

EFFECT ON CONTRACTS OF WAR ORDERS OR OTHER ACTS OF STATE

It has generally been stated to be the rule that impossibility arising subsequently to the formation of the contract does not excuse a contractor from the usual consequences of non-performance; he must pay damages to the other party.¹ To this rule, however, there are several classes of exceptions: first, where the impossibility is caused by a change in the domestic law; secondly, where the subject-matter of the contract is destroyed; and thirdly, where the impossibility is caused by death or illness of the party bound to perform. As has been asserted in this JOURNAL,² these exceptions practically nullify the general rule. It is believed that no case can be found where a promisor has been held to pay damages for failing to perform an act that has become absolutely impossible without any fault of his own. The rule it is believed should be stated to be that a contractor is not excused from performing merely on the ground of increased difficulty or expense.

The question of impossibility as an excuse for non-performance has come up in a somewhat new aspect in a number of cases during the great war. Thus in *Moore & Tierney v. Roxford Knitting Co.* (1918, N. D. N. Y.) 250 Fed. 278, where a buyer claimed damages for failure to make and deliver goods as per contract, the seller replied that it was prevented from performing because of orders for goods given by the United States government for war purposes, these orders having precedence by Act of Congress.³ By reason of the non-delivery, the buyer had himself declared the contract at an end. As in many other cases during the war the negotiations between the manufacturer and the government agents were very informal. The agent had asked what was the mill's capacity for making knitted goods for the government, and further said, "I would request you not to write me that you are sold up and cannot furnish any of these goods. I am aware that this condition prevails with every one." Later an order was given requiring the mill's full capacity and advising that the order was obligatory, although no reference was made to the Acts of Congress. These Acts provided that orders of the government "shall be obligatory" and "shall take precedence over all other orders and contracts." Refusal to comply was made a crime; and on refusal to fill orders at reasonable prices the President was authorized to take possession of the factory.

The court held that the informal order was obligatory and that the seller acted under compulsion; also that the contractual duty to the

¹ *Paradine v. Jane* (1647) Aleyn, 26.

² *Discharge of Contract* (1913) 22 YALE LAW JOURNAL, 513, 519.

³ Nat'l Defence Act, June 3, 1916, 39 St. at L. 166, and Naval Appropriations Act, March 4, 1917, 39 St. at L. 1168.

buyer was at an end and that the buyer had no right to damages for breach. It would have been otherwise had the seller voluntarily sought the government work and thus intentionally disabled itself from performing the contract with the buyer.⁴

It is to be observed that in the *Roxford Knitting Company* case the duty to deliver as agreed was expressly subject to delays or non-delivery by reason of strikes, accidents, or for any reason beyond the control of the seller. The decision might well be regarded as resting upon this provision, although little was said of it. Even in the absence of such a provision, however, the decision would probably be the same. Thus in a late English case,⁵ where a claim for damages was made for failure to deliver raspberries as agreed, and where the contract apparently contained no similar provision, it was held to be a good defense that the government had requisitioned the defendant's whole supply.⁶

In the case of the knitting company, stated above, the government order did not make performance totally impossible; for not only could the goods have been manufactured after the government work was done, but it was not totally impossible to increase the size and capacity of the plant—admitting that this might have been extremely difficult and expensive. The seller did not claim to be totally discharged but claimed only that delay was justified. This would be correct, and the buyer would still be bound to pay for the goods, unless the delay should prove to be so great as to prevent what is often called

⁴This principle is specifically applied in the still more recent case of *Mawhinney v. Millbrook Woolen Mills* (1918, N. Y. Sup. Ct.) 172 N. Y. Supp. 461. If the government contract is voluntarily sought because of war profits, or if the government in awarding the contract did not demand precedence in accordance with the Act of Congress, the contractor is not excused for failure to perform his private contract.

For another and more doubtful variation in the application of the rule, see *Standard Silk D. Co. v. Roessler* (1917) 244 Fed. 250, (1918) 27 YALE LAW JOURNAL, 408.

⁵*Lipton v. Ford* [1917] 2 K. B. 647.

⁶The English statute differs somewhat from the Acts of Congress. "It is hereby declared that where the fulfilment by any person of any contract is interfered with by the necessity on the part of himself or any other person of complying with (government requirements) . . . that necessity is a good defense to any action or proceeding taken against that person in respect of the non-fulfilment of the contract so far as it is due to that interference." Defence of the Realm, No. 2, Act (5 Geo. 5, c. 37) sec. 1, sub-sec. 2. Under such a statute as this a contractor would be excused by much less than a total impossibility, and it would be unnecessary to determine whether the contract called for specific raspberries or berries to be grown on specific land, as in *Howell v. Coupland* (1876) L. R. 1 Q. B. D. 258.

Where the contract contains a provision like that in the principal case it is clearly discharged by a government requisition of the entire plant. *Metropolitan Water Board v. Dick* (1917, H. L.) 117 L. T. Rep. 766. See (1918) 27 YALE LAW JOURNAL, 953.

"substantial performance." The buyer's duty to pay would surely be constructively conditional upon performance within some period of time that would be reasonable.

