

REVIEWS

THE EFFECT OF WAR ON CONTRACTS. By George J. Webber. London: The Solicitors' Law Stationery Society, 1946. 2d ed. Pp. 802. £3 17s 6d.

THE first edition of this work was published in 1940. Within six years a new edition, "three times as large as the first," has been made desirable, partly by the developments caused by the recent war, partly by a number of decisions in the House of Lords reversing some views that had generally prevailed, and partly because of the author's desire to make a more thorough and critical review of the field. This edition well deserves a full review on its own merits.

In a foreword by Sir David Maxwell Fyfe, this work is described as "essentially a practitioner's book"; but there is no less reason for describing it as a book for law students, law professors, and judges. They will find here a thorough and critical review of great numbers of court decisions, with a full statement of the facts and a full and fair exposition of the reasoning of the judges; they will find also a presentation of the theories of legal scholars as well as the author's original analysis of problems and matured views on questions of policy.

The book is especially useful to American lawyers because nowhere else is so complete a picture of English case law available and because to a very considerable extent American case law and theory are stated for comparison. The fact that British statutes and administrative orders are continually referred to is not a defect from the American standpoint; for the same problems are dealt with in our own statutes and orders, and comparison is profitable. Not many decisions of our state courts are cited.

The book is divided into four Parts. Of these, Part I contains chapters on the Duration and Termination of War, Emergency Powers, Who is an Enemy, Contracts with an Enemy, and Procedural Capacity of Enemy Aliens. With all of these our courts have been and will continue to be frequently concerned. Part II deals with the effect of war on specific kinds of Commercial Contracts, including Agency, Corporate Shareholders, Sales, Negotiable Instruments, Insurance, Freight, and Service.

Parts III and IV fill much more than half of the book and deal with the subject of Frustration of Contract. It is here that the greatest contribution of the author is found; and it is to this that the reviewer will direct his specific comment.

When a court holds that a contractor's duty is discharged by impossibility of performance or by frustration of object, the explanation commonly made has been that the contractor's duty is impliedly conditioned on the continued possibility of performance and of attainment of the purpose for which the contract was made. This implied condition is supposed to be such by reason of the actual intention of the parties, to be discovered by a process of

interpretation and factual inference from the language of the agreement. The starting point has been that "the courts cannot make a contract for the parties" and that impossibility is no excuse unless the parties have themselves agreed that it shall be one.

In many cases, however, this doctrine has been disregarded, even though the court has been forced to admit that the supervening event that has caused impossibility or frustration is one that the parties did not in fact foresee and as to which their contract is silent. Sometimes it is said that the court should not "imply" a condition except such as the parties themselves would have agreed on if they had foreseen the events that subsequently occurred. What they might have agreed, had they thought about it, is a very doubtful speculation.

It has long been observed by the more analytically inclined judges that the asserted "intention of the parties" is often in fact the intention of the judges. The process is one of judicial "construction" even though expressed in terms of mere "interpretation." While it is literally true that the courts do not make a contract for the parties, it is also literally true that it is the courts and not the parties who determine the legal operation of any contract that the parties have made. And this legal operation varies with the facts and events occurring after its making. In making its determination, the court starts with the process of interpretation of the words and other expressions of the parties; by this process it attempts to discover the intention and the understanding of each of the parties. The meaning given by each party to his own expressions and to those of the other party may be far from identical with that given to them by the other party. The court must determine whose meaning should prevail, a matter dependent on substantive contract law and not upon agreement of the parties.

After interpretation and the adoption of a judicially accepted meaning, comes the process of judicial construction, using this phrase to describe the process of adjudging the legal relations of the parties: their rights and duties, and it may be, their powers, privileges and immunities. These legal relations do not spring into being, complete and immutable, at the instant of contracting. They vary with the march of time and with subsequent events. If the parties have foreseen and provided for these subsequent events, as interpretation may show, the legal relations will be adjudged consistently with that interpretation. Thus, the terms of the contract may include a provision with respect to strikes, or war, or delay, or non-performances great or small. With some very important and extensive limitations, men still have a very broadly inclusive "liberty of contract." But the provisions that they insert may be very loose and indecisive; and many events occur that are not foreseen or provided for in any way.

