

PAUL MITCHELL

A. INTRODUCTION

HOCHSTER v DE LA TOUR[1] is one of the most important, and controversial, cases in 19th century contract law. Sir Guenter Treitel would even place it in the top three.[2] The legal proposition it established was both simple and radical: where one of the parties to a contract told the other party that he was not going to perform it, the other party could be excused from performance and sue immediately for breach of contract, in spite of the fact that no performance was yet due. By recognising this doctrine of 'anticipatory breach', the Court of Queen's Bench developed the common law in a way that, despite its intuitive attraction, has proved difficult to explain theoretically.[3] Most obviously, it is difficult to see how a party could be in breach of contract when the terms of the contract did not yet require anything of him.

The first part of this essay explores the common law position immediately before *Hochster*, revealing that the ideas underpinning the decision had been previously articulated, although they had not quite been drawn together in the way that the Queen's Bench was to do. The second part focuses on the case itself, explaining what was most likely to have influenced the court to decide as it did. The final part of the essay examines the influence and legacy of the decision.

[1] *Hochster v De La Tour* (1853) 2 E & B 678, 118 ER 922 (QB).
[2] GH Treitel, *Landmarks of Twentieth Century Contract Law* (Oxford, Oxford University Press, 2002) 2.
[3] See, eg J Dawson, 'Metaphors and Anticipatory Breach of Contract' (1981) 40 *Cambridge Law Journal* 83; Q Liu, 'Claiming damages upon an anticipatory breach: why should an acceptance be necessary?' (2005) 25 *Legal Studies* 559; M Mustill, 'Anticipatory Breach of Contract: The Common Law at Work' in *Butterworths Lectures 1989–90* (London, Butterworths, 1990) 1; JC Smith, 'Anticipatory Breach of Contract' in E Lomnicka and C Morse (eds), *Contemporary Issues in Commercial Law* (London, Sweet & Maxwell, 1997) 175. For a comparative perspective see D Carey Miller, 'Judicia Bonae Fidei: A New Development in Contract?' (1980) 97 *South African Law Journal* 531; J Gulotta, 'Anticipatory Breach—A Comparative Analysis' (1975–76) 50 *Tulane Law Review* 927.

B. THE COMMON LAW IN 1853

Hochster's case was not the first in which the courts had had to consider the legal consequences of parties jeopardising the future successful performance of a contract. Indeed, since at least the 17th century, the courts had been developing rules and principles to identify when an innocent party could bring an action despite the contract remaining unperformed on his part. As John William Smith was to write, in the year before *Hochster* was decided,

> Few questions are of so frequent occurrence, or of so much practical importance, and at the same time so difficult to solve.[4]

The following two sections focus on situations where the defendant was liable despite performance apparently not yet being due.

1. The Defendant Disables Himself From Performance

One situation in which questions arose about an action for breach before performance was due was where the parties had become engaged to be married. Each was seen as making an enforceable contractual promise,[5] the breach of which gave rise to damages.[6] Clearly there was a breach if, on the agreed wedding day, one of the parties refused to go through with it. But what if, before the agreed wedding day, the defendant married someone else? In *Harrison v Cage*[7] the Court of King's Bench held that there was an immediate breach, the defendant having disabled herself from performance by the 'pre-contract'.[8]

This idea of disabling oneself by marrying another person was expanded and developed in two important 19th century cases—*Short v Stone*[9] and *Caines v Smith*.[10] The issue in both cases was that the defendants had promised to marry the respective claimants within a reasonable time of a request by the claimant. In both cases the defendants had married other people; and their former fiancé(e)s had, understandably, not requested that they carry out their prior engagement. This absence of a request gave rise to two distinct legal arguments. First, it was said that the claimant's request was a condition precedent to the defendant's liability. Secondly, it was argued that, because no request had yet been made, it could not be assumed that the contract would be broken when it was made: by that time, for instance, the defendant's current spouse might have died, leaving the defendant free to marry again.

[4] JW Smith, *A Selection of Leading Cases on Various Branches of the Law*, 2nd edn (London, A Maxwell, 1852) vol 2, 8.
[5] This is no longer the case: see the Law Reform (Miscellaneous Provisions) Act 1970 s 1.
[6] *Holcroft v Dickenson* (1672) Carter 233, 124 ER 933 (CP) (breach by fiancé); *Harrison v Cage* (1698) 1 Lord Raym 386, 91 ER 1156 (KB) (breach by fiancée).
[7] *Harrison v Cage* (1698) 1 Lord Raym 386, 91 ER 1156 (KB).
[8] *Ibid* 387, 1156.
[9] *Short v Stone* (1846) 8 QB 358, 115 ER 911.
[10] *Caines v Smith* (1847) 15 M & W 189, 153 ER 816 (Ex).

Both arguments failed. In *Short v Stone* the answer to both of them was held to lie in focusing on the feelings and intentions of the parties at the time of entering into the contract.[11] That intention was 'to marry in the state in which the parties respectively are at that time'.[12] It was, therefore, irrelevant that the defendant might become available again: by marrying someone else, the defendant had breached a promise to stay single. And, by committing that breach, the defendant also

> must be taken to dispense with the contract so far that the other may have an action against him without a request to marry.[13]

The real force of the analysis on this second point lay not so much in its giving effect to the intentions of the parties—we may doubt that the parties had given any thought to it—but rather in the way that it excused the claimant from going through with a pointless (and, in the circumstances, tasteless) performance. Thus, as Coleridge J commented,[14]

> The promise to marry within a reasonable time after request must mean after request within a time when it might reasonably be made. If the defendant disables himself from fulfilling such a request, then, in the first place, he dispenses with the request, because it has become impossible to make the request effectually, and, secondly, he has broken his own contract, because he is no longer able to fulfil that.

A concern to avoid wasteful, pointless performance was also to be found in other cases, including, later, *Hochster v De La Tour*.

Whilst the reasoning in *Caines v Smith*[15] echoed *Short v Stone* on the issue of dispensing with the request, the analysis of the breach point was different. Alderson B said:

> Why should we presume that the wife will die before the lapse of a reasonable time, or in the lifetime of her husband? We ought rather to presume the continuance of the present state of things; and while that continues, it is clear that the defendant is disabled from performing his contract.[16]

Although the reasoning of Alderson B led, on the facts, to the same conclusion as the Court of Queen's Bench in *Short v Stone*, the difference was potentially highly significant. It would seem that if the defendant's spouse had died, the court could not 'presume the continuance of the present state of things'. If that presumption could not be made it would be difficult, on the analysis of Alderson B, to identify a breach. For the Court of Queen's Bench, by contrast, the breach consisted not in remaining married to someone else, but in having changed status after the contract was made.

[11] *Short* (n 9 above) 8 QB 358, 369; 115 ER 911, 915.
[12] *Short* (n 9 above) 8 QB 358, 369; 115 ER 911, 915.
[13] *Short* (n 9 above) 8 QB 358, 369; 115 ER 911, 915
[14] *Short* (n 9 above) 8 QB 358, 370; 115 ER 911, 915.
[15] *Caines v Smith* (1847) 15 M & W 189, 153 ER 816 (Ex).
[16] *Ibid* 15 M & W 189, 190; 153 ER 816, 817 (Ex).

Behind this difference in analytical approach lay a deeper, as yet unarticulated question: Was the defendant in these cases to be seen as breaching a present obligation (such as the obligation to remain single), or as breaching in advance an obligation not yet strictly due? The obvious difficulty with the latter approach was that it brought forward the time of performance, to a point in time earlier than that to which the defendant had agreed. As one later commentator pointed out, this was 'to enlarge the scope' of the defendant's obligation.[17] So the better option seemed to be to analyse the position in terms of breaching a present obligation. But this option was not free from difficulty. In *Short v Stone* the court had drawn on the parties' presumed intentions in order to find a present, ongoing obligation to remain single. It was, in effect, an implied term. But in other factual situations it might be problematic to imply such a term; and even if it could be implied, there might be difficulties over its precise content.

These uncertainties about the scope and basis of the doctrine, however, tended to remain beneath the surface, and the rule was applied outside the marriage context. For instance, in *Bowdell v Parsons*[18] Lord Ellenborough CJ held that a breach of contract was sufficiently alleged against a seller of hay who, it was stated, had delivered the hay to other buyers: 'by the defendant's selling and disposing of the rest of the hay to other persons, he disqualified himself from delivering it to the plaintiff'.[19] Similarly, in *Amory v Brodrick*[20] it was held that the assignor of a bond breached his contract with the assignee to avow, ratify and confirm any actions brought by the assignee, when he released the debtor under the bond from his obligations. The Court of King's Bench held that, by executing the release, he had 'wholly disabled himself from avowing, &c'.[21]

One particularly emphatic illustration was provided by *Ford v Tiley*,[22] in which the defendant had promised to grant a lease of a public house to the claimant 'with all possible speed after he should become possessed of or in possession of'[23] it. At the time of the agreement the premises were tenanted under a lease which expired at midsummer 1827; but in June 1825 the defendant granted a further lease to the same tenants for 23 years. The claimant sued immediately, only to be met with the objection that the action was premature. Bayley J made it clear that this objection was incorrect[24]:

[17] S Williston, *The Law of Contracts* (New York, Baker, Voorhis & Co, 1921) vol 3, §1319 (at 2371).
[18] *Bowdell v Parsons* (1808) 10 East 359, 103 ER 811 (KB).
[19] *Ibid* 10 East 359, 361; 103 ER 811, 812 (KB).
[20] *Amory v Brodrick* (1822) 5 B & Ald 712, 106 ER 1351 (KB).
[21] *Ibid* 5 B & Ald 712, 716; 106 ER 1351, 1353 (Holroyd J) (KB).
[22] *Ford v Tiley* (1827) 6 B & C 325, 108 ER 472; (1827) 5 LJ (OS) KB 169 (reporting the retrial) (KB).
[23] *Ibid*.
[24] *Ford v Tiley* (n 22 above) 6 B & C 325, 327 (KB). A different view of *Ford v Tiley* is given in Mustill, 'Anticipatory Breach of Contract: The Common Law at Work', *Butterworths Lectures 1989–90* (London, Butterworths, 1990) 1, 20–22. It is submitted, however, that this view is unconvincing. In particular, it is difficult to understand the criticism of Bayley J's judgment as 'not even mentioning' the timing point (at 21), when Bayley J did expressly deal with it in the passage quoted below.

