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Contracts - Performance - Effect of Act of God

NOTES

CONTRACTS—PERFORMANCE—EFFECT OF ACT OF GOD. The unprecedented floods which swept through North Dakota's Red River Valley in the spring of 1950[1] have aroused some speculation as to the effect of North Dakota statutes on contract liability, particularly in regard to leases. The North Dakota Code[2] states:

> "The want of performance of an obligation or of an offer of performance, in whole or in part, or any delay therein is excused by the following causes to the extent they operate.
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> 2. When it is prevented or delayed by an irresistible superhuman cause...unless the parties have agreed expressly to the contrary."

The Code also limits the liability of a carrier because of any irresistible superhuman cause.[3]

Other states have statutes with similar provisions[4] excusing performance in the event of an irresistible superhuman cause, commonly called Act of God.

ORIGIN OF ACT OF GOD DOCTRINE

Probably the earliest use of the term, Act of God, was made by Coke in *Shelly's Case*,[5] and was continued enthusiastically by him in subsequent cases.[6] The doctrine arose to soften the harsh rule first expounded in the leading case of *Paradine v. Jane*.[7] In that case Prince Rupert had entered with hostile forces and expelled the tenant from the land, preventing him from taking his profits and thus making him delinquent in his rent payments. The court stated the law of the time when it said, "When the party by his own contract created a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract....Though the land be surrounded or gained by the sea, or made barren by wildfire, yet the lessor shall have his whole rent." This rule was directly applied in numerous English cases[8] and was adopted in many American

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[1] Grand Forks Herald, April 25, 1950.

[2] N. D. Rev. Code § 9-1104 (1943).

[3] N. D. Rev. Code § 8-0901 (1943).

[4] Mont. Rev. Code §§ 7452, 7867 (1935); Cal. Civ. Code § 1511 (Deering 1941).

[5] Wolfe v. Shelly, 1 Co. Rep. 93b, 76 Eng. Rep. 206 (C. B. 1581).

[6] Keighley's Case, 10 Co. Rep. 1392, 77 Eng. Rep. 1136 (C. B. 1609); Blumfield's Case, 5 Co. Rep. 86b, 77 Eng. Rep. 185 (K. B. 1596); Laughter's Case, 5 Co. Rep. 21b, 77 Eng. Rep. 82 (K. B. 1595).

[7] 1 Aleyn 26, 82 Eng. Rep. 897 (K. B. 1648).

[8] Jacobs v. Credit Lyonnaise, 12 Q. B. D. 589 (1884); Sheffield Waterworks Co. v. Carter, 8 Q. B. D. 632 (1882); Atkinson v. Ritchie, 10 East 531, 103 Eng. Rep. 877 (K. B. 1809).

cases.[9] Although at times harsh and unjust, the rule has its foundation in good sense and inflexible honesty. The law will not insert for the benefit of one of the parties, by construction, an exception which the parties have not, either by design or neglect, inserted in their engagement.[10]

Although the rule of *Paradine v. Jane* represents an ideal statement of the law of contract performance, and is frequently stated by the courts to be the general rule of contracts,[11] it soon became apparent that injustice and hardship would result if it were strictly enforced. By the beginning of the twentieth century, the Anglo-American Law recognized several exceptions under which a promisor might be excused from performance when certain supervening elements made performance impossible.[12]

THE CONTINUED EXISTENCE EXCEPTION TO PERFORMANCE

If A contracts to sell and deliver his black cow Daisy to B and Daisy dies, how can A perform his contract? Obviously such a contract is based upon the continued good health and activity of Daisy. This illustrates an exception which was recognized in an early English case[13] where the court said, "In contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied in the contract that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance."[14] The continued existence exception has become firmly intrenched in American decisions[15] and is approved by the leading authorities.[16] It has been applied in situations involving renting a particular premise,[17] death of a prospective partner,[18] death of a particular animal,[19] failure of natural gas sup-

[9] Berg v. Erickson, 234 Fed. 817 (8th. Cir. 1916); School Dist. No. 1 v. Dauchy, 25 Conn. 530 (1857); School Trustees of Trenton v. Bennett, 27 N. J. L. 513 (1859); see Southern Ry. v. White, 284 Fed. 560, 561 (6th Cir. 1922).

