

constantly present with respect to personal property which must pass its time in other taxing jurisdictions,³⁶ a standard should be formulated which allows consideration of the practical risk involved rather than, as the instant case seems to do, allow a full tax by the domicile in a fact situation which, as a practical matter, presents no greater danger of the offensive double taxation than did previous situations where the full domicile tax was denied.³⁷

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Contracts—Impossibility Occurring after Breach Limits Damages.—*Model Vending, Inc. v. Stanisci.*¹—Plaintiff and defendant entered into a written agreement whereby plaintiff was to have the exclusive right to place vending machines in defendant's bowling alley for a period of five years. Eleven months later defendant breached the contract by commencing to sell similar merchandise at his newly established snack bar. Plaintiff filed suit for breach of contract and resulting damages for loss of profits for the entire term of the contract, but while the suit was pending² defendant's bowling alley was destroyed by fire. HELD: The destruction of the premises on which the contract was to be performed made the contract impossible of performance as of that date, and although defendant had breached the contract before the fire, plaintiff was entitled to recover only for loss of profits up to the time of the fire and not for the entire term of the contract.³

Full damages have been recovered when the promisor's breach causes the loss resulting from the supervening impossibility to shift to the promisee. Thus, in *Mills v. Indemnity Ins. Co. of North America*⁴ full damages were recovered against defendant subcontractor's surety when, after breach by the subcontractor and the consequent resumption of certain bridgework by the plaintiff, the bridgework was destroyed by fire. The court said, "While the high water was the immediate cause of the loss, he would not have been placed in the position to have incurred the loss had it not been for the wrongful act of the Metal Products Company."⁵

The instant court, finding no precedent in New Jersey,⁶ gathered sup-

³⁶ *Ott v. Mississippi Valley Barge Line Co.*, supra note 25; *Standard Oil v. Peck*, supra note 23, at 384.

³⁷ *Standard Oil v. Peck*, supra note 23.

¹ 74 N.J. Super. 12, 180 A.2d 393 (1962).

² See Brief for Defendant, p. 1.

³ The following articles are of particular interest on the general topic: Conlon, *The Doctrine of Frustration as Applied to Contracts*, 70 U. Pa. L. Rev. 87 (1922); Page, *The Development of the Doctrine of Impossibility of Performance*, 18 Mich. L. Rev. 589 (1920); Patterson, *Constructive Conditions in Contracts*, 42 Colum. L. Rev. 903, 943 (1942); Smith, *Frustration of Contract: A Comparative Attempt at Consolidation*, 58 Colum. L. Rev. 287, 307 (1958).

⁴ 114 W.Va. 263, 171 S.E. 532 (1933).

⁵ *Ibid.*

⁶ The court was perhaps moved by the decision in *Von Waldheim v. Englewood Heights Estates*, 115 N.J.L. 220, 179 Atl. 19 (1935), where plaintiff, a defaulting buyer under an installment contract for the sale of real estate, was held entitled to a return

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port by analogizing⁷ to authority concerning anticipatory repudiation followed by events making performance of the act contracted for illegal.⁸ The loss in such instances "should rest where chance has placed it; and the same should be true in case of any supervening excusable impossibility."⁹

In the case at hand, the breach was total but there had been actual failure to perform only part of the promisor's undertaking before the impossibility occurred.¹⁰ Regarding this particular set of circumstances, the court cited Williston¹¹ and Restatement of Contracts¹² in approval of the rule announced. Comment *d* of the Restatement provides:

Impossibility on the part of a promisor occurring after he has committed a breach does not ordinarily discharge him, but it will do so if the breach consists merely of an anticipatory repudiation.¹³ After a breach of any other kind impossibility supervening before the time for full performance has elapsed will limit the damages recoverable if the impossibility would have occurred had there been no breach.¹⁴ Thus, if an employer or employee who breaks his contract becomes so ill shortly afterwards that the contract could not have been performed, recovery will be limited.¹⁵ (Footnotes supplied.)

of the consideration he had paid on the contract when the property was condemned by the state, the award having been paid over to the seller. The case, however, could not serve as authority since it specifically called attention to the fact that the seller had waived the defendant's past breaches by not insisting upon a forfeiture; and, since subsequently the lands were merely "taken by another buyer, the state, under the Eminent Domain Act," the seller was in no way damaged. 115 N.J.L. at 224, 179 Atl. at 21.

⁷ Since the court felt prone to analogize, it is submitted that the law of torts would have served as one more area in support of the rule announced. Under the "but for" rule the defendant's conduct is not a cause of the event if the event would have occurred without it. See Prosser, Torts 220 (2d ed. 1955); McLaughlin, Proximate Cause, 39 Harv. L. Rev. 149, 155 (1925); Smith, Legal Cause in Actions of Tort, 25 Harv. L. Rev. 103, 106, 109 (1911); Restatement, Contracts § 432(1) (1934). As to limiting damages in the field of tort see Peaslee, Multiple Causation and Damage, 47 Harv. L. Rev. 1127 (1934).

