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THE IMPACT OF THE WAR ON PRIVATE CONTRACTS

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THE destruction and impairment of contracts caused by governmental agencies because of the necessities of war production have been more far-reaching than is generally realized. A report that one large industrial organization has been prevented from performance of contracts involving more than one hundred and fifty million dollars gives a hint of the extent of these commercial casualties.

Here is a typical case: early in 1941 *W* company agreed to manufacture for and sell to *D* company, which agreed to buy and pay for, a complicated machine to be specially manufactured. Delivery was to take place in two years. In due course priorities were granted to the *D* company and in turn extended to the *W* company. Work progressed (although at times delayed by priorities difficulties) until August, 1942, when the War Production Board cancelled all priorities and prohibited the *D* company from accepting delivery under the contract. *D* company immediately notified *W* company of those developments. By that time *W* company had expended toward the manufacture of the machine a sum equal to approximately half of the contract price. Nothing had been delivered to *D* company.

Two principal questions arise from such events:

(a) What is the effect on the continued existence of a contract which is made impossible or more difficult of performance by orders of governmental agencies such as the WPB or OPA?

(b) Who bears the loss arising upon frustration of a contract through governmental action?

Answer to the first question, applied to its many varying phases, has been attempted in a multitude of cases. In both the First World War and this one that inquiry has received considerable attention in England and America.

The second question, applied to limited circumstances, definitely has been answered in England by a reply, which, incidentally, has negatived a rule which had been in force there for four decades.

In the United States, a development of the law dealing with that basic, and in some respects more important, inquiry is still in its rudimentary stages.

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I.

DOCTRINE OF COMMERCIAL FRUSTRATION

The pronouncement of the House of Lords in the *Metropolitan Water Board* case, by reason of certain dramatic legal background, and also because of its high authority, has become a prominent landmark in the development of the doctrine of "commercial frustration."

In the month preceding the beginning of World War I, the Water Board had entered into a contract with the respondents for the construction of a reservoir to be completed within six years. The contract was supplemented the following May. A substantial amount of work had been done by February 21, 1916, when work was stopped by the Minister of Munitions and the plant of the respondent sold under his direction. The Water Board promptly commenced action, asking for a declaration that the contract was still in existence and had not been determined. The respondent's defense was predicated on the order of the Minister of Munitions.

Following *Horlock's* case[1] and distinguishing the facts from *Tamplin's* case,[2] Lord Dunedin observed:

> "... Earl Loreburn points out that in all cases it must be said that there is an implied term of the contract which excuses the party, in the circumstances, from performing the contract, and then continues ...: 'It is, in my opinion, the true principle, for no Court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted.' He further points out that the particular ratio decidendi in various cases is sometimes that performance has become impossible, and that the party concerned did not promise to perform an impossibility; sometimes it is put that the parties contemplated a certain state of things which fell out otherwise."

The same doctrine runs through the other opinions, Lord Atkinson saying:

> "... The Executive Government, acting no doubt legally and within its powers, has for objects of State made it illegal and impossible for the respondents to do that which they promised to do.

[1] Horlock v. Beal, [1916] 1 A.C. (H.L.) 486, 85 L.J. (N.S.) (1 K.B.) 602, 114 L. T. R. 193, 32 T. L. R. 251 (1916).

[2] Tamplin v. Petroleum Products Co., [1916] 2 A.C. (H.L.) 397, 85 L. J. (N.S.) (2 K.B.) 1389, 115 L.T.R. 315, 32 T.L.R. 677 (1916).

No one can tell how long it may continue to be invaded. In my opinion they are entitled to be absolved from the further performance of that promise."

And Lord Parmoor saying:

"'... The rule laid down in Brewster v. Kitchell . . . rests upon this ground, that it is not reasonable to suppose that the legislature, while altering the condition of things with reference to which the covenantor contracted, intended that he should remain liable on a covenant which the legislature itself prevented his fulfilling'."[3]

By unanimous vote the contract was held to have been terminated by action of the governmental agency.

The doctrine, with many qualifications, exceptions and modifications, was not new to the English and American law.[4] But the statement in the *Metropolitan* case represented an attempt to distill the rule into purer philosophical form.[5]

[3] Metropolitan Water Board v. Dick, Kerr & Co., Ltd., [1918] A.C. (H.L.) 119 at 127, 135 and 141, 87 L.J. (N.S.) 370, 34 T.L.R. 113, 117 L.T.R. 766 (1917).

[4] Marshall v. Glanville, [1917] 2 K.B. 87, 116 L.T.R. 560 (1917); Re Shipton, [1915] 3 K.B. 676, 84 L.J. (N.S.) (2 K.B.) 2137, 113 L.T.R. 1009, 31 T.L.R. 598 (1915); Andrew Millar & Co. v. Taylor & Co., [1916] 1 K.B. 402, 85 L.J. (N.S.) (1 K.B.) 346, 114 L.T.R. 216, 32 T.L.R. 161 (1916); Jager v. Tolme, [1916] 1 K.B. 939, 85 L.J. (N.S.) (2 K.B.) 1116, 114 L.T.R. 647, 32 T.L.R. 291 (1916); Horlock's case, [1916] 1 A.C. (H.L.) 486; The Styria v. Malcolmson, 186 U.S. 1, 22 S. Ct. 731 (1901). See Griswold v. Waddington, 16 Johns. (N.Y.) 438 (1819) and The William Bagaley, 5 Wall. (72 U.S.) 377 (1866), dealing with destruction of executory contracts between citizens and persons who become alien enemies because of war.

[5] The rather abstract character of the rule is illustrated by the words of Lord Wright in Fibrosa Spolka Akeyjna v. Fairbairn Lawson Combe Barbour, Ltd., 167 L.T.R. (H.L.) 101 (1942) who, alluding to the reasoning of Lord Sumner in Hirji Mulji v. Cheong Yue Steamship Co., 134 L.T.R. (P.C.) 737 (1926), said at p. 112.

"... He combines with this a reference to what has been generally accepted by English law, that the rule is explained in theory as a condition or term of the contract implied by the law *ab initio*. No one who reads the reported cases can ignore how inveterate is this theory or explanation in English law. I do not see any objection to this mode of expression, so long as it is understood that what is implied is what the court thinks the parties ought to have agreed on the basis of what is fair and reasonable, not what as individuals they would or might have agreed. 'It is,' said Lord Sumner, 'irrespective of the individuals concerned, their temperaments and failings, their interest and circumstances.' The court is thus taken to assume the role of the reasonable man, and decides what the reasonable man would regard as just on the facts of the case. The hypothetical 'reasonable man' is personified by the court itself. It is the court which decides. The position is thus somewhat like the position in the cases in which the court imports a term in a contract on the basis of what is reasonable."