[10] School Trustees of Trenton v. Bennett, 27 N. J. L. 513 (1859).

[11] Colson, **The Excuse of Impossibility in West Virginia Contract Law**, 48 W. Va. L. Q. 189, 194 (1942).

[12] Page, **Development of the Doctrine of Impossibility of Performance**, 18 Mich. L. Rev. 589, 600 (1920).

[13] Taylor v. Caldwell, 3 B. & S. 826, 122 Eng. Rep. 309 (Q. B. 1863). Plaintiffs leased Surrey Gardens and Music Hall from defendants. The premises were destroyed by fire, and plaintiffs sued for breach of the lease agreement. Action was denied on the ground that the parties impliedly contracted on the basis that the premises would remain in existence.

[14] Id. at 309.

[15] North American Oil Co. v. Globe Pipe Line Co., 6 F. 2d 564 (8th Cir. 1925); Barkemeyer Grain Co. v. Hannant, 66 Mont. 120, 213 Pac. 208 (1923); Pearce-Young-Angel Co. v. Charles R. Allen, Inc., 213 S. C. 578, 50 S. E. 2d 698 (1948). **But see** Berg v. Erickson, 234 Fed. 817, 821 (8th Cir. 1916). See Note, 74 A. L. R. 1289 (1931).

[16] Restatement, Contracts § § 281, 460 (1932); 6 Williston, Contracts § 1946 (rev. ed. 1938).

[17] Taylor v. Caldwell, 3 B. & S. 826, 122 Eng. Rep. 309 (Q. B. 1863).

[18] Dow v. State Bank, 88 Minn. 355, 93 N. W. 121 (1903).

[19] Pinkham v. Libbey, 93 Me. 575, 45 Atl. 823 (1900).

ply,[20] trees from a certain tract,[21] fruit from a designated orchard,[22] and potatoes from a certain field.[23]

FRUSTRATION OF THE VENTURE EXCEPTION TO PERFORMANCE

Closely related to the continued existence exception is the frustration of the venture exception which is best illustrated by the "coronation cases." These held that the postponement of the coronation of Edward VII excused performance of contracts for hire of seats and vantage points along the anticipated route of procession.[24] Performance was excused, not because impossible, but because circumstances beyond the parties' control had frustrated the sole value of the contracts. Whether this should be based on failure of consideration, or implied condition, or destruction of the subject matter, the end result seems equitable in most instances.[25]

Also illustrative of this exception are the many cases of commercial ventures frustrated by government controls, regulations, and rationing.[26]

THE IMPRACTICABILITY EXCEPTION TO PERFORMANCE

The promisor's obligation continues, even though performance of a contract becomes difficult, more burdensome, or more expensive; nor will the fact that the promisor is unable to perform excuse him from liability.[27] This rule is based upon the fact that the ultimate purpose of a contract is to transfer the risk of performance to the promisor; this purpose is defeated if performance is excused merely because the promisor finds that he has assumed a greater obligation than he can profitably discharge. Applications of this rule are numerous.[28] However there persists a vigorous minority of cases that excuse performance when extreme and unforseen difficulties and expense render performance impracticable.[29]

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[20] Bruce v. Indianapolis Gas Co., 46 Ind. App. 193, 92 N. E. 189 (1910).

[21] International Paper Co. v. Rockefeller, 161, App. Div. 180, 146 N. Y. Supp. 371 (1914).

[22] Ontario Deciduous Fruit Grower's Assn. v. Cutting Fruit-Packing Co., 134 Cal. 21, 66 Pac. 28 (1901).

[23] Snipes Mountain Co. v. Benz Bros. & Co., 162 Wash. 334, 298 Pac. 714 (1931).

[24] Krell v. Henry [1903] 2 K. B. 740 (C. A.); See 6 Williston, Contracts § 1954 (rev. ed. 1938); Buckland, **Casus and Frustration in Roman and Common Law**, 46 Harv. L. Rev. 1281, 1290 (1933).

