St. John's Law Review

Volume 17
Number 2 *Volume 17, April 1943, Number 2*

Article 9

Contract for Sale of Goods--Contract Frustrated by War--Total Failure of Consideration--Recovery of Money Previously Paid (Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd., [1943] W.N. 177)

St. John's Law Review

tion thereof.[14] In the *Matter of Brogan*[15] it was held that a defendant in a Nevada divorce action was precluded from impeaching the validity of the decree in order to assert a claim under New York's Decedent Estate Law § 18 because of his subsequent remarriage. The Court, however, reaffirmed that all the *Williams* case did was to remove from the question of "full faith and credit" the subsidiary question of fault. *McCarty v. McCarty*,[16] following this, avers that plaintiff can challenge validity of defendant's decree despite the fact that the court found that he abandoned her without reasonable cause. The judgment of a sister state must be given full faith and credit but the findings are not conclusive when domicile was fraudulent and ineffectual to confer jurisdiction.

H. C. W.

CONTRACT FOR SALE OF GOODS—CONTRACT FRUSTRATED BY WAR —TOTAL FAILURE OF CONSIDERATION—RECOVERY OF MONEY PREVIOUSLY PAID.—Appellant company was incorporated in Poland and had its head and seat at Wilno. The defendant was registered and carried on business in the United Kingdom. By a c.i.f. contract in writing dated July 12, 1939, defendant agreed to sell and plaintiff to purchase certain machinery for £4,800, of which £1,000 was in fact paid. Delivery was to be three or four months from settlement of final details at Gdynia in Poland, and the place of erection of the machinery, though unmentioned in the contract, was agreed to be in Wilno. The contract contained a clause to the effect that, "in the event of war, a reasonable extension of time shall be granted". On September 1, 1939, war broke out between Poland and Germany and on September 3, 1939, Great Britain declared war on Germany. About September 23, 1939, Gdynia was occupied by the enemy. Respondents did not deliver the machinery and appellants claim the return of the £1,000 paid on account. Tucker, J., dismissed the action, and the Court of Appeal affirmed his decision. In view of the fact that all Poland was then occupied by the enemy, appellants obtained from the Board of Trade a license to proceed with the appeal. *Held,* that the clause, providing for a "reasonable extension of time" in event of war, could not prevent frustration of the contract by the

---

[14] *Cf.* Matter of Brogan, 265 App. Div. 463 (2d Dep't), *aff'g,* 178 Misc. 801 (1943); Oberlander v. Oberlander, 179 Misc. 459 (1943); Reese v. Reese, Queens Co. Sup. Ct., N. Y. L. J., March 13, 1943, p. 999; McCarty v. McCarty, Kings Co. Sup. Ct., N. Y. L. J., Feb. 28, 1943, p. 478; Baker v. Baker, N. Y. Co. Sup. Ct., N. Y. L. J., Feb. 24, 1943, p. 740; Jiranek v. Jiranek, Westchester Co. Sup. Ct., N. Y. L. J., Jan. 28, 1943, p. 385

[15] Cited *supra* note 14, 265 App. Div. 463 (2d Dep't), *aff'g,* 178 Misc. 801 (1943).

[16] Cited *supra* note 14, N. Y. L. J., Feb. 28, 1943, p. 478.

war, on the ground that it had made express provision for that contingency. The war involved an indefinite interruption of performance, causing a total failure of the consideration bargained for. A party, who has paid money under a contract, may recover it should there be such a failure of consideration, not because of any provision of the contract, but because the law gives a remedy in quasi-contract to any party who has not received that for which he contracted. Therefore, appellants could recover the £1,000. *Chandler v. Webster* was overruled. *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1943] W. N. 177; Appeal from Court of Appeal [1942] 1 K. B. 12, [1941] W. N. 122.