Thus, the ordinary reasonable man—long pointed out to tort-feasors as the ideal citizen—goes into "trade."

The apparent clarity of their Lordships' statements in the *Metropolitan* case is, however, illusory. Its application to the ever-changing facts of cases that arise will never leave it unburdened from difficult questions of fact.

What is a "short and temporary stoppage" and what, as said in *Admiral Shipping Co. v. Weidner*,[6] is such an inordinate postponement of fulfillment that when the delay is over will not accomplish that which the parties to the contract must have known that each of them had in mind, will ever involve questions of fact that are bound to obscure the apparent lucidity of the implied condition philosophy.

However, that a state of war is such an event as to render "the performance of a contract indefinitely impossible" seems to be settled by the opinion of Lord Simon in the *Fibrosa case*,[8] who, quoting Lush J. in *Geipel v. Smith*,[7] says:

> "'...a state of war' (in that case the Franco-German war of 1870) 'must be presumed to be likely to continue so long and so to disturb the commerce of merchants as to defeat and destroy the object of a commercial adventure like this'."[8]

The *Tennants* case[9] decided a few months earlier than the *Metropolitan Water* case was even more extreme in its facts. There a seller had agreed to deliver magnesium chloride, but with the outbreak of the war the supply from Germany was cut off so that he was not able to supply the buyer except by purchasing at a greatly increased price sufficient to satisfy the buyer's contract but in disregard of his other contracts. Here there was not an entire physical impossibility nor an illegality in performance of the contract, but an extreme economic condition. The contract, however, was held terminated, the House of Lords holding that the shortage of supply was such as to hinder delivery, but qualified its statement with the observation that a rise in

[6] [1916] 1 K.B. 429.

[7] L.R. 7 Q.B. 404 at 414 (1872).

[8] Fibrosa Spolka Akeyjna v. Fairbairn Lawson Combe Barbour, Ltd., 167 L.T.R. (H.L.) 101 at 102 (1942).

In The Stryia v. Malcolmson, 186 U.S. 1 at 14, 22 S. Ct. 731 (1901) the Court said, quoting from the lower federal court:

"'When two nations formally proclaim the existence of a state of war between themselves with all the solemnity observed in this instance, it would seem to be going too far to say that parties whose contracts are affected thereby should wait some indefinite time, which a court shall find reasonable, in a vague expectation that the belligerents may think better of it and make peace.'"

[9] Tennants (Lancashire), Ltd., v. C. S. Wilson and Co., Ltd., [1917] A.C. (H.L.) 495, 86 L.J. (N.S.) (2 K.B.) 1191, 116 L.T.R. 780, 33 T.L.R. 454 (1917).

price would not in itself constitute a frustration of the contract. This case has some interest in connection with the effect of OPA price regulations presently to be mentioned.

The doctrine is not without limitations. That the governmental acts make performance unprofitable or more difficult or expensive does not constitute a frustration of the contract.[10]

Nor is the contract terminated if the parties appear to have contracted with reference to the existence of a state of war and have clearly contemplated the risks arising from it.[11]

Nor if performance was due before the occurrence of the governmental action.[12] Nor if non-performance is due to the fault of one of the parties rather than because of the governmental inhibition.[13]

A development of law in the United States during the first World War was along parallel lines. *North German Lloyd v. Guaranty Trust Company*[14] was a libel against a German ship which had contracted to carry kegs of gold from New York to Plymouth and Cherbourg. The shipment began July 27, 1914. In mid-ocean the master of the ship was advised of the imminence of war, then proceeded to a point from which his coal supply would carry him back to America, which

[10] Metropolitan Water Board case, [1918] A.C. (H.L.) 119; Thomson v. Thomson, 315 Ill. 521, 146 N.E. 451 (1925); Commonwealth v. Bader, 271 Pa. 308, 114 A. 266 (1921); Commonwealth v. Neff, 271 Pa. 312, 114 A. 267 (1921); Columbus Ry., Light & Power Co. v. Columbus, 249 U.S. 399, 39 S. Ct. 349 (1919); Texas Co. v. Hogarth Shipping Co., 256 U.S. 619, 41 S. Ct. 612 (1920); London & Lancashire Ind. Co. v. County, 107 Ohio St. 51, 140 N.E. 672 (1923).

[11] Smith v. Morse, 20 La. Ann. 220 at 222 (1868); Mederios v. Hill, 8 Bing 231, 131 Eng. Rep. 390 (1832); Bolckow, V. & Co. v. Compania Minera de Sierra Minera, 115 L.T.R. (K.B.) 745, 33 T.L.R. 111 (1916); Primos Chemical Co. v. Fulton Steel Corp., (D.C.N.Y. 1920) 266 F. 945; Krulewitch v. Natl. Imp. & Tr. Co., 186 N.Y.S. 838 (1921); Northern Pac. R. Co. v. Am. Trading Co., 195 U.S. 439, 25 S. Ct. 84 (1904); Lithflux M. & C. Works v. Jordan, 217 Ill. App. 64 (1920).

In late 1941 and early 1942, many contracts were written with a so-called "escalator clause," which provided for variations in the consideration to be paid dependent upon fluctuations in the price of the principal items entering into production, usually steel and labor. If such contracts receive the consideration of the courts it will be interesting to observe whether such clauses are held to have eliminated the implied condition.

[12] Produce Brokers v. Weiss & Co., 118 L.T.R. (K.B.) 111, 87 L.J. (N.S.) (K. B.) 472 (1918), affirmed by Court of Appeal, see 145 L.T.J. 188 (1918); Salembier, L. & Co. v. North Adams Mfg. Co., 178 N.Y.S. 607 (1919).

[13] Rader v. Northrup-Williams Co., (C.C.A. 4th, 1920) 269 F. 592; Neuberg v. Payne Co., 37 N.Y.S. (2d) 366 (1942); Tabachnik v. Lamar S. F. Corp., (D.C.N.Y. 1942) 46 F. Supp. 699.

