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The Effect of Our Civil War on Contracts

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THE EFFECT OF OUR CIVIL WAR ON CONTRACTS

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CONTENTS.

I.

The Object of War and What It is.

Before we can look at the effects of war, we must know what war is and what its objects are. War has been defined as an armed contest waged as public force between independent states or an organized company of belligerents and independent states. What its objects are, is a question of broad expanse and investigation shows most interesting results. The war among the early tribes was an exhibition of physical and brute force. No rules of law were looked at and its only object was to gain the property of your opponent even at the cost of life. Then what a man had, he must fight to keep and "may the stronger win" was their motto. This idea of war must have existed in our more civilized times, as Vattell puts it, "That the declaration of war authorizes, and even obliges every subject of whatever rank, to secure the persons and things of their enemies where they fall into their hands." However the ideas of men have indeed changed, and no longer do we seek destruction of another's goods, but rather the preservation thereof. Mr. Story, in his book on contracts (Sec. 743-746), assigns

the following reason why contracts are void during war. "That it is the policy of two couhtries at war to injure each other to their utmost ability, even though such injury may be recoiling continuously. Besides, no two countries can be at war and have their subjects at peace. The very object of war is thus frustrated." I am fully convinced, though, that even Mr. Story's rule is a little too hard under the prevailing customs of war. The great safe guard is public policy. This guides us to our sense of right and wrong and is too well settled to admit dispute. See (Potts vs. Bell, 8 Term. Rep., 348.)

II.

The Importance of Public Policy and its relations.

Public Policy forbids Courts of Justice to allow any validity to contracts with belligerents, because of their tendency to effect injuriously the highest public interests and to undermine or destroy the safeguards of social fabric. (Sprotts vs. U. S., 20 Wall. 459). Thus where a promisory note was given as consideration for services to go as substitute in the Confederate army and fight against the United States, (Chancely vs. Bailey et al., 37 Ga. 532) it was held that such a contract was illegal and void, because against Public Policy and in Pichens

vs. Eckridge (42 Miss. 142), which is a similiar case, it was held to be a void consideration, because a contract contrary to the public policy of the United States and directly in aid of the Rebellion.

In an action on promisory note given as security for purchase price of war bonds issued by Arkansas convention and purchased by defendant as a mere business transaction, the Court held that such a contract was against public policy, so no action could be sustained in the Federal Courts and that the consideration was illegal under principals of law, the Constitution of the United States and laws of Congress and proclamation of the President. The issue of such bonds, though used as a circulating medium in the state, did not constitute a forced currency which the people in the state were obliged to use. (Hanawer vs. Woodruff, 15 Wall. 439).

III.

The Effect of War on Contracts.

According to most international law writers, the necessary and immediate consequence of war is to prohibit all intercourse or dealing between the subjects of the belligerent

states." This doctrine is founded on the principal that a declaration of war not only puts the adverse governments in their political capacities at war, but also renders the subjects of one the enemies of the other.

The English rule is that "A subject domiciled cannot make a contract against the interests of his country." The case of Potts vs. Bell (8 Term Rep. 548) is a leading English authority as to the effect of war and says, "A declaration of war generally contains a prohibition to trade with the enemy, but a proclamation for letters of Marque and Reprisal does not, and it is only from the prohibition of the King, by virtue of his prerogative, that the illegality arises."

Anson says that any agreement which contemplates action hostile to a friendly state is unlawful and void and not only is it unlawful to enter into a contract with an alien enemy, but it is unlawful to purchase goods in an enemy's country without a licence of the crown. (Anson on Contracts, page 197) Thus we may see that contracts between such enemies must of fact be illegal and void, because how can they be perfect when one of the most important ingredients of a contract - legality of object - is wanting.

There are certain exceptions to the above strict rule and it is now limited to contracts which are unexecuted at the time of declaration of war. We might consider the subject in regard to three classes of contracts. First, contracts, with which suspension during the continuance of hostilities is the effect, or contracts executed before the war began. Secondly, contracts which are absolutely void, or unexecuted contracts, and thirdly, contracts, which, by their nature or object, would be inconsistent with a suspension. The effect takes place at once by the very existance of war and the notice is the happening of the event. It is an act of Congress; and as Congress has the power of making or declaring war, it has the undoubted right to regulate and modify, in its discretion, the hostilities which it sanctions. This is quite apparent in granting of licences to parties to trade with belligerents. Contracts, which of their nature will not admit of delay and suspension, are often permitted to be fulfilled during state of hostility. The opinion of Judge Jackson in Coolridge vs. Inglee (13 Mass. 26) offers an explanation of this situation and says: "Commercial intercourse between two nations at war is understood to be prohibited. This interdiction applies, in general, to any species of commerce by which the enemy may be benefited at the