> by the lease of June 1825, the defendant has given up his right to have the possession, and has put it out of his power, so long as the lease of June 1825 subsists, to grant the lease he stipulated to grant. It is very true, the defendant may obtain surrender of that lease before midsummer 1827, and then he will be in a condition to grant the lease he stipulated to grant; but the obtaining such a surrender is not to be expected, and the authorities are, that where a party has disabled himself from making an estate he has stipulated to make at a future day, by making an inconsistent conveyance of that estate, he is considered as guilty of a breach of his stipulation, and is liable to be sued before such day arrives.

Although the theoretical problems hinted at in the marriage cases caused little difficulty in practice, they did not completely go away. Thus, in *Lovelock v Franklyn*,[25] where the agreement was for the transfer of the defendant's interest in a house if the claimant paid him 140*l* within seven years, it was held that the defendant's transferring his entire interest to a third party was an immediate breach. That was clearly correct, since the defendant had promised to perform at any point in the seven-year period, and he had now incapacitated himself from doing so. But Lord Denman CJ was at pains to distinguish the case from a situation where the defendant's obligation was to sell or lease a property on a fixed date in the future. There, he suggested, there would be no breach if the defendant disposed of the property before the date fixed for performance, because 'the party had the means of rehabilitating himself before the time of performance arrived'.[26] These dicta could not be reconciled with the ratio of *Ford v Tiley*.[27] Nor did they sit easily alongside Denman CJ's analysis in *Short v Stone*,[28] delivered three days earlier. Perhaps the point was that, whilst an obligation to remain single could be implied on the facts of *Short*, no obligation to remain owner could be implied in an agreement to transfer property at a future date. But that explanation does not get us very far: why is no implication to be made in the latter case? Possibly it is because property—particularly land—might be legitimately alienated by way of mortgage, or other security, and the parties must be presumed to have accepted that possibility. At any rate, it seems unrealistic to assume that a purchaser promising a fixed price for property will be indifferent to its being passed around before delivery; apart from anything else, such intervening ownership might affect its value. Whatever the true reason that Lord Denman had in mind, these cases illustrated that, although its precise basis could have been clearer, the self-disablement principle provided a powerful tool for releasing innocent parties from pointless performance and allowing them to sue immediately, both within and beyond the marriage context.

[25] *Lovelock v Franklyn* (1846) 8 QB 371, 115 ER 916.
[26] *Ibid* 8 QB 371, 378; 115 ER 916, 918–19.
[27] *Ford v Tiley* (n 22 above).
[28] *Short v Stone* (n 9 above).

2. The Defendant Prevents the Claimant from Performing

A second situation where the courts allowed an action before the claimant appeared to be strictly entitled to it, was where the defendant had prevented the claimant from performing. In other words, if the defendant had stopped the claimant from fulfilling the condition precedent to the defendant's liability, the courts did not insist on that condition being satisfied.

The early cases took a strict approach to prevention. For instance, in *Blandford v Andrews*[29] the claimant sought to enforce an agreement under which the defendant had undertaken to procure a marriage between the claimant and Bridget Palmer before the Feast of St Bartholomew. The defendant claimed that he was excused from performance by reason of the claimant's actions in going to Bridget and telling her that she was a whore, and that if she married him he would tie her to a post. The Court of Queen's Bench, however, held that the claimant had not prevented performance, since

> these words, spoken before the day, at one time only, are not such an impediment but that the marriage might have taken effect.[30]

A similarly strict idea of prevention could be seen in *Fraunces's Case*,[31] which concerned the construction of a will under which John Fraunces was to lose his estate if he 'prevented' the executors from removing certain movables. The court unanimously held that denial by words was not enough,

> but there ought to be some act done; as after request made by the executor to shut the door against them, or lay his hands upon them.[32]

Coke CJ referred to a case concerning the master of St Catharine's, who had let three houses on condition that the leases were forfeited if the lessee harboured a lewd woman there for more than six months. In an action by the master for forfeiture, the tenant had replied that the master commanded the woman to stay there. This reply was held bad in law, since the

> master had no colour to put the lewd woman into possession; for which cause the lessee might well put her out.[33]

A further plea, that the master had turned the lessee out and installed the woman by force was, however, held to be good in law.

Clearly, merely being unco-operative was not to be confused with preventing fulfilment of a condition. But even this strict doctrine had some potential application to less unusual contractual circumstances. For instance, where a

[29] *Blandford v Andrews* (1599) Cro Eliz 694, 78 ER 930 (QB).
[30] *Ibid.*
[31] *Fraunces's Case* (1609) 8 Co Rep 89b, 77 ER 609 (CP).
[32] *Ibid* 8 Co Rep 89b, 91a; 77 ER 609, 613 (CP).
[33] *Fraunces's Case* (n 31 above) 8 Co Rep 89b, 92a; 77 ER 609, 614 (CP).

contractual payment was to be made on receipt of property, and the defendant refused to accept the property, it was held that 'a tender and refusal would amount to performance'.[34] But even here, the courts proceeded cautiously, subjecting the pleading of the tender to highly critical scrutiny.[35]

Ultimately it was to take a characteristically untechnical analysis from Lord Mansfield CJ to give the doctrine real commercial effectiveness. In *Jones v Barkley*[36] there was an agreement for the defendant to pay £611 to the claimants if the claimants would assign their interest in certain stock to a third party and also execute a release of all claims that they might have against that third party. The claimants prepared a draft of the release for the defendant's approval, but he refused to read it, saying that he did not intend to pay. The claimants then brought what the report describes as 'a special action on the case, for non-performance of an agreement',[37] to which the defendant pleaded that the claimants had never assigned the interest or executed the release. The claimants demurred and their demurrer was upheld by the Court of King's Bench.

As can be seen from the facts described above, *Jones v Barkley* did not fit easily into the existing doctrine of prevention. There was clearly no question of physical force. Moreover, both the assignment and the release could have been executed by the claimants had they so wished, since there was nothing to suggest that the third party beneficiary of the arrangement would have refused to accept them. Counsel for the claimants met this difficulty by arguing that the claimants' actions were 'equivalent to . . . performance of their part of the agreement'.[38] He went on to elaborate, saying that[39]

> [w]herever a man, by doing a previous act, would acquire a right to any debt or duty, by a tender to do the previous act, if the other party refuses to permit him to do it, he acquires the right as completely as if it had been actually done; and, if the tender is defective, owing to the conduct of the other party, such incomplete tender will be sufficient; because it is a general principle, that he who prevents a thing from being done, shall not avail himself of the non-performance, which he has occasioned.

No authority was cited in support of this general principle.

Lord Mansfield CJ, however, was not to be deterred by a lack of authority. 'If ever there was a clear case', he said, 'I think the present is'.[40] 'Take it on the reason of the thing' he continued:

> The party must shew he was ready; but, if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go farther, and do a nugatory act. Here, the draft was shown to the defendant for his approbation of the

[34] *Blackwell v Nash* (1721) 1 Str 535, 93 ER 684 (KB).
[35] *Lancashire v Killingworth* (1701) 1 Lord Raym 686, 91 ER 1357(KB).
[36] *Jones v Barkley* (1781) 2 Dougl 684, 99 ER 434 (KB).
[37] *Ibid.*
[38] *Jones v Barkley* (n 36 above) 2 Dougl 684, 685–6; 99 ER 434 (KB).
[39] *Jones v Barkley* (n 36 above) 2 Dougl 684, 686; 99 ER 434, 435 (KB).
[40] *Jones v Barkley* (n 36 above) 2 Dougl 684, 694; 99 ER 434, 439 (KB).

> form, but he would not read it, and, upon a different ground, namely, that he means not to pay the money, discharges the plaintiffs from executing it.[41]

Willes and Ashhurst JJ concurred, as did Buller J, who added that *Blandford v Andrews* was distinguishable, since there

> the defendant had agreed to use his endeavours, and, notwithstanding what had been done by the plaintiff, he might have prevailed on the woman, before the time elapsed, to marry him.[42]

The most obvious innovation in *Jones v Barkley* was the looser approach to prevention. Although the defendant's co-operation was unnecessary for the fulfilment of the condition, the defendant was to be regarded as having stopped the claimant 'on the ground of an intention not to perform on his part'. This was not really prevention; rather, it was a good reason for the claimant to be excused from further performance. As Lord Mansfield had suggested, such a rule was sensible, because otherwise the claimant would be forced to persevere with a performance that he knew was not wanted. But as well as this consideration of economic efficiency, there was the mysterious 'general principle' referred to by counsel. This was almost certainly a borrowing from Roman law, in particular Justinian's *Digest* 50.17.1.161, which stated that

> [i]n iure civile receptum est, quotiens per eum, cuius interest condicionem non impleri, fiat quo minus impleatur, perinde haberi, ac si impleta condicio fuisset. quod ad libertatem et legata et ad heredum institutiones perducitur. quibus exemplis stipulationes committuntur, cum per promissorem factum esset, quo minus stipulator condicioni pareret.[43]

Lord Mansfield, whose expertise in Roman law was well known, may well have recognised the allusion. At any rate, the combination of civilian-inspired principle and commercial pragmatism had prompted an important advance in the common law.

The looser approach to prevention which *Jones v Barkley* authorised was still good law at the time of the decision in *Hochster v De La Tour*. For instance, it was relied upon in *Laird v Pim*,[44] where purchasers of land had gone into possession before conveyance, but then refused to complete. It was held that there was no need for the vendors to prove title and execute a conveyance before bringing their action for damages. Similarly, in *Cort v The Ambergate,*

[41] *Jones v Barkley* (n 36 above) 2 Dougl 684, 694; 99 ER 434, 440 (KB).
[42] *Jones v Barkley* (n 36 above) 2 Dougl 684, 694–5; 99 ER 434, 440 (KB).
[43] 'It is established in the civil law that whenever anyone in whose interest it is for a condition to be fulfilled arranged for it not to be fulfilled, the position is regarded as being the same as if the condition had been fulfilled. This is applied to liberty and legacies and institutions of heirs. And stipulations are also entered into on this basis when the promisor prevented the stipulator from obeying the condition'. A Watson (ed), *The Digest of Justinian* (Philadelphia, PA, University of Pennsylvania Press, 1985) II, 50.17.1.161.
[44] *Laird v Pim* (1841) 7 M & W 474, 151 ER 852 (Ex).

