94

CONTRACT—LIQUOR—LEGALITY OF RIGHT TO RESCIND CONTRACT—55,000 CASES, VICTORIA BRANDY—PURCHASE ORDER B34337—DEPARTMENT OF LIQUOR CONTROL.

SYLLABUS:

Legality of right to rescind contract for 55,000 cases of Victoria Brandy under Department of Liquor Control Purchase Order No. B34337 discussed.

Columbus, Ohio, January 26, 1945

Mr. Robert M. Sohngen, Director, Department of Liquor Control
Columbus, Ohio

Dear Sir:

I have your letter dated January 19, 1945, and received by this office January 22, 1945, inquiring if a certain contract for the purchase of 55,000 cases of Victoria Brandy may be rescinded by the Department of Liquor Control at this time.

The following facts appear from your letter and enclosures accompanying your letter. A quotation offering to sell 55,000 cases of Victoria Cognac type of brandy at $35.00 per case was received from the seller dated December 15, 1943. The quotation which is on the standard form furnished by the Department of Liquor Control stated that the merchandise offered was to be furnished F.O.B. Port of Entry "55,000 cases at the rate of 5,000 cases per month beginning February, 1944." Following the printed word "terms" on the quotation form this appears:

"Irrevocable purchase order providing for and including all merchandise shipped from Portugal prior to January 1, 1945, as evidenced by Ocean Bills of Lading. Net—Sight Draft, Inland Bill of Lading attached."

A purchase order of the Department on the regular purchase order form accompanies your letter. It bears the Department's number B34337 and the date of December 15, 1944. It is an order for 55,000 cases of Victoria Brandy at $35.00 a case and typed on it are the following terms:

"F.O.B. Port of Entry. To be shipped cheapest and best route, freight collect, to be charged to the State of Ohio, Dept. of Liquor Control. This order irrevocable for all merchandise up to and including the amount ordered, providing accompanied by ocean bill of lading dated prior to January 1, 1945, to be shipped at the rate of approximately 5,000 cases per month, beginning in February, 1944.

Net Sight Draft Inland Uniform Order Bill of Lading attached"

A second quotation on the regular form dated April 1, 1944, from the seller is in the file you furnished. It is for the same quantity of Victoria Brandy and bears the quoted price of $42.20. On Purchase Order B34337, referred to above, the typed price of $35.00 has a line drawn through it in ink and above the typed price is written in ink the price per case of $42.20. No explanation is present in your file but it is obvious that the increase in price represents only the increase in federal taxes which was effective on that day, April 1, 1944. Also with your letter is a list of shipments of Victoria Brandy received under Purchase Order B34337 in Ohio. The first is dated May 31, 1944, and is for 1,000 cases. In June, 1944, the Department received in Cleveland 6,015 cases and in the months following the receipts at Ohio warehouses were as follows:

July	2,500
August	1,720
September	1,655
October	7,195
November	7,800
December	13,977
January, 1945	8,406

In freight cars at Cleveland yet to be unloaded are 5,895 cases and there remains to be delivered in Ohio under the contract according to your

figures 828 cases. I have presently no figures showing shipments from Portugal or receipts as to time and quantity at the Port of Entry, which I understand was Philadelphia.

You ask whether you have the legal right to "refuse the acceptance of the 5,895 cases in the freight yards at Cleveland and 828 cases still to come."

Because I have no facts which raise the question I am assuming in my answer that no problems of private international law are involved and what is said herein is based on generally accepted principles of law and the established Ohio law.

A court or other interpreter of meaning in construing a contract as in construing statutes, wills and other writings is said to be bound by the intent of the parties. It is the duty of the interpreter to establish and declare the intent of the parties to the agreement from the language used. The rule is concisely stated in 12 Am. Jur. 748 as follows:

> "Taking into consideration this limitation it may be said that the object of all rules of interpretation is to arrive at the intention of the parties as it is expressed in the contract. In other words, the object to be attained in interpreting a contract is to ascertain the meaning and intent of the parties as expressed in the language used."

See also 9 O. Jur. 393 et seq.

