UNIVERSITY OF PENNSYLVANIA
LAW REVIEW
AND AMERICAN LAW REGISTER

FOUNDED 1852

Published October to June by the Law School of the University of Pennsylvania, 34th and Chestnut Streets, Philadelphia, Pa.

SUBSCRIPTION PRICE, $3.00 PER ANNUM; SINGLE COPIES, 35 CENTS

NOTES.

CONFLICT OF LAWS—BY WHAT LAW IS THE LIABILITY OF AN INSURANCE COMPANY TO PAY, ON THE EXECUTION OF AN INSURED CRIMINAL, DETERMINED?—In a recent case the question arose as to the liability of an insurance company where the insured was put to death by legal execution for crime. The policy was executed at the company's office in Wisconsin. It provided that it should not take effect until the first premium should be paid. It was delivered to the insured, a resident of Virginia, in the latter state through the local agent of the company and there the first premium was paid. Death by legal execution was not excepted by the terms of the contract.

The representatives of the deceased argued that the contract should be governed by the law of Wisconsin where it was made, by which law such an exception would not be implied as in accord with the public policy of that state. But the court held that Virginia was the place where the contract was made; that the "proper law" was, therefore, the law of Virginia; and that the exception under that law must be read into the contract. In its opinion the court says:

"The obligation of a contract undoubtedly depends upon the law under which it is made."[1]

Now though it is obvious that the court did not here determine the validity of any part of the contract, still it was necessary to consider it as though containing a positive provision insuring death by legal execution and ascertain the proper law to govern its validity. In a state invalidating such a provision the exception would be implied in its absence, and in regarding the law of the place of making as the "proper law" the court followed the rule almost universally adopted in cases involving contracts of insurance.

The principles governing the choice of laws with respect to contracts are frequently stated by courts and text-writers in terms apparently inconsistent and conflicting. As to contracts in general it has been frequently stated that the validity and effect of a contract are governed by the law of the place where it is made.[2] Again, it has been stated in numberless cases that the validity interpretation and obligation of a contract is to be governed by the law of the place of performance if different from the place of making.[3] But, on examination, these cases do not appear to be in hopeless conflict. In the great majority of those cited in support of the first rule the question was as to the formal validity of the contract, *i. e.*, did the formulistic acts done constitute a contract? On the other hand, in cases regarding the place of performance as the "proper law," the questions raised include questions of breach and discharge, that is, performance in law. So it would seem that in many jurisdictions the rule laid down by Mr. Justice Hunt most exactly expresses the results obtained in the various decisions. The rule is that "Matters bearing upon the execution, the interpretation and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. * * *"[4]

In some jurisdictions, however, the courts determine what is the proper law by an examination of the intent of the parties. The rule is often stated that the parties are presumed to intend the law of the place of making, unless the contract is to be performed in a different place, when they are presumed to intend the law of that place. The doctrine was introduced into the English law by Lord Mansfield[5] from the civil law, where the idea prevails that a man

[1] Northwestern Mutual Life Ins. Co. v. McCae, 32 Sup. Ct. Rep. 220 (1912).

[2] Campbell v. Crampton, 2 Fed. 417 (1880); Roubicep v. Haddad, 67 N. J. L. 522 (1902); Hunt v. Jones, 12 R. I. 265 (1879); Carnegie v. Morrison, 2 Metc. 381 (1841).

[3] Pope v. Nickerson, 3 Story, 465 (1844); McDaniel v. Chicago & N. W. R. R. Co., 24 Iowa, 412 (1868); Dyke v. Erie R. R., 45 N. Y. 113 (1871); Waverly Nat. Bank v. Hall, 150 Pa. 466 (1892); Montana Coal Co. v. Co., 69 Ohio, 351 (1904); Springs v. Southbound R. R., 46 S. C. 104 (1896); Benners v. Clemens, 58 Pa. 24 (1868); Graham v. Bank, 84 N. Y. 393 (1881).

[4] Scudder v. Union Nat. Bank, 91 U. S. 406 (1875).

[5] Robinson v. Bland, 2 Burr. 1077 (1760).

may choose his law, is law in England today,[6] and has spread to America to considerable extent.[7] It is submitted, however, that the rule is not adopted in its entirety and that these American jurisdictions would still decide questions of formal validity by the law of the place of making regardless of the intention.[8] Under this rule the place of making and the place of performance of the contract are only evidence of the intention of the parties, and while the latter is sufficient alone to decide the question, its presumptive force may be rebutted by extraneous circumstances.