Nottingham and Boston and Eastern Junction Railway Company[45] the contract was for the supply of 3900 tons of cast-iron railway chairs, but after delivery of about half of that quantity the defendant indicated that it would not be prepared to take any more. The defendant argued that the claimants had failed to perform the condition of manufacturing and offering the remaining 2000 tons of chairs, and that the defendant had done nothing to prevent them from fulfilling that condition. The court was quick to point out that prevention did not require physical restraint, making the following interventions in argument[46]:

> Coleridge J. Suppose a man said, 'If you come for such a purpose, I will blow your brains out'. That would be no physical prevention.
>
> Lord Campbell C.J. Such a threat might be used ten days before the act was to be done.

The theme was continued in the court's judgment:

> It is contended that 'prevent' here must mean an obstruction by physical force; and, in answer to a question from the Court, we were told it would not be a preventing of the delivery of goods if the purchaser were to write, in a letter to the person who ought to supply them, 'Should you come to my house to deliver them, I will blow your brains out'. But may I not reasonably say that I was prevented from completing a contract by being desired not to complete it?[47]

However, although the principle laid down in *Jones v Barkley* was firmly established by the 1850s, it was not entirely unproblematic. One difficulty concerned its scope: How much missing performance would the principle presume in the claimant's favour? In *Smith v Wilson*[48] the contract was for the shipment of goods from London to Montevideo and a return voyage with another cargo. The ship began its voyage, but was seized and returned to London; once it had been restored to its owner (the claimant) he approached the freighter (the defendant) for instructions, but the defendant refused and renounced the charter-party. The claimant sued for the freight due on both voyages, relying on *Jones v Barkley* to show that he had been prevented from performance of a condition. Lord Ellenborough CJ, however, held that *Jones* did not apply[49]:

> [T]he difference between the two cases is this; in the one, by doing an act in the power of the party to have done, he would have acquired a full and instant right to the duty demanded; in the other, by doing the act tendered to the full extent to which the party tendering was able to perform it, he would still have only taken certain steps of remote and uncertain effect towards the attainment of the object and completion of the event necessary to be obtained and completed, in order to vest a right to the duty demanded in the party demanding it.

[45] *Cort v The Ambergate, Nottingham and Boston and Eastern Junction Railway Company* (1851) 17 QB 127, 117 ER 1229.
[46] *Ibid* 17 QB 127, 139; 117 ER 1229, 1234.
[47] *Cort v The Ambergate* (n 45 above) 17 QB 127, 145; 117 ER 1229, 1236.
[48] *Smith v Wilson* (1807) 8 East 437, 103 ER 410 (KB).
[49] *Ibid* 8 East 437, 444; 103 ER 410, 413–14 (KB).

This was not a completely convincing analysis. Assuming that the contract was not discharged by the delay,[50] the freighter was surely in breach of contract in refusing to give the necessary instructions about delivery. In these circumstances it would be wasteful to require further performance before bringing an action, just as it would have been in *Jones v Barkley*. The problem with *Smith v Wilson* was, it is submitted, a different one. It related not to the scope of the decision in *Jones v Barkley*, but to its effect.

What the claim in *Smith v Wilson* highlighted was a potential ambiguity in *Jones*. *Jones* had made it clear that where a defendant renounced his contract, the claimant was not required to fulfil unperformed conditions before suing. The claimant was excused, or, to put it as counsel had done in that case, 'the [claimant] acquires the right as completely as if it had been actually done'.[51] The potential ambiguity about *Jones* was whether it permitted the claimant merely to sue for damages, or whether it went further, and allowed the claimant to sue on the fiction that he had actually performed. If the latter were the correct interpretation, the claimant would be able to recover the contract price despite not having incurred the expenses of performance. This, essentially, is what the claimant in *Smith v Wilson* was trying to do.

There are several reasons why the Court of King's Bench in *Jones* was unlikely to be endorsing the idea that the claimant would sue on the fictional basis that he had performed the condition. Perhaps the strongest reason is that the claimant was not claiming the contract price: the claim was for damages.[52] Furthermore, the general principle about an innocent party acquiring a right 'as completely as if it had actually been done' was only articulated by counsel. The fact that none of the judges adopted it may indicate that they wished to be more cautious. Finally, one powerful theme in the judgments concerned the avoidance of waste; it is hardly likely that the judges intended their decision to give rise to the equally wasteful result that a defendant must pay for a performance that he has never received.

There was, therefore, no general principle that a claimant who was prevented from performing a condition precedent had all the rights available to a claimant who had fulfilled such conditions. There was, however, some support for a special rule, applicable mainly to employment, and known as the doctrine of constructive service. Under this doctrine, where an employee was wrongfully dismissed part way through the period by reference to which his salary was paid, and he offered to work the remainder of the period, he was to be treated, as a matter of law, as if he had served the whole period. Thus, in *Gandell v Pontigny*[53] a clerk who was paid quarterly was dismissed part way through a quarter; he offered to continue, but his employer refused. The clerk brought an

[50] Eg *Jackson v Union Marine Insurance Co* (1874) LR 10 CP 125.
[51] *Jones v Barkley* (n 36 above) 2 Dougl 684, 686; 99 ER 434, 435 (KB).
[52] This may have been lost sight of at the retrial: F Dawson, 'Metaphors and Anticipatory Breach of Contract' (1981) 40 *Cambridge Law Journal* 83, 91–5.
[53] *Gandell v Pontigny* (1816) 4 Camp 375, 171 ER 119 (NP).

action in *indebitatus assumpsit*, to which it was objected that no action for work and labour could lie for work and labour that had not been done. Lord Ellenborough, however, disagreed:

> If the plaintiff was discharged without a sufficient cause, I think this action is maintainable. Having served a part of the quarter and being willing to serve the residue, in contemplation of law he may be considered to have served the whole.

Although the doctrine was not confined to employment cases,[54] its precise scope was not clear, nor were its origins. Smith, arguing for its limitation to employment, attributed it to (unspecified) 'decisions on the law of settlement'.[55] Addison, on the other hand, pointed to the Roman law support for a wider doctrine in the general wording of Justinian's *Digest* (D.50.17.1.161),[56] which had probably been influential in *Jones v Barkley*.

This uncertainty about the doctrine's scope and basis may well have contributed to judicial doubts about it as the 19th century wore on. In *Archard v Hornor*[57] Lord Tenterden CJ held that a claimant bringing an *indebitatus assumpsit* claim could recover only for the time actually served. *Gandell v Pontigny* was not referred to and, indeed, would have been distinguishable since there was no offer to continue work in *Archard*. Later cases, however, regarded Lord Tenterden's one sentence analysis as unavoidably conflicting with *Gandell v Pontigny*, and expressed a strong preference for Lord Tenterden's view. They did not, however, go quite so far as to abolish the doctrine of constructive service. In *Smith v Hayward*,[58] for example, it was said to be unnecessary to decide the point because the action had been brought before the end of the period during which the employee was claiming to have constructively served. In *Fewings v Tisdal*,[59] similarly, the claimant formulated his claim so as to avoid the question.

As a result of this judicial caution, constructive service could not be deleted from the books. For instance, in the first edition of his *Leading Cases* Smith included a tentative account of the doctrine in his note on *Cutter v Powell*.[60] The hesitancy was judicially noted, and approved,[61] but the doctrine lingered on. Smith continued to deal with it in his second edition,[62] published in the year before *Hochster v De La Tour*.

The continuation of the doctrine of constructive service was, it is submitted, unfortunate. Viewed purely on its own terms it was unconvincing: here was a

[54] Eg *Collins v Price* (1828) 5 Bing 132, 130 ER 1011 (CP) (school fees).
[55] Smith, *A Selection of Leading Cases on Various Branches of the Law* (n 4 above) vol 2, 20.
[56] See n 43 above. Cave (ed), *Addison on the Law of Contracts*, 6th edn (London, Stevens and Sons, 1869) 372.
[57] *Archard v Hornor* (1828) 3 C & P 349, 172 ER 451 (NP).
[58] *Smith v Hayward* (1837) 7 Ad & E 544, 112 ER 575 (QB).
[59] *Fewings v Tisdal* (1847) 1 Ex 295, 154 ER 125.
[60] JW Smith, *A Selection of Leading Cases on Various Branches of the Law* (London, A Maxwell, 1837).
[61] *Goodman v Pocock* (1850) 15 QB 576, 582; 117 ER 577, 579 (Patteson J).
[62] Smith, *A Selection of Leading Cases on Various Branches of the Law* (n 4 above) vol 2, 20–21.

claimant recovering on a count for work and labour that he had not done. Such a fictitious basis of recovery might have been justifiable if it was the only way to do justice between the parties, but the doctrine had the potential to cause injustice. As the courts had acknowledged, to avail himself of the doctrine, the employee had to remain ready to resume work until the end of the stipulated period.[63] In other words, he had to remain idle; and if he took other work he lost his claim. An employee who could easily obtain alternative employment had no legal obligation, and no incentive, to do so: the fact that he could have avoided losing wages was legally irrelevant.

The position where the employee sued for damages for breach of contract was very different. There subsequent offers of employment by either a third party or the defendant himself were relevant to mitigation of damage: if the claimant had increased his loss through 'his own misconduct and folly',[64] that increase was not recoverable. Furthermore, evidence of actual offers was not necessary. As Erle J explained in *Beckham v Drake*,[65]

> [t]he measure of damages . . . is obtained by considering what is the usual rate of wages for the employment here contracted for, and what time would be lost before a similar employment could be obtained. The law considers that employment in any ordinary branch of industry can be obtained by a person competent for the place, and that the usual rate of wages for such employment can be proved, and that when a promise for continuing employment is broken by the master, it is the duty of the servant to use diligence to find another employment.

A year later, in *Goodman v Pocock*,[66] the same judge drew on the contrast between the doctrine of constructive service and the rules on mitigation of damages in contract to explain his dissatisfaction with the former[67]:

> I think the true measure of damages is the loss sustained at the time of dismissal. The servant, after dismissal, may and ought to make the best of his time; and he may have an opportunity of turning it to advantage.

In short, the contractual rules were seen as being both an accurate method of assessing compensation ('the true measure') and as appropriately reflecting how the innocent party should respond to the breach ('may and ought to make the best of his time'). The constructive service doctrine, he felt, did neither.