[25] See Comment, 46 Mich. L. Rev. 224 (1947); See Page, **Development of the Doctrine of Impossibility of Performance**, 18 Mich. L. Rev. 589 (1920).

[26] See Restatement, Contracts § 458 (1932); Comment, 43 Mich. L. Rev. 598 (1944); Note, 43 Col. L. Rev. 404 (1943); Note, 18 Rocky Mt. L. Rev. 140 (1945).

[27] Kiyoichi Fujikawa v. Sunrise Soda Water Works Co., 158 F. 2d 490 (9th. Cir. 1946); Union Electric Co. v. Lovell Livestock Co., 101 Mont. 450, 54 P. 2d 112 (1936); Hanna v. Commercial Travelers' Mut. Accident Ass'n., 204 App. Div. 258, 197 N. Y. Supp. 395 (1922); Newmann v. Goruk, 243 Wis. 503, 11 N. W. 2d 155 (1943).

[28] For a collection of cases, see 6 Williston, Contracts § 1963, n. 1. (rev. ed. 1938).

[29] See, e. g., Transbay Const. Co. v. City and County of San Francisco, 35 F. Supp. 433 (N. D. Cal. 1940), **rev'd on other grounds** 134 F. 2d 468 (9th. Cir. 1943); Mahaska County State Bank v. Brown, 159 Iowa 577, 141 N. W. 459 (1913); cf. Mineral Park Land Co. v. Howard, 172 Cal. 289, 156 Pac. 458 (1916).

The decisions while clearly equitable in some cases seem to be unrealistic in others. In many highly competitive fields such as road-building and construction work, costs and estimates are pared to a minimum in order to achieve low bidder status. To say that an experienced contractor does not consider the possibility of encountering conditions that may increase his costs is a refusal to face the facts. If he does consider it, then the happening is forseeable and loss should fall on the contractor-promisor. If he considers it and does not insert an exception into the contract, then the court by "implying" a condition is in reality creating a new contract for the parties.[30] Another difficulty in enforcing this minority exception on the basis of impracticability is the fact that between mere hardship and actual impossibility lies a vast middleground area for which it will be difficult if not impossible to set up rules except by a visceral feeling that justice will be accomplished in a certain case.

DEFINING AND LIMITING FACTORS OF THE ACT OF GOD DOCTRINE

The rigidity of the doctrine of *Paradine v. Jane* seems unduly harsh when performance of a contract is rendered impossible by extraordinary manifestations of nature such as lightning, cloudburst, or flood. State courts have applied the Act of God doctrine even in the absence of statute as a common law principle.[31] The federal courts have shown more reluctance in excusing performance due to an alleged Act of God.[32] In delimiting the doctrine, the courts have said, "...Act of God...means an accident against which ordinary skill and foresight is not expected to provide;"[33] "...a cause which operates without any aid or interference from man; for if the cause of loss was wholly human or became destructive by human agency and cooperation, then the loss is to be ascribed to man and not to God...;"[34] "An Act of God is a cause which no human prudence or power could prevent or avert."[35] Such things have been characterized as Act of God: sudden and extraordinary flood,[36] lightning,[37] cloudburst,[38] snowstorm,[39] tornado,[40] freeze and frost damage.[41]

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[30] See Page, **Development of the Doctrine of Impossibility of Performance**, 18 Mich. L. Rev. 589, 598-99 (1920).

[31] **Id.** at 592, n.5 (1920).

[32] Tennessee Electric Power Co. v. White County, 52 F. 2d 1065 (6th. Cir. 1931); United States v. Lewis, 237 Fed. 80 (8th. Cir. 1916); Berg v. Erickson, 234 Fed. 817 (8th. Cir. 1916).

[33] Dorman v. Ames, 12 Minn. 347, 362 (1866).

[34] Clay County v. Simonsen, 1 Dak. 38, 46 N. W. 592 (1877).

[35] Smith v. Western Ry. of Alabama, 91 Ala. 455, 8 So. 754 (1891).

[36] Strauss v. Wabash, St. L. & P. Ry., 17 Fed. 209 (1883).