When the words of a contract, however, are ambiguous or have conflicting meanings it is permissible to depart from the words of the instrument and go to the circumstances entering into and surrounding the making of the contract to determine the intent of the agreement. In 9 O. Jur. 408 the following is stated:

> "In construing a contract consideration should be given to all the circumstances under which the contract was made. That construction and effect should be given which shall best accord with the apparent intention of the parties as manifested by its terms taken in connection with the subject matter to which it relates and the circumstances accompanying the whole transaction. In an early supreme court case, it is said:
>
> 'Extrinsic parol evidence is always admissible to give effect to a written instrument by applying it to its subject matter by proving the circumstances under which it was made thereby

enabling the court to put themselves in the place of the parties, with all the information possessed by them, the better to understand the terms employed in the contract and to arrive at the intention of the parties.' "

In 17 C. J. S. at 744 the text is as follows:

"In arriving at the intention of the parties, where the language of a contract is susceptible of more than one construction, it may and should be construed in the light of the circumstances surrounding them at the time it is made, it being the right and duty of the court to place itself as nearly as may be in the situation of the parties at the time so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and the correct application of the language of the contract. For this purpose in construing a contract the court will consider the nature of the agreement itself, together with all the facts and circumstances leading up to and attending its execution, the relation and condition of the parties, the nature and situation of the subject matter, and the apparent purpose of making the contract."

In 12 Am. Jur. at 786 the following is found:

"It is said that the circumstances in which the parties to a contract are placed may generally be considered when they will throw light upon the problems to be solved. General or indefinite terms contained in a contract may be explained or restricted by the circumstances surrounding its execution. The scope and application of most words vary according to the nature of the subject under discussion and the circumstances under which they are used."

As you undoubtedly have anticipated from the above approach, I consider the terms of the agreement under consideration ambiguous and doubtful in meaning. The agreement here results, of course, from the acceptance by the vendor of Purchase Order B34337, which was made in response to the quotation of the same date noticed above. That purchase order imposes the terms of the contract. For convenience, they are repeated here:

"F.O.B. Port of Entry. To be shipped cheapest and best route, freight collect, to be charged to the State of Ohio, Dept. of Liquor Control. This order irrevocable for all merchandise up to and including the amount ordered, providing accompanied

by ocean bill of lading dated prior to January 1, 1945, to be shipped at the rate of approximately 5,000 cases per month, beginning in February 1944.

Net Sight Draft Inland Uniform Order bill of Lading attached"

The above words "this order irrevocable for all merchandise up to and including the amount ordered, providing accompanied by ocean bill of lading dated prior to January 1, 1945," imply that all that is necessary for compliance on the part of the vendor is that the goods be shipped from Portugal prior to the date used, January 1, 1945. Following that definite statement and separated from it by a comma are the words: "to be shipped at the rate of approximately 5,000 cases per month, beginning in February 1944." Immediately the meaning of the preceding words are made doubtful by the latter words. It will be noticed also that the latter provision does not provide for delivery beginning in February, 1944, but rather that the merchandise be shipped beginning at that time. By the use of the words "to be shipped" instead of the words "to be delivered" the meaning is further obscured. The specific use of the word "irrevocable" raises further doubt by reason of the fact that any contract once agreed to is irrevocable in that it may not be breached in the absence of justification. The question arises, does that word have a special significance here?

All of the above factors make it, in my opinion, necessary to go into the circumstances surrounding the execution of the contract in order, if possible, to resolve the conflicts and clear the agreement of the obvious ambiguity.

I have knowledge independent of that furnished by you that during negotiations for the purchase of the brandy the vendor was desirous of securing bank credit or a bank loan to finance the purchase on its part of the brandy. The bank to which application was made for the credit or the loan insisted that before it would be granted a contract be executed which might not be rescinded by the vendee before completion of deliveries. To enable the vendor to secure the bank credit or loan so that it could supply the Department of Liquor Control the agreement was made to be "irrev-

ocable for all merchandise up to and including the amount ordered, provided accompanied by Ocean Bill of Lading dated prior to January 1, 1945." See 9 O. Jur. 413 wherein it is stated as follows:

> "Preliminary negotiations may be considered for the purpose of explaining ambiguous language in a written contract. It is immaterial that the negotiations consist in positive engagements, because their effect depends not on their promissory obligation but upon the aid they afford in the interpretation of the written contract. Conversation between the parties before, or at the time of, the making of a written contract is admissible to show the sense in which ambiguous words were used therein."