3. The Overall Position

The law relating to contractual liabilities arising before performance was apparently due was, therefore, well developed by the time that *Hochster v De La Tour*

[63] *Smith v Hayward* (n 58 above).
[64] *Speck v Phillips* (1839) 5 M & W 279, 283; 151 ER 119, 120 (Alderson B) (Ex).
[65] *Beckham v Drake* (1849) 2 HLC 579, 606–7; 9 ER 1213, 1223.
[66] *Goodman* (n 61 above).
[67] *Goodman* (n 61 above) 15 QB 576, 583–4; 117 ER 577, 580 (QB).

came to be decided. But that is not to say that the decision in *Hochster* was inevitable. Whilst it was recognised that liability could arise in particular situations, none of those situations obviously fitted the factual matrix in *Hochster*. As we shall see, the defendant merely told the claimant that his contractually promised services would not be required. The defendant had not disabled himself from performance, nor had he obviously prevented the claimant from fulfilling a condition precedent to the defendant's liability. Certainly he had indicated that he would not perform the contract, but in the prevention cases the time for performance had always elapsed before the action was brought. If *Hochster* was to be fitted into the prevention category, some concept of anticipatory prevention would have to be recognised. On the other hand, allowing a claimant to terminate as soon as the defendant indicated that he would not perform would give considerable scope for the principle of mitigation: the claimant could—and, as a matter of law would be presumed to—take all reasonable steps to find employment elsewhere. So far as the interplay of broad principles was concerned, the outcome in *Hochster* was finely balanced.

There was also a question about authority. In *Phillpotts v Evans*,[68] which concerned a sale of wheat, the buyer had told the seller that he no longer wanted the goods and would not accept them if tendered. The wheat was, at that point, already on its way to the buyer and, when it arrived, the buyer did as he had intimated, and rejected it. The sole question was whether damages should be assessed by reference to the market price at the date of the defendant's notice, or the market price at the date of the seller's tender of the goods. The Court of Exchequer held that the correct date was the date of tender, with Parke B offering a trenchant analysis of why the date of notice was irrelevant:

> If [counsel for the defendant] could have established that the plaintiffs, after the notice given to them, could have maintained the action without waiting for the time when the wheat was to be delivered, then perhaps the proper measure of damages would be according to the price at the time of the notice. But I think no action would then have lain for the breach of contract, but that the plaintiffs were bound to wait until the time arrived for delivery of the wheat, to see whether the defendant would then receive it. The defendant might then have chosen to take it, and would have been guilty of no breach of contract; for all that he stipulates for is, that he will be ready and willing to receive the goods, and pay for them, at the time when by the contract he ought to do so. His contract was not broken by his previous declaration that he would not accept them; it was a mere nullity, and it was perfectly in his power to accept them nevertheless; and, vice versa, the plaintiffs could not sue him before.[69]

Parke B reasserted this view in *Ripley v M'Clure*,[70] a case in which the defendant had expressed the intention not to receive a cargo as he was contractually bound to do.

[68] *Phillpotts v Evans* (1839) 5 M & W 475, 151 ER 200 (Ex).
[69] *Ibid* 5 M & W 475, 477; 151 ER 200202 (Ex).
[70] *Ripley v M'Clure* (1849) 4 Ex 345, 154 ER 1245; (1850) 5 Ex 140, 155 ER 60.

> [I]f the jury had been told that a refusal before the arrival of the cargo was a breach [said Parke B], that would have been incorrect. We think that point rightly decided in *Phillpotts v Evans*[71].

The task facing counsel for the claimant in *Hochster v De La Tour* was, therefore, somewhat daunting. Not only was there the obvious obstacle of contrary authority to be overcome; there was also the problem that the facts did not quite fit into any of the recognised categories for liability. A court finding for the claimant would have to be persuaded to be both independent-minded and creative.

C. *HOCHSTER v DE LA TOUR*

1. The Facts

Albert Hochster and Edgar de la Tour first met in April 1852, in Egypt.[72] Hochster was acting as courier for a man named Maskill; de la Tour was a 'private gentleman' on his travels. De la Tour made arrangements with Maskill to join his party and, for the rest of the trip, Hochster acted as de la Tour's valet. De la Tour was evidently in financial difficulties at this time, because he borrowed various sums of money from Hochster, which were repaid on the parties' return to England.

In May 1852 de la Tour wrote to Hochster, stating that he intended to make another journey, this time to Switzerland, and wished Hochster to act as his courier. He called on Hochster and the parties agreed terms of 10*l* per month, commencing on 1 June 1852. Although the defendant later sought to deny that any contract had been made, arguing that 'what the plaintiff had construed into a contract was merely what had occurred in conversation',[73] the jury held that there was a binding contract at this point. At the same meeting de la Tour asked Hochster to obtain a passport for him. To this end the parties went together to Coutts, the bankers, to obtain the necessary letter, and Hochster then went on to the Foreign Office, where he paid for the passport with his own money.

'Some time after', according to Hochster's version of events,

> the defendant wrote again to the plaintiff, stating that his friends had told him that it would be very foolish to spend 300l in three months, and that the plaintiff's charge of 10l per month was preposterous, and that he should not require his services[74].

[71] *Ibid* 4 Ex 345, 359; 154 ER 1245, 1251.

[72] *Hockster v De Latour*, *The Times* (25 April 1853) 7 (report of trial before Erle J). The detailed facts given here are taken from the report's summary of the claimant's evidence.

[73] *Ibid.*

[74] *Hockster v De Latour* (n 72 above).

The defendant, Hochster added, had refused to pay any compensation. Other accounts give a less abrupt version of de la Tour's final letter. The summary in *The Times* when the case was being argued in the Queen's Bench states that[75]

> After communicating with his friends the defendant thought it prudent to break his contract, and wrote a letter to the plaintiff, in which he said, his friends were amazed that he, with an income of only 500*l* a year, should have entered upon an enterprise which would entail an expense of 300*l* in three months, and concluded by telling the plaintiff that he should not require his services, but, that he would endeavour to recommend him to another party.

The *Weekly Reporter*'s version also indicates that, in his letter, de la Tour said that

> he wished to know what sum there was due to the plaintiff in obtaining a passport for himself, which the plaintiff had done at the defendant's request[76].

We may never know exactly what the letter said. The claimant may have been over-sensitive to it, reading de la Tour's friends' criticisms as directed at him, when they were in effect being directed at de la Tour himself. Certainly de la Tour seems to have been financially inept—the money problems he experienced in Egypt were proof of that, let alone his failure to budget for his trip to Switzerland—and it may be unfair to regard him as arrogant. Perhaps what really provoked Hochster's sense of being badly treated was that he was dealt with as if he were a mere servant or tradesman, whose services could be dispensed with at will. He may have felt that his professional status as a courier called for different treatment.[77]

At any rate, one thing was clear: the engagement was off. Hochster brought his action for breach of contract on 22 May, and was not long out of work. He secured an appointment to accompany Lord Ashburton on a tour of the Continent commencing on 4 July 1852 at the same basic rate of 10*l* per month.

2. Counsel's Arguments

The trial of *Hochster v De La Tour* took place before Erle J and a jury on 22 April 1853. As soon as the claimant had finished giving evidence, counsel for the defendant took the point that there was no cause of action since 'one side alone could not make a breach of contract before the time arrived for its fulfilment'.[78] What was required, he argued, was a continuing refusal to perform

[75] *Hochster v De Latour*, *The Times* (11 June 1853) 7 (QB).

[76] *Hochster v De Latour* (1853) 1 WR 469 (QB).

[77] Such distinguished men as Adam Smith, Thomas Hobbes and John Locke had acted as guides for wealthy aristocrats making grand tours. Hibbert, *The Grand Tour* (London, Thames Methuen, 1987) 20–23.

[78] *Hockster v De Latour* (n 72 above).

extending to the time that performance was actually due. Erle J recognised the force of this submission, saying

> he should decide against him, but would give him leave to move on account of the strong authority which [counsel] had produced[79].

Judgment for the claimant was entered, with damages being assessed by the jury at 20*l*. A rule arresting this judgment was later granted and, on 10 June 1853, Hannen appeared for the claimant, to show cause against that rule.

Hannen began by anticipating his opponents' reliance on *Phillpotts v Evans*[80] and *Ripley v M'Clure*.[81] The analysis in those cases, he argued, should not be read as applying to all situations of a refusal to perform; rather, it should be read as applying only to those refusals which were capable of being retracted before performance was due. What made a refusal incapable of being retracted was, essentially, that it had been acted upon[82]:

> If one party to an executory contract gave the other notice that he refused to go on with the bargain, in order that the other side might act upon that refusal in such a manner as to incapacitate himself from fulfilling it, and he did so act, the refusal could never be retracted.

He cited *Cort v The Ambergate, Nottingham and Boston and Eastern Junction Railway Company*[83] in support of that proposition.

Hannen then went on to address the point about the timing of the action. Again, he argued that the apparently universal language used by Parke B in *Phillpotts v Evans* and *Ripley v M'Clure* could not be supported in its widest sense, for it was clear that when a party disabled himself from performance—as, for instance, in the cases concerning marriage—the claimant was not required to wait until the time when performance was due. At this point Lord Campbell CJ interrupted, to ask[84]:

> It probably will not be disputed that an act on the part of the defendant incapacitating himself from going on with the contract would be a breach. But how does the defendant's refusal in May incapacitate him from travelling in June? It was possible that he might do so.

Hannen's reply, as reported by Ellis and Blackburn was as follows[85]:

> It was; but the plaintiff, who, as long as the engagement subsisted, was bound to keep himself disengaged and make preparations so as to be ready and willing to travel with the defendant on the 1st June, was informed by the defendant that he would not go on with the contract, in order that the plaintiff might act upon that information; and the plaintiff then was entitled to engage himself to another, as he did.

[79] *Hockster v De Latour* (n 72 above).
[80] *Phillpotts v Evans* (n 68 above).
[81] *Ripley v M'Clure* (n 70 above).
[82] *Hochster v De La Tour* (1853) 2 E & B 678, 683; 118 ER 922, 924 (QB).
[83] *Cort v The Ambergate* (n 45 above).
[84] *Hochster* (n 82 above) 2 E & B 678, 684 (QB).
[85] *Hochster* (n 82 above) 2 E & B 678, 684 (QB).

The Law Journal reporters summarised it slightly differently[86]:

> Where the contract is such as to require preparation for its performance, and the conduct of one party before the day is such as reasonably to lead the other party to think there is no use in making such preparation, such conduct must be considered the same in effect as if the party had disabled himself from performance. There should be readiness and willingness to perform down to the time of actual performance; and if before that there is such retraction as to warrant the other party in acting upon it, that is sufficient to support an action.