[37] Mays v. Missouri & N. A. Ry., 168 Ark. 908, 271 S. W. 977 (1925).

[38] Rodgers v. Central Pac. Ry., 67 Cal. 607, 8 Pac. 377 (1885).

[39] Cormack v. New York, N. H. & H. Ry., 196 N. Y. 442, 90 N. E. 56 (1909).

[40] Chandler v. Aetna Ins. Co., 188 So. 506 (La. App. 1939).

[41] **Compare** Givens v. Vaughn-Griffin Packing Co., 146 Fla. 575, 1 S. 2d 714 (1941), (where frost damage in Florida was termed an Act of God), **with** Sargent Barge Line v. The Wyomissing, 127 F. 2d 623 (2nd. Cir. 1942), (where the court held that ice in the river in New York in January can not be considered an Act of God). Clearly the latter holding would be compelling precedent should there arise a North Dakota case involving winter climatic conditions.

The expressions "Act of God" and "unavoidable accident" have sometimes been used synonomously and as equivalent terms, but there is a distinction. There may be an unavoidable or inevitable accident which no amount of skill or foresight could prevent; yet if it is not brought about by some natural or superhuman cause, it does not fall within the Act of God category. If a ship proceeding in deep water strikes an object breaking off its propellor and the ship is damaged, the injury is due to an inevitable accident, but it is not an Act of God.[42] To come within the doctrine the cause of the inevitable accident must be traceable solely to natural causes not attributable in any degree to the conduct of man[43] and not in reason preventable by human foresight, strength, or care.[44]

Another limitation upon the doctrine is related to the "foreseeability rule" of torts. Thus, even though a solely natural cause prevents performance, if that cause could reasonably have been foreseen, the Act of God doctrine is not a good defense to an action on the contract.[45] The case of *Berg v. Erickson*[46] is an apt illustration. Here the defendant agreed to furnish "plenty of good grass" for the plaintiff's cattle. A severe drought caused a shortage. The defendant refused to re-deliver the cattle until his agister's lien was satisfied. Plaintiff replevied the cattle claiming they were worth $33,000.00 less now than they would have been had the defendant performed his contract. The defendant pleaded an Act of God as a defense in that the drought had prevented proper performance. The court, in finding for the plaintiff, took the view that as droughts were not uncommon in Kansas, the defendant could have stipulated in the contract that drought would excuse performance, instead of making a positive guarantee to furnish plenty of good grass. Was this lack of a provision due to an oversight or had it been purposely omitted? The case seems to indicate that the defendant, knowing conditions in Kansas, made a gamble and lost. It is probable that the defendant did think of the possibility of drought and intentionally left it out of the contract for the purpose of inducing the plaintiff to pay him $7.00 per head for pasturing. When a contract is susceptible to two interpretations, it will usually be construed against the maker.[47]

The doctrine is further limited in that it does not inure to one who could have avoided the damage by complying with his contract,[48] nor

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[42] Alaska Coast Co. v. Alaska Barge Co., 79 Wash. 216, 140 Pac. 334 (1914).

[43] Much the same test is applied here as in the theory of proximate cause in negligence actions. See Prosser, Torts §46 (1941).

[44] Hecht v. Boston Wharf Co., 220 Mass. 397, 107 N. E. 990 (1915).

[45] Gleeson v. Virginia Midland Ry., 140 U. S. 435 (1891); Ryan v. Rogers, 96 Cal. 349, 31 Pac. 244 (1892).

[46] 234 Fed. 817 (8th. Cir. 1916).

[47] 3 Williston, Contracts § 621 (rev. ed. 1938).

