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CONTRACTS-EFFECT OF SUPERVENING TEMPORARY IMPOSSIBILITY

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CONTRACTS—EFFECT OF SUPERVENING TEMPORARY IMPOSSIBILITY—The plaintiff, a Japanese-owned corporation located in the United States, was operating under a limited license to do business granted under an executive order.[1] On November 1, 1941, the plaintiff contracted to purchase from the defendant corporation 6,000 pockets of rice for delivery during November and December 1941 at the plaintiff's option. On December 7, 1941, the Secretary of the Treasury revoked all licenses issued under the executive order and the plaintiff's place of business was closed. Upon learning of this, the defendant corporation notified the plaintiff of his (defendant's) repudiation of the contract on December 9, 1941. On December 31, 1941, the plaintiff obtained a treasury license to complete the contract with the defendant and wired the defendant to ship the rice for December delivery. The defendant refused, and denied any liability under the contract. On appeal from a dismissal of plaintiff's suit for damages, *held,* affirmed. The promisor of an executory contract is discharged from the duty of performance when performance is rendered impossible by a supervening change of law which may be of sufficient duration to change the nature of his obligation. *Pacific Trading Co. Inc. v. Louisiana State Rice Milling Co.,* (La. 1949) 42 S. (2d) 855.

While the early common law imposed upon the promisor a strict duty of performance of his contractual obligation,[2] there is little doubt today that a supervening event rendering such performance impossible or illegal will excuse him, unless he has assumed the risk of the particular prevention.[3] Similarly, where the prevention is merely temporary, as in the principal case, the promisor is relieved of the duty of performance for the duration of the prevention.[4] A problem arises, however, when performance again becomes possible and the promisee seeks to hold the promisor to the contract. The usual test applied by the courts to determine whether the contract has been completely discharged by the delay, or merely suspended and subject to revival, is whether requiring performance would impose upon the promisor an obligation substantially different from that which he originally assumed.[5] While the test is simple in statement, results from its application

[1] Executive Order No. 8389 of April 10, 1940, 12 U.S.C.A. §95a note.

[2] Paradine v. Jane, Aleyn 26, 82 Eng. Rep. 897 (1647).

[3] Page, "The Development of the Doctrine of Impossibility of Performance," 18 MICH. L. REV. 589 (1920); 6 WILLISTON, CONTRACTS §1931 (1938); Patterson, "Constructive Conditions in Contracts," 42 COL. L. REV. 903 (1942). The view is somewhat more strict in Louisiana. 21 TULANE L. REV. 603 (1947).

[4] 6 WILLISTON, CONTRACTS §1957 (1938).

[5] Metropolitan Water Board v. Dick, [1917] 2 K.B. 1, affd. [1918] A.C. 119; Allanwilde Transport. Corp. v. Vacuum Oil Co., 248 U.S. 377, 39 S.Ct. 147 (1919); Frey, "Contract Defaults and Cancellations in Wartime," 38 ILL. L. REV. 167 (1943); 6 WILLISTON, CONTRACTS §1957 (1938). Where mere suspension of a contract with an enemy alien would impede the war effort, the contract is held discharged without regard to the usual test. Diamond, "Effect of War on Pre-existing Contracts Involving Enemy Nationals," 53 YALE L.J. 700 (1944).

are apt to vary depending upon the point in time to which the court refers. The Louisiana court in the principal case is in accord with the English view in looking at the facts of the case at the inception of the prevention.[6] Since it appeared to the defendant, as a "prudent business operator," that dealings with the plaintiff might remain illegal for the duration of the war, or at least for such a time as to impair materially the value of the bargain, the defendant was held justified in regarding the contract as discharged. That the prevention was in fact of shorter duration than reasonably foreseeable at its inception, and that, as far as the report shows, no substantial burden would be imposed on the promisor by requiring performance, are regarded as immaterial. This time of inception approach, if strictly applied, removes all distinction between cases where suit is brought while performance is still impossible, and those where suit is brought after the prevention is removed. In both cases the court must speculate on the probable duration of the prevention and the probable consequences of requiring performance at an uncertain future time.[7] A less speculative method of attack, and that applied in most American decisions, is to assess the burden of requiring performance on the basis of the facts existing at the time the prevention is removed.[8] While objections have been raised that this use of hindsight provides no way in which the promisor can determine his rights pending removal of the prevention,[9] these objections would seem unfounded. If, during the period of suspension, it becomes necessary for the promisor to change his position to save himself from loss, and he does so, his duty of performance should be discharged as of that time, since to require future performance would certainly result in hardship.[10] In the absence of such a change of position, there seems no reason to discharge the promisor merely because he anticipates such change may become necessary. The report of the principal case does not allow it to be said with certainty that the result would have been different had the court adopted this approach. However, it would seem this might be the case, since it does not appear that the delay was for a sufficient time to change materially the obligation of the defendant. There is no doubt