More often than not, an event that causes "impossibility of performance" or "frustration of object" is not actually provided for. The parties have no thought that the hired music hall may be destroyed by fire; and there is not the slightest expression as to whether the hirer must still pay the rent, or

whether the owner must pay damages for not having the hall ready for the exhibition¹ or must make restitution of rental that was paid in advance.

In joyful anticipation of the coronation of the king, contracts are made for the rental of roofs and windows along the announced course of the coronation pageant, without a thought that the king's illness may cause the pageant to be abandoned. On the prescribed day, the owner has his roof and his window ready. Must the tenant pay the agreed rental though no gilded procession will pass by?² Must the owner make restitution of rental that was paid in advance?³

In 1939 a contract was made by Fairbairn, a British manufacturer, and Fibrosa, a Polish company, for the manufacture of certain machinery and its delivery at Gdynia. Fibrosa paid £1,000 in advance. The contract expressly provided for a "reasonable extension of time" if delivery should be "hindered or delayed . . . by strikes, war," and other named events. Two months later England was at war with Germany and the Germans occupied Poland. In 1940, Fibrosa sued for damages for nondelivery, or alternatively for restitution of the £1,000. The trial court and the Court of Appeal held that Fibrosa had no right to either damages or restitution. The House of Lords agreed with respect to damages, but reversed the lower courts as to restitution. The contract was held to be "frustrated" by war and the Trading with the Enemy Act, and that Fairbairn's duty to deliver was discharged, not merely postponed; but the House of Lords held, overruling *Chandler v. Webster*, that there was a quasi contractual right to restitution of the money paid in advance.⁴ This decision agrees with the American law as expressed in the Restatement of Restitution.

The author of the present volume presents these cases, and many others in the same field, with great fulness and critical insight. He indicates the increasing tendency for the judges to hold that a promisor's duty is conditional on continued possibility, not because such was the intention of the parties as found by inferential interpretation but because in the opinion of the court justice so requires. This is most notably expressed in the opinions of Lord Wright. There is no "implied term"; the promisor's duty is "constructively" conditional. Some of the judges adhere to the older forms of expression. The author himself agrees with Lord Wright, saying: "This, it

1. In *Taylor v. Caldwell*, 3 B. & S. 826 (1863), the court held that the owner was not liable in damages, because his duty was "impliedly conditional" on the continued existence of the hall.

2. In *Krell v. Henry* [1903] 2 K. B. 740, the court held that the contract, so far as executory, was "frustrated" and the rent not yet due at time of abandonment never became due.

3. In *Chandler v. Webster* [1904] 1 K. B. 493, the court held that the hirer had no right to restitution of rental paid in advance and that he must still pay instalments of rent that fell due before abandonment of the pageant. Forty years later, the House of Lords has expressly overruled this decision in *Fibrosa Sp. Ak. v. Fairbairn L.C.B. Ltd.* [1943] A.C. 32. To this case the author devotes many pages.

4. The *Fibrosa* case, *supra*.

is submitted, is the true basis of the modern doctrine of frustration of the adventure; the 'implied condition' is, in the last analysis, a 'constructive condition' read into the contract by the court and imputed to the parties."⁵

The author follows the English judges in treating "frustration of contract" as a kind of impossibility of performance. This is fully justified where the facts are like those in the *Fibrosa* case. The performance promised by Fairbairn was made impossible by war and Act of Parliament; and the purpose for which *Fibrosa* promised to make payment of the price was wholly frustrated. In many cases of "frustration" this is not true. In *Chandler v. Webster* and the other "Coronation cases," no performance promised by either party became "impossible" in any sense of that word. The roofs and windows could still be occupied and the rental could still be paid. Nor was the "object" of the contract frustrated; a "contract" has no object. In any contract each of the two parties has a purpose for which he makes it; but these two purposes are never identical. The abandonment of the coronation pageant "frustrated" the purpose of the one who hired the roof or the windows, a purpose that was known to the owner though not embodied in any way in the words of the contract, and a purpose but for which the roof and the windows would have had little rental value. This purpose would be "frustrated" even though the promised performances were fully rendered. The purpose of the owner was not frustrated in any respect by the king's illness. His purpose was the getting of the promised money. This purpose is indeed frustrated by the latest decision of the House of Lords; it required no court decision to frustrate the purpose of the hirer.⁶