[14] 244 U.S. 12, 37 S. Ct. 490 (1916); see The San Guiseppe (C.C.A. 4th, 1941) 122 F. (2d) 579.

was 1,070 miles this side of Plymouth. He there turned back, although war had not formally been declared. In denying recovery for the breach of contract of carriage, the court ruled that a ship owner may give up his voyage to avoid capture after war is declared, and so likewise is at liberty to anticipate war.

This was followed by *Allanwilde Transport Corporation v. Vacuum Oil Company*,[15] holding that a carrier was discharged from his obligation to perform a contract for carriage where first he had been turned back by a storm and then had been inhibited by the refusal of the government to permit ships to enter the war zone. The right of a carrier to retain pre-paid freight, while expressly bottomed on the terms of the bill of lading, will become relevant to our second inquiry.[16]

Roxford Knitting Company v. Moore & Tierney[17] achieved the same result, but based its reasoning upon the paramount power of the government in time of war to appropriate private property and cut through all contractual rights. Plaintiff had sued defendant for the price of certain underwear delivered. Defendant had counter-claimed that a contract between them provided for the delivery of greater amounts than had been delivered and that the damage suffered by defendant by reason of non-delivery exceeded the amount claimed by the plaintiff. The latter replied that the government had ordered it to turn over its manufactured products to the Navy. Plaintiff was allowed to recover for what had been delivered and defendant's counter-claim was denied because of the impossibility on plaintiff's part to perform after the impact of governmental orders. The doubts that bedeviled the House of Lords in the *Metropolitan Water* case and caused it to rationalize a basis for the termination of the contract do not seem to have concerned the Circuit Court of Appeals, which based its decision

[15] 248 U.S. 377, 39 S. Ct. 147 (1919). See 3 A.L.R. 15, 21 (1919).

[16] In Texas Co. v. Hogarth Shipping Co., 256 U.S. 619 at 629, 41 S. Ct. 612 (1920), in which a ship chartered for a certain voyage was requisitioned by the British government, it was said:

"It long has been settled in the English courts and in those of this country, federal and state, that where parties enter into a contract on the assumption that some particular thing essential to its performance will continue to exist and be available for the purpose and neither agrees to be responsible for its continued existence and availability, the contract must be regarded as subject to an implied condition that, if before the time for performance and without the default of either party the particular thing ceases to exist or be available for the purpose, the contract shall be dissolved and the parties excused from performing it."

See The Styria v. Malcolmson 186 U.S. 1, 22 S .Ct. 731 (1901); Borup et al v. Western Operating Corp., (C.C.A. 2d., 1942) 130 F. (2d) 381.

[17] (C.C.A. 2d, 1920) 265 F. 177. See 11 A.L.R. 1415, 1429 (1921).

on the right of the general government to cut through all private rights for the protection of the public safety.

That basis possesses a satisfying directness and could perhaps be urged as a foundation for all similar cases were we not embarrassed by the statements in *Mitchell v. Harmoney*[18] and *United States v. Russell*,[19] relied upon by that court, which hold that the government is bound in all such cases to make full compensation to the owner. A pursuit of that philosophy would irresistibly inspire the claim that the government is obligated to compensate a citizen whose property right in a contract has been destroyed by the necessities of war.[20]

In *Mawhinney v. Millbrook Woolen Mills*,[21] the New York court relied both on the *Roxford* case and the *Metropolitan Water Board* case. There a purchaser sued a manufacturer for failure to deliver part of an order of woolens in accordance with the terms of a written contract. When the contract had been partially performed, the government contracted for a large quantity of uniform cloth to be manufactured by the defendant. The National Defense Act made compliance with military orders obligatory and gave them precedence over all other orders and contracts. Recovery for breach of contract was denied.

The cases noticed up to this point are those in which a governmental order or an event of war has made the contract physically impossible of performance. Another situation arises in judging the effect of price controls. There the governmental order does not prohibit the manufacture or delivery of the articles but prohibits their sale at more than a specified price. If, before the promulgation of the order, a contract has been entered into at a higher price, what is the effect on the contract? The courts might have argued that such an order does not render the contract impossible of performance, but merely makes it more unprofitable or difficult, and have followed that exception to the general rule. But the very few authorities so far available seem to indicate a trend the other way, holding that, "The price at which the goods were to be sold . . . was as much an essence of the contract as any of its other provisions."[22] Such orders have consequently been held to be a "complete frustration of performance," bringing an end to the contract.

[18] 13 How. (54 U.S.) 115 (1851).

[19] 13 Wall. (80 U.S.) 623 (1871).

[20] That claim has been rejected in Omnia Commercial Co. v. United States, 261 U.S. 502, 43 S. Ct. 437 (1923): "Frustration and appropriation are essentially different things."

[21] 231 N.Y. 290, 132 N.E. 93 (1921). See 15 A.L.R. 1506, 1512 (1921).

[22] Re Kramer v. Uchitelle, 288 N.Y. 467 at 472, 43 N.E. (2d) 493 (1942). See 141 A.L.R. 1497, 1502 (1942).

In the *Ross Lumber* case, which arose during the First World War, the price of lumber had been fixed by the government at a point higher than the market price with reference to which the parties had contracted. "...a necessary term of a binding contract, thus, without the fault of either of the parties, ceased to exist, and either party could refuse to be further bound by the terms."[23]

The earlier federal case and the later New York cases reach the same result and employ the same reasoning without apparent reference to each other.

There is still another type of case in which the governmental order does not directly affect the contract but impairs the use to which the parties can put the fruits of the contract. Under this classification are leases of business property made for specific purposes. The rule seems to be that if the governmental order has entirely destroyed the possibility of selling the products which were to be sold on the leased premises, a frustration of the contract has occurred and the lessee is excused from further payments of rent.[24] The same result followed when the tenant was drafted and so became unable to enjoy the benefits of the lease.[25]

But if the governmental regulation does not entirely prohibit the

[23] Ross Lumber Co. v. Hughes Lumber Co., (C.C.A. 5th, 1920) 264 F. 757 at 760. See Sanders v. Lowenstein, 264 App. Div. 367, 35 N.Y.S. (2d) 591 (1942).

That the trend of these cases may be reversed is indicated by the implication of the vigorous dissent of Lehman, J. in the Kramer case, and by such cases as Freund v. Zephyr Laundry Machine Co., (N.Y. 1942) 39 N.Y.S. (2d) 250, in which the court refused to find a salesman's contract impossible of performance despite government orders and directives restricting and prohibiting the sale of articles which the salesman had been employed to sell.