expense of our own country." But the books of highest authority on the law of nations and the usages of civilized people in modern times abundantly prove that intercourse is not universally prohibited, and that in some cases contracts with an enemy are allowable. After examining carefully and in detail the statements of the text writers expressing the belief that "the prohibition is confined among all civilized nations in modern times to such intercourse as is commercial and dismissing the idea of something mysteriously noxious with an enemy." The case in point was the sale by one American citizen to another of a British licence. Judge Jackson held that the sale was good, but he was overruled on the ground that it would be unlawful for an American citizen to use it. Another most interesting case on the present point is that of Kershaw vs. Kelsey (100 Mass. 561) in which the defendant was a citizen of Massachusetts and the plaintiff was in Rebel territory. A contract was made during the late Civil War to lease a plantation in the South at a rent payable part in cash, and part from the cotton raised thereon, and by which the lessor agreed to deliver and the lessee to receive and pay for the corn then on the plantation and which was immediately delivered and used thereon. This was held not to be prohibited by the law of

nations, or act of Congress in 1861, (Chapter 3, Sec. 5) and proclamation of the President under that act. The elaborate opinion of Gray, J. is worthy of our attention and in it we may see the correct view of our law of to-day. He says, "that the result is that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries; and that this includes any act of voluntary submissions to the enemy, or receiving his protection, as well as any act or contract which tends to increase his resources; and every kind of trading or commercial dealing or intercourse, whether by submission of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third parties or partnerships, or by contracts in any form looking to or involving such transactions, or by insurances upon trade with only the enemy. The cases have not been carried beyond judicial decision.

At this age of the world, when all the tendencies of the law of nations are to exempt individuals and private contracts from injury or restraint in consequence of war between their governments, we are not disposed to declare such contracts

unlawful as have not been heretofore adjudged to be inconsistent with the state of war.

The trading or transmission of property or money which is prohibited by international law is from or to one of the countries at war. An alien enemy residing in this country may contract and sue like a citizen.(II. Kent Com. 63.) The crime consists in exporting the money or property, or placing it in the power of the enemy.

Public international law, being the rule which governs the intercourse of one nation and its subjects with another nation and its subjects, is ordinarily limited, so far as the rights of property and contracts are concerned, to movable, or, in the phrase of the common law, personal property which is in its nature capable of being carried or transmitted from one country to another; and does not usually touch private interests in immovable property or real estate; although a government may, by express law or edict, appropriate and confiscate for its own use, the profits or even the title of land within its territory or occupation belonging to subjects of the enemy. (III. Phillamore's Int. Law, 135, 731)

In regard to real estate there is no difference between a friend and an alien, except that an alien cannot

maintain an action to recover it while it lasts, or that it may be confiscated by an extraordinary act of the government.

Licences. (A)

In a civil war it is well settled that a sovereign has belligerent as well as sovereign rights against his rebel subjects and may exercise either at his discretion.

A state of war may exist and yet commercial transactions go on. They are not necessarily inconsistent with each other. The licences to do business are partial suspenses of the law of war and are common in modern times. While Bynkershoek in his Quaest. Juris Pub., (lib. I., ch. 3) says that war causes the interdiction of commercial intercourse, he further remarks: "The utility, however, of merchants and the mutual wants of nations have almost got the better of the laws of war as to commerce. Hence it is alternately permitted and forbidden in time of war as princes think it most for the interest of their subjects. A commercial nation is anxious to trade and accomadate the laws of war to the greater or lesser wants that it may be in the goods of others. Thus, sometimes a mutual commerce is permitted generally; sometimes as to certain merchandise only, while others are permitted, and sometimes it is permitted altogether.

This licence is sort of a safe conduct granted by a belligerent state to its own subjects, to those of its enemies or to neutrals to carry on trade which is interdicted by the laws of war and it operates as a dispensation from the penalties of those laws, with respect to the state granting it and so far as its terms can be fairly construed to extend. The supreme power alone is competent to decide what conditions of political or commercial expediency will justify a relaxation or suspension of its belligerent rights and it requires the good faith of the party receiving it. It is not subject to a transfer or assignment or may be made in trust for another. (Halleck's Treatise on International Law and Law of War, page 675).