In dealing with contracts of insurance, however, most cases have determined the proper law regardless of the intention of the parties. In the light, then, of the rules laid down in Scudder v. Bank,[9] and which in substance are declared in many other cases, it would seem that too little attention has been paid to the claims of the laws of the place of performance as the governing law with respect to some of the matters arising out of insurance contracts. It is true the contract in that case was not an insurance contract, but it is not apparent why the rules laid down there are not applicable to insurance contracts. However, in cases where an insurance policy is issued in one state to become effective in another, it is held to be made in the latter and not subject to statutes of the home state in the matter of forfeiture or non-forfeiture for the non-payment of premiums.[10] It has been said that these cases only establish that where the contract is made outside of the state where the home office of the company is situated, the statutes of that state can have no extra-territorial effect;[11] but they have been cited, in cases where a local statute excluding the defense of suicide is in force in the jurisdictions where the contract was made, for the general prop-

[6] *In re* Missouri S. S. Co., 42 Ch. D. 321 (1889); Lloyd v. Guilbert L. R., 1 Q. B. 122 (1865); Chartered Bank of India v. Nav. Co., 9 Q. B. D. 118 (1882).

[7] Liverpool S. S. Co. v. Ins. Co., 129 U. S. 397 (1889); Coghlan v. R. R. Co., 142 U. S. 101 (1891); Hall v. Codell, 142 U. S. 116 (1891); Pritchard v. Norton, 106 U. S. 124 (1882); Bell v. Packard, 69 Me. 105 (1879); New England Mtge. Co. v. McLaughlin, 87 Ga. 1 (1891); Dickenson v. Edwards, 97 N. Y. 573 (1879); Thomton v. Dean, 19 S. C. 583 (1883); Grand v. Livingston, 38 N. Y. S. 490 (1896); Cattle Co. v. McNamara, 145 Fed. 17 (1906); Davis v. Aetna, 67 N. H. 218 (1892).

[8] Amer. Mtge. Co. v. Sewell, 92 Ala. 163 (1890).

[9] *Vide supra* (4).

[10] Mutual Life Ins. Co. of N. Y. v. Cohen, 179 U. S. 262 (1900); Equitable Life Ins. Co. v. Clemens, 140 U. S. 226 (1891); Griesemer v. Mut. Life Ins. Co., 10 Wash. 202 (1894); Fidelity Mut. Life Assn. v. Harris, 94 Tex. 25 (1900); Equitable Life v. Weinning, 58 Fed. 541 (1893); Antes v. State Ins. Co., 61 Neb. 55 (1900); Mutual Life Ins. Co. v. Hathaway, 106 Fed. 815 (1901); *contra:* on the ground that such a statute constitutes a limitation on the corporate power to contract applicable wherever the contract may be made or is by its terms performable; Fidelity Mut. Life Assn. v. McDaniel, 25 Ind. App. 608 (1900); Fidelity Mut. Life Assn. v. Ficklin, 74 Md. 172 (1891).

[11] Mutual Life Ins. Co. v. Hill, 193 U. S. 551 (1903).

osition that the "proper law" to determine the validity of stipulations in an insurance contract, is the law of the place where the contract was made.[12] These decisions have all turned on the point that the contract was consummated where the statute was in force, and that the law of the place of making was the "proper law" to apply. Mr. Minor gives as a reason for this, the fact that performance of such a contract, that is, the payment of money due thereon, "will never be illegal."[13] This explanation, however, does not seem sound. The conditions under which the money is to be paid determine the legality of the payment. The question is one having to do with performance of the contract and the very one arising in the principal case. Is there a promise on the part of the company to perform under the circumstances, or is an exception to its general promise to pay to be implied where the death is by legal execution in which case the company is discharged of all obligation and there is performance in law? It is submitted that under the rules as applied to contracts in general the question should be decided by the law of the place of performance. In the principal case the place of making and the place of performance being Virginia, the result would be the same under either law, but the language used is misleading.

Having decided the "proper law" to be the law of the place of making, the place of making under the facts was undoubtedly Virginia. Wherever there is an express stipulation in the contract that it shall not take effect until payment of the first premium and the premium does not accompany the application, but the company sends the policy to its own agent, who delivers the same to the insured upon receipt of the first premium, from the latter, the contract will be deemed to have been made in the state where the policy was so delivered and the premium paid.[14]

E. H. B., Jr.

CONTRACTS—PROCUREMENT OF BREACH.—The much mooted question of the actionability of a procurement of a breach of contract arose in an interesting way in a recent case in North Dakota.[1] The plaintiff had contracted with A to find purchasers for A's land at a commission per acre of land sold. He had also contracted with B to pay B for procuring such purchasers for him. He alleged that

[12] Knights Templar & Mutual Life Indemnity Co. v. Berry, 50 Fed. 511 (1892); affirming 46 Fed. 439 (1891); National Union v. Marlow, 74 Fed. 775 (1896).