The Kramer case should be examined on the effect of frustration on the arbitration clause. Compare Heyman v. Darwin, 111 L.J. Rep. (K.B.) 241 (1942); Johnson v. Atkins, (Cal. 1942) 127 P. (2d) 1027; Lipman v. Haeuser Shellac Co., 289 N.Y. 76, 43 N.E. (2d) 817 (1942), discussed in 43 COL. L. REV. 508 (1943) and 41 MICH. L. REV. 995 (1943).

[24] Canrock Realty Co. v. Vim Electric Co., 37 N.Y.S. (2d) 139 (1942); Schantz v. American Auto Supply Co., 178 Misc. 909, 36 N.Y.S. (2d) 747 (1942); Signal Land Corp. v. Loecher, 35 N.Y.S. (2d) 25 (1942).

Kaiser v. Zeigler, 187 N.Y.S. 638 (1921), reviews the lease situation arising from the adoption of the prohibition amendment. The great weight of authority was found to be that such an enactment destroys the subject matter of the contract, makes performance impossible and hence terminates the lease.

Chandler v. Webster, [1904] 1 K. B. 493, 90 L.T.R. 217 (1904) was overruled in the Fibrosa case on the point of who should bear the loss but approved in its holding that the lease had been destroyed by failure of its purpose.

[25] Jefferson Estates, Inc. v. Wilson, 35 N.Y.S. (2d) 582 (1942).

business to be carried on in the leased premises but only limits or restricts it and thus makes the use less profitable, the lease is not brought to an end.[26]

So if the lease provided that the premises were to be used for an automobile showroom only, federal orders, restricting the purchase of new automobiles to certain individuals but placing no restriction on the sale of used cars, did not destroy the lease. "These are war times and no one can expect to carry on business as usual."[27]

In the lease cases the reasoning was based upon the proposition that the parties are presumed to have contracted with a view to the law as it existed at the time; that a change of law, making enjoyment of the contract impossible, excuses both from performance.

So, the diminution of the retail sales of gasoline, because of the orders of the Federal Petroleum Co-ordinator, did not of itself destroy a lease.[28] But it seems that if the defendant were able to show that the diminution was in such volume as to defeat the beneficial enjoyment of the lease, it could be held to be a frustration.[29]

The lease cases seem to indicate an inclination on the part of the courts to apply the doctrine that impossibility has not occurred when performance becomes less profitable or more difficult. But they appear to recognize a line beyond which lack of profit can amount to complete destruction of the contract.

The so-called "no damage statute" and the priorities regulations in accordance with it dispose of the immediate question of damages for breach such as arose in the *Roxford* and *Mawhinney* cases. The statute is as follows:

> "...No person, firm, or corporation shall be held liable for damages or penalties for any default under any contract or purchase order which shall result directly or indirectly from his compliance with any rule, regulation, or order issued under this section."[30]

[26] Byrnes v. Balcom, 265 App. Div. 268, 38 N.Y.S. (2d) 801 (1942); Colonial Operating Corp. v. Hannon Sales and Service, Inc., 265 App. Div. 411, 39 N.Y.S. (2d) 217 (1943).

[27] Deibler v. Bernard Bros., 319 Ill. App. 504 at 506, 48 N.E. (2d) 422 (1943).

[28] Knorr v. Jack and Al, Inc., 38 N.Y.S. (2d) 406 (1942).

[29] Port Chester Central Corp. v. Leibert, 39 N.Y.S. (2d) 41 (1943).

[30] Section 2 (a) (2) of Pub. Act 671, 76th Cong., (June 28, 1940), 54 Stat. L. 676, as amended by Pub. L. 89; 77th Cong., 2d sess. (May 31, 1941), 55 Stat. L. 236.

Suppose a contract having its locus in a state that denies the rule of the Metropolitan Water Board case, supra note 3: would this statute deprive the injured party of

This statement of policy is repeated in Priorities Regulation Number 1, which reads:

> "...No person shall be held liable for damages or penalties for any default under any contract or purchase order which shall result directly or indirectly from his compliance with any rule, regulation, or Order issued by the Director of Priorities." [31]

That statute and the regulations do not, however, dispose of the contract nor answer the inquiry whether it continues in existence so that either party may insist upon performance after relaxation of the controls of the War Production Board.

The time element is covered. There can be no damages for failure to perform at the time specified in the contract. But the parties to the contract must still look to cases like the *Metropolitan Water* case to determine whether either one may insist on performance after the emergency has passed.[32]

In that connection, it is interesting to note that the War Production Board in informal correspondence expressed the opinion in 1942 that a cancellation of priorities destroyed the contract, but that a mere suspension of priorities did not have that effect. Twelve months later, however, it expressed the opinion that the same effect followed even from its suspension orders made a year previously. Perhaps the board unconsciously leaned toward the view that a suspension of one year or more had caused such an "inordinate postponement" as mentioned in the *Weidner*[33] case.

One is led to inquire whether the *Metropolitan Water* case and all other cases of frustration could have been based upon the destruction of the time element rather than upon the failure of an intangible, indefin-

his property without due process? Stated differently, is this statute valid if it is not declaratory of the law of the state of the contract?

The "No damage" statute was clarified in 1942 by Pub. L. 507, 77th Cong., 2d sess. (March 27, 1942), 56 Stat. L. 176.

[31] 6 FED. REG. 4490, tit. 32, c. IX, sub-section 13, § 994.13 (August 30, 1941).

[32] Of course, when the time element is destroyed the contract is ordinarily destroyed as time is usually of the essence of the contract, particularly when the contract expressly so provides or the circumstances indicate that to be the intention of the parties; Skolnick v. South, 287 Ill. App 627 (1936); Primos Chemical Co. v. Fulton Steel Corp., (D.C.N.Y. 1920) 266 F. 945. When time is not of the essence or there has been a waiver, it may be made of the essence by notice requiring performance within a specified reasonable time; Mawhinney v. Millbrook Woolen Mills, Inc., 231 N.Y. 290, 132 N.E. 93 (1921). See 15 A.L.R. 1506, 1512 (1921) and 12 Am. Jur. § 310, p. 865 (1938).