As reported by Ellis and Blackburn, that was pretty much the end of counsel's substantive argument. However, the report in *The Jurist* indicates that Hannen made a further point about the existing remedies available. Referring to Smith's discussion of the doctrine of constructive service in his note to *Cutter v Powell*, Hannen observed[87]:

> [I]t is said, that a servant who is wrongfully dismissed may recover the whole of his wages in an action of indebitatus assumpsit, if the action is brought after the expiration of the term for which he was hired. But in many cases that count would not include the special damage arising from the expenditure of money which the party had incurred in preparing to complete the contract

Hannen's argument was a sophisticated and original exposition of the law. He circumvented the difficulty of Parke B's remarks in *Phillpotts v Evans* and *Ripley v M'Clure* by reading them narrowly—in a way that was not obvious from the judgments themselves—and limiting them to situations where the refusal could not be retracted. The central idea in his submissions was that if the defendant induced the claimant to rely on his statement about non-performance, the statement could not subsequently be disowned. The language Hannen was using—particularly as reported in the Law Journal reports—was very close to an assertion of estoppel.

Having articulated the central principle of justifiable reliance, Hannen then skilfully rearranged the case law to illuminate it. *Cort*'s case, which had appeared to be an authority against the claimant, could now be presented as supporting the claimant, since there the claimant had indeed relied on the defendant's representation. The requirement of prevention—which was the true basis of the decision in *Cort*, and which would not have favoured the claimant if applied strictly in *Hochster*—was pushed into the background. Similarly, the cases on the defendant disabling himself from performance, which seemed not to help the claimant in *Hochster* (because the defendant had not disabled himself), could be repositioned to support the claimant. Here the claimant had been induced by the defendant's representation to disable himself from performing, so the situation was analogous to the defendant's disability cases; and the 'defendant's disability' cases showed that actions would lie before performance was due.

[86] *Hochster* (1853) 22 LJ(QB) 455, 456–7.
[87] *Hochster* (1853) 17 Jur 972, 973 (QB).

The discussion of constructive service was also important, despite its neglect by Ellis and Blackburn. What Hannen had to say about the precise application of the doctrine was perhaps not very compelling on the facts of *Hochster*: expenditure incurred at the defendant's request, for his benefit, surely would be recoverable in *indebitatus assumpsit*. More importantly, Hannen was reminding the court of the alternative remedy that was still available to claimants who did not take steps to mitigate their loss. Offering full payment to those who remained idle whilst denying any remedy to those who promptly took steps to improve their position was not obviously attractive. In effect, Hannen was reminding the judges of the claimant's meritorious conduct whilst avoiding a crude plea for sympathy.

Hannen's submissions, so far as we can judge from printed summaries, were an effective and impressive performance. Crompton J was quick to pick up Hannen's hint about mitigation, commenting that he was[88]

> inclined to think that the [claimant] may . . . say: 'Since you have announced that you will not go on with the contract, I will consent that it shall be at an end from this time; but I will hold you liable for the damage I have sustained; and I will proceed to make that damage as little as possible by making the best use I can of my liberty'.

Lord Campbell CJ also made clear his approval, saying that Hannen's opponents 'have to answer a very able argument'.[89] As it turned out, Hannen's submissions were a turning point in his career: Lord Campbell's praise secured him a part in the *Shrewsbury Peerage Case* (1857–58), after which 'his rise was rapid both in London and on circuit'.[90]

Hugh Hill QC and Deighton, for the defendant, began their argument by reasserting the more orthodox interpretations of *Cort*, *Phillpotts* and *Ripley*. *Cort*, they argued, was distinguishable, since there the action had been brought after performance was due. *Phillpotts* and *Ripley* showed that the declaration of an intention not to perform was not in itself a breach of contract. But they were quickly diverted from this exposition of the authorities by interventions from the Bench. Crompton J asked whether the claimant could not

> on notice that the defendant will not employ him, look out for other employment, so as to diminish the loss?[91]

Lord Campbell CJ expressed a similar concern: 'So that you say the plaintiff, to preserve any remedy at all, was bound to remain idle'.[92] Erle J identified a further undesirable consequence of upholding the defendant's submissions[93]:

[88] *Hochster* (n 82 above) 2 E & B 678, 685 (QB).
[89] *Hochster* (n 82 above) 2 E & B 678, 685.
[90] Polden, 'Hannen, James Baron Hannen (1821–1894)' *Oxford Dictionary of National Biography* (2004–06).
[91] *Hochster* (n 82 above) 2 E & B 678, 686.
[92] *Hochster* (n 82 above) 2 E & B 678, 686.
[93] *Hochster* (n 82 above) 2 E & B 678, 686.

> Suppose the defendant, after the plaintiff's engagement with Lord Ashburton, had retracted his refusal and required the plaintiff to travel with him on 1st June, and the plaintiff had refused to do so, and gone with Lord Ashburton instead? Do you say that the now defendant could in that case have sued the now plaintiff for a breach of contract?

Counsel did their best, replying that a declaration of intention not to perform should be seen as an offer to rescind the agreement, which the claimant could choose either to accept or reject. But it was clear that, by this point in the hearing, the court was more concerned with the practical consequences of the defendant's position than with the technical legal analysis.

3. The Judgment

The unanimous judgment of the Court of Queen's Bench was delivered a fortnight later by Lord Campbell CJ. Lord Campbell began by setting out what he described as the defendant's 'very powerful'[94] contention that the claimant could not bring an action until his employment was due to begin. However, Lord Campbell continued, this proposition could not be universally true: in cases of promises to marry in the future, the action lay as soon as one of the parties married someone else. The explanation for the marriage cases could not be that performance was impossible—it was not impossible, since the defendant's spouse might die before the defendant was due to marry the claimant.[95] Rather, there was a breach of an immediate obligation[96]:

> [W]here there is a contract to do an act on a future day, there is a relation constituted between the parties in the meantime by the contract, and that they impliedly promise that in the meantime neither will do any thing to the prejudice of the other inconsistent with that relation. As an example, a man and woman engaged to marry are affianced to one another during the period between the time of the engagement and the celebration of the marriage. In this very case, of traveller and courier, from the day of the hiring till the day when the employment was to begin, they were engaged to each other; and it seems to be a breach of an implied contract if either of them renounces the engagement.

The judgment then proceeded to consider whether, as a matter of principle, the claimant should have to remain bound to perform after the defendant's declaration. 'It is surely much more rational' said Lord Campbell,[97]

> and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered

[94] *Hochster* (n 82 above) 2 E & B 678, 688.
[95] *Hochster* (n 82 above) 2 E & B 678, 688.
[96] *Hochster* (n 82 above) 2 E & B 678, 689.
[97] *Hochster* (n 82 above) 2 E & B 678, 690.

> from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract.

Broader considerations of justice were also seen as supporting the claimant's case[98]:

> The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured: and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer.

Finally, the judgment addressed the potential difficulties relating to the assessment of damages. These difficulties, it suggested, should not be exaggerated. Damages were to be assessed by the jury, who could take all contingencies into account in arriving at an appropriate sum. It followed that the verdict for the claimant given at the trial was correct.

The most remarkable thing about this judgment was how little it had in common with the argument of counsel for the successful claimant. Thus, whilst counsel had attempted to re-interpret the language used by Parke B in *Phillpotts v Evans* and *Ripley v M'Clure* so as to distinguish those remarks, the court was impatient of such subtleties. If Parke B had meant to say that a refusal in advance of performance being due could never be a breach, he was wrong; it was as simple as that.[99] More fundamentally, the court did not adopt counsel's argument about the importance of the claimant's detrimental reliance on the defendant's statement. For the court, it was not a question of the declaration becoming unretractable; rather, the declaration was itself a breach of the implied term not to do anything to the prejudice of the other party pending performance. In the judges' view, the claimant's decision to act on the statement merely made it 'reasonable' to give him the 'option' to sue immediately. If the claimant decided to wait and see if the defendant would perform, and the defendant failed to do so, the claimant would not lose his remedy.

Such boldness was particularly surprising from a court where the judges often disagreed with each other. Indeed, the frequency of disagreement started to demoralise Lord Campbell CJ, who wrote in his diary later the same year that he found his work so 'irksome' that he

> would as soon be beaten well all the time with a cudgel as preside in Queen's Bench with . . . on one side and . . . on the other.[100]

[98] *Hochster* (n 82 above) 2 E & B 678, 691.

[99] *Hochster* (n 82 above) 2 E & B 678, 692–3. See also the same criticisms of those two cases, made by a similarly constituted Court of Queen's Bench, in *Cort v The Ambergate, Nottingham and Boston and Eastern Junction Railway Company* (1851) 17 QB 127, 147.

[100] Hardcastle (ed), J Campbell, *Life of John, Lord Campbell* (London, John Murray, 1881) 2.317–2.318 (Diary entry from 24 December 1853).

He later said of Erle J, that '[w]ith him I had differed oftener than with any other judge'.[101] No one reading the judgment in *Hochster v de la Tour* could have suspected these conflicts. What, then, could have prompted a unanimous Court of Queen's Bench to go so much further, and on such a broader basis, than counsel had been prepared to argue? The answer, it is submitted, is to be found in an examination of the individual judges involved, and the fundamental political questions raised by the facts of the case.

Lord Campbell CJ, who presided in the Court of Queen's Bench, had been Chief Justice since 1850. Before his appointment to that position he had a long and distinguished career as a barrister, politician and author. His literary work—particularly his *Lives of the Chief Justices* (1849)[102]—offers us revealing insights into how he believed the Chief Justice should best fulfil his duties. As one contemporary reviewer recognised, 'the hero, and deservedly the hero of Lord Campbell's biographies'[103] was Lord Mansfield. Commenting on Mansfield's appointment in 1756, Campbell wrote:

> Although he did not then delineate in the abstract the beau ideal of a perfect judge, he afterwards proved to the world by his own practice that it had been long familiar to his mind.[104]

Campbell had a particularly high regard for Lord Mansfield's development of commercial law, which he described as follows[105]:

> As respected commerce, there were no vicious rules to be overturned,—he had only to consider what was just, expedient and sanctioned by the experience of nations further advanced in the science of jurisprudence. His plan seems to have been to avail himself, as often as opportunity admitted, of his ample stores of knowledge, acquired from his study of the Roman civil law, and of the juridical writers produced in modern times by France, Germany, Holland and Italy,—not only in doing justice to the parties litigating before him, but in settling with precision and upon sound principles a general rule, afterwards to be quoted and recognised as governing similar cases.

The importance of 'settling with precision and upon sound principles a general rule' could be seen equally in Campbell's own articulation of the implied term in *Hochster v De La Tour*.[106] However, the facts of *Hochster* did not give any scope to draw on Continental jurisprudence—for which Lord Campbell was to express his admiration elsewhere[107]—since Pothier followed the approach of Justinian's *Digest* (D50.17.1.161) in stating that a contracting party prevented

[101] *Ibid* 2.383.

