BUTTERWORTH *v.* TELLIER.

Opinion delivered March 14, 1932.

GUARANTY—CONSTRUCTION.—Under a contract whereby the majority stockholders in a corporation guaranteed to a minority stockholder that dividends on his stock would be paid to him by the majority stockholders until the corporation should be in condition to declare a regular dividend out of its earnings, *held* that there was an implied condition that the dividends were to continue only so long as the corporation continued to exist unless it was dissolved on account of the neglect or mismanagement of its affairs by the majority stockholders.

Appeal from Pulaski Circuit Court, Second Division; *Richard M. Mann,* Judge; reversed.

STATEMENT BY THE COURT.

J. A. Tellier sued A. C. Butterworth and Edna Ward Miller, executors of the estate of Charles H. Miller, deceased, and A. C. Butterworth, individually, to recover damages for an alleged breach of contract. The defendants denied any liability under the contract.

J. A. Tellier was the principal witness for himself. He is a lawyer, and according to his testimony has lived in Little Rock since August 5, 1905. He became acquainted with Major Charles H. Miller in 1908 and with A. C. Butterworth in about 1914. Sometime in the latter year, the Miller Engineering Company was organized by the above-named parties. Witness held one share in the corporation, which proved to be successful until Major Miller went to France in 1918. Miller and Butterworth were successful contractors during these years, and witness occasionally acted as attorney for them. All of the parties were close and intimate friends, and had offices in the same building near each other. In the fall of 1919,

a corporation was organized for the purpose of operating a granite quarry on the Arch Street Pike near Little Rock. At the beginning, Major Miller and Butterworth each took $25,000 of stock and John Dickinson a like amount. Witness took $5,000. The operation of the quarry did not prove to be successful because the machinery was too light. Miller and Butterworth then proposed to witness to take $10,000 additional stock, and he assented to their request, believing that they would make a success of the business of the corporation. As a basis for taking out the additional stock, on the 17th day of April, 1920, the parties signed in duplicate an agreement which reads as follows:

"MEMORANDUM OF AGREEMENT.

"It is agreed by Charles H. Miller, A. C. Butterworth and J. A. Tellier that said Tellier has and will purchase a total amount of $15,000 of the capital stock of the Southern Granite Company. In consideration of the said purchase of said stock and payment therefor on or before the 19th day of April, 1920, and the personal advantage accruing to said Miller and said Butterworth as majority stockholders of said company, and to raise immediate needed capital, it is agreed by said parties that said Tellier shall receive dividends on said stock at the rate of ten per cent., and the payment of said dividends shall be made every ninety days, beginning on the 10th day of July, 1920, and shall continue until such time as the corporation is in a position to declare regular dividends out of its earnings. Said stock shall be credited with the payment of said dividends and shall draw dividends the same as all other stock at such times as regular dividends shall be declared. Said Miller and said Butterworth hereby guarantee said ten per cent. dividends payable as above stated and for the consideration herein enumerated.

(Signed) "Charles H. Miller,
"A. C. Butterworth,
"J. A. Tellier."

The corporation proved to be unsuccessful; and, after the death of Major Miller, Butterworth continued to make payments under the written contract for a time and then ceased to do so. The record shows that during this time Miller and Butterworth paid Tellier under the contract something more than the principal of the stock last subscribed by him. When the corporation became insolvent, judgments were obtained against it which exhausted all of its property, and it was finally dissolved. Tellier gave his note to a bank for the $10,000 by which he secured the additional capital stock.

According to the testimony of A. C. Butterworth, he and Major Miller lost about $150,000 in the operation of the Southern Granite Company, and they paid every cent of indebtedness of every one they owed or thought that they owed. They paid up the amount the corporation owed Tellier without interest. They agreed to get for Tellier $10,000 under the contract above set forth, and repaid him $11,625. Major Miller's estate has not paid anything on the indebtedness, but Butterworth has personally paid Tellier $3,913.58, since Major Miller's death. This, with a total of $7,711.42 paid by Miller and Butterworth, makes the total of $11,625 paid under the contract from April 10, 1920, to January 10, 1928. The property of the Southern Granite Company has all been gone for years under foreclosure suits brought against it. There was no secret about the foreclosure. Tellier knew all about it. Worthen & Company bought the property in, and Butterworth contracted with them for the repurchase of it. Worthen & Company bought the property in for the amount of a judgment that the company had against the corporation, and Butterworth paid them the amount of the judgment.

Other evidence was introduced at the trial in the circuit court, but the conclusion we have reached as to the proper interpretation to be placed upon the contract, which is the basis of the lawsuit, renders it unnecessary to state it.

The court instructed the jury as follows: "Ladies and gentlemen of the jury: This is a suit by J. A. Tellier against A. C. Butterworth and the estate of C. H. Miller, deceased. The proof in the case shows that the Southern Granite Company was organized, the stockholders being Mr. Butterworth, C. H. Miller, and Mr. Tellier became a stockholder. In order to become a stockholder, he borrowed at the last time $10,000 and made a note at the Southern Trust Company which included $5,000, for which he had previously bought stock. At that time Mr. Butterworth and Mr. Miller executed a contract with Mr. Tellier under the terms of which they were to pay 10 per cent. dividends on his stock amounting to $15,000, for which he gave a note at the bank. The company did not prosper, and did not function, and of course the stock, for that reason, became worthless. From time to time during the period of years Mr. Butterworth and Mr. Miller recognized and paid the indebtedness under this contract before and after the company ceased to function, and for that reason after the company went out of existence the payments were made under the contract, even though there was no company to pay dividends. Therefore, it appears to the court under the undisputed testimony that the defendants are indebted to the plaintiff on the installments that have matured up to this time. There is some question about whether this contract would terminate, and when it would terminate. The court feels that the contract would last until the obligation at the bank was paid, and under the law, as the court sees it, the defendants are liable to the plaintiff for payments under the contract up to date, which have not been paid and amount to $4,875, and you will be instructed to return this verdict: 'We, the jury, by direction of the court find for the plaintiff in the sum of $4,875, and interest'."

The jury returned a verdict in compliance with the directions of the court, and, to reverse the judgment rendered upon it, this appeal has been prosecuted.

Frauenthal, Sherrill & Johnson, for appellant.

June P. Wooten, for appellee.

HART, C. J., (after stating the facts). Counsel for appellee seek to uphold the construction placed upon the contract by the court under the rule that, when a man undertakes by an express contract to do a given act, he is not absolved from liability for nonperformance, even though he is prevented from doing it by an act of God or some impossibility placing it beyond his power to perform the contract. Among the many cases following this rule are *Cassady* v. *Clarke,* 7 Ark. 123; and *Davis* v. *Bishop,* 139 Ark. 273, 213 S. W. 744. In the latter case, the court also recognized certain exceptions to the general rule, and one of them is that where the subject-matter of the contract has been destroyed or the event creating the impossibility is one which could not reasonably be supposed to have been within the contemplation of the contracting parties, the promisor is discharged from the performance of the contract or the obligation to answer in damages.

Again in *Holton* v. *Cook,* 181 Ark. 806, 27 S. W. (2d) 1017, 69 A. L. R. 709, the court recognized that contracts of this character must be considered as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible without fault of the contractor.

Numerous other cases applying the rule and the exceptions thereto may be found in a case note to 21 A. L. R. commencing at 1274, and in 74 A. L. R., commencing at 1290. No useful purpose could be served by an extended review of the decisions because, to determine whether a case falls within the general rule or the exceptions thereto, reference must be made to the facts of each particular case.

It is earnestly insisted by counsel for appellee that in all of these cases the court has recognized that the death of the person or destruction of the subject-matter of the contract has rendered the performance of the

contract a physical impossibility. We do not agree with counsel in this contention. Since the question is one as to the construction of the contract, it can make but little difference how the subject-matter of the contract went out of existence, so long as the party charged was not in any degree in fault in the premises. The minds of the parties are presumed to have contemplated the possible loss of the property. For cases illustrating the principle, see *Dexter* v. *Norton,* 47 N. Y. 62, 7 Am. Rep. 415; and *Lorillard* v. *Clyde,* 142 N. Y. 456, 24 L. R. A. 113, 37 N. E. 489.

In the latter case, there was a guaranty of dividends of the corporation for a term of years made by the manager to persons who were formerly his competitors in business, which the corporation had been formed to continue under what was substantially a partnership arrangement, while both parties were prohibited from becoming interested in competing business during that period, which the court held implied the existence of the corporation during the time specified, capable of earning and declaring dividends. In that case it was also held that a defense to a guaranty of corporate dividends that the corporation had been dissolved would not be defeated on the ground that the dissolution was caused by the defendant's own misconduct, where it was adjudged on the application of the plaintiff for technical breach of corporate duty, for some of which he was as much responsible as the defendant.

We have set out the contract, which is the basis of this lawsuit, in our statement of facts, and need not repeat it here. Reference to it will show that Miller and Butterworth were owners of the majority of the stock in the corporation. Tellier first subscribed for $5,000 worth of the stock and then increased it to $15,000. Miller and Butterworth were original subscribers of stock for $25,000 each. The contract recites that in consideration of the purchase of said stock by Tellier and the personal advantage accruing to Butterworth and Miller as

majority stockholders, it was agreed by the parties that Tellier should receive dividends on said stock at the rate of ten per cent., and that he should continue to receive them until such time as the corporation was in a position to declare regular dividends out of its earnings. It then provides that said stock shall be credited with the payment of said dividends and shall draw dividends the same as all other stock at such times as regular dividends shall be declared. It then provides that Miller and Butterworth shall guaranty said ten per cent. dividends, payable as above stated, and for the further consideration enumerated. Miller, Butterworth and Tellier were all intimate friends and closely associated with each other in business. Miller and Butterworth were the managing officers of the corporation. Just what relation Dickinson had is not shown.

A reasonable construction of the contract shows that there was an implied condition that the dividends to be paid on the stock of Tellier were to be made by Miller and Butterworth as managing officers of the corporation, and were to continue only so long as the corporation continued in existence, and was not dissolved on account of the neglect or mismanagement of its affairs by Miller and Butterworth. The record does not show that any act of Miller or Butterworth caused the insolvency of the corporation. It was organized at a time when the business affairs of the country were in good condition, and it was thought in good faith by all of the parties that great profits would be made in the operation of the granite quarry. The parties had made large profits in other transactions. Like many other businesses, the corporation lost instead of making money. This resulted finally in its insolvency, and its assets were sold to pay the creditors of the corporation. As above stated, there is nothing to show that Miller and Butterworth were at fault in the management of the corporation and caused its insolvency by any act of neglect of their own in the management of the corporation.

In this connection, it may be stated that Tellier received the price of his subscription to the last stock and a little more besides. Even after the death of Miller, Butterworth continued to make payments for a time, and this was after the corporation ceased to exist. This at least showed good faith in the premises.

Upon a consideration of the whole case, we are of the opinion that there was no liability under the contract, and the court erred in directing a verdict for the plaintiff. Inasmuch as the case seems to have been fully developed, the judgment will be reversed, and the cause of action will be dismissed here.