[33] [1916] 1 K.B. 429.

able "implied condition." True, in the main case the purchaser, who is generally the one most interested in the time of performance, was seeking the perpetuation of the contract, but a seller may have a like interest in the time element. It may be extremely expensive for him to perform at some indefinite date in the future. An aggregate reading of all the cases impresses one with the constant intrusion of the time element. It should not be surprising if the doctrine eventually finds its resting place upon that foundation.

The *Metropolitan Water Board* case obviously has become deeply imbedded in American jurisprudence. One who studies that case and then the American cases is impressed by the laborious care with which the House of Lords sought to express the rationale of the doctrine as well as by the nonchalant ease with which it was imported into our law. Be that as it may, there can be little doubt that the doctrine of "commercial frustration," fortified now by the "no damage" statute, has become a permanent part of American law.

II.

WHO BEARS THE LOSS?

On the second subject of inquiry: who bears the loss in case of frustration, the *Fibrosa* case[84] will be as important in its influence upon the courts as the *Metropolitan Water Board* case has proved to be. But the *Fibrosa* case will leave many questions unanswered because by its facts and the terms of the opinions of the Lords it is limited to cases of total failure of consideration.

Variations in facts have arisen and will continue to arise and may in part be summarized into the following classifications:

1. Cases in which there is a total failure of consideration, although the contractor had been put to expense in preparing for performance, as in the *Fibrosa* case.

2. Cases in which the contract is divisible and one or more completed units have been delivered.

[84] Fibrosa Spoka Akeyjna v. Fairbairn Lawson Combe Barbour, Ltd., 167 L.T.R. (H.L.) 101 (1942). See 144 A.L.R. 1298, 1317 (1943).

One of the first American war cases to follow the doctrine applied in the Fibrosa Case is Cinquegrano v. T. A. Clarke Motors, (R.I. 1943) 30 A. (2d) 859, in which a buyer who had made a payment on account of the purchase of a new motor car which could not be delivered because of priority restrictions was allowed to recover his payment from the seller. It is not particularly helpful as the seller suffered no loss from the destruction of the contract. See Swift v. Hale Pontiac Sales, 34 N.Y.S. (2d) 888 (1942).

3. Cases in which the contract is not divisible, but there has been a partial performance (a) by delivery of articles which have utility to the purchaser or are salable on a general market; (b) by delivery of articles which have no utility except as inseparable parts of the completed machine or structure.

4. Cases involving a sub-contractor who has (a) completed his work, or (b) partially completed it.

5. Those involving work done in improving or repairing existing machines or structures, title of which is in the purchaser.[35]

I.

The *Fibrosa* case is a complete answer, at least for British jurisdictions, in the first class of cases. A Polish company had contracted with a manufacturer in Leeds whereby the latter agreed to supply certain machines for forty-eight hundred pounds; one-third was to be paid with the order and the balance against shipping documents. The contract was dated July 12, 1939; delivery was to be at Gydnia, Poland, three or four months after settlement of final details. Six days after the contract, the Polish company paid one thousand pounds toward the initial payment of sixteen hundred pounds due. On September 1, 1939, Germany invaded Poland and on September 3 Great Britain declared war on Germany. On September 23 Poland was declared enemy territory. Performance of the contract became both impossible and illegal. The machines were never shipped. The Polish company demanded repayment of the thousand pounds. Recovery was allowed on the theory that the contract having been frustrated, both parties were excused from further performance, and that since the defendant had received money from the plaintiff, who had received nothing in return, the defendant had been unjustly enriched and plaintiff was entitled to a quasi contractual recovery. The rule was stated by Lord Wright to be "on the simple theory that a man, who has paid in advance for something which he has never got, ought to have his money back."

The case specifically overruled *Chandler v. Webster*,[36] which was one of the coronation cases. There the owner of a building had let cer-

[35] These classifications do not cover the entire field. For an additional type see The San Guiseppe, (C.C.A. 4th, 1941) 122 F. (2d) 579. There a vessel which put in at Norfolk on account of war was held excused from its contract to carry to London, but was held responsible for the cost of unloading.

[36] [1904] 1 K.B. 493, 90 L.T.R. 217 (1904). The doctrine so overruled is said to have had its origin in Blakeley v. Muller, [1903] 2 K.B. 760 at 762, 88 L.T.R. 90 at 92 (1903), but took its name from the Chandler case.

tain rooms overlooking a public street to be sublet by the lessee for use by spectators in viewing the coronation parade of Edward VII. The contract provided for a certain down payment and the balance on the day of the coronation. Prior to that day His Majesty (being but human flesh) contracted a cold which necessitated cancellation of the parade. It was held that "the loss lies where it falls" with the result that the sums paid or rights accrued before the event of frustration were not to be surrendered, but all obligations falling due for performance after the event were discharged.[37]

Under that principle the lessor was entitled to retain the amounts paid or that were due prior to the frustration and such sums could not be recovered by the lessee. That principle had been applied in a number of cases in the lower courts of England, but had never been reviewed by the House of Lords. The *Fibrosa* case was the first consideration of the principle by that body. *Chandler v. Webster* was overruled.

Lord Wright observed that the *Chandler* case had been criticized by Williston and had not been followed in most of the states in America, a comment believed amply supported by American authorities.

The *Fibrosa* doctrine, as observed, works a "rough justice."[38] It

[37] In Dougherty Co. v. 2471 Tons of Coal, (D.C. Mass. 1922) 278 F. 799, the owner sued the charterer of a vessel for demurrage. Part of the delay had been caused by governmental action. The court said at p. 801:

"... Government control of business is very apt to cause heavy losses to persons engaged in the business controlled. That was so in this instance; there is a large out of pocket loss, which somebody must bear. Generally speaking, losses caused by government interference with the performance of contracts are left where they fall; they are not to be transferred from one person to another, unless the latter has contracted to take the risk of them, or is otherwise obliged to do so. The Juno, (1916) L. R. Prob. Div. 169; Met. Water Board v. Dick, [1918] App. Cas. 119."

This case in terms would seem to support Chandler v. Webster, but upon its facts it could have been decided the same way under the rule of the Fibrosa case.