In the light of the special circumstances related above the ambiguity of the agreement clears. In so far as time was to be the essence of the contract it was only that all shipments as evidenced by an Ocean Bill of Lading should leave Portugal prior to January 1, 1945. The phrase "to be shipped at the rate of approximately 5,000 cases per month" is minimized in meaning by the consideration of those circumstances. I consider this conclusion to be strengthened by the fact that the meaning of the phrase regarding shipments of approximately 5,000 cases per month is itself ambiguous and obscure in meaning when examined beside the words as to the contract being irrevocable, which are not obscure in meaning standing alone. As noted previously, the terms of the agreement call for the brandy to be shipped at the rate of approximately 5,000 cases a month —not to be delivered at that rate. It is questionable what the meaning is of the words "to be shipped at the rate of approximately 5,000 cases per month." Is it to be shipped from Portugal or from the Port of Entry, and does it import any date of delivery to the warehouses of the Department of Liquor Control in Ohio? I cannot consider that these doubtful words override the clear statement that the contract is irrevocable if the merchandise is accompanied with Ocean Bills of Lading dated prior to January 1, 1945. This conclusion is in accord with the rule as stated in 17 C. J. S. 817 that where separate statements as to time are conflicting "the definite and precise will prevail over the indefinite."

I believe that the same result is reached even if it be considered that the contract as to deliveries was breached in some degree, which I cannot here decide because I have no information as to when shipments, as con-

trasted with deliveries, began and how they were spaced in time or quantity and because the contract contains no promise as to time of deliveries.

It is the general rule that a breach of an agreement must be material in order to justify recision of the contract by the injured party. See Restatement of the Law of Contracts, Section 274, and 9 O. Jur. 511. The rule by which the degree of a breach is to be considered sufficient to justify recision is determined is well stated in the Restatement of Law of Contracts, Section 275, as follows:

> "In determining the materiality of a failure fully to perform a promise the following circumstances are influential:
>
> (a) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated.
>
> (b) The extent to which the injured party may be adequately compensated in damages for lack of complete performance.
>
> (c) The extent to which the party failing to perform has already partly performed or made preparations for performance.
>
> (d) The greater or less hardship on the party failing to perform in terminating the contract.
>
> (e) The wilful, negligent or innocent behavior of the party failing to perform.
>
> (f) The greater or less uncertainty that the party failing to perform will perform the remainder of the contract."

If we consider what happened under the contract in the terms of the above rule and set down the conclusions resulting therefrom under the same identifying marks as used in the above rule, the following conclusions, I believe, would be set out:

> (a) In the absence of a specific promise in the contract as to delivery and in the absence of information that the rate and spacing of shipments varied materially from that promised and in view of the doubtful meaning of the words "to be shipped at the rate of approximately 5,000 cases per month, etc.", it cannot be said that the Department of Liquor Control will fail to receive any benefit that could reasonably have been anticipated under the contract.
>
> (b) If a breach has occurred, it does not appear that the Department cannot be adequately compensated by damages.

(c) The party failing under the contract, if he did so, had made substantial preparations for performance and as presently viewed has substantially performed his part of the contract.

(d) The hardships on the party failing to perform, if such be the fact, would be extreme.

(e) If there did exist a delay in the shipments, it does not appear that it was caused by the wilful act or negligence of the vendor but rather by conditions imposed by the present war in Europe and an embargo imposed by the Portuguese government.

(f) The facts eliminate a consideration of the factor marked as "f" above, inasmuch as approximately the entire contract amount has been delivered.

Considering all of the above factors together, it does not appear that the facts justify a conclusion that there occurred a breach of the contract sufficiently material to justify recision on the part of the Department of Liquor Control.

Another reason occurs to me why the Department may not refuse to accept the 5,895 cases now in Cleveland in freight cars. Although it is not important, in view of the conclusions above reached and has not been relied upon or explored fully as to validity as a reason, it should be mentioned for your consideration. The contract calls for delivery "F.O.B. Port of Entry" with freight to be paid by the Department of Liquor Control from the Port of Entry. Unless there be facts not known to me that would change the conclusion, it is true by the general rule that on a F.O.B. contract of sale the vendor has fully performed when the goods sold are delivered on board cars. See General Code, Section 8399, Rule 4 (2), 35 O. Jur. 790. Applied to the instant case, that rule means that on being placed on cars at the Port of Entry the brandy became the property of the Department of Liquor Control, for which the Department is obligated to pay. It would appear, under these circumstances, that recision by the Department of the contract would have to come before complete performance by the vendor and that it is now too late for recision of the remainder of the contract.

Because of the nature of my conclusion I have found it unnecessary to consider whether or not there was by the conduct of the Department of Liquor Control a waiver of any possible breach of the contract in question.

Answering your question in the terms in which it was asked, it is my opinion that you, as Director of the Department of Liquor Control, have no legal right to refuse the acceptance of 5,895 cases of Victoria Brandy in the freight yards in Cleveland, Ohio, and the 828 cases yet to be delivered, if the 828 cases are accompanied by an ocean bill of lading dated prior to January 1, 1945.

Respectfully,

HUGH S. JENKINS
Attorney General