[6] Bank Line Ltd. v. Chapel & Co., [1919] A.C. 435; Anglo-Northern Trading Co., Ltd. v. Emlyn Jones & Williams, [1917] 2 K.B. 78; McNair, "Frustration of Contract by War," 56 L.Q. REV. 173 at 205 (1940). But cf. Andrew Millar & Co. v. Taylor & Co., [1916] 1 K.B. 402.

[7] The speculative nature of such determinations is shown by the entirely different conclusions drawn from the same facts by the trial court in Autry v. Republic Productions, Inc., (D.C. Cal. 1946) 165 P. (2d) 688, and the appellate court in the same case, 30 Cal. (2d) 144, 180 P. (2d) 888 (1947). Also see Patch v. Solar Corp., (C.C.A. 7th, 1945) 149 F. (2d) 558.

[8] Village of Minneota v. Fairbanks, Morse & Co., 226 Minn. 1, 31 N.W. (2d) 920 (1948), noted 47 MICH. L. REV. 117 (1948); Schoellkopf v. Moerlbach Brewing Co., 184 N.Y.S. 267 (1920), affd. 189 N.Y.S. 954, 198 App. Div. 965 (1921); U.S. Trading Corp. v. Newmark Grain Co., 56 Cal. App. 176, 205 P. 29 (1922). Neither Williston nor the Restatement mention the time of inception approach. 6 WILLISTON, CONTRACTS §1957 (1938); 2 CONTRACTS RESTATEMENT §462 (1932).

[9] Blair, "Breach of Contract Due to War," 20 COL. L. REV. 413 at 422 (1920); Pederick & Springfield, "War Measures and Contract Liability," 20 TEX. L. REV. 710 at 731 (1942).

[10] 2 CONTRACTS RESTATEMENT §596(c) (1932); "War Law Notes," 10 GEO. WASH. L. REV. 827 at 947 (1942); Borup v. Western Operating Corp., (C.C.A. 2d, 1942) 130 F. (2d) 381; Allanwilde Transportation Corp. v. Vacuum Oil Co., supra, note 6.

that the defendant would be justified in changing his position before performance became possible, for example, by making other contracts for the sale of the same rice, but it does not appear that he did change his position other than to notify the plaintiff of rescission. There seems no reason why repudiation, unaccompanied by other acts of the defendant, should be sufficient change of position to discharge his obligation.[11] Although the Louisiana court has some American authority for its strict application of the time of inception view,[12] it would appear that ignoring the facts as they exist at the time performance becomes possible may result in substantial injustice.

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[11] 6 WILLISTON, CONTRACTS §1958 (1938); MCELROY, IMPOSSIBILITY OF PERFORMANCE 179 (1941); U.S. Trading Corp. v. Newmark Grain Co., supra, note 9.

[12] Earn Line S.S. Co. v. Sutherland S.S. Co., Ltd., (D.C. N.Y. 1918) 254 F. 126, affd. (C.C.A. 2d, 1920) 264 F. 276; Pederick and Springfield, "War Measures and Contract Liability," 20 TEX. L. REV. 710 at 731 (1942); Neumond v. Farmers' Feed Co., 244 N.Y. 202, 155 N.E. 100 (1926). In 20th Century Lites v. Goodman, 64 Cal. App. (2d Supp.) 938, 149 P. (2d) 88 (1944) the view was applied to a "frustration of the adventure" situation.