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CONTRACTS-IMPOSSIBILITY-EFFECT OF CROP FAILURE ON MIDDLEMAN'S CONTRACT

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CONTRACTS—IMPOSSIBILITY—EFFECT OF CROP FAILURE ON MIDDLEMAN'S CONTRACT—Defendant, a produce dealer, offered to sell to plaintiff a specified quantity of Texas "New Crop U.S. 1 blackeye peas." When the original offer was made on June 13, 1947, plaintiff asked how defendant could be sure the peas would be "No. 1." Defendant replied that because the locality of Dilley, Texas, had been unusually dry, the pea crop would be sold as dry "blackeyes;" defendant also stated that he had already made a contract to purchase 7,000 bags of these "blackeyes" from a certain canning company. On June 16 the contract for 800 bags of peas was consummated, delivery to plaintiff to be made on or before June 30, 1947. A few days later, the entire pea crop in the locality of Dilley was destroyed by a torrential rainfall. In spite of exhaustive efforts to obtain "U.S. 1 blackeyes" from other parts of Texas, defendant was unable to do so. The trial court found that the contract did not contemplate delivery of peas from any particular locality and that delivery of peas of the quality contracted for from the state of Texas was not made impossible by an act of God. Plaintiff recovered judgment and defendant appealed. *Held*, reversed. The contract contemplated delivery from a specific crop from a particular locality. The subject matter of the contract had been destroyed by an act of God, discharging defendant's duty to perform. *Pearce-Young-Angel Co., Inc.* v. *Charles R. Allen, Inc.*, (S.C. 1948) 50 S.E. (2d) 698.

Since the case of *Taylor* v. *Caldwell*,[1] there has been a gradual extension of the doctrine that certain types of impossibility will excuse performance of a contract. The development of the doctrine has been impeded by dictum in the early case of *Paradine* v. *Jane*,[2] to the effect that impossibility will not excuse performance of an unconditional promise. As many writers have pointed out,[3] *Paradine* v.

[1] 122 Eng. Rep. 309 (1863).

[2] 82 Eng. Rep. 897 (1647).

[3] 6 WILLISTON, CONTRACTS, rev. ed., §1937 (1938); Page, "The Development of the Doctrine of Impossibility of Performance," 18 MICH. L. REV. 589 (1920); ANSON, CONTRACTS, 5th ed., 467 (1930).

Jane did not involve a problem of impossibility, the issue being one of failure of consideration. The stumbling block remains, however, and courts have resorted to the expedient of grouping all cases into a few recognized exceptions to the general rule that impossibility is no excuse.[4] If a particular case cannot be fitted into one of these exceptions, the promisor is not excused regardless of the hardship or injustice of his case. Courts and writers have come to realize that injustice can result from this mechanical application of unbending rules, and attempts have been made to formulate a general rule covering all cases of excusable impossibility which will express the reason behind the exceptions. Perhaps the most popular theory evolved is that all promises, although unconditional in terms, are in fact subject to the constructive condition that performance will be excused if circumstances arise which make performance impossible, provided the promisor did not assume the risk of the impossibility. This theory has been criticized as being based upon the fiction that the parties intended such a condition, when in fact they had no intention at all as to the matter.[5] However, this criticism overlooks the fact that the entire doctrine of constructive conditions in the law of contracts is based upon the fiction of an assumed intent where no actual intent existed. While this theory of constructive conditions provides a satisfactory solution for most cases of impossibility, its fictitious basis may produce confusion of thought unless the true reason for the application of the fiction is kept constantly in mind. That reason would seem to be the one expressed by Justice Holmes; namely, that if the parties had realized the possibility that certain circumstances would render performance impossible, the promisor would not have assumed the risk that those circumstances would not occur, and the promisee would not have expected him to do so.[6] Applying Holmes' test to the principal case, the correctness of the decision would seem doubtful. In most cases where delivery of a crop has been excused, the promisor was a grower, and it was within the contemplation of both parties that delivery would be made from a specific crop from particular land.[7]

