

Contracts--Implied Condition--Attorney's Fees (General Talking Pictures Corporation v. Rinas, 248 App. Div. 164 (1st Dept. 1936))

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ment of peace among those engaged in armed conflict in the Chaco, as a standard of guidance for the President in his ascertainment of fact and proclamation thereof. Hence, the act is also sustainable in accordance with the doctrine of *stare decisis*.

A. F.

CONTRACTS—IMPLIED CONDITION—ATTORNEY'S FEES.—Plaintiff rented a talking-picture machine to defendant for use in the latter's theatre for a period of ten years at a fixed rental, the entire sum to be paid during the first two years. No provision was made for the termination of liability for the agreed compensation in the event of the destruction of the theatre. The defendant could assign this contract, which in fact he did, provided he remained liable as a guarantor. The contract further provided for recovery of attorney's fees incurred by plaintiff in collection of rent. Approximately seven months after the start of the contract period a fire destroyed the premises but left uninjured the equipment. Upon the request of the defendant's assignees the plaintiff removed the machine from the theatre ruins and has held it for defendant's use. In an action for rent the plaintiff recovered the entire balance of the consideration for the ten-year period plus an arbitrary sum of five hundred dollars for attorney's fees. Defendant appealed on the ground that the continued existence of the theatre during the term of the agreement was an implied condition to his liability and that the destruction of the theatre and the voluntary removal and retention of the apparatus by the plaintiff ended all liability. *Held*, affirmed, in part. No condition will be implied where such a condition might have been provided against in the contract.¹ The value of attorney's fees, however, in absence of stated amount in contract, must be recovered on a *quantum meruit* basis, and the lower court was in error in granting an arbitrary figure. *General Talking Pictures Corporation v. Rinas*, 248 App. Div. 164, 288 N. Y. Supp. 266 (1st Dept. 1936).

Subsequent or intervening impossibility of performance, as a defense, should be clearly distinguished from impossibility arising at the time the contract is made, for in the latter instance the contract may be avoided in some cases on the ground of lack of consideration, if the consideration is obviously and on the face of the contract impossible or in other cases on the ground of mutual mistake of fact.² It is with the former problem that we are now concerned. The general rule is that a contracting party is bound by the unconditional promise he has made even though performance becomes impossible by reason

¹ *Harmony v. Bingham*, 12 N. Y. 99 (1854).

² 1916 F. L. R. A. 10; *Beebe v. Johnson*, 19 Wend. 500 (N. Y. 1838).

of circumstances beyond his control.³ Where the contract calls for an act possible in itself, the performance is not excused by inevitable accident or unforeseen contingencies.⁴ To remedy the glaring injustices which would arise in some instances if such a precept were rigidly enforced resort has been had to the doctrine of implied conditions.

Certain contracts⁵ might show in their inherent nature that it was contemplated when made, that their fulfillment would be dependent upon the continuance or existence at the time of performance of certain persons or things. In these cases a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse performance.⁶ The implied condition is a part of the contract as if it were written into it and by its terms further performance is excused if the subject matter is destroyed without the fault of either of the parties before the time for complete performance has arrived.⁷ The court refused to bring the instant case⁸ within this class of contracts and has laid down the broad rule that where a condition might have been provided against, liability continues in absence of such a provision. Most certainly such language is too general, for we have numerous cases⁹ where the courts have terminated liability though the conditions which might have been provided against were not inserted in the written contract. The court was probably motivated in this case¹⁰ by the fact that though the contract provided that the happening of certain specified events, such as the bankruptcy of lessee, *etc.*, would terminate the contract, destruction by fire was not among the enumerated exceptions.¹¹ In *Harmony v. Bingham*,¹² where an agreement provided for certain conditions and omit-

³ *Harmony v. Bingham*, 12 N. Y. 99 (1854).

Where a party is prevented by act of God from discharging a duty created by the law, he is excused. But where he engages unconditionally by express contract to do an act, performance is not excused by inevitable accident or unforeseen contingencies not within his control. *Wheeler v. Connecticut Mut. Life Insurance Co.*, 82 N. Y. 543 (1880).

⁴ *WHITNEY, CONTRACTS* (2d ed. 1934) 255.

⁵ *Taylor v. Caldwell*, 3 B. & S. 826 (Q. B. 1863); *People v. Bartlett*, 3 Hill 570 (N. Y. 1842).

