

No. 1200 BC-2

In The
Supreme Court of Athens

DUKE THESEUS,

Petitioner & Cross Respondent,

v.

PETER QUINCE & THE RUDE

MECHANICALS

Respondents & Cross Petitioners,

ON WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF ATHENS

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

[1] The lower court erred by holding that the transformation of Bottom was not an act of the gods covered by the *force majeure* clause of the contract between Theseus and Peter Quince.

[2] The lower court ruled correctly that the non-performance was excused by the doctrine of impossibility or impracticability.

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STATEMENT OF THE CASE

In 1200 BCE Athens, to celebrate the marriage of their leader, Duke Theseus, to his bride, the wise Queen Hippolyta, and promote their budding acting careers, producer/director Peter Quince and his players, known as The Rude Mechanicals, agreed to perform a contemporary tragedy, *Pyramus and Thisbe*. The Duke was so excited that he contracted with Quince and the Rude Mechanicals to perform the play at the Theater of Dionysus on Theseus' wedding night, and the Duke invited 300 of Athens' nobility to attend, each paying 300 drachmae. "Theseus agreed to pay each player the generous sum of 3,000 drachmae, one half in advance and one half after the performance." *Theseus v. Quince*, 001 Ath. Super. Ct. 001, at 1 (Ath. Super. Ct. 1200 BCE) (*Order*). Naturally, the "contract contained a standard *force majeure* clause whereby both parties were relieved from liability or obligation to the other upon proof that 'an extraordinary and unforeseen event external to the contract had occurred, including war, revolution, crime, or an act of the gods.'" *Id.* (quoting the Royal Contract at cl. 5). Acts of the gods were defined as earthquakes, epidemics, fires, floods, hurricanes, or volcanic eruptions. Further, "the party who could no longer perform would notify the other and make all reasonable efforts to mitigate the harmful effects of non-performance." *Id.*

Quince arranged to have the five Rude Mechanicals meet and practice in the forest outside of the city, where he claimed there was "a marvelous convenient place for our rehearsal. This green plot shall be our stage." (III.i.2-3).¹ Unknown to Theseus and Quince,

¹ The full record is available at: <https://www.folgerdigitexts.org/download/pdf/MND.pdf>.

who, like everyone else in Athens, could not possibly have divined this state of affairs, the forest was the realm of deities and their messengers. Among these were the King of the Fairies, Oberon, and his sprite, Robin Goodfellow (AKA Puck). Using their own powers, and those of flowers struck by Cupid, Oberon and Puck planned to interfere with the players and others.

When the Rude Mechanicals were in the woods, four Athenian youths, Lysander, Hermia, Demetrius and Helena – mismatched couples seeking love and marriage – frolicked therein and, after much exhausting argument, settled in for a nap. Seizing the chance to play Aphrodite and cause the right lovers to couple, “[t]he king of the fairies, Oberon, enlisted his sprite, Puck, to cast spells with flowers and eye drops on the sleeping lovers, causing confusion as to who was in love with whom.” *Order* 1-2. And, “[u]ltimately the fairies set everything straight between the lovers with new fairy dust[.]” But the fairies’ appetite for hijinks was not yet satisfied. “[J]ust before the dress rehearsal [for *Pyramus and Thisbe*], Puck, as part of his forest mischief, turned Bottom’s head into the head of an ass, causing the other Rude Mechanicals, when they saw him, to flee from the forest in terror, and to refuse to come back to work.” *Id.* at 2.

Alas, the play had to be cancelled as Bottom could not be Pyramus in an ass’s head and the players had run off in fear of contagion. The lower court’s rulings on summary judgment in the subsequent lawsuit were half correct. Although the lower court incorrectly held that Puck’s transformation of Bottom’s head into that of an ass was not an act of the gods covered by the *force majeure* clause of Theseus’ contract with Peter Quince, it rightly ruled that performance was impossible after Puck turned Bottom into an half-ass.

ARGUMENT

“[W]hat fools these mortals be.” (III.ii.117). This line by Puck clarifies that events preventing Quince from performing *Pyramus and Thisbe* under the terms laid out in his contract with Theseus were “acts of the gods.” Throughout the record, Oberon and his constituents refer to the people in the woods as mere “mortals.” Ever since man created stone tablet dictionaries predating the fine marble references carved into the Parthenon, the uncontradicted antonym of “mortals” has, of course, been “gods.” *Plato’s Socratic Dictionary* (quoted as *Merriam Webster*). Since Oberon and his henchmen are, by their own admission, gods, their conversion of Bottom into a half-ass was an act of the gods that legally excuses Respondents from their contractual duties to Theseus on impossibility grounds.

I. “Bless thee, Bottom, bless thee! Thou are translated!” (III.i.120): The transformation of Bottom into an ass was an act of the gods.