[102] John Lord Campbell, *Lives of the Chief Justices of England* (London, John Murray, 1849).

[103] N Senior, 'Lord Campbell's *Chief Justices*' 93:189 *Edinburgh Review* (Jan 1851) 97, 129. For the attribution of this anonymous review to Senior see Levy, *Nassau W Senior* (Newton Abbott, David & Charles, 1970) 313–14.

[104] Campbell, *Lives of the Chief Justices of England* (n 102) II.393.

[105] Campbell, *Lives of the Chief Justices of England* (n 102) II.404.

[106] See quotation at n 96 above.

[107] Swain, 'The Will Theory of Contract in the Nineteenth Century: Its Influence and Limitations' in Lewis, Brand and Mitchell (eds), *Law in the City* (Dublin, Four Courts Press, 2007) 163, 165.

from fulfilling a condition was to be placed in the same position as if he had fulfilled it.[108] There was no civil law doctrine equivalent to anticipatory breach.[109]

Campbell's assessment of Mansfield's attitude to precedent also casts light on his approach to *Hochster v De La Tour*[110]:

> PRECEDENT and PRINCIPLE often had a hard struggle which should lay hold of Lord Mansfield; and he used to say that he ought to be drawn placed between them, like Garrick between TRAGEDY and COMEDY. Though he might err, like all other mortals, where there was no fixed rule of law which could not be shaken without danger, he was guided by a manly sense of what was proper, and he showed that he considered 'law a rational science, founded upon the basis of moral rectitude, but modified by habit and authority'.

The central role of rationality here is mirrored in the court's analysis in *Hochster*, as is the readiness not to be constrained by authority. For Campbell, it was clear that what made Mansfield a great judge was that, whilst others were content to follow authority as 'a matter of faith',[111] Mansfield's decisions were dictated by his acute perception of what 'reason' required.

What 'reason' required on the facts of *Hochster v De La Tour* was not immediately obvious. Legal logic (which might not be the same as 'reason') seemed to suggest that one could not be in breach of a contract before one was due to perform it. But the facts of *Hochster* engaged with wider issues of rationality. Fundamentally, they raised the question about what the law should do where one contracting party was told in advance that his services would not be required. Did the law require him to wait around in case the other party changed his mind? If the law did require the claimant to wait, it was positively discouraging him from exercising his right to work elsewhere. And at the time of the decision in *Hochster*, a person's right to work was seen as absolutely fundamental.

The centrality of freedom of labour had been famously established by Adam Smith in *The Wealth of Nations*.[112] Indeed, 'the propensity to truck, barter, and exchange one thing for another'[113] was seen by Smith as the foundation of the entire economic system. In his view, it was essential to the success of the system that the freedom to contract should be uninhibited: a free and competitive market was the only way to maximize efficiency.[114] Smith's ideas were tremendously influential and formed the basis of the school of classical economics, which flourished throughout the early 19th century.[115]

[108] J Pothier, *Treatise on the Law of Obligations*, D Evans (trans) (Philadelphia, PA, Robert Small, 1826) vol 1, 107–9 [212].

[109] Zimmermann, *The Law of Obligations* (Oxford, Oxford University Press, 1996) 815–16 fn 228.

[110] Campbell, *Lives of the Chief Justices of England* (n 102) II.417.

[111] Campbell, *Lives of the Chief Justices of England* (n 102) II.439.

[112] A Smith, *An Inquiry Into the Nature and Causes of The Wealth of Nations* (Edinburgh, 1776); subsequent references are to the Dent edition (London, 1910).

[113] *Ibid* Book I, ch II, 12.

[114] A helpful summary of Smith's thought is given in PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, Oxford University Press, 1979) 294–303.

[115] *Ibid* 304–5.

It is hardly possible that the judges who decided *Hochster* could have been unaware of this economic thinking.[116] Indeed, there is evidence to show that they were aware. Erle J, for instance, had developed and articulated the doctrine of mitigation in a series of judgments which emphasised and incentivised the optimal use of labour.[117] Later, in his capacity as Chairman of the Trades Union Commissioners, he was to claim that the law gave the fullest protection to freedom of labour and capital[118]:

> *Every person has a right under the law, as between him and his fellow subjects, to full freedom in disposing of his own labour or his own capital according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others.*

Even if the interference were not in itself unlawful, it would, in Erle's view, still give rise to liability if it interfered with the claimant's right.[119]

Lord Campbell's familiarity with classical economic ideas would have come directly from his political experience, and from his involvement in law reform. He had been a Member of the House of Commons throughout the 1830s, when the influence of economists had been at its height.[120] Furthermore, Campbell was a committed Whig,[121] as were many of the economist MPs,[122] so he may well have shared, as well as heard, their views. One particularly striking parallel with *Hochster v De La Tour* was the reform of the poor laws, which was debated in Parliament throughout the 1830s and 1840s. The problem with the existing poor laws was perceived as being that they were not administered in a way that encouraged self-reliance.[123] As Nassau Senior, the moving spirit of the reforms, put it, the prevailing system 'must diminish industry by making subsistence independent of exertion'.[124] He described the aim of the 1834 Poor Law Amendment Act as being

> [t]o raise the labouring classes, that is to say, the bulk of the community, from the idleness, improvidence, and degradation, into which the ill-administration of the laws for their relief has thrust them.[125]

[116] 'It is scarcely possible that any educated man growing to maturity between (say) 1800 and 1850 could not have read a good deal of the new political economy and radical political utilitarianism': Atiyah, *The Rise and Fall of Freedom of Contract* (n 114 above) 293.

[117] *Beckham v Drake* (1849) 2 HLC 579, 606–7; 9 ER 1213, 1223; *Goodman v Pocock* (n 61 above) 15 QB 576, 583–4; 117 ER 577, 580; *Emmens v Elderton* (1853) 4 HLC 624, 656; 10 ER 606, 618. He was also a party to the decision in the lower court in *Elderton v Emmens* (1848) 6 CB 160, 136 ER 1213, see especially at 178, 1219–20.

[118] W Erle, *The Law Relating to Trade Unions* (London, Macmillan 1869) 12.

[119] *Ibid.*

[120] F Fetter, 'The Influence of Economists in Parliament on British Legislation from Ricardo to John Stuart Mill' (1975) 83 *Journal of Political Economy* 1051.

[121] He was, for instance, a member of Brooks's Club, which he described, in a letter to his father, as 'the stronghold of the Whigs': Hardcastle (ed), *Life of John, Lord Campbell* (n 100 above) 1.409.

[122] Fetter, 'The Influence of Economists in Parliament (n 120).1053.

[123] For a more detailed account, see Levy, *Nassau W Senior* (n 103 above) 80–90.

[124] Levy, *Nassau W Senior* (n 103 above) 80.

[125] Levy, *Nassau W Senior* (n 103 above) 90.

The reform of the poor laws powerfully illustrated how a system of self-consistent legal rules, designed with the best of motives, could be exposed by economic analysis as unfit for its purpose. Senior took a similar approach, though with less immediate success, to his critique of property law. In his evidence to the Real Property Commission (1828), chaired by Lord (then Mr) Campbell, he advocated radical simplification of the conveyancing system, so as to facilitate the transfer of land. He returned to the point in his review of Campbell's *Lives of the Chief Justices*, where he described the English system of conveyancing as 'a disgrace to a civilised nation',[126] and Coke's exposition of it as

> a memorial of his utter unfitness to discover or even to understand the real purposes for which laws ought to be made.[127]

Campbell could not have been unaware of what Senior, 'one of the most influential of the classical economists',[128] thought that those real purposes were.

The judgment in *Hochster v De La Tour* should, therefore, be seen not as merely an important innovation in the law of contract. Clearly it was innovative, but it also reflected a very distinctive attitude to the role of the appellate judge (as personified by Lord Mansfield), and a readiness to shape common law rules by reference to extra-legal notions of rationality and efficiency. It deserves its landmark status for all three reasons.

D. THE EFFECTS OF *HOCHSTER v DE LA TOUR*

The doctrine of anticipatory breach, as created by *Hochster v De La Tour*, remains good law today, and has been approved by the House of Lords several times.[129] But that is not to say that it has been seamlessly incorporated into the fabric of the common law. On the contrary, challenges to the scope, basis, and even the existence of the doctrine have emerged in the case law. In this Part those challenges are outlined, and the responses to them evaluated.

1. The Nature of Repudiation

In *Hochster v De La Tour* itself there could be no dispute that the defendant had renounced the contract. But other factual situations were less clear, and the courts showed a consistent reluctance to recognise less explicit conduct as a

[126] Senior, 'Lord Campbell's *Chief Justices*' (n 103 above) 105.
[127] Senior, 'Lord Campbell's *Chief Justices*' (n 103 above) 104.
[128] Atiyah, *The Rise and Fall of Freedom of Contract* (n 114 above) 317.
[129] *Martin v Stout* [1925] AC 359 (HL); *Moschi v LEP Air Services Ltd* [1973] AC 331 (HL); *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277 (HL).

renunciation. For instance, in *In re Agra Bank*[130] it was held that a bank did not renounce its contractual obligation to pay under a letter of credit by stopping payment generally. Page Wood VC said that he found it

> quite impossible to bring this case within the principle of the cases . . . especially the courier's case, *Hochster v De La Tour*, which went as far as any.[131]

Similarly, inviting one's creditors to a meeting, showing them a bleak financial statement of one's situation and asking for more time to pay did not show an intention to abandon the contract.[132] Even a letter setting out in detail all the party's failed attempts to obtain the funding necessary to complete the contract was not enough, because it went on to say that the party would continue trying.[133] As Megaw LJ put it, 'the expression of this "hope, however forlorn" is quite inconsistent with a final refusal'.[134] It was also essential to place the defendant's statement in its factual and legal context: a refusal to provide a cargo for a ship, for example, might appear to be a renunciation of the charterer's obligations, but if the refusal was made on the first of several days provided by the contract for loading, that appearance was deceptive.[135] In essence, there was a fine line between pessimism and renunciation; and if the party receiving a gloomy communication read too much into it, and terminated the contract, he himself would be liable for breach. Only the clearest renunciation could be acted on with confidence.[136]