[38] An amplification of the difficulties of the doctrine was made by Lord Wright in Fibrosa Spolka Akeyjna v. Fairbairn Lawson Combe Barbour, Ltd., 167 L.T.R. (H.L.) (1942) 101 at 113 (1942) in these words:

"... But I think it is clear both in England and Scots law that the failure of consideration which justifies repayment is a failure in the contract performance. What is meant is not consideration in the sense in which the word is used when it is said that in executory contracts the promise of one party is consideration for the promise of the other. No doubt in some cases the recipient of the payment may be exposed to hardship if he has to return the money though before the frustration he has incurred the bulk of the expense and is then left with things on his hands which become valueless to him when the contract fails, so that he gets nothing and has to return the prepayment. These and many other difficulties show that the English rule of recovering payment the consideration for which has failed works a rough justice. It was adopted in more primi-

cannot, nor could any other doctrine, do such justice as would satisfy both parties. The seller who may have been put to large outlays in preparing for performance loses his expenditures. The suggestion sometimes made that he should be entitled to recover on quasi contractual principles has no basis in reason. Recovery should be based upon unjust enrichment of the other party, (which has not occurred in these situations). It should not be extended to cases of unfortunate impoverishment. If the buyer were charged with any part of those expenses, he would be obliged to pay for something he has never received. This would be true even if there were an apportionment between them.

It might be argued that the seller would not have embarked upon his expenditures excepting on the faith of the contract to which he was induced to become a party by the purchaser. The answer is that the purchaser did not contract for an uncompleted thing, but for a certain result of which he has received no part, and consequently has obtained neither benefit nor enrichment. The amount expended toward performance is a casualty of war. In that sense the loss lies where it falls.

The *Fibrosa* case has been criticized[39] for permitting the recovery of the entire amount paid by the purchaser: it is argued that the seller has been unjustly enriched only to the extent of the money received by him less his expenditures. That argument makes the result dependent upon the incidental circumstance of prepayment. Suppose there had

tive times and was based on the simple theory that a man who has paid in advance for something which he has never got ought to have his money back. It is further imperfect because it depends on an entire consideration and a total failure. Courts of equity have evolved a fairer method of apportioning an entire consideration in cases where a premium has been paid for a partnership which has been ended before its time (Partnership Act, sect. 40), contrary to the Common Law rule laid down in *Whincup v. Hughes* [(1871) 24 L.T.R. 76; L.R. 6 C.P. 78]. Some day the Legislature may intervene to remedy these defects."

In the Whincup case, L.R. 6 C.P. 78 at 81 (1871), Bovill, C. J., states the common law rule as follows:

"... The general rule of the law is, that where a contract has been in part performed no part of the money paid under such contract can be recovered back. There may be some cases of partial performance which form exceptions to this rule. . . . But there the consideration is clearly severable."

It is further pointed out in the case that under the common law, an action for money had and received would lie where there was a total failure of consideration.

In addition to the jurisdiction conferred upon courts of equity of partnership cases under the Partnership Act mentioned by Lord Wright which permits apportionment of an entire consideration when a partnership is dissolved, there is some authority to indicate that courts of equity do have general jurisdiction different from the common law rule. In the Whincup case, two equity cases are cited as authorities; Soam v. Bowden, Finch's Rep. 396; Newton v. Rowse, 1 Vern. 460.

[39] 144 A.L.R. 1325 (1943).

been no prepayment? On what theory could the seller recover? There has been no enrichment of the vendee. There has been only an unfortunate impoverishment of the seller. The latter's claim for redress must stand on its own bottom, not upon the incident of whether partial prepayment has been made.

Before passing, we must note that the *Fibrosa* case permitted the rule of the *Chandler* case to stand when applied to prepayment of freight in carriage by ship. That exception was said to be based upon an implied understanding arising from the custom of the trade. The Supreme Court of the United States applied the same rule to freight[40] but based it upon the terms of the bill of lading which, in effect, expressed the implied understanding referred to by the House of Lords.

The principle followed in the *Fibrosa* case had frequently been applied in the United States in cases involving total failure of consideration. But in some the element of expense incurred by the seller was absent. Of that type are those that deal with the sale of lands or chattels on which a prepayment had been made by the buyer but in which transfer of title later proved to be impossible. Recovery of the amount paid by the buyer has generally been allowed.[41] "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."[42]

But we are principally concerned with cases in which the seller has been put to expense, as that circumstance is present in the vast majority of contracts which have felt the impingement of the orders of the WPB or OPA. While we find a rapidly multiplying number of cases dealing with frustration by war orders, the number dealing with the burden of the loss is to date meager. A close parallel exists between the burden of loss problem in war frustration cases and the fire cases in which a contractor (seller) has agreed to erect a building upon the land of the owner (buyer), has partially completed the structure, when it is

[40] Allanwilde Transport Corp. v. Vacuum Oil Co., 248 U.S. 377, 39 S. Ct. 147 (1919). See 3 A.L.R. 15, 21 (1919).

[41] VonWaldheim v. Englewood Heights Estates, 115 N.J.L. 220, 179 A. 19 (1935); Watson v. Donald, 142 Ill. App. 110 (1908); Kares v. Covell, 180 Mass. 206, 62 N.E. 244 (1902); Ogren v. Inner Harbor Land Co., 83 Cal. App. 197, 256 P. 607 (1927); Potts Drug Co. v. Benedict, 156 Cal. 322, 104 P. 432 (1909); Erdreich v. Zimmerman, 107 Misc. 508, 176 N.Y.S. 762 (1919). See the automobile purchase cases in note 34, supra.

[42] 6 WILLISTON, CONTRACTS, rev. ed., § 1974, p. 5545, note 3 (1938). See dictum in Primos Chemical Co. v. Fulton Steel Corp., (D.C.N.Y. 1920) 266 F. 945.

destroyed by fire. May the contractor recover for what he has done, or, conversely, may the owner recover back any prepayments he has made?

