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Contracts--Discharge--Impossibility of Performance Due to Administrative Order (L.N. Jackson & Co. v. Royal Norwegian Government, 177 F.2d 694 (2d Cir. 1949))

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RECENT DECISIONS

CONTRACTS — DISCHARGE — IMPOSSIBILITY OF PERFORMANCE DUE TO ADMINISTRATIVE ORDER.—This is an action to recover damages for breach of contract. On November 7, 1941 the plaintiff contracted with the defendant for the shipment of 1,000 tons of copra from Beira, East Africa, to New York City on the Tropic Star. At the time this contract was made the defendant had subjected all its ships to the operation of a system of ship warrants controlled by the U. S. Maritime Commission pursuant to the Presidential Order of August 26, 1941.[1]

On December 8, 1941 following the bombing of Pearl Harbor the United States entered World War II. On December 22, 1941 the U. S. Maritime Commission, because of the critical situation in shipping, ordered the defendant to cancel the 1,000 tons of copra and to substitute therefor wool. The defendant acceded to this order. The plaintiff, being unable to obtain other shipping space, brought this action to recover the loss suffered because of the defendant's non-performance. The District Court gave judgment to the plaintiff. It refused to excuse the defendant's non-performance on the ground that such an order from the Maritime Commission should have been foreseen when the defendant agreed to comply with the Ship Warrants Act.[2] *Held,* reversed and remanded for dismissal of the action. A contractual duty is discharged, in the absence of circumstances showing either a contrary intention or contributing fault on the part of the person subject to the duty, when performance is subsequently prohibited by an administrative order, made with due authority, by an officer of the United States.[3] *L. N. Jackson & Co. v. Royal Norwegian Government,* 177 F. 2d 694 (2d Cir. 1949).

In this case the court granted relief under the doctrine of impossibility of performance. This is an equitable device created by the courts in order to excuse performance under a contract when, in view of contingencies which have arisen since the formation of the contract, it would be unjust to demand performance of the promisor. The court will imply a condition, excusing a breach of contract, which it feels would have been expressed if the parties had contemplated

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[1] Exec. Order No. 8871, 6 FED. REG. 4469 (1941), implementing the Ship Warrants Act of July 14, 1941, 55 STAT. 591 (1941), 50 U. S. C. App. § 1281 *et seq.* (1946). This Act provided that ships holding such warrants would be entitled to preferential treatment in U. S. ports. In return the owners were required to accept all orders of the Maritime Commission with respect to the operation of their vessels.

[2] L. N. Jackson & Co. v. Lorentyen, 83 F. Supp. 486 (S. D. N. Y. 1949).

[3] RESTATEMENT, CONTRACTS § 458(b) (1932).

the contingency.[4] The courts will not apply this doctrine to cases in which the contingency should have been foreseen.[5]

In applying this doctrine the court follows an unbroken line of cases holding that performance of a contract is excused when prevented by a governmental order. In one case a defendant was excused from paying rent on an electrical advertising display when its illumination was prohibited by fuel conservation orders.[6] In another the breach of a contract to return a person to Norway was excused when prevented by war restrictions.[7] A contract of carriage by sea was dissolved when governmental action caused the loss of the ship prior to the time of voyage.[8] Performance of contracts for the delivery of cotton goods at a set price was excused when the Office of Price Administration fixed a maximum price lower than that specified in the contract.[9] The failure to deliver gold to England was held not to constitute a breach of contract since the imminence of war between England and Germany created a grave danger that the ship would be captured if the terms of the contract were performed.[10]

In discounting the contention that the action of the Maritime Commission should have been foreseen, the court points out that the contingency primarily responsible for the breach in this case was the Pearl Harbor disaster which was hardly foreseeable. The case therefore falls directly in line with those excusing performance made impossible by a governmental order.

W. J. N.

EQUITY—INJUNCTION—TRADE NAMES AND UNFAIR COMPETITION—ACTION TO ENJOIN THE USE OF NAME.—Plaintiff's Hotel New Yorker, established in 1930 in New York City, contains some 2500 rooms and maintains a large budget for advertising and publicity on a national scale. Of its national and international clientele, several thousand yearly are drawn from Missouri and several hundred from Kansas City. Almost continuously since 1920 the defendants had operated various restaurants including one called the "New

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[4] Lion Brewery of New York City v. Patrick Loughran, 131 Misc. 331, 226 N. Y. Supp. 656 (Sup. Ct. 1928).

[5] Madeirense Do Brazil S/A v. Stulman-Emrick Lumber Co., 147 F. 2d 399 (2d Cir. 1945); Browne v. Fletcher Aviation Corp., 67 Cal. App. 2d 855, 155 P. 2d 896 (1945).

[6] 20th Century Lites v. Goodman, 64 Cal. App. 2d 938, 149 P. 2d 88 (1944).

[7] Borup v. Western Operating Corp., 130 F. 2d 381 (2d Cir. 1942).

[8] Texas Co. v. Hogarth Shipping Co., 256 U. S. 619, 631 (1921).

[9] Kramer v. Uchitelle, 288 N. Y. 467, 43 N. E. 2d 493 (1942).

[10] The Kronprinzessin Cecille, 244 U. S. 12 (1917).