Where a party made an assertion about his legal position, the courts were confronted with a further difficulty. On the one hand, a genuine attempt to ascertain one's own rights or duties seemed to be the opposite of a refusal to perform legal obligations. But, on the other hand, if one party asserted that he was not required to perform because some condition was not satisfied, and, as a matter of law, that assertion was incorrect, the party was effectively refusing to perform his contract. The courts' resolution of the problem has not been consistent.[137] Support for the view that the party's mistaken assessment of his legal rights was irrelevant could be found in *Danube and Black Sea Railway and Kustendjie Harbour Company (Limited) v Xenos*,[138] where the defendant's erroneous belief that his agent had exceeded his authority in making the contract was given no weight. In *Woodar Investment Development Ltd v Wimpey*

[130] *In re Agra Bank* (1867) LR 5 Eq 160.
[131] *Ibid* 164.
[132] *In re Phoenix Bessemer Steel Company* (1876) 4 Ch D 108 (Ch & CA).
[133] *Anchor Line Ltd v Keith Rowell Ltd, The Hazelmoor* [1980] 2 Lloyd's Rep 351 (CA).
[134] *Ibid* 354.
[135] *Avery v Bowden* (1855) 5 E & B 714, 119 ER 647 (QB); (1856) 6 E & B 953, 119 ER 1119 (Ex Ch).
[136] *Spettabile Consorzio Veneziano di Armamento e Navigazione v Northumberland Shipbuilding Company Limited* (1919) 121 LT 628 (CA).
[137] JC Smith, 'Anticipatory Breach of Contract' in E Lomnicka and C Morse (eds), *Contemporary Issues in Commercial Law: Essays in Honour of AG Guest* (London, Sweet & Maxwell, 1997) 175, 176.
[138] *Danube and Black Sea Railway and Kustendjie Harbour Company (Limited) v Xenos* (1861) 11 CB(NS) 152, 142 ER 753 (CP); (1863) 13 CB(NS) 825, 143 ER 325 (Exch Ch).

Construction UK Ltd,[139] however, the House of Lords favoured the opposite view, holding that there was no renunciation where the defendant insisted on his own erroneous interpretation of a crucial contractual term.

To some extent the uncertainties illustrated by the cases on repudiation are inherent in any rule that allows proof of intention by conduct. However, it is submitted that the approach to renunciation adopted by the House of Lords in *Woodar's case* makes that uncertainty unnecessarily larger, and complicates what should be a simple rule. It is also difficult to reconcile with broader contractual principles, in particular the principle that liability for breach of contract is strict.

2. The Requirement of Acceptance

In *Hochster v De La Tour* the claimant had decided to act immediately on the defendant's renunciation, and to put an end to the contract. Shortly afterwards, in *Avery v Bowden*,[140] Lord Campbell CJ took the opportunity to confirm the decision in *Hochster*, and to make it clear that for liability to arise under the *Hochster* doctrine, it was essential for the claimant to have ended the contract. Thus, where, under a charterparty, the charterer refused to supply a cargo in conformity with the contract and told the captain that 'there was no use in his remaining there any longer',[141] no liability arose if the captain continued to insist upon having a cargo. In other words, there was no right to damages under *Hochster* if the innocent party affirmed the contract.

One question prompted by this rule concerned what the innocent party had to do to show that he was exercising his option to terminate. In *Hochster* itself, the claimant could be said to have acted to his own detriment—in the sense that he disabled himself from performance by making alternative, conflicting, arrangements with Lord Ashburton—and there was some support for the view that detrimental reliance was necessary. Thus, in *Danube and Black Sea Railway and Kustendjie Harbour Company (Limited) v Xenos*,[142] a charterer who had been told that the ship-owner would not perform his obligation made another contract with a different ship-owner. The Court of Common Pleas held that the claimant had exercised his option to terminate, but seemed unsure whether the alternative contract was crucial. Erle CJ, the only member of the court who had been involved in *Hochster v De La Tour*, seemed to think not.[143] Williams J, however, gave a rather different exposition of the law[144]:

[139] *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277 (HL).
[140] *Avery v Bowden* (1855) 5 E & B 714, 119 ER 647 (QB); (1856) 6 E & B 953, 119 ER 1119 (Ex Ch).
[141] *Avery v Bowden* (1855) 5 E & B 714, 728; 119 ER 647, 652–3; (1856) 6 E & B 953, 975; 119 ER 1119, 1127 (Cresswell J).
[142] *Danube and Black Sea Railway* (n 138 above) (CP).
[143] *Danube and Black Sea Railway* (n 138 above) 11 CB(NS) 152, 176; 142 ER 753, 763 (CP).
[144] *Danube and Black Sea Railway* (n 138 above) 11 CB(NS) 152, 178; 142 ER 753, 763–4 (CP).

> the cases . . . have fully established, that, if before the time for the performance of the contract arrives, one of the parties thereto not merely asserts that he cannot or will not perform it, but expressly repudiates and renounces it, the party to whom the promise is made may treat that as a breach of contract, at his option; at all events, where he has in consequence thereof acted so as to interfere with the performance of the contract on his part according to its original terms.

Byles J held a similar view. It was 'plain', he said[145]

> that if, in consequence of that renunciation of the contract by Xenos, the company were induced to incur liability and expense, and, still more, to make another contract for the transport of their goods by another vessel, the defendant must be held bound by it . . . indeed, the law does require that there shall be some act done by the other party to intimate his assent to the renunciation of the contract, beyond his saying so.

Keating J referred back to *Phillpotts v Evans*,[146], in which Parke B had said that a refusal to perform before the date for performance was not a breach.

> What distinguishes this case from *Phillpotts* [he explained,] is, that here there is the strongest evidence of the company having acted upon the refusal of Xenos to perform his contract.[147]

The case went on to the Exchequer Chamber,[148] but the judgment was, unfortunately, very short, and did not deal expressly with the question of detrimental reliance. The judges may, however, have been hinting at a preference for the view of Erle CJ when they said that

> [u]pon receiving notice from Xenos that he would not receive the cargo upon the terms agreed upon, the company had a right at once to treat that as a breach.[149]

'At once' might suggest that there was no need for detrimental reliance.

It is submitted that the view of Erle CJ was the more convincing. The need for detrimental reliance had indeed been emphasised in *Hochster v De La Tour*, but only in the claimant's arguments; the judgment, as we have seen, proceeded on a different, wider basis. A vital part of that basis was that the claimant should take all reasonable steps to mitigate his loss. But it was not necessary, in order to have a claim under the principle in *Hochster*, to show that those steps had been successful. On the contrary, if the steps had been unproductive, the award of damages would be larger. In other words, detrimental reliance clearly was relevant to the *Hochster* principle, but it was relevant only to mitigation of loss, not to whether liability arose at all.

The fact that liability under *Hochster* could only arise where the claimant exercised his right to end the contract also gave rise to two further questions. The first concerned a matter of substance: Was *Hochster* confined to situations where

[145] *Danube and Black Sea Railway* (n 138 above) 11 CB(NS) 152, 180–81; 142 ER 753, 764 (CP).
[146] *Phillpotts v Evans* (n 68 above).
[147] *Danube and Black Sea Railway* (n 138 above) 181, 765 (CP).
[148] *Danube and Black Sea Railway* (n 138 above) (Exch Ch).
[149] *Danube and Black Sea Railway* (n 138 above) 13 CB(NS) 825, 827; 143 ER 325, 326 (Exch Ch).

what the defendant expressed the intention to do would, if carried out, have given the claimant a right to terminate? The answer, given in *Johnstone v Milling*,[150] was 'Yes'. There it was said that the renunciation of the landlord's covenant to rebuild demised premises could not give rise to liability under *Hochster*, since an actual breach of that covenant would not entitle the tenant to terminate the lease. In *Afovos Shipping Co SA v Romano Pagnan and Pietro Pagnan, The Afovos*[151] Lord Diplock went further, holding that the doctrine of anticipatory breach required a threatened 'fundamental' breach,[152] as distinct from the threat to breach a term which the parties had merely agreed should give rise to a right to terminate. There has been no challenge to this rule, and it is submitted that the basic position, as set out in *Johnstone v Milling*, has considerable logical force: it would make little sense to allow a claimant to terminate the contract for a threatened breach if the actual breach itself would not have entitled him to terminate. But it is not clear that Lord Diplock's extension of the doctrine is equally convincing: if the parties choose to raise a term to the status of a condition, it seems sensible to attach to that term all of the consequences that attach to conditions arising by force of law.[153] If the parties were prepared to agree that a failure to satisfy the term should give the innocent party the right to terminate, it is difficult to see why a renunciation of that term should not give rise to the same rights.

The second question concerning termination was, on the face of it, merely about terminology. It arose because, whilst the courts accepted that there could be no liability under *Hochster* unless there was termination, it was not clear how this position should be encapsulated. One possibility was to say that the breach was not 'complete'[154] until acceptance by the other party. Another possibility, advanced by Bowen LJ in *Johnstone v Milling*,[155] was to say that the declaration of intention was not a breach at all[156]:

> It would seem on principle that the declaration of such intention by the promisor is not in itself and unless acted on by the promisee a breach of the contract; and that it only becomes a breach when it is converted by force of what follows it into a wrongful renunciation of the contract. Its real operation appears to be to give the promisee the right of electing either to treat the declaration as brutum fulmen, and holding fast to the contract to wait till the time for its performance has arrived, or to act upon it, and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. But such declaration only becomes a wrongful act if the promisee elects to treat it as such.

[150] *Johnstone v Milling* (1886) 16 QBD 460 (CA).
[151] *Afovos Shipping Co SA v Romano Pagnan and Pietro Pagnan, The Afovos* [1983] 1 WLR 195 (HL).
[152] *Ibid* 203.
[153] *Bettini v Gye* (1876) 1 QBD 183.
[154] *Avery v Bowden* (1855) 5 E & B 714, 722; 119 ER 647, 650 (Watson, Atherton and Mellish, counsel for the defendant).
[155] *Johnstone v Milling* (n 150 above).
[156] *Johnstone v Milling* (n 150 above) 472–3.

In the same case Lord Esher MR went further, being driven to explain the requirement for acceptance in terms of rescission. After referring to *Hochster*, he said[157]:

> the doctrine relied upon has been expressed in various terms more or less accurately; but I think that in all of them the effect of the language used with regard to the doctrine of anticipatory breach of contract is that a renunciation of the contract, or, in other words, a total refusal to perform it by one party before the time for performance arrives does not, by itself, amount to a breach of contract but may be so acted upon and adopted by the other party as a rescission of the contract so as to give an immediate right of action. When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not of course amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission.

This had gone beyond a mere search for appropriate terminology; it had become an exercise in reclassification.