The rule in those cases is consistent with the doctrine of the *Fibrosa* case. If the contract is to erect and build an entire structure, the contract being indivisible, the contractor bears the entire loss.[43]

Under those circumstances the contractor cannot recover for work performed or material furnished before the destruction of the contract.[44]

In case partial payments have been made they may be recovered back if the contractor refuses to rebuild.[45] The same rules have been applied whether the fire was caused accidentally or by an act of God, such as lightning, violent storms or other disturbances of nature.[46] "The act of God may properly lift from his shoulders the burden of performance, but has not yet been extended so as to enable him to keep the other man's property for nothing."[47]

Many apparent parallels between those cases and the cases typified

[43] Tompkins v. Dudley, 25 N.Y. 272 (1862); Schwartz v. Saunders, 46 Ill. 18 (1867); School Trustees v. Bennett, 3 Dutcher (27 N.J.L.) 513 (1859); Siegel v. Eaton and Prince Co., 165 Ill. 550, 46 N.E. 499 (1897); Huyett & Smith Co. v. Edison Co., 167 Ill. 233, 47 N.E. 384 (1897); Quaker Mfg. Co. v. Zucker, 124 Ill. App. 547 (1906); Keeling v. Schastey & Vollmer, 18 Cal. App. 764, 124 P. 445 (1912); Tulsa Opera House Co. v. Mitchell, 165 Okla. 61, 24 P. (2d) 997 (1933); Milske v. Steiner Mantel Co., 103 Md. 235, 63 A. 471 (1906); Fildew v. Besley, 42 Mich. 100, 3 N.W. 278 (1879); Gabler v. Evans Laboratories, 129 Misc. 911, 223 N.Y.S. 408 (1927); Vogt v. Hecker, 118 Wis. 306, 95 N.W. 90 (1903); Bogar & Son Co. v. Zug, 48 Dauphin Co. (Pa.) 178 (1940); U.S.F. & G. Co. v. Parsons, 147 Miss. 335, 112 So. 469 (1927), annotations in 53 A.L.R. 88 (1928).

[44] Peck-Hammond & Co. v. Miller, 164 Ky. 206, 175 S.W. 347 (1915); Adams v. Nichols, 19 Pick. (36 Mass.) 275 (1837); Fildew v. Besley, 42 Mich. 100, 3 N.W. 278 (1897); Public Schools v. Bennett, 3 Dutcher (27 N.J.L.) 513 (1859); Eaton v. Joint School Dist., 23 Wis. 374 (1868); Vogt v. Hecker, 118 Wis. 306, 95 N.W. 90 (1903); Siegel v. Eaton & Prince Co., 165 Ill. 550, 46 N.E. 449 (1897); Huyett & Smith Co. v. Edison Co., 167 Ill. 233, 47 N.E. 384 (1897); Keeling v. Schastey & Vollmer, 18 Cal. App. 764, 124 P. 445 (1912).

[45] U. S. F. & G. Co. v. Parsons, 147 Miss. 335, 112 So. 469 (1927) with annotations in 53 A.L.R. 88 (1928); Doll v. Young, 149 Ky. 347, 149 S.W. 854 (1912); Stees v. Leonard, 20 Minn. 448 (1874); Keel v. East Carolina Stone & Constr. Co., 143 N.C. 429, 55 S.E. 826 (1906).

[46] United States v. Lewis, (C.C.A. 8th, 1916) 237 F. 80; School Dist. v. Dauchy, 25 Conn. 530 (1857); Doll v. Young, 149 Ky. 347, 149 S.W. 854 (1912); Public Schools v. Bennett, 3 Dutcher (27 N.J.L.) 513 (1859); Vogt v. Hecker, 118 Wis. 306, 95 N.W. 90 (1903); Krause v. Crothersville, 162 Ind. 278, 70 N.E. 264 (1904) with annotations in 65 L.R.A. 111 (1904).

[47] Board of Education v. Townsend, 63 Ohio St. 514 at 524, 59 N.E. 223 (1900). See 52 L.R.A. 868 (1901). See also Bell v. Kanawha Traction & E. Co., 83 W. Va. 640, 98 S.E. 885 (1919); Lamb v. Cal. Water & Tel. Co., (Cal. 1942) 129 P. (2d) 371.

by the *Fibrosa* case suggest themselves. In both the contractor (seller) has incurred expense in preparing for performance; in both the consummation of the contract has been frustrated by events beyond the control of either party; in both the buyer has received no benefits. The parallels are such as to make quite possible an application of the rule of the fire cases to situations arising from the frustration of contracts due to the exigencies of war.

The rule is, however, a harsh one. It falls heavily upon the seller who in the war cases has not been able to protect himself with insurance as a contractor in the fire cases is able to do when he has knowledge of the applicable law.

This severity will undoubtedly cause the courts to seek circumstances to soften its effects and to cause a distribution of the loss upon some defensible basis. This has occurred in the fire cases.

2.

One method of relief is to hold the contract divisible. A contract for placing an elevator in a building provided for one-half payment when the engine was on the foundation, and final payment on completion of the work. The building was destroyed after the engine was on the foundation. The contract was held severable. The contractor was permitted to recover for the engine, but not for the work he had done toward the completion of the remainder of the job.[48]

In another case a contract for an installation of a sprinkler provided that one-third of the purchase price was to be paid when enough material was shipped to begin the work, one-third when the work was substantially completed, and the balance thirty days thereafter. When enough material was shipped to begin the work, and it was paid for, the house burned down. It was held that the buyer could not recover the installment paid. The court said:

> "'If installments are to become due and payable absolutely on the performance of a certain proportion of the work, each of such installments is due and payable when such part or proportion specified is completed, and the subsequent accidental destruction of the structure does not relieve the owner from his obligation to pay such installments.'"[49]

That rule has been applied in a number of cases.[50]

[48] Siegel v. Eaton & Prince Co., 165 Ill. 550, 46 N.E. 449 (1897).

[49] Greenfield v. Globe Automatic Sprinkler Co., (C.C.A. 5th, 1922) 285 F. 27 at 28. See Peck-Hammond & Co. v. Miller, 164 Ky. 206, 175 S.W. 347 (1915).

[50] Anderson v. Quick, 163 Cal. 658, 126 P. 871 (1912); Richardson v. Shaw, 1

It is not our purpose to discuss the principles defining indivisible or severable contracts, but only to point out that this construction of a contract affords an escape from what at times may prove to be a burdensome application of the rule of the *Fibrosa* case.

3.