[13] Minor; Conflict of Laws, Sec. 170, n. 1.

[14] Equitable Life Assur. Soc. v. Clemens (*vide supra*); Mutual Life Ins. Co. v. Cohen (*vide supra*); Mutual Life Ins. Co. v. Hill (*vide supra*); Mutual Ben. Life Ins. Co. v. Robinson, 19 U. S. App. 266 (1893); Milliard v. Brayton, 177 Mass. 533 (1900); Cravers v. N. Y. Life Ins. Co., 178 U. S. 389 (1899).

[1] Sleeper v. Baker, 134 N. W. Rep. 716 (N. D. 1911).

A and B conspired by fraudulent devices, and with intent to defraud him, to deal directly with each other, ignoring his agency and cheating him out of moneys due on his contract with A. There was also an allegation that the purchasers had been procured by the plaintiff in performance of his contract. The court held that the allegations of the count against B did not state a cause of action. "The rule, as we see it, is substantially this; 'that an action cannot in general be maintained for inducing a third person to break his contract with the plaintiff, the consequence, after all, being only a broken contract for which the party to the contract may have his remedy by suing on it.' "[2]

The court correctly points out that the allegation of "conspiracy" has no bearing on the question of civil liability,[3] and that the case in its last analysis is one of the procurement of a breach of contract.

Before discussing the precise point involved in the principal case a mention of certain well-established rules of law in relation to rights of free business activity will be useful. No one questions that the boycott by violence or intimidation is a tort. A man has a right to have labor or custom flow freely to him and no violent interference with this right is legally justifiable.[4] The question presented by cases of boycott by economic pressure is a more difficult one for the law, for in such case the infringement of the plaintiff's right to deal is caused by the exercise of the same right by the defendant. In the typical case where A refuses to deal with B, if B deals with C, before the decision of Walker v. Cronin,[5] the American cases took the position that C's right to deal or refuse to deal, being an absolute right, A was not liable for any injury resulting from the exercise of that right;[6] and even later in England this doctrine of absolute rights prevailed.[7] The statement of law found in

[2] This quotation of the court is from Chambers v. Baldwin, 91 Ky. at 126 (1891), where the court in that case quotes from Cooley on Torts, 2nd Ed., 581.

[3] In a very early English case, Savile v. Roberts, 1 Ld. Raym. 374, we find these words: "Though in the old books such actions are called conspiracies, yet they are nothing in fact but actions on the case." The Supreme Court of Kentucky, citing these words of Lord Holt, said: "It is clear, therefore, as well upon the authority of other cases, as that of Savile v. Roberts, that an act which if done by one alone, constitutes no ground of an action on the case, cannot be made the ground of such an action by alleging it to have been done by and through a conspiracy of several." Kimball v. Haman, 34 Ky. at 411 (1871). Cases which may possibly be considered *contra* are: Blindell v. Hagan, 54 Fed. 40 (1893); affirmed in Hagan v. Bindell, 56 Fed. 696, C. C. A. (1893); Elder v. Whitesides, 72 Fed. 724 (1895); City v. Produce Exchange, 48 L. R. A. 90 (1900).

[4] Yanett v. Taylor, Cro. James Rep. 567 (1620); Tarleton v. McYawley, 1 Peake, 205 (1793).

[5] 107 Mass. 555 (1871).

[6] Orr v. Insurance Co., 12 La. Ann. 255 (1857); Bowen v. Matheson, 96 Mass. 499 (1867).

[7] Allen v. Flood, A. C. 1 (1898); Huttely v. Simmons (1895), 67 L. J. Q. B. 213; but see Quinn v. Leatham (1901), A. C. 495.

Walker v. Cronin, *supra,* is an expression of the theory which is the foundation of the doctrine of relative rights. "Any act, the natural result of which is an injury to a particular person, knowingly done by one person, and resulting in injury to the other, renders the actor liable to the injured person, unless the actor has just cause and excuse." If, in the statement of the rule the want of just cause and excuse is called "malice," or "purely malicious motive," the rule, though perhaps clouded, is not altered. The application of this rule has resulted in a general trend of authority that a boycott by economic pressure is a tort.[8] Cases taking the opposite view [9] are explained, it is submitted, not by a difference in views of the law, but because of the comparative ease in finding just cause and excuse when "capital" boycotts "labor," owing to the different economic aspect of the case.