[48] Holt Mfg. Co. v. Thornton, 136 Cal. 232, 68 Pac. 708 (1902). Plaintiff contracted to harvest grain for the defendant beginning not later than July 5. He did not start until July 10, and high winds shelled out much of the grain. Held, though the winds might have been an Act of God, plaintiff could have avoided damage by complying with his contract.

does it apply to one who has failed to use due care. The latter standard is generally applied in negligence actions,[49] but is equally applicable in contract actions as a defense to the Act of God doctrine. The *Gleeson case*[50] though one involving an action for damages illustrates the same standard which would be applied in contract cases. Here the plaintiff, a railway mail clerk on defendant's train, was injured in a derailment caused by a slide in a cut. The defendant pleaded Act of God as a defense because a rain had loosened the earth, and the vibration of the train caused it to come down. The defense was denied, since the railroad company had constructed the cut and was under a duty to maintain it in a reasonably safe condition. Also the rain was not so unusual as to be termed an Act of God, and the effect of it on the cut could have been foreseen by ordinary engineering skill.[51]

Another limitation upon the doctrine is that the natural cause which prevents performance must be one in which no human agency intervenes.[52] In the *Polack* case,[53] a landlord sued his tenant for nonperformance of a covenant to repair damages. The defendant, although admitting that someone had tampered with the reservoir walls, pleaded Act of God in that unusual rains had filled the reservoir, causing it to break and flood the property. It was held that this was not due to an Act of God solely, since unknown third persons had intervened.[54] The promisor could have provided in his contract for relief from liability in the event of third party interference.

Finally even though there is a natural unprecedented catastrophe, performance will not be excused where the promisor has had ample warning by newspaper, radio, or otherwise, and has failed to take adequate precautions. A railroad in North Dakota in late winter carrying cars of perishables which become stuck in snowdrifts where the perishables freeze, could hardly plead Act of God as a defense if snow plows had not been sent out or storm warnings had been ignored.[55] A promisor would be under some duty to mitigate the anticipated damage when he has received warning of the impending natural disturbance.

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[49] This again is related to the doctrine of proximate cause in negligence actions. See Prosser, Torts §§ 45-50 (1941).

[50] Gleeson v. Virginia Midland Ry., 140 U. S. 435 (1891).

[51] Accord, Standard Brands v. Nippon Yusen Kaisha, 42 F. Supp. 43 (D. Mass. 1941); Central Georgia Electric Membership Corp. v. Heath, 60 Ga. App. 649, 4 S. E. 2d 700 (1939); Blessing v. Camas Prairie Ry., 3 Wash. 2d 266, 100 P. 2d 416 (1940).

[52] Gleeson v. Virginia Midland Ry., 140 U. S. 435 (1891); United States v. Kansas City Southern Ry., 189 Fed. 471 (D. Ark. 1911); Conlin v. Coyne, 19 Cal. App. 2d 78, 64 P. 2d 1123 (1937); Hubbard v. Olsen-Roe Transfer Co., 110 Ore. 618, 224 Pac. 636 (1924); Polack v. Pioche, 35 Cal. 416 (1868).

[53] Polack v. Pioche, 35 Cal. 416 (1868).

[54] Id. at 424.

[55] See Backus v. Start, 13 Fed. 69 (C. C. N. D. Ohio 1882), involving inadequate precautions to avert flood damage.

APPLICATION OF THE NORTH DAKOTA STATUTE

Perhaps the most common contract that would be affected by flood conditions such as prevailed in the Spring of 1950 in the Red River Valley is the ordinary lease of a dwelling or a business establishment. The Statutes of North Dakota give relief to the lessee when the property is destroyed.[56] This would not give the relief desired in many cases where the property was rendered uninhabitable for several months, but was later rendered livable when the flood subsided. Under these conditions could the lessee terminate the lease without further liability? Could he be relieved from rent payments during the time the property was uninhabitable? Could the tenant regard the events as a species of eviction which would relieve him from payments or end the lease? The general rule is that eviction must be by some positive act of the landlord or third person.[57] Mere uninhabitability does not warrant abandonment of the premises and is not a constructive eviction.[58] Thus a flood which would cause a lessee to vacate the premises would not be a sufficient eviction to relieve him from the liability of rent payments.