A contract containing a provision like that in the knitting case really creates no duty to deliver goods at all events but only a duty to deliver in case reasonable diligence would cause performance to take place.⁷ Even in the absence of such a provision, there is a tendency to excuse a contractor by something less than absolute impossibility.⁸ But mere "economic unprofitableness," even though that is due to war conditions, is not an excuse for failure to perform.⁹

In one of the cases cited above¹⁰ the court denied that mere impossibility caused by an act of the legislature or of the executive would excuse a contractor, saying that the "true rule is that where performance of a contract, *legal when made, becomes illegal*, by some event, statute, decision, or lawful act of public authorities, both parties are excused from further performance." Of course this rule is correct in its affirmative form. Where impossibility of performance arises from a change in the law of our own country, making performance of a previously made contract unlawful, the obligation is dissolved and there is no liability for non-performance.¹¹ That the court's

⁷ So in *Davison Chemical Co. v. Baugh Chemical Co.* (1918, Md. App.) 104 Atl. 404, a manufacturer of acid was excused from delivery because war in Europe made the procurement of pyrites impossible. A better acid could have been made from brimstone, which was obtainable; but the expense would have been twice as great. A similar decision was rendered by the House of Lords in *Wilson & Co. v. Tennants* [1917] A. C. 495.

⁸ See *North German Lloyd v. Guaranty Trust Co.* (1917, U. S.) 37 Sup. Ct. 490; *Clarksville Land Co. v. Harriman* (1895) 68 N. H. 374, 44 Atl. 527; *Baily v. De Crespigny* (1869) L. R. 4 Q. B. 180. Cf. *Watts & Co. v. Mitsui* (H. L.) [1917] A. C. 227. In *Mineral Park Land Co. v. Howard* (1916) 172 Cal. 289, 156 Pac. 458, the court said that "prohibitive cost" was the same as impossibility "to all fair intents." A similar statement was made by Maule, J., in *Dahl v. Nelson* (1881) 6 App. Cas. 38, 52.

⁹ *Wilson & Co. v. Tennants* [1917] 1 K. B. 208, [1917] A. C. 495; *Dixon v. Henderson* (1917, K. B.) 117 L. T. Rep. 636. In a general way this is admitted by the court in *Mineral Park Land Co. v. Howard*, *supra*.

¹⁰ *Mawhinney v. Millbrook Woolen Mills*, *supra*.

¹¹ *Louisville & N. R. R. Co. v. Mottley* (1911) 219 U. S. 467, 31 Sup. Ct. 265; *Cowley v. N. P. R. R. Co.* (1912) 68 Wash. 558, 123 Pac. 998; *Cordes v. Miller* (1878) 39 Mich. 581; *Jamieson v. Indiana Nat. Gas Co.* (1891) 128 Ind. 555, 28 N. E. 76; *Baltimore etc. R. R. Co. v. O'Donnell* (1892) 49 Ohio St. 489, 32 N. E. 476; *Hanford v. Connecticut Fair Ass'n.* (1918) 92 Conn. 621, 103 Atl. 838, (1918) 28 YALE LAW JOURNAL, 198. If the contract was made subsequently to the passage of the law, it was illegal and void *ab initio*.

It appears also that a promisor's liability may be terminated where his performance is prevented by some act of the state, even though the act is brought about by the fault or inefficiency of the promisor himself. *Hughes v. Wamsutta Mills* (1865, Mass.) 11 Allen, 201 (prevention by imprisonment for crime); *State v. Herber* (1918, Okla.) 173 Pac. 651 (bondsmen discharged when their

rule is correct in its negative part may well be doubted. The statement of Lord Reading¹² is to be preferred: "It is true that the act to be performed was not rendered unlawful by an act of the legislature passed since the entering into of the contract, but it was a lawful act of state which equally rendered the delivery of these specific goods impossible."¹³

It is altogether probable that a contract the performance of which would require a breach of the law of some friendly nation would now be held to be illegal and void. If this is true, and possibly even if it is not, a change in some foreign law making the performance of a previously made contract illegal (or impossible) ought to be given the same effect as would a like change in the domestic law.¹⁴

A. L. C.

failure to produce prisoner in court was caused by his imprisonment for another crime); *Moshenz v. Independent Order etc.* (1913) 215 Mass. 185, 102 N. E. 324 (injunction due to illegal acts); *People v. Globe Mut. L. I. Co.* (1883) 91 N. Y. 174 (dissolution of corporation for failure to maintain a reserve). But impossibility due to bankruptcy does not terminate liability. *Central Trust Co. v. Chicago Auditorium* (1915) 240 U. S. 581, 36 Sup. Ct. 412.

¹² *In re Shipton and Harrison's Arbitration* [1915] 3 K. B. 676.

¹³ A case might be put where performance is rendered impossible by an unlawful act of the commander in chief.

¹⁴ See *Ford v. Cotesworth* (1870) L. R. 5 Q. B. 544; *Cunningham v. Dunn* (1878) 3 C. P. D. 443. This aspect of the matter is treated at length by Lorenzen, *Moratory Legislation Relating to Bills and Notes and the Conflict of Laws*, *supra*, p. 324.