⁸ Supra note 1, at 16, 180 A.2d at 395-96, citing 6 Williston, Contracts § 1759 (rev. ed. 1938).

⁹ Id. at 16, 180 A.2d at 396.

¹⁰ Ibid.

¹¹ Id. "In the second situation supposed the amount of recovery should be limited if it can be shown that the remaining performance due from the defendant after the breach would have been excused by impossibility. Thus, in an action on a contract of employment, broken by the wrongful discharge of the servant, evidence should be admitted of the employer's death after the breach but during the term of the promised services." 6 Williston, Contracts § 1967A; see, e.g., Rubin v. Segal, 188 App. Div. 636, 177 N.Y. Supp. 342 (1919).

¹² Supra note 1, at 17, 180 A.2d at 396-97, citing Restatement, Contracts § 457, comment *d* (1932).

¹³ Fratelli Pantanella, S. A. v. International Commercial Corp., 89 N.Y.S.2d 736 (Sup. Ct. 1949).

¹⁴ Cf. Dale v. Commonwealth, 101 Ky. 612, 42 S.W. 93 (1897). Pardon of the accused by the Governor after forfeiture of his bond by his departure from the court before conclusion of trial held not to relieve his sureties from liability.

¹⁵ Rubin v. Segal, supra note 11.

The court noted that Professor Corbin was in apparent disagreement both with Williston and the Restatement,¹⁶ but reasoned that his statement was evidently intended to apply only to situations of supervening impossibility occurring after the entire time for performance of the executory contract had expired.¹⁷

Naturally, had plaintiff's suit for loss of profits for the entire term of the contract been successfully concluded one day before the fire, there could be no contention that damages should thereafter be limited. However, these were not the facts before the court, and to allow full damages on the basis of the breach alone is to deny that the primary aim in measuring damages in the field of contract law is to arrive at compensation.¹⁸ The damages for breach of contract should place the plaintiff in the position he would have been in had there been no breach.¹⁹ And had there been no breach, there nevertheless would have remained the fire. In such a situation, the normally operative rule as to impossibility discharging the promisor from further performance should and would prevail.²⁰

An analogous situation often exists when plaintiff, after having filed suit for breach of contract, is thereafter allowed to recover for damages occurring to the time of trial.²¹ It seems reasonable, therefore, that if damages under particular circumstances can be increased, then it should follow that damages under particular circumstances can be decreased. Thus the court in *In re Griffin Mfg. Co.*,²² in allowing plaintiff to prove damages occurring subsequent to the commencement of the action, likewise aided the defendant bankrupt by taking judicial notice of the panic of 1929 in mitigation of such damages.

In reaching a decision founded on analogy and logic, and thereby adjusting the loss between the parties, it would appear that the *Stanisci* court has made the law of impossibility a little more possible to live with.

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Corporations—Appraisal Statutes—Who May Seek Appraisal under the Statute.—*Bache & Co. v. General Instruments Corp.*¹—Bache & Co., a stock brokerage firm, was the registered owner of 33,400 shares of the com-

¹⁶ Supra note 1, at 18, 180 A.2d at 397, citing 6 Corbin, Contracts § 1341 (1951). "Impossibility of performance caused by death of a person or by destruction of the subject matter is not operative as a discharge if the breach for which suit is brought occurred before there was any such impossibility."

¹⁷ See *Holt Mfg. Co. v. Thornton*, 136 Cal. 232, 68 Pac. 708 (1902), where, under a contract to harvest wheat to commence on July 5, appellant did not begin work until July 15 after a large amount of the grain had shelled out. Accord, *Ollinger & Bruce Dry Dock Co. v. James Gibbons & Co.*, 202 Ala. 516, 81 So. 18 (1919).

¹⁸ *Fratelli Pantanella, S. A. v. International Commercial Corp.*, supra note 13; *McCormick*, Damages 560 (1935) and cases cited therein.

¹⁹ *Hawkins v. McGee*, 84 N.H. 114, 146 Atl. 641 (1929).

²⁰ *Taylor v. Caldwell*, 3 B.&S. 826, 122 Eng. Rep. 309 (K.B. 1863).

²¹ *Losei Realty Corp. v. City of New York*, 254 N.Y. 41, 171 N.E. 899 (1930).

²² 43 F.2d 624 (N.D. Ga. 1930).

¹ 74 N.J. Super. 92, 180 A.2d 535 (1962).