In *Chandler v. Webster*,[1] the House of Lords stated that, although there was frustration of the object and thus failure of consideration, it would not write a new contract for the parties by implying any conditions which were foreseeable when the contract was made. The court distinguished the case from that of *Taylor v. Caldwell*,[2] pointing out that a contract for the sale of a particular thing must not be construed as a positive contract, but as subject to an implied condition that, when the time comes for fulfillment, the specified thing continues to exist.[3] Whereas in the *Taylor* case the premises which were the very subject of the lease were destroyed prior to time of performance, in the *Chandler* case the leased premises were available. Defendant, in the *Chandler* case, had not contracted to provide a coronation procession, nor could the holding of said procession be implied as a condition, since plaintiff contracted to pay in advance of the scheduled date for the procession. While New York has followed the law laid down by *Chandler v. Webster*,[4] it has recognized the doctrine that frustration of the object of the contract excuses further performance, and has refused to enforce a contract on the theory that the mutually contemplated object having failed, plaintiff could not exact payment.[5]

---

[1] *Contra:* Chandler v. Webster, [1904] 1 K. B. 493. Defendant agreed to let to plaintiff a room for the purpose of viewing a coronation procession, which subsequently became impossible, owing to the illness of the King. The court held that plaintiff lessee was not entitled to recover the £100 which he had paid; and defendant lessor was entitled to payment of the balance, for which he counterclaimed, inasmuch as his right to that payment had accrued before the procession became impossible.

[2] Taylor v. Caldwell, 3 Best & Smith 826 (1863). Defendant had agreed to let plaintiff have the use of a music hall for the purpose of having concerts upon certain specified days. Before performance of the contract, the hall was destroyed by fire. Plaintiff was excused from taking the garden and paying the money, and defendant from performing its promise to give the use of the hall and gardens and other things.

[3] Krell v. Henry, [1903] 2 K. B. 754; *cf.* principal case. *But see* note 1 *supra*.

[4] Forty-fifth St. Realty Co. v. 17–19 W. 45th St. Corp., 142 Misc. 310, 254 N. Y. Supp. 284 (1931).

[5] Alfred Marks Realty Co. v. Hotel Hermitage Co., 170 App. Div. 484, 156 N. Y. Supp. 179 (1915). This case must be differentiated from the *Chandler* case for, in the latter, defendant's rights had vested before the day

It is difficult to see why the House of Lords overruled *Chandler v. Webster,* since that case involved the theory of frustration of object, whereas the instant case was decided rather on that of impossibility of performance.[6] At one time, in order to protect the integrity of contracts, the harsh rule prevailed that a promisor is not excused from performance *under any circumstances* unless he has shielded himself by an express condition.[7] This harsh rule has gradually been relaxed, in the interests of justice, and the courts now recognize several exceptions to the rule that impossibility of performance is no excuse.[8] However, frustration of the object of a contract, literally, does not mean impossibility of performance.[9] If a party to a contract has paid money and the other party has wholly failed to perform on his part, restitution may be had both in England[10] and the United States.[11] The rule is that one who has paid for goods which he never gets is entitled to recover the payment, even though the reason why performance is not made by the seller is excusable impossibility, for the reason that there has been a total failure of consideration.[12] However, where performance is still possible, although the expected value of the performance is destroyed, the contract does not become void *ab initio* so as to undo all that has been done under it.[13] The parties are merely excused from further performance, but the contract is

---

the procession was to take place; in the former, plaintiff's rights were to vest upon publication and delivery of the books—publication taking place after the calling off of the race was not the publication contemplated by the contract.

[6] Since a "reasonable extension of time" could not be determined because of the prolonged nature of the war, performance of the contract was impossible. Furthermore, shipment by defendant at the time Gdynia was in German hands would have been illegal under the doctrine of Trading with the Enemy (*see Baily v. De Crespigny,* L. R. 4 Q. B. 180 [1869], holding that where the law forbids or prevents performance of a promise, legal when made, the promisor is freed from liability; performance of such a promise is illegal as well as impossible).

[7] Wheeler v. Connecticut Mut. Life Ins. Co., 82 N. Y. 543 (1880).

