SOME LEGAL CONSEQUENCES OF THE EUROPEAN WAR

The sudden outbreak of war among five great European powers gave rise to many questions affecting the liability of citizens of our own country in their commercial dealings with inhabitants of the belligerent countries, some of which may be of interest to the readers of this Review.

During the two or three weeks of the mobilization of armies in France, Austria, Russia and Germany, when all communication by telegraph or post was cut off from large portions of those countries, these questions presented themselves in acute form, and required the determination by residents of this country of a course of action in the face of the extraordinary condition of affairs then existing, which threatened serious legal liability in whatever event might be the outcome.

Agents in America, cut off from all communication with their European principals, were compelled, on their own responsibility, to take action concerning the business of their agency and the performance of contracts with, or made by them on behalf of their foreign principals.

Certain legal principles had been settled in cases growing out of wars in the past, by the application of which conclusions were reached as to these problems of 1914 with a certain degree of confidence. While the general rule is that agents must strictly adhere to the instructions of their principals and only act within the scope of the powers expressly conferred, or necessary to the carrying out of the principals' instructions, in the face of unforeseen circumstances, agents have been held to be vested with discretionary powers, and to be liable for the exercise of such powers only where guilty of gross negligence or fraudulent conduct.[1] Even where specific instructions are given by the principal, if it become impossible to comply with them, and communication with the principal cannot be had within the time allowed for action, the agent is held to be invested with authority to do for his principal that which a prudent man would do for the reasonable protection of his own interests under the given circumstances.[2] This principle was enunciated and applied by

[1] *Leotard v. Graves,* 3 Caines (N. Y.) 225.

[2] *Judson v. Sturges,* 5 Day (Conn.) 559; *Drummond v. Wood,* 2 Caines (N. Y.) 310.

Mr. Justice Story, on the circuit, in a case which is frequently cited and relied upon as establishing the law on this point.[3] The facts in that case were that a cargo of flour had been shipped from Boston to South America in charge of a supercargo. Part of it was sold in Rio Janeiro and the remainder carried to Montevideo, but the market at that place being unfavorable, the supercargo concluded to carry it to Batavia. He did so and there delivered it to the plaintiff, a merchant, to sell and invest the proceeds, together with the proceeds of the flour sold in South America, for the benefit of the shipper. The market at Batavia was glutted; the flour was somewhat damaged, but the plaintiff succeeded in selling it on six months' credit, himself advanced the amount of the price, and invested it in coffee, which he consigned to the Boston shipper by whom it was received, without knowledge of the fact that the flour had been sold on credit. The purchaser of the flour became insolvent and unable to pay the purchase price, and the Batavia merchant thereupon brought suit against the Boston shipper and recovered the amount so advanced. Mr. Justice Story, in charging the jury, referred to the fact that the shipper's instructions in their terms only contemplated sales of the cargo in South America, and then said:

> "It turned out, however, that the flour could not all be sold at the South American ports, or at least not sold, unless at an enormous sacrifice. The parties had not looked for any such event. What then was it the duty of the supercargo to do, in such a case of unexpected occurrence not within the contemplation of the instructions? Was he to sacrifice the flour, or throw it overboard? No one pretends that it was intended to be brought back to the United States under any circumstances. It would probably have been spoiled and ruined on the return voyage and come home actually worthless. Now I take it to be clear that if, by some sudden emergency, or supervening necessity, or other unexpected event, it becomes impossible for the supercargo to comply with the exact terms of his instructions, or a literal compliance therewith would frustrate the objects of the owner, and amount to a total sacrifice of his interests, it becomes the duty of the supercargo, under such circumstances, to do the best he can, in the exercise of a sound discretion, to prevent a total loss to his owner; and if he acts *bona fide*, and exercises a reasonable discretion, his acts will bind the owner. He becomes, in such case, an agent from necessity for the power."

[3] *Forrester v. Boardman*, 1 Story 43.

As the Supreme Court of Massachusetts pointed out in applying this decision to the case of a consignment of hay during the civil war by owners in Maine to commission merchants in Louisiana, which the latter sold and, yielding to the military exigencies of the time, took payment for in the only thing they could get, certificates of indebtedness, worth less than par,

> . . . "the interests of commerce require, and the enlightened principles of commercial law bestow, a discretion which enables the factor to protect his principal from the irreparable injury which would be liable to arise in the absence of authority to act under critical circumstances, unexpectedly occurring, which do not admit of delay for the purposes of communication and consideration. And the factor, so placed, who acts prudently, and in good faith, as the owner himself, being a wise man, would have been likely to do if personally present, finds his protection in the sincerity and sound discretion of his conduct, and is not answerable for consequences, although subsequent events may demonstrate that his principal would have been the gainer by a different course from the one he has conscientiously and discreetly adopted."[4]

The same principle is applicable not only to factors but to every other species of agency.