[4] Three exceptions to the general rule, recognized everywhere, allow excuse of the promisor when: (1) impossibility is brought about by a change in the domestic law; (2) death or sickness makes performance of a contract for personal services impossible; and (3) the contract is impossible of performance because the specific subject matter with which it deals has been destroyed without the fault of the promisor. The court fits the principal case within the third exception. In two other categories of cases, courts are becoming increasingly desirous of excusing because of impossibility. They are: (4) where the contract contemplates some particular mode of performance and that method of performance becomes impossible; and (5) where the entire purpose and motivation for the contract is "frustrated" by a subsequent change in circumstances. See 6 WILLISTON, CONTRACTS, rev. ed., §1935 (1938).

[5] Page, "The Development of the Doctrine of Impossibility of Performance," 18 MICH. L. REV. 589 at 599 (1920).

[6] The Kronprinzessin Cecilie, 244 U.S. 12, 37 S.Ct. 490 (1917). See also GRISMORE, CONTRACTS, §§169 to 176 (1947); Wade, "The Principle of Impossibility in Contract," 56 LAW QUARTERLY REV. 519 (1940); and Woodward, "Impossibility of Performance, as an Excuse for Breach of Contract," 1 COL. L. REV. 529 (1901).

[7] See Howell v. Coupland, 1 Q.B. D. 258 (1876); Pearson v. McKinney, 160 Cal. 649, 117 P. 919 (1911); Matousek v. Galligan, 104 Neb. 731, 178 N.W. 510 (1920); Squillante v. California Lands, Inc., 5 Cal. App. (2d) 89, 42 P. (2d) 81 (1935); Snipes Mountain

In such a case it would be unreasonable to suppose that the grower would assume the risk of a crop failure. But where the promisor is a dealer in produce and not a grower, it would seem that he would normally be aware of the risks of a crop failure and expect to assume them, if he has not provided otherwise in his contract. And this is so even if the parties have a particular crop in mind. While the cases are not unanimous, they tend to support this view.[8] In the principal case, plaintiff's inquiry gave notice to defendant of plaintiff's apprehension that there might not be a sufficient quantity of "U.S. 1 blackeyes" available. Defendant knew that his ability to perform would depend on continued dry weather. His reassuring answer to plaintiff's question, the short time within which delivery was to be made, and the absence of an escape clause in the contract all tend to justify the belief that defendant would have been willing to accept the risk of impossibility due to a crop failure had this contingency been contemplated. If this interpretation of the facts is correct, plaintiff should have prevailed. The court, however, having interpreted the evidence as showing that a specific subject matter was contemplated, excused defendant through a mechanical application of the proposition that destruction of the specific contemplated subject matter excuses the promisor.

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Co. v. Benz Bros. & Co., 162 Wash. 334, 298 P. 714 (1931); 74 A.L.R. 1287 (1931); Ontario Deciduous Fruit-Growers' Ass'n. v. Cutting Fruit-Packing Co., 134 Cal. 21, 66 P. 28 (1901); Rice & Co. v. Weber, 48 Ill. App. 573 (1892); Davis Co. v. Bishop, 139 Ark. 273, 213 S.W. 744 (1919); St. Joseph Hay & Feed Co. v. Brewster, (Mo. App.) 195 S.W. 71 (1917).

[8] See Anderson v. May, 50 Minn. 280, 52 N.W. 530 (1892); Jones & Co. v. Cochran, 33 Okla. 431, 126 P. 716 (1912); Newell v. New Holstein Canning Co., 119 Wis. 635, 97 N.W. 487 (1903); Berg v. Erickson, (C.C.A. 8th, 1916) 234 F. 817; Eskew v. California Fruit Exchange, 203 Cal. 257, 263 P. 804 (1927); Sunseri v. Garcia & Maggini Co., 298 Pa. 249, 148 A. 81 (1929).