It is not every frustration of one contractor's purpose that should be held to discharge him from his promissory duty. There is such a frustration in every instance of a blasted hope. Undoubtedly the cases will multiply in which a disappointed contractor asserts his frustration as a defense or as a reason for restitution. Witness the many conflicting tenancy cases in our State courts where the purpose of one who rents a building for a saloon is frustrated by a prohibition law. A solving principle may be something like this: A contractor is not discharged by frustration of his purpose unless that purpose was known to the other party and the possibility of its attainment was an essential factor in giving to the consideration furnished by that other party the value that enabled him to induce the advantageous bargain. In

5. Again, he says on page 414: "The time has come to shed the fiction of 'implied contract' and to regard the doctrine as a mode by which, upon the facts of a case, the court itself does justice in circumstances for which the parties never provided."

6. This reviewer therefore agrees with Dr. Cecil A. Wright, quoted by the author on page 443, to the effect that, when an event frustrates the purpose of one of the parties without frustrating the purpose of the other, the duty of the one may be partly or wholly discharged and the duty of the other not discharged at all. The duty of the hirer of the Coronation windows was constructively conditional on continued possibility of the pageant; but he could waive the condition, tender the full agreed payment, and enforce the owner's promise to permit occupancy. The author is quite right in saying that this analysis is not that of the English judges. They may yet adopt it when the proper case arises.

the *Fibrosa* case there was a total "failure of the consideration" for the buyer's money, both that which was paid in advance and that which was merely promised. In the Coronation cases there was merely a depreciation in the value of the consideration. Nevertheless, that depreciation was so great that the overruling of *Chandler v. Webster* must be approved. The owner is not justified by the existing social and business mores in demanding payment of the fortuitously high rent for his worthless window seats or in retaining that rent if already received. If he had been put to expense in preparing the windows for occupancy, the courts may still find it desirable to allow compensation or to divide the loss.

When, for the purpose of avoiding obvious injustice, the court holds that a promise is constructively conditional on some fact or event not actually provided for by the parties, the judicial process is essentially the same as when the court finds a promise by making an "implication" that is not true interpretation. The difference between an implied condition and a constructive condition is the same in character as that between an implied promise and a constructive promise. The author was logically correct when in his first edition he declared that constructive conditions and constructive promises are alike quasi contractual. Both are based on court action and not on actual expressions of assent. His present acknowledgment of error in his former statement is quite unnecessary; but it may be sound diplomacy in avoiding attacks by those who like to adhere to old fictions in forms of expression.⁷ It took the *Fibrosa* case to re-establish the law of Quasi Contract in England and to restore to good standing the views that Lord Mansfield expressed in *Moses v. Macferlan* in 1760. The present reviewer expressed the view in the pages of this *Journal* in 1912 that "Quasi Contract," as thus far in judicial use, is applicable only to non-contractual obligations for the payment of money, usually measured by value received and created to avoid an unjust enrichment.⁸ As so used, the term denotes a constructive promise but not a constructive condition of a promissory duty. A constructive or "quasi" contract creates a legally enforceable duty; a constructive or "quasi" condition is a fact or event without which a legally enforceable duty does not exist. The first creates duty; the second limits duty. But nothing will be gained by fighting for a particular definition of the term "quasi contract."

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7. The author, making liberal use of italics, quotes Lord Wright, *Legal Essays and Addresses*, 259, as follows: "The truth is that the court, or jury, as a judge of fact, decides this question in accordance with what seems to be just and reasonable in its eyes. The judge finds in himself the criterion of what is just and reasonable. *The court is in this sense making a contract for the parties—though it is almost blasphemy to say so.* But the power of the court to do this is most beneficial, and indeed even essential."

8. Corbin, *Quasi Contractual Obligations* (1912) 21 *YALE L. J.* 533.

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