English cases have held that the doctrine of frustration has no application to ordinary building leases.[59] This is based on the common law view that a lease of realty is a conveyance of an interest in land;[60] hence a person acquiring a lease is regarded as a purchaser pro tanto of an estate in land, and he bears the risk of any calamity that befalls the land since it is regarded as his in equity, subject only to the right of the lessor to receive rents and profits.[61] English writers have realized the hardship of the above rule and recommend some legislative enactment providing relief.[62] New York has provided for positive relief in its statutes[63] which in effect excuse performance upon a showing that the premises have been rendered untenantable by the elements. Apparently the North Dakota Statute[64] grants such affirmative relief only when there has been destruction of the premises. If the majority decisions are followed[65] no relief would be granted where there is only partial destruction under these particular North Dakota statutes. The North Dakota Act of God statute probably can be used to fill this juridical gap. It should be noted that where the leased premises are in a region subject regularly to floods, Act of God would not be a good defense to ex-

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[56] N. D. Rev. Code §§ 47-1614, 47-1617 (1943).

[57] See, for a discussion, 32 Am. Jur., Landlord and Tenant § 246 (1941).

[58] Ibid.

[59] Mathey v. Curling, [1922] 2 A. C. 180 (H. L.); Whitehall Court v. Ettlinger, [1920] 1 K. B. 680 (1918).

[60] Tiffany, Real Property § 74 (3rd ed. 1939).

[61] Walford, Impossibility and Property Law, 57 L. Q. Rev. 339, 340 (1941).

[62] Id. at 372.

[63] N. Y. Real Property Law §227 (1939).

[64] N. D. Rev. Code §§ 47-1614, 47-1617 (1943).

[65] See, e. g., Waite v. O'Neil, 76 Fed. 408 (6th. Cir. 1896); Humiston, Keeling and Co. v. Wheeler, 175 Ill. 514, 51 N. E. 893 (1898); Ainsworth v. Mount Moriah Lodge, 172 Mass. 257, 52 N. E. 81 (1898).

cuse performance. Since the flood is foreseeable, it could be implied that the parties contracted with that condition in mind.

SUMMARY

No cases in North Dakota have been found directly interpreting the statute.[66] Hence we must indulge in some intellectual impertinence to forecast what our high court's attitude will be. Since the statute evidently represents a statement of a common law exception to the rigid rule of contracts, it is anticipated that a narrow view will be maintained as to what constitutes an Act of God, so that our near-sacred concepts of property and contracts will not be greatly disturbed. The concurring opinion in a North Dakota case[67] mentions Act of God, but that doctrine does not seem to have been considered in the decision. The court in this case apparently takes the view that the causes excusing performance as set out in the statute[68] are not exclusive, for their reasons seem based on other and perhaps equitable grounds.

California with a statute similar to that in North Dakota has interpreted the Act of God doctrine well within the limitations discussed in this article. The California courts have also held that the doctrine is a matter of defense only; it cannot be used to excuse non-performance by the plaintiff.[69]

The North Dakota statute lays down certain exceptions to the hard and fast rule of contract enforcement as illustrated in *Paradine v. Jane*. It is not thought that these are the only exceptions to strict enforcement of a contract. It is believed that inasmuch as they are exceptions to the strict rule of contracts, they should be narrowly construed in the interests of the promisee.

LAWYER REFERENCE PLANS—LEGAL AID—LEGAL FACILITIES FOR THE MODERATE INCOME GROUP. Frequent constitutional assurances may be found to the effect that every person should be able to find prompt and certain legal recourse when needed,[1] a time-honored guarantee that is expressly set out in the Magna Carta.[2] That these solemn provisions have not been effective is pointedly indicated in a recent sur-

[66] N. D. Rev. Code § 9-1104 (1943).
[67] Sandry v. Brooklyn School Dist., 47 N. Dak. 444, 182 N. W. 689 (1921).
[68] N. D. Rev. Code § 9-1104 (1943).
[69] Remy v. Olds, 4 Cal. U. 240, 34 Pac. 216 (1893).

[1] See Pirsig, Cases on Judicial Administration 1 (1946) for constitutions embodying such guarantees. One group of authorities have indicated that the Federal Constitution's guarantee of equal protection of the law requires legal counsel regardless of financial means of client. National Lawyers Guild Committee on Professional Problems, **The Availability of Legal Services and Judicial Processes to the Low and Moderate Income Groups and Proposals to Remedy Present Deficiencies**, 10 Law. Guild Rev. 8 (1950).
[2] Magna Charta § 40 (1215).