EXECUTED CONTRACTS. (B)

Executed Contracts, - or those which are merely suspended during hostilities. These contracts must have been such before breaking out of war, otherwise it would be dependent upon the sovereign power whether or no they survived. The most interesting of this class are contracts of insurance, existing, but by the interference of war, one party is unable to fulfill his

part. The doctrine is fully expressed in Summer vs. Hartford Insurance Company (13 Wall. 158) The plaintiff was a resident of Mississippi and the defendant a resident of Connecticut. The plaintiff had insurance and the contract was that the amount should be paid in sixty days and that any action against the company must be brought inside of twelve months. Plaintiff brings the action and then the war broke out and after the war he continues. Defendants claim that he did not bring his action in twelve months. The Court held that there was a difference from the statute in "twelve months from cause of action" and "twelve months from loss." Here the plaintiff was prevented from bringing his action in twelve months by the war; hence he was relieved of this duty. The fact that he waited longer than the number of days equal to twelve months is not material. The twelve month limitation is unlike a statute and does not expand enough to admit four years of war. That the war suspended the contract until renewal of peace. And in Hamilton vs. The Mutual Life Insurance Company of New York (9 Blatchford 234) where one Goodman had his life insured and had been paying the premiums to the Company's agent in Alabama. The war broke out and Goodman tried to pay premiums, but the Company had moved all

of its agencies and he could not pay. After the war was over he offered to pay the premiums in arrears, with interest, but the defendants claimed that the contract was dissolved, there being a term in the contract which said that any default in the payment of premiums avoided the contract. The Court held:- that the contract was merely suspended during the war; that deceased (Goodman) had always been willing to pay premiums, but there was no place to pay them, and the war having prevented it, it was considered the same as a tender and refusal to accept and therefore the exact day of payment was waived. Held further; that the Insurance Company should accept the premiums and pay the policy, or rather, pay the policy less the amount of the unpaid premiums. Where the contract is such that its continued existence does not depend on any further intercourse between the parties, the effect is to suspend operations and on return of peace the rights of the parties may be enforced. The Manhattan Insurance Company vs. Warwick (20 Grattan (Va.) 614) is a similar case, except that the offer of payment of premiums was made to agent in Richmond and was told that the payments had to be made in New York. Held: The contract was partly executory and partly executed. Entirely executory on the part of the Insurance Company and partly executed and

and partly not on part of Warwick. Judge Anderson here remarked that he was under the impression that the principal that, "War dissolves a contract" does not apply to a single instance of a contract made and executed by one of the parties in whole or in part before the war. And where the execution of the contract on his part was completed before he was entitled to any performance on the part of the other party (had been partly performed) or when the dissolution of the contract made before the war would work a forfeiture, such an application of the rule would be arbitrary, unreasonable and immoral. The parties entering into the contract before the war did nothing criminal or unlawful, that they, or either of them should be laible to a punishment of a forfeiture of their contract. This is not so when the contract is made during the war. In that case it is criminal and unlawful and therefore void. This seems to me the proper distinction. The crime consists in exporting money or property, or placing it in the power of the enemy, not in delivering to an alien enemy or his agent residing here under the control of the government. If the debtor could have paid his debt in any way during the war without danger of violating his duty or the laws of the land, the interest on the debt does not abate and he is still liable.

The Mutual Benefit Life Insurance Company vs. Henrietta Hilyard (37 N. J. L., 444) is also a case where it was impossible to pay premiums on account of war breaking out. The Court held, not dissolved but merely suspended, and excused for time being. (Bedle, J.) Whether a pre-existing contract is dissolved or not, by the war, depends upon whether it is essentially antagonistic to the laws governing a state of war. If the contract is of a continuing nature, as in the case of partnership, or of an executory character merely, and in the performance of its features it would violate such laws, it would be dissolved, but if not, and rights have become vested under it, the contract will either be qualified or its performance suspended, according to its nature, so as to strip it of its objectionable features, and save such rights. The tendency of adjudication is to preserve, and not to destroy contracts existing before the war. (The policy was not forfeited by mere non-payment of the premiums during the war.)

This kind of a contract is one for a life and not for a year and the yearly payment is only part consideration. (N. Y. Life Insurance Company vs. Strathem et al.,(93 U. S., 24) See also Cohen vs. Mutual Life Insurance Co. (50 N. Y., 610.)