It has long been established under Athenian law that an act of the gods is “an unusual, extraordinary, sudden, and unexpected manifestation of the forces of nature which man cannot resist . . . [the event] could not reasonably have been anticipated or prevented by human agency.” *Marjan Int’l. Corp. v. V.K. Putman, Inc.*, 1993 WL 541204, at *12 (S.D.N.Y. 1993) (quoting Am. Jur. 2d Act of God § 1 (1962)). Athenian courts have generally coalesced around three requirements to demonstrate that an event was an act of the gods: (i) the occurrence was unusual or abnormal; (ii) it was solely caused by force strictly of nature with no human contribution; and (iii) no human prudence or precaution could have avoided the damage caused. 6 Am. Jur. Proof of Facts 3d 319 (2020).

- A. **“I have had a dream past the wit of man to say what dream it was. Man is but an ass if he go about to expound this dream.” (IV.iv.214): Bottom’s Transformation was an Unusual or Abnormal Situation.**

Under Athenian law, an act of the gods is “such an unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have been anticipated or expected.” *Johns v. R&D Towing, Inc.*, 2019 WL 7344776, at *2 (S.D.W. Va. 2019) (quoting *In re Flood Litigation*, 216 W. Va. 534, 548, 607 S.E.2d 863, 877 (2004)). Being transformed from a human into an animal is an unusual, unexpected and deeply unpleasant experience. *See, e.g.*, F. Kafka “The Metamorphosis” (1915) (“When Gregor Samsa woke up one morning from unsettling dreams, he found himself changed in his bed into a monstrous vermin.”); P. Ovid “Metamorphoses” (8 AD) (“Arachne’s . . . head shrank to the smallest size, and her whole body became tiny. Her slender fingers stuck to her sides as legs, the rest is belly, from which she still spins a thread, and, as a spider, weaves her ancient web.”); Homer “The Odyssey” (700 BCE?) (“[Circe] drugged [the meal] with wicked poisons . . . after [Odysseus’ crew] had drunk she turned them into pigs by a stroke of her wand, and shut them up in her pig-styes.”).

When Puck “did [Bottom] at this advantage take, [and] An ass’s noll [] fixèd on his head”, he created an unusual and extraordinary manifestation of nature. (III.ii.16-17). Peter Quince’s reaction to his comrade’s plight demonstrates how shocking and unexpected Bottom’s transformation was to the Rude Mechanicals: “O monstrous! O strange! We are haunted. Pray, masters, fly, masters! Help!”. (III.i.105).

Theseus's argument that "Bottom was always an ass" is specious and does not mitigate the peculiar nature of Bottom's transformation. There is a profound difference between having the appearance of a donkey and being a bit of a jackass. If Theseus or any ruler or leader could equate the two, entire governmental bodies would be occupied by literal, as opposed to figurative, donkeys. Nevertheless, the Duke of Athens seems to have difficulty understanding what the fundamental nature of a thing is, particularly in litigious settings where he owes money to the artisans of Athens. Theseus will do, or say, anything to avoid his binding contractual obligations. In *In re the Ship of Theseus*, 001 Sc. Ath. 001 (1200 BCE) (documented by Heraclitus), Theseus appears to have refused to pay his outstanding bill to shipbuilders of Athens on the grounds that the ship was no longer the same ship since every piece of the ship had been replaced during his round-trip voyage to Minos. Surely that was a jackass move on Theseus' part, and yet it did not transform him into a donkey.

B. "Either I mistake your shape and making quite, / Or else you are that shrewd and knavish sprite / Called Robin Goodfellow." (II.i.33): Bottom's Transformation was Solely Caused by the Fey Influence of Puck.

Athenian courts interpret acts of the gods as circumstances "caused by violence of nature in which no human agency participates by act or omission." *United States v. Great Northern Ry Co.*, 220 F. 630, 633-34 (7th Circ. 1915). Puck, the architect of Bottom's transformation, is a being (and also was acting on behalf of someone) outside the bounds of human abilities – he is a "hobgoblin" or "sprite" in the service of Oberon, King of the Fairies. (II.i.34 and 41). Puck's

remarkable abilities are clearly superhuman; he can “put a girdle round about the Earth / In forty minutes” and appear in the form of an animal or flame – “Sometime a horse I’ll be, sometime a hound, a hog, a headless bear, sometime a fire.” (I.i.181-82; III.i.110-11).

As Bottom’s transformation was directly caused by Puck, it was a circumstance arising outside of any human interference. Fairies are beings with powers outside the realm of human comprehension, which they sometimes use to transform pumpkins into coaches, or to make deeply impractical glass slippers. *See, e.g.*, J. Keats “La Belle Dame Sans Merci” (1819) (involving a man kidnapped