The English courts put the authority of the agent in such a contingency squarely upon the impossibility of communicating with the principal.[5] This consideration, therefore, was regarded as applicable to those cases where American houses on behalf of European principals prior to the outbreak of war on August 1, 1914, had entered into contracts for the purchase or sale of stocks, or of such commodities as, *e. g.*, wheat, corn or other comestibles, and where, owing to the decline in value of collaterals pledged as margins to protect them from loss in carrying the same for their principals, they were threatened with serious loss, and were cut off from communication with their European principals. Even where a stock broker himself has advanced money to purchase a stock for a customer, to be carried on margin, the general rule of law is that he must not close out

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[4] *Greenleaf v. Moody*, 13 Allen 363, 368. See Mechem on Agency, 2d ed., 718 and note.

[5] See *Guilliam v. Twist*, 2 Q. B. 84; *Hawtayne v. Bourne*, 7 M. & W. 595, cited in Mechem, *supra*.

the transaction without the principal's authority, unless, after reasonable notice, the latter fails to keep good the margin.[6]

But where it is impossible to communicate with the principal, and delay means serious loss, the agent becomes invested with powers of necessity as established in the cases above cited,[7] and may act as reasonable, prudent men would do in the conduct of their own business under the same conditions.

The closing of the New York exchanges on August 1, 1914, and the consequent suspension of all trading in stocks and in commodities dealt in on the Produce, Cotton, and other mercantile exchanges, led to the adjustment by the appropriate committees of those exchanges, without litigation of many questions involving the principles here discussed. Other controversies were adjusted by agreement after communication was restored between the United States and the countries at war, but it would be unsafe to predict that litigation may not yet arise out of the conditions produced by the sudden outbreak of war, which will require the application of some of the principles here discussed.

Different principles were brought into operation where the war actually prevented one of the parties from carrying out contracts made in the United States to be performed in European countries.

It is well settled, as a general rule, that the fact that a contract becomes impossible of performance by reason of the particular circumstances is not a legal excuse for non-performance. Still less will unexpected expense, difficulty, or inconvenience short of impossibility serve as an excuse.[8]

The exception to this rule is that where performance is prevented by the act of God, or *vis major,* the party liable to performance is excused. Pollock has defined *vis major* as "An event which, as between the parties, and for the purpose of the matter in hand, cannot be definitely foreseen or controlled."[9] The existence of war in the country where the contract is to be performed is held not to excuse performance by a citizen

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[6] *Content v. Banner,* 184 N. Y. 121; *Baker v. Drake,* 66 N. Y. 518; *Rothschild v. Allen,* 90 App. Div. (N. Y.) affd. 180 N. Y. 561. See *Richardson v. Shaw,* 209 U. S. 365.

[7] *Jarvis v. Hoyt,* 2 Hun (N. Y.) 637.

[8] Pollock on Contracts, 8th ed., pp. 428-9; *Baker v. Johnson,* 42 N. Y. 126.

[9] Pollock, p. 436.

of our own country unless so stipulated in the contract "because he might have provided against it by the contract."[10]

The leading case in England is *Paradine v. Jane,* Alleyn 26, where the Court said:

> "When the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident or inevitable necessity, because he might have guarded against it by his contract."[11]

The existence of a state of war between the countries of the respective parties to a contract does, however, sometimes operate to suspend or dissolve a contract, not because performance of it is thereby made difficult, dangerous or impossible, but because war makes intercourse between the belligerents illegal, and therefore the performance of a continuing contract becomes illegal. But even then, the tendency of later decisions is only to suspend the part of a contract the performance of which necessarily violates the duty of allegiance to the state, while those parts which do not so violate that duty must be carried out.[12]

While the acts of the Sovereign of one of the parties to the contract may excuse him from performance, under the law of his own country, the acts of an alien Sovereignty will not excuse him unless so agreed in the contract. This has been adjudged where an embargo or quarantine maintained by a foreign government has prevented the delivery of cargo or led to the arrest or detention of ships.[13]

In deciding a suit for breach of contract to furnish a cargo to and from Gibraltar, where after the cargo was unloaded at that port, all public intercourse was forbidden because of a pestilence, Lord Ellenborough stated the rules in the following language:

> "If indeed the performance of this covenant had been rendered unlawful by the government of this country, the

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[10] *West v. Uncle Sam,* Fed. Cas. 17427, McAll. 505; *Elsey v. Stamps,* 78 Tenn. 709.