Many situations have arisen in which the contract was unquestionably indivisible but part of the materials necessary for performance had been delivered to the seller. This was the situation in innumerable cases that felt the impact of the order of the WPB in 1942. Those cases fall into two divisions: first, where the materials delivered have general utility to the purchaser or are salable on the open market. Few war cases discussing that precise question seem to be available but the application of the unjust enrichment rules of the *Fibrosa* case would seem to dictate that in such instances the purchaser should be liable for the fair market value of the materials that he has received and which are usable by him. There is in such instances an actual enrichment of the purchaser and not merely an incidental impoverishment of the seller. No doubt can be entertained that in those cases courts would permit recovery for the fair value of such materials. A recovery of that kind was allowed, without discussion of the principle, in the *Roxford Knitting* case, discussed above.[51]

The second are those in which the material delivered has value only as an inseparable part of the completed machine or structure. If such a part had been delivered in the *Fibrosa* case, it is not believed that the result would have been different. The buyer has received no advantage or enrichment and has on his hands merely a piece which is as useless as junk. If, however, the part delivered would have utility as a replacement or spare part in machines being operated by the purchaser or others, the case would fall under the preceding paragraph.[52]

Mo. App. 234 (1876); Keel v. East Carolina Stone & Constr. Co., 143 N.C. 429, 55 S.E. 826 (1906); note Ann. Cas. 1913A, 458.

[51] 6 WILLISTON, CONTRACTS, rev. ed., § 1759, ¶ 1, p. 4996 (1938):

"If any legal part of the contract has been performed, recovery of the value of the part performance may be had on a *quantum meruit* count, whether the supervening illegality prevents the defendant from receiving further performance or prevents the plaintiff from rendering it."

It is perhaps more accurate to state that recovery is allowable for the value of the *benefit* derived from part performance.

[52] 2 CONTRACTS RESTATEMENT, § 468, p. 884 (1932) states what Lord Wright in the Fibrosa case 167 L.T.R. (H.L.) 101 at 112 considers the American law to be:

4.

There are also the cases of the sub-contractors who contribute only a part of the labor or materials, or both, toward the erection of a building while the owner himself, or other contractors construct the other parts. The tendency appears to be to hold that the sub-contractor may recover for what he has done.[53] In those cases the rule seems to be that the continued existence of the building is an implied condition of the contract, that upon its destruction both are excused from further performance, but that since the contractor did not agree to complete an entire building he may recover for what he has done even though he did not complete his work. If, however, he is a contractor who agrees to supply a distinct and separate part of the structure, such as an elevator or ventilating system, and his contract is an indivisible one, the doctrine of the *Fibrosa* case applies.[54]

5.

The price of work done in improving or repairing existing machines or structures, the title of which is in the purchaser, can be recovered even though the subject matter is destroyed before completion of the

"... the law of the United States seems to go beyond the mere remedy of claims for money had and received and allows the recovery of the value of the benefit of any part performance rendered while performance was possible."

The quotation from the RESTATEMENT is as follows:

"Sec. 468—Rights of Restitution.

"(1) Except where a contract clearly provides otherwise, a party thereto who has rendered part performance for which there is no defined return performance fixed by the contract, and who is discharged from the duty of further performance by impossibility of rendering it, can get judgment for the value of the part performance rendered, unless it can be and is returned to him in specie within a reasonable time.

"(2) Except where a contract clearly provides otherwise, a party thereto who has rendered performance for which the other party is excused by impossibility from rendering the agreed exchange, can get judgment for the value of what he has rendered, less the value of what he has received, unless what he has rendered can be and is returned to him in specie within a reasonable time.

"(3) The value of performance within the meaning of Subsections (1, 2) is the benefit derived from the performance in advancing the object of the contract, not exceeding, however, a ratable portion of the contract price."

These rules squarely are based upon quasi-contractual unjust enrichment and not unfortunate impoverishment. The definition of value seems to be "market value," never in excess of contract value. The still knotty problem of determining value in the absence of "market value" is left to the discretion of the court.

[53] Swartz v. Saunders, 46 Ill. 18 (1867); Clark v. Busse, 82 Ill. 515 (1876); Rawson v. Clark, 70 Ill. 656 (1873); Cook v. McCabe, 53 Wis. 250, 10 N.W. 507 (1881); Butterfield v. Byron, 153 Mass. 517, 27 N.E. 667 (1891); Gabler v. Evans Laboratories, 129 Misc. 911, 223 N.Y.S. 408 (1927).

[54] Huyett & Smith Co. v. Edison Co., 167 Ill. 233, 47 N.E. 384 (1897); Louisville Foundry and Machine Co. v. Patterson, 29 Ky. L. 349, 93 S.W. 22 (1906).

work. This rule seems to proceed sometimes upon the principle that the continued existence is a condition to the performance but more truly upon the doctrine that title to the parts completed vests in the purchaser moment by moment as the work progresses.[55]

The coming years will doubtless bring forth many cases in development of the doctrine which finds its first expression in the *Fibrosa* case. There have been incidental answers in some of the cases. In the *Roxford Knitting* case the seller was permitted to recover for the materials that he had delivered. This supports the principle stated in division 3 above. In the lease cases the entire loss falls upon the landlord. Those cases seem to fall in the first classification of which the *Fibrosa* case is the leading authority.

When the courts consider the war cases, with their many varying circumstances, it is not unlikely that they will find a convenient parallel in the fire cases, which begin basically with the doctrine expressed in the *Fibrosa* case. The exceptions and qualifications could, with some logic, be applied to the divers situations that will arise in cases of frustration through war orders.

All of the rules which have been discussed are subject to any express provision in the contract directing where the loss shall fall. After our entry into the war and before the government had so thoroughly occupied the industrial field, many of the contracts expressly provided for the contingency of prohibition of the work. An ordinary provision was that the seller should be compensated for what he expended—some eliminated his element of profit. Such contractual provisions prevail over any of the rules that have been discussed.[56]

The burden of developing a body of common law to meet the contract damage problems now being created by the war might be removed from the courts by the enactment of legislation, both federal and state. However, unless such legislation is drawn with the most extreme care, it could create more problems than it would solve. It seems unlikely that a statute could meet the situation as well as an application of the principles which have been discussed.

[55] Angus v. Scully, 176 Mass. 357, 57 N.E. 674 (1900) with annotations in 49 L.R.A. 562 (1900); Goldfarb v. Cohen, 92 Conn. 277, 102 A. 649 (1917); Carroll v. Bowersock, 100 Kan. 270, 164 P. 143 (1917); Ganong v. Brown, 88 Miss. 53, 40 So. 556 (1906); Halsey v. Waukesha Springs Sanitarium Co., 125 Wis. 311, 104 N.W. 94 (1905); Krause v. Crothersville, 162 Ind. 278, 70 N.E. 264 (1904).

[56] American Union Line v. Oriental Nav. Corp., 239 N.Y. 207, 147 N.E. 227 (1924); Mosser Co. v. Cherry River Co., 290 Pa. 67, 138 A. 85 (1927).