It must be noted that this doctrine has led the courts to hold many acts to be torts, which could not be enjoined, however inadequate the legal remedy, because such injunction would of necessity be an order for personal service or a prohibition of the free expression of ideas. The question of equitable remedy, therefore, has no proper bearing on the question of the actionability of acts of the character under discussion.

If, then, the fact that the defendant's acts could not be stopped in equity does not prevent their amounting to a tort at law, it would seem that a boycott by persuasion might, under Walker v. Cronin, *supra,* be held a tort if no justification could be found for it. However, to support an action under the facts of the principal case, it is not necessary to go to the length of so holding, for in the principal case there is a pre-existing contract the breach of which is procured, a fact lacking in the ordinary case of boycott.

On the question presented in the principal case the authority is in conflict. The rule sustaining the action undoubtedly had its origin in the English Statute of Labourers [10] and the early law with regard to the seduction of servants, and the conflict seems, in the main, to be, whether it should be extended so as to apply to any case which presents the facts necessary to found an action on the case under the rule of Walker v. Cronin, *supra.* It has, beyond a doubt, been thus extended in England in the now famous cases of Lumley v. Gye,[11] and Bowen v. Hall,[12] although Lord Coleridge dissented in both of those decisions on the ground that such actions ought not to be allowed where the relation of master and servant does not exist. Walker v. Cronin was the first case to follow Lumley v. Gye in America. This case, and Haskins v. Royster,[13] which

[8] Moores v. Bricklayers' Union, 23 Ohio W. L. B. 48 (1899).

[9] Raycroft v. Taynor, 68 Vt. 219 (1896).

[10] 23 Edw. III.

[11] 2 Ell. & Bl. 228 (1853).

[12] L. R. 6 Q. B. Div. 333 (1881).

[13] 70 N. C. 601 (1874).

followed it, adopted the extended doctrine in their language,[14] but were, in their facts, cases of contracts of employment. Three years later the North Carolina court held that the reasons for the decision of Haskins v. Royster "cover every case where one person persuades another to break any contract with a third person."[15] Many cases[16] in America can be found which, it is submitted, go to this length, unless they are susceptible of the distinction sought to be applied to them in the principal case. That distinction seems to be this: That to the general rule that an action lies for the procurement of a breach on contract there are two exceptions: first, where the contract is one of employment, *vide supra;* and second, "where a person has been procured against his will or contrary to his purpose, by coercion or deception of another to break his contract." This second exception is fully discussed in Chambers v. Baldwin[17] and Boyson v. Thorn,[18] and adopted by the courts deciding those cases. If it is sound, it can, perhaps, be made to explain all the cases which have extended the original rule, and will, of course, exclude the principal case.

It is submitted that the exception is not sound. Force and fraud are not the only unjustifiable means of procuring a breach of contract. Mere persuasion may come equally within the rule of Walker v. Cronin. Moreover, it does not seem necessary that the breach be against the will of the party breaking the contract in order to render it the proximate result of the defendant's acts.[19] Such a requisite could properly be made if the question were one of criminal liability.

It is submitted that there was no justification for the defendant's acts in the principal case. It is certainly not a case of altruistic persuasion, nor even one of ordinary competition, as the defendant was, by his contract with the plaintiff, at least morally bound not to take the action he took. It is true that a strong group of authorities can be arrayed in support of the principal case; but it is believed that the contrary view is reached by courts which endeavor to keep the law abreast of modern economic advancement.

F. L. B.

---

[14] Rodman, J., in Haskins v. Royster, 70 N. C. 601 (1874), quoting from Walker v. Cronin, *supra:* "We are satisfied that it is founded upon the legal right derived from the contract and not merely upon the relation of master and servant, and that it applies to all contracts of employment if not to contracts of every description."

[15] Jones v. Stanley, 76 N. C. 355 (1877).

[16] Rice v. Manley, 66 N. Y., 82 (1876); Benton v. Pratt, 2 Wend. 385; Green v. Button, 2 Cromp. M. & R. 707.

[17] Chambers v. Baldwin, 1 Ky. at 127 (1891).

[18] 98 Cal. 578 (1893).

[19] Bowen v. Hall, L. R. 6 Q. B. Div. 333 (1881).

MISTAKE—RESCISSION—MEANING OF THE WORD "MUTUAL."—In Frazier *et al.*, v. State Bank of Decatur,[1] the defendants were members of the board of directors of a corporation. The note of the corporation payable to the order of the plaintiff fell due. The plaintiff agreed to a renewal of the note, provided the directors would execute in their individual capacities, and accordingly sent a note reading: "We, or either of us, promise to pay," etc., for the defendants to execute. The directors erased the words "or either of us," inserted the words "as directors," executed the note and returned it to the plaintiff. On discovering the mistake, an action was brought on the original note. Recovery was allowed.

A mistake to justify rescission and the cancellation of instruments must be one occurring in the bargain itself,[2] or in transactions leading up to the bargain, the importance of which is of such magnitude that they are in reality part of the bargain itself.[3] A mistake as to a purely collateral matter will not justify rescission.[4] The plaintiff in these cases seeks to be restored to *statu quo*, to have the contract nullified—in other words, he acts in complete disaffirmance of his bargain.[5] The fact that the subject-matter of the contract is a negotiable instrument does not prevent the admission of the evidence to show that there was no contract.[6]

A mistake which justifies reformation is one which occurs, not in the bargain itself, but subsequent to the bargain; it is a mistake in reducing to writing the contract of the parties.[7] There must be a valid pre-existing contract and a mistake in giving expression to the meaning of the parties to justify reformation.[8] A mistake which justifies rescission will not justify the court in awarding reformation, nor will a mistake justifying reformation justify the court in awarding rescission.[9] The above case is in harmony with established principles.

---

[1] 141 S. W. (Ark.) 941, (1911).

[2] Rupley v. Dagget, 74 Ill. 351 (1874); Goddard v. Insurance Co., 108 Mass. 56 (1871); Raffles v. Wichelhaus, 2 H. and C. 906 (1864).

[3] Broughton v. Hutt, 3 DeG. and J. 501 (1858); Griffith v. Sebastian County, 49 Ark. 24 (1886). The court in the leading case views the transaction as the sale of a chattel. It is submitted that all questions of the materiality of mistake in cases of contract are really founded on the well-known rules in Jones v. Just, 9 B. and S. 141 (1868), though these rules are but seldom cited in cases of mistake.

[4] Dambwann v. Schulting, 75 N. Y. 55 (1878).

[5] Crowe v. Lewin, 95 N. Y. 423 (1884); Webster v. Stark, 10 Lea (Tenn.) 406 (1882).

[6] Daniel, Negotiable Instruments, Fourth Ed., Vol. I, Sec. 81b.

[7] Canedy v. Marcy, 13 Gray, 373 (1859); Pitcher v. Hennessey, 48 N. Y. 415 (1872).

[8] As to the necessity of the mistake being mutual in cases of reformation, see 11 Columbia L. R. 301.

[9] A few well recognized exceptions to this rule may be found. Willes v. Yates, 44 N. Y. 525 (1871); Griswold v. Hazard, 141 U. S. 260 (1891).

The law has been somewhat unsettled in cases of rescission and reformation until recently, due not so much to the inherent difficulty of the subject as to the confusing terminology of the cases. The word "mutual" has been used to mean "common," and "reciprocal";[10] and our leading case is not exempt from this inaccuracy. A mistake which is either mutual ("mutual" used in its strict sense meaning "common") or reciprocal will justify rescission. The cases where the mistake is mutual are easy of identification,[11] but the cases where the mistake is reciprocal are not so easy to recognize and calling these mistakes "mutual" has caused much uncertainty.[12]

"A unilateral mistake, coupled with ignorance thereof by the other party, does not constitute a mutual mistake,"[13] and will not justify rescission.[14] Careful diction in the decisions will do much toward clarifying an avoidable confusion in legal phraseology.

C. A. S.

---

[10] See the following articles: "Law as to Mistake of Fact in Its Effect Upon Contracts," Truman Post Young, 38 Amer. Law Rev. 384 (1904); "Mistake in Contract," Roland R. Foulke, 11 Columbia Law Rev. 197, 299 (1911).

[11] Conturier v. Hastie, 5 H. L. C. 673 (1856).

[12] Notes to Mr. Foulke's article, p. 209.

[13] "Mistake of Fact as a Ground for Affirmative Equitable Relief," Edwin H. Abbot, Jr., 23 Harvard Law Rev. 608 (1910), the most satisfactory treatment of this subject.

[14] Steinmeyer v. Schroeppel, 226 Ill. 9.