[11] Cited and relied on in *Jacksonville, &c. Ry. Co. v. Hooper,* 160 U. S. 514, 527.

[12] Owen, Declaration of War, 417; *Mutual Benev. Life Ins. Co. v. Billyard,* 37 N. J. L. 444.

[13] *Duff v. Lawrence,* 3 Johns. 162; *Barker v. Hodgson,* 3 M. & S. 270; *Jacobs v. Credit Lyonnais,* 12 Q. B. Div. 589; *Spencer v. Chadwick,* L. R. 10, Q. B. 517; *Sjoerbs v. Luscombe,* 16 East 201.

> contract would have been dissolved on both sides, and this defendant, inasmuch as he had been thus compelled to abandon his contract, would have been excused for the non-performance of it, and not liable to damages; but if, in consequence of events which happen at a foreign port, a freighter is prevented from furnishing a load there, which he has contracted to furnish, the contract is neither dissolved, nor is he excused for not performing it, but must answer in damages."[14]

An exception to this general rule exists in the case of a blockade of a vessel's port of destination. The law of England and the United States is that that fact relieves the shipmaster of the duty of performance and places on him the duty to use his best judgment as to the disposal of the cargo. He may recover freight according to the benefit the shipper derives from the master's services, but neither party may recover damages for delay resulting from a blockade.[15]

Some of these principles were relied upon to determine questions which were presented by the outbreak of the war, affecting the payment in European countries of interest or principal of corporate obligations. Railroad and other corporations had issued bonds in very large amounts which, by their terms, were payable in London, Paris, Berlin and other European cities, at stipulated rates of exchange. The war occurring August first, arrangements previously had been made for the payment of the interest due on that date. Some interest was payable September first and a larger amount October first, which had to be provided for. During the first three weeks in August, where exchange was purchasable at all upon European continental capitals, it was at rates prohibitive of normal business relations, yet in cases where the debtor companies had deposited funds in America with the trustees under trust deeds, or with fiscal agents under agreements whereby the latter had undertaken to provide the necessary funds to meet maturing coupons and bonds in European capitals, the liability of these institutions became a matter of some concern. The *moratorium* issued in certain of the European countries operated to prevent actions being brought there by holders of bonds or coupons to enforce their payment, but it was suggested that the failure to remit and have on hand at the designated agency in European places moneys sufficient

[14] *Barker v. Hodgson*, 3 M. & S. 270.

[15] The Spartan, 25 Fed. 44; *Palmer v. Lorrillard*, 16 Johns 348; Abbott's Law of Merchants, Shippers & Seamen, 14th ed., p. 878.

to meet the maturing obligations might affect the credit of the obligors and furnish a basis for actions against the trustees or fiscal agents in this country, and reference was made to the rule above cited that the existence of war is no excuse for non-performance of contracts, unless where the war exists between the countries of the parties to the contract.

In some cases, contracts between the trustee or fiscal agent and the debtor corporation required the former to deposit a certain number of days before the maturity of the principal or interest of its obligations, a sum sufficient to meet them when due, and the trustee or fiscal agent thereupon agreed to publish notice in designated European capitals to the effect that payment would be made at the specified places and offices on the agreed date, such notices to be published in a certain number of newspapers a given number of weeks prior to such due date; and it was mooted whether or not after August 1st, under the existing conditions, advertisements, the publication of which had been commenced pursuant to such agreements, should be discontinued. Later on, when it became possible to communicate with the continental countries, and to cause advertisements to be inserted in newspapers in accordance with the contracts, it was queried whether or not such notices should be published, in view of the strong probability that it would be impossible to remit the necessary funds to make payment in accordance therewith, except at rates of exchange which would be practically prohibitive. The best opinion seemed to be that it was the duty of the fiscal agent or Trustee to carry forward the contract so far as possible, in order that when he came to plead and rely upon impossibility of further performance he at least might not himself have failed to perform something which was wholly within his power, although at the time of such performance it seemed as though it were futile and even amounted to making promises which it was probable he could not perform. As a matter of fact, however, so far as the writer has been able to learn, in all these cases it became possible, without undue expense, to comply with the contract provisions at the maturities of the respective obligations; but in the early days of August, the probabilities were all the other way. That in the event it became feasible to perform the contracts, confirms the wisdom of complying with their terms so far as possible and of not seeking to justify a breach by the forecast of a result which was "on the lap of the Gods."

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