[8] North German Lloyd v. Guaranty Trust Co., 244 U. S. 12, 37 Sup. Ct. 490, 61 L. ed. 960 (1917); International Paper Co. v. Rockefeller, 161 App. Div. 180, 146 N. Y. Supp. 371 (1914); Gesualdi v. Personeni, 128 N. Y. Supp. 683 (1911); Butterfield v. Byron, 153 Mass. 517, 27 N. E. 667 (1891); Baily v. De Crespigny, L. R. 4 Q. B. 180 (1869), cited *supra* note 6.

[9] "Where performance remains entirely possible, but the whole value of the performance to one of the parties at least, and the basic reason recognized as such by both parties for entering into the contract, has been destroyed by an unforeseen event, this operates as failure of consideration in substance for the promise of the other party, because such performance has lost its value. The name 'frustration' has been given to this situation." (3 WILLISTON, CONTRACTS § 1935.)

[10] Giles v. Edwards, 7 T. R. 181 (1797).

[11] Martin v. Cunningham, 231 Mass. 280, 121 N. E. 21 (1918); Brokaw v. Duffy, 165 N. Y. 391, 59 N. E. 196 (1901).

[12] Joyce v. Adams, 8 N. Y. 291 (1853).

[13] Taylor v. Caldwell, 3 Best & Smith 826 (1863), cited *supra* note 2.

enforceable with respect to things done and rights accrued up to the time that fulfillment of the object of the contract became impossible.[14]

A. J.

CORPORATIONS—OFFICERS—APPEAL AND ERROR—CONSTITUTIONAL LAW.—The Securities Exchange Commission brings certiorari to review a decision of the United States Court of Appeals for the District of Columbia,[1] reversing an order made by the Commission approving a plan of reorganization for the Federal Water Service Corporation. The directors and officers of the Federal Water Service Corporation (hereafter called Federal), a holding company registered under the Public Utility Holding Company Act of 1935,[2] purchased preferred stock of the company during a period in which the management of the company, which they controlled, proposed to the Commission successive plans of reorganization pursuant to the Act.[3] The respondents controlled Federal through their control of its parent, Utility Operators Company, which owned all of the outstanding shares of Federal's Class B common stock, representing the controlling voting power in the company. Prior to this plan, three other plans for reorganization were submitted by Federal which provided for participation by Class B stockholders in the equity of the proposed reorganized company. This feature of the plans was unacceptable to the Commission, and all were ultimately withdrawn. The present plan proposing a merger contemplated the elimination of Class B stock and the conversion of the preferred stocks and Class A stock into a new common stock with a par value, the effect of which was to reduce materially the capital of the corporation. The Commission declined to approve the plan on the ground that the plan permitted the preferred stock purchased by respondents to participate in the reorganization on a parity with all other preferred stock. Thereafter, the plan was amended to provide that the preferred stock, so purchased, unlike other preferred stock, would not be converted into stock of the reorganized company, but might be surrendered to the reorganized

[14] Economy v. S. B. & L. Bldg. Corp., 138 Misc. 296, 245 N. Y. Supp. 352 (1930); Alfred Marks Realty Co. v. Hotel Hermitage Co., 170 App. Div. 484, 156 N. Y. Supp. 179 (1915), cited *supra* note 5.

[1] 128 F. (2d) 303, 75 U. S. 374 (App. D. C. 1942), wherein order of Commission was reversed and remanded on the ground that the Commission acted on a vital question of policy which Congress would have to act first by changing the standard it has expressed in the Act. Thus, the Commission exceeded its statutory authority. There was at the time no regulation of the Commission, no provision of the Statute, and no rule of common law or equity prohibiting the purchase of stock by an officer or director of a corporation during the pendency of reorganization proceedings.

[2] C. 687, 49 STAT. 803, 15 U. S. C. A. § 79 *et seq.*

[3] PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, §§ 7 and 11.