⁶ *Part Auz Quilles L. Co., Inc., v. Meigs P. W. Co., Inc.*, 204 App. Div. 541, 198 N. Y. Supp. 563 (1st Dept. 1923); *Dexter v. Norton*, 47 N. Y. 62 (1871); *Gabler v. Evans Laboratories*, 129 Misc. 911, 223 N. Y. Supp. 408 (1927).

⁷ *Butterfield v. Byron*, 153 Mass. 517, 27 N. E. 667 (1897).

⁸ *General Talking Pictures Corp. v. Rinas*, 248 App. Div. 164, 288 N. Y. Supp. 266 (1st Dept. 1936).

⁹ *Nitro Powder Co. v. Agency of Canadian Car & Foundry Co.*, 233 N. Y. 294, 135 N. E. 507 (1922); *Kirkpatrick Home for Childless Woman v. Kenyon*, 206 App. Div. 728, 199 N. Y. S. 851 (4th Dept. 1923).

¹⁰ *General Talking Pictures Corp. v. Rinas*, 248 App. Div. 164, 288 N. Y. Supp. 266 (1st Dept. 1936).

¹¹ See p. 29, 30 of Records on Appeal from Judgment and Order.

¹² *Harmony v. Bingham*, 12 N. Y. 99 (1854).

ted others, it was held¹³ that the parties excluded the conditions not specifically mentioned.

Where a particular building is specified in a contract merely for the sake of convenience and it is in truth immaterial whether or not the work is to be done there, destruction of that building will not excuse performance since there was no inherent impossibility of performance in the contract.¹⁴ This does not contravene the doctrine that destruction of the building or other means of performance which is necessary by the terms of the contract or within the contemplation of both parties discharges the duty to perform.¹⁵

It is well to keep in mind that it is the function of the courts to interpret contracts and they are loath to make them for individuals. As has been aptly said "where a person has expressly agreed to do an act in a contract of his own drawing and neglected to insert a clause (express condition) saving himself from liability for non-performance, in case a foreseeable contingency arises the law should not imply a condition for his own protection which by his own carelessness he failed to insert in the contract."¹⁶ The court may not inject into a contract a provision not expressly or by necessary implication included therein.¹⁷

R. I. R.

CRIMINAL LAW—CONSTITUTIONALITY OF NEW YORK'S "ALIBI STATUTE."¹—Section 295-1 of the Code of Criminal Procedure provides, that if a person indicted by a grand jury intends to offer testimony establishing his presence elsewhere than at the scene of the crime at the time of its commission, he must, when demanded by the prosecuting attorney, file a bill of particulars not less than eight days before

¹³ *Standard Oil Co. of N. Y. v. Central Dredging Co.*, 225 App. Div. 407, 233 N. Y. Supp. 279 (3d Dept. 1929); *Texas Co. v. Hogarth Shipping Co.*, 256 U. S. 619, 41 Sup. Ct. 612 (1921).

¹⁴ *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 491 (1875); *Hefferon v. Neumond*, 198 Mo. App. 667, 201 S. W. 645 (1918).

¹⁵ *Stewart v. Stone*, 127 N. Y. 500, 28 N. E. 595 (1891).

¹⁶ *WHITNEY, CONTRACTS* (2d ed. 1934) 260; *Amer. Central Ins. Co. of St. Louis v. McHose*, 66 F. (2d) 749 (C. C. A. 3d, 1933); *Public Schools of Trenton v. Bennett*, 27 N. J. L. 513 (1859); *Krappman Whiting Co. v. Middlesex Water Co.*, 64 N. J. L. 240, 45 Atl. 692 (1900); *Foley v. Mfg. Fire Ins. Co.*, 152 N. Y. 131, 64 N. E. 318 (1897); *Tompkins v. Dudley*, 25 N. Y. 272 (1862). In contracts to build entire structures failure to insert a clause relieving from liability, not only disables contractor from collecting compensation for a partially erected building which has been destroyed by fire but renders him liable for damages for non-performance if he fails to replace the building on time.

¹⁷ *American Central Ins. Co. of St. Louis v. McHose*, 66 F. (2d) 749 (C. C. A. 3d, 1933).

¹ N. Y. Laws 1935, c. 506.