Of course, it might not often matter exactly what terminology was used to get to the result. But sometimes it could matter. For instance, if an issue arose about jurisdiction, it could be crucial to know where the breach occurred: was it when a letter expressing the intention not to perform the contract was posted abroad, or when it was received in England? In *Cherry v Thompson*,[158] which predated *Johnstone v Milling*, it was held that the breach occurred on posting. And, although that analysis was difficult to reconcile with Bowen LJ's approach (unless one gave the acceptance some retroactive effect) and inconsistent with Lord Esher MR's (which denied a breach), it was followed in later cases.[159]

The root of the problem over terminology could be traced back to *Hochster v De La Tour*. There the court had made clear how important it was that the remedy depended on termination, but the reason given was not one of legal analysis. Rather, reason (or rationality) called for a rule which would liberate the claimant from the restrictions of his now useless contract, and allow him to make the best of his opportunities elsewhere. This reason had no obvious legal equivalent. Its closest legal counterpart was the doctrine of mitigation; but mitigation had no role unless there had already been a breach. Perhaps it would have been better if later courts had expressly recognised that *Hochster v De La Tour* created a new species of breach of contract, for which no action would lie unless the innocent party terminated. Certainly that would have been preferable

[157] *Johnstone v Milling* (n 150 above) 467.
[158] *Cherry v Thompson* (1872) LR 7 QB 573.
[159] *Holland v Bennett* [1902] 1 KB 867 (CA); *Mutzenbecher v La Aseguradora Espanola* [1906] 1 KB 254 (CA); *Martin v Stout* [1925] AC 359 (HL).

to the awkward attempts to force the doctrine into some existing category: such an approach was at best inelegant, and at worst potentially misleading.

3. The Basis of the Rule

The cases dealt with so far in this Part all acknowledged *Hochster v De La Tour* as good law, whilst trying to expound and develop its principles. But judicial approval of the decision was not universal, and in *Frost v Knight*[160] the Court of Exchequer advanced a series of criticisms of the decision which, in its view, showed that the case had been wrongly decided.

Frost v Knight involved facts which were obviously suited to the application of anticipatory breach: the parties had agreed to marry on the death of the defendant's father (who disapproved of the match); but, before that unhappy event, the defendant renounced the engagement. Kelly CB, who gave the leading judgment, was not unsympathetic to the claimant's situation,[161] but he was unconvinced that she could have a remedy for breach of contract. The fundamental difficulty, in his view, was that no contractual obligation had been breached[162]:

> to say that the contract is broken, is simply to utter an untruth. One contracts in 1870 to pay another 1000l on the 1st of January 1871. To say that the contract is broken before the year 1870 is at an end is undeniably and self-evidently untrue.

That, he continued, was as true of the facts of *Hochster v De La Tour* as it was of the case before him. Lord Campbell's judgment 'will be found', he said[163]

> when carefully considered, to amount to no more than an argument upon the reasonableness of affording some remedy to the plaintiff, where, by reason of the declaration of the defendant that he would not take him into his service when the 1st of June should arrive, he was obliged either to remain unemployed until the 1st of June, and lose the opportunity of obtaining another employment, or to accept any other engagement that might be offered to him and so disentitle himself to maintain an action, on the ground that he could not aver that he was ready and willing to perform his part of the agreement.

In short, the courts had introduced a 'fiction'[164] in order to create a remedy. Channell B expressed his agreement.[165]

When the case was heard by the Exchequer Chamber,[166] however, *Hochster v De La Tour* was restored. Cockburn CJ made it clear that

[160] *Frost v Knight* (1870) LR 5 Exch 322 (Ex).
[161] *Ibid* 336: 'the painful and embarrassing situation in which she has been placed by the declaration made to her by the defendant'.
[162] *Frost v Knight* (n 160 above) 327.
[163] *Frost v Knight* (n 160 above) 329.
[164] *Frost v Knight* (n 160 above) 331.
[165] *Frost v Knight* (n 160 above) 337.
[166] *Frost v Knight* (1872) LR 7 Exch 111 (Ex Ch).

> the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it.[167]

He also explained that this was not a mere matter of authority: the rule in *Hochster* operated 'for the common benefit of both parties'.[168]

But, although the Exchequer Chamber had disapproved the decision of the court below, the criticism that the *Hochster* principle rested on a 'fiction' did not disappear. Since the doctrine was now too well-established to be abandoned, the concern about fiction prompted judges to identify some other basis for the rule. The explanation that established itself was that the defendant's declaration allowed the claimant to treat his future breach as inevitable, and sue him for it in advance.[169] Thus, in *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos*[170] Mocatta J said that[171]

> the doctrine of anticipatory breach is an artificial one. It may be said to be one of the legal fictions which remains very much alive. At the date of a renunciation and its acceptance there is in truth no actual breach of contract, since the time for its performance has not yet arrived.

He went on to explain that this artificiality caused difficulties[172]:

> Once there is a renunciation and an acceptance of it, there is in the eyes of the law a breach and the contract is at an end, but the assumed and in law inevitable failure to perform is one at the date in the future when performance would have been required had there been no anticipatory breach. It is in relation to that assumed future breach of contract, which by law is anticipated, that damages have to be assessed.

When the case reached the Court of Appeal Lord Denning MR was quick to point out that Mocatta J had misunderstood the doctrine. 'The renunciation itself is the breach',[173] he said, and Megaw LJ agreed.[174] Edmund Davies LJ, on the other hand, seemed to accept the inevitable future breach argument when he said that the claimant's argument was mistaken because it required the court to 'anticipate not only a breach, but the *worst* breach'.[175] In *Afovos Shipping Co SA v Romano Pagnan and Pietro Pagnan, The Afovos*[176] Lord Diplock also seemed to support the inevitable future breach analysis, when he said that the effect of renunciation was that

[167] *Ibid* 113.
[168] *Frost v Knight* (n 166 above) 113.
[169] *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401 (QB).
[170] *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1971] 1 QB 164 (QB & CA).
[171] *Ibid* 182.
[172] *The Mihalis Angelos* (n 170 above) 182.
[173] *The Mihalis Angelos* (n 170 above) 196.
[174] *The Mihalis Angelos* (n 170 above) 209–10.
[175] *The Mihalis Angelos* (n 170 above) 201.
[176] *Afovos Shipping Co SA v Romano Pagnan and Pietro Pagnan, The Afovos* [1983] 1 WLR 195 (HL).

the party not in default need not wait until the actual breach; he may elect to treat the secondary obligations of the other party as arising forthwith.[177]

It is submitted that this recourse to ideas of inevitable future breach was both unnecessary and unconvincing. It was unnecessary because the principle in *ochster v De La Tour* did not rest on a fiction. It rested, as the court in *ochster* had made clear, on an implied term that the parties would not act to ch other's prejudice pending performance. Of course, one might disagree with e court's readiness to imply such a term,[178] but that is a different question. The evitable future breach explanation was also unconvincing. Not only was it ghly artificial, it also missed the point. In situations such as *Hochster v De La our*, for instance, the future breach was not inevitable: the defendant might ange his mind after all. The point was that the claimant should not be obliged wait around to see; he should be allowed (and encouraged) to seek alterna- e employment.

E. CONCLUSION

bert Hochster went on to become an art dealer and importer, trading at Gerrard Street in London[179]; the theft of two Dresden china ornaments from ose premises prompted his only other recorded activity as a litigant.[180] Of lgar de la Tour there is no trace. But the litigation that brought these two men the Court of Queen's Bench has done anything but fade into obscurity, and it lly deserves its continuing landmark status. If anything, its importance has ided to be underestimated as a result of misplaced criticism and the pursuit of minological orthodoxy. In particular, the criticisms and terminological scurity introduced by later courts may have inhibited its use as a general inciple. The ideas behind it could, for instance, cast light on the proposition at a party can foist unwanted contractual performance on another.[181] The inciple of not acting to the other party's prejudice pending performance might ggest a broader general idea about good faith. In short, once the full significe of *Hochster v De La Tour* is appreciated, it can be seen not only as *the* landark case in anticipatory breach, but also as having the potential to be a idmark for other areas of contract law as well.

[177] *Ibid*, 203.
[178] Contrast the view of Mustill, 'Anticipatory Breach of Contract: The Common Law at Work' 24 above), who (at 42) describes the implied term as 'fanciful' with Smith, 'Anticipatory Breach Contract' (n 137 above) at 178: 'well within the modern doctrine of implied terms'.
[179] Exhibition Culture in London 1878–1908 website: www.exhibitionculture.arts.gla.ac.uk. The lding is now Gerrards Corner restaurant.
[180] *R v Dixon*, The Times (6 August 1878) 10.
[181] *White & Carter (Councils) Ltd v McGregor* [1962] AC 413 (HL).

6

Taylor v Caldwell (1863)

CATHARINE MACMILLAN

A. INTRODUCTION

A LANDMARK CASE IS one which stands out from other less remarkable cases. Landmark status is generally accorded because the case marks the beginning or the end of a course of legal development. *Taylor v Caldwell*[1] is regarded as a landmark case because it marks the beginning of a legal development: the introduction of the doctrine of frustration into English contract law. This chapter explores the legal and historical background to the case to ascertain if it is a genuine landmark. A closer scrutiny reveals that while the legal significance of the case is exaggerated, the historical significance of the cases reveals an unknown irony: the case is a suitable landmark to the frustration of human endeavours. While the existence of the Surrey Music Hall was brief, it brought insanity, imprisonment, bankruptcy and death to its creators.

B. VICTORIAN PLEASURES

1. The Pleasure Gardens

The tale of the Surrey Music Hall reflects the development of entertainments and pleasures in Victorian London. There was a 'leisure revolution' in Victorian England,[2] brought about by decreased working hours and the increased free time spent in new, more pleasurable, fashions. It has been noted that 'the market constituted the chief generator of cultural activity in Victorian Britain'.[3] Cultural pursuits were dependent upon private finance and this dependency underpins the history of the Surrey Music Hall. The Music Hall arose from the

[1] *Taylor v Caldwell* (1863) 3 B & S 826, 122 ER 309; SC 32 LJQB 164; 8 LT 356; 11 WR 726 (Court of Queen's Bench). All further references are to the report at 3 B & S.
[2] See, eg, J Lowerson and J Myerscough, *Time to Spare in Victorian England* (Trowbridge/Esher, The Harvester Press, 1977); KT Hoppen, *The Mid-Victorian Generation 1846–1886* (Oxford, Clarendon Press, 1998) chs 10 and 11.
[3] Hoppen, *The Mid-Victorian Generation 1846–1886* (n 2 above) 374.