UNEXECUTED AND CONTINUING CONTRACTS. (C)

Unexecuted and Continuing Contracts, or contracts which are illegal and void by the operation of war. This is the undisputed rule and I am unable to find authorities which will give me light on a new theory. But the later tendencies to promote commerce have weakened the heretofore unbreakable rule and the nature and importance of the contract must rather be the test. It is not the policy for a civilized nation of to-day to attach iron-clad rules to their commercial prospects. They must, indeed, be elastic to withstand the actions and reactions of a country at war, while the science of warfare has heard the appeal of the commercial world and seeks to aid it by an increase of privileges.

The doctrine was imported from the English by Griswold vs. Waddington (15 Johns. (U. S.) 57), which is probably the foundation of the American rule. This was the case of an American citizen who was a member of a firm in England and also here in the United States. He never had any management of the European firm, but rather controlled the American firm. The plaintiff sold goods during the War of 1812 to the English firm and this action was to obtain a remission of certain forfeitures and penalties incurred by the transmission of goods

to England and PLAINTIFFS offer in evidence a statement by the defendant that the certain partnership existed. The Court held that the plaintiffs were not mislead by this statement as they knew nothing of it when sale took place; That where two countries are at war, all communications and transactions between their citizens are unlawful. The object of a partnership is to advance and promote the objects of the concern. The war makes all the citizens enemies with each other. If business were allowed the very object of war would be defeated. The communication between these partners would be unlawful. Goods which are shipped during hostilities are liable to seizure and condemnation. No debts contracted in the partnership name can be recovered in courts of either nation, nor can debts due the firm be recovered. If the partnership were not dissolved, then each is liable, but the opinion is that the war suspended the partnership relations between the partners, and that without doubt ipso facto dissolved the firm. Each partner may dissolve the firm at any time, but during the war notice cannot be given. When the law dissolves the firm, public notice is unnecessary and the people are obliged to know it. Therefore defendant is not liable, having acted in good faith and if such partnership expire by their own limitation during the war, public notice is not required.

In Matthews vs. McStea (91 U. S. 7) defendant claimed dissolution by war before the acceptance of certain notes. Justice Strong held: that all the intercourse between the two powers at war was unlawful and also between their subjects. Each is an enemy of the other and it dissolves commercial partnerships existing between subjects or citizens of the two contending parties prior to the war. Civil war acts the same as foreign war. However, trading with the enemy may be allowed. It is the right of Congress, and the authority of the President or Commander-in-chief of the land and naval forces of the United States, in special cases to give licences to certain parties for the purpose of carrying on commercial transactions even in time of war. But in a civil war, more than in a foreign war, it is important that unequivocal notice should be given of the illegality of traffic or commercial intercourse, for in civil war only the government can know where the insurrection has assumed the characteristics of war. See also U. S. vs. Lane (8 Wall. 195) and McKee vs. U. S. (8 Wall. 166)

A licence if given to a citizen is proper, but if given to a neutral, it would be abuse of power and the goods would be subject to capture and to condemnation in the prize courts of the other belligerent and if issued to the subject

of that belligerently the enemy, would also be liable to confiscation as being a breach of their intelligence. (Note, 3 Wheaton, 207.)

In Bank of New Orleans (Resp.) vs. Edward Matthews (42 N. Y. 12) which was an action on a promisory note made by the firm, one member of which lived in Massachusetts and the other in Confederate territory. The plaintiff endorsed the note in May, 1862, but previously there had been a notice of dissolution of the firm published in New Orleans Picayune. New Orleans was under Rebel forces until after the endorsement of the note and then proclamation restored the commercial intercourse with New Orleans. The point discussed was dissolution of the firm by war. Peckham, J. held:- The general rule is that war dissolves the partnership and converts every hostile citizen into a public enemy. Therefore a citizen of New York, a former member of the firm, is not liable upon a note indorsed in firm name after the commencement of the war. In an action on a note thus given, the fact that power of attorney had been given to agent of the firm does not estop partner from alleging a residence in New York in the absence of proof that the party discounting the note had seen the power of attorney or believed he lived in New Orleans. (Parsons on Partnership, page 29)

As to alien enemies, partnership is impossible and if there be a partnership with an alien friend and war breaks out, the war entirely suspends the partnership. From the language sometimes used, one would terminate and annul the partnership altogether, and in many cases it might have this effect. But when the terms and business and state of affairs of the partnership were such that an entire suspension of all rights and intercourse during the partnership would still leave the partnership in a condition to go on as before when the war ended, we should say that the partnership revived at peace, and did not need to be created anew.

No alien enemy can bring an action in any court of a hostile country and this rule has been applied to a citizen then resident in a foreign country, and on the ground that if he prevailed, and funds in satsifaction were remitted to a foreign country, it would strengthen the enemy. The reason is that the existence of hostility between the two countries renders illegal all commercial intercourse between their citizens. This disability attaches to alien carrying on trade in enemies countries, although he resides there, also as consul of a neutral country. His individual character for purpose of trade is not merged into his national character. In Willison vs.

Patterson (7 Taunton 439) defendants gave notes to plaintiff and they were accepted during war between England and France. Defendants were residents of England and plaintiffs of France, but were English citizens. The bills were drawn in France and accepted by the defendants in England. The war was over before the action began. Held:- this was trading between enemies and the plaintiff could not recover. No contract with an alien enemy in time of war can be enforced in a Court of British Judicature, although plaintiff does not sue until the return of peace.

Scholefield vs. Eichellneger (7 Peters 568) was an action for balance due on account. Defendant claimed that contract was made during war and was void. Plaintiff claims that contract did not take effect until shipping of goods after the war, and that it was valid. However, the Court held that as the other partner had died during the war, and so the partnership was ended, and the contract was not extended beyond his death. See also Woods vs. Wilder (43 N. Y. 164)

Effect on Interest and the Statute of Limitations (D)

The general rule as to interest on debts is that as all business and transactions being forbidden between the

parties, the debtor was unable to pay if he wished to, without violation of the positive laws of the country and nation. Therefore, he shall not be liable to payment of interest, because where a person is prevented from paying the principal during war, he certainly would not be compelled to pay interest. See Hoare vs. Allen(20 Dallas 102). However, the rule is changed so that contracts which may be paid during the war without breach of duty to the state and the debtors do not pay them, then the interest runs.

The statute of limitations is also suspended during the time of war by reason of the inability to enforce a claim. In Lemmes vs. Hartford Insurance Company (13 Wall. 158) it was held that the disability to sue imposed by war relieved the party from the consequences of failing to bring suit within the specified time in the policy. It would also seem that the same principal applied to relieve party from non-payment of premiums by the day on which they are due. And in Brown vs. Hiatt (1 Dillon 372) it was held that the statute of limitations was suspended during the time of the Civil War and even though the statute began to run before the war, that time of war must be taken out.

TREATIES (E)

The question as to treaties has never been practically settled. It is generally believed, though, that they are merely suspended during war. In the St. Lawrence difficulty, Great Britain claimed that the war ended the treaty, while the United States claimed that it was merely suspended. There are treaties which are made in contemplation of war and as to these, the rule is that they are neither avoided nor suspended, but have full force and effect all of the time.

IV.

CONCLUSION.

By this time we have covered much of the ground over which the wars and our late Civil War extended their power over contracts. We have found that the object of war is to subject one country to the will of another by public force. To make all the citizens of one state enemies of the citizens of the other is the necessary result of war between their governments. From the primitive idea of total destruction, our

superior learning and pride have given us an idea of preservation. That public policy is our standard of reckoning is abundantly proved by the manner in which it is interwoven into all the public acts of to-day. The strict neutrality preserved by the United States in all matters concerning other nations has grown up from our great ideas of public policy, the protectorate of our Congress.

The effect of our war appears to be to place the citizens and belligerents in a state of non-intercourse; to render them the legal, not fighting, enemies of each other; to suspend all intercourse between citizens and belligerents; partnerships are dissolved; it renders all trade between belligerents illegal and suspends treaties except those which only arise in contemplation of war. But again our modern ideas have become expanded and it is now that the remedies are suspended rather than the rights. We may even continue the trade and intercourse with belligerents by obtaining a licence. These are the fruits of relaxation and are common in time of war in the United States. The distinction between contracts which are executed and those unexecuted is evened down by the existence of certain contracts which are inconsistent with suspension and by licenced contracts.

The line is becoming a fine one and the doctrine of preservation and the needs of our merchants weigh heavily on the heretofore sound law of nations.

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Woods vs. Wilder, (43 N. Y. 164).

TEXT BOOKS.

Anson on Contracts, page 197.

Halleck's Treatise on International Law and Law of War, page 675.

2 Kent's Commentaries, 63.

Note,3 Wheaton 207.

3 Phillamore's International Law, pages 135, 731.

Parsons on Partnership, page 29.

Story on Contracts, Sections 743-746.