

File No. 26208 Continued.

words. Both parties must have contracted with the knowledge that the City could not deliver more garbage than it produced, and that if the City failed, it could not deliver any at all, and if the supply diminished, it could deliver only what it had. This seems to me to be self-evident.

This proposition is discussed in Elliott on Contracts, Volume 3, Section 1911, in which it is stated:-

"And it is well settled that when from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled, unless when the time for the fulfillment of the contract arrived some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done, then, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach the contract becomes impossible from the finishing of the thing without the default of the contractor."

Legal principles applicable to this question were discussed in the case of Walker vs. Tucker, 70 Ill. 527, in which, in interpreting a contract relating to extraction of coal from a mine, the Court said:-

"The appellants are expressly bound by their covenant "to work the said coal mine during the continuance of this lease and agreement in a good and workmanlike manner." It was incumbent on appellants to know, and the presumption is they did know, when they made this covenant, the difficulties to be encountered in performing it. It is elementary law that when the contract is to do a thing which is possible in itself, the promiser will be liable for a breach thereof, notwithstanding it was beyond his power to perform it, for it was his own fault to run the risk of undertaking to perform an impossibility, when he might have provided against it by his contract.

"But where, from the nature of the covenant, it is apparent the parties contracted on the basis of the continued existence of a given person or thing, a condition is implied that if the performance became impossible from the finishing of the person or thing, that shall excuse such performance.

"If, therefore, the coal mine was exhausted, the appellants were excused from further working it."

Probably the clearest statement of the law applicable to such cases is set forth in the English case of Taylor vs. Caldwell, 3 Best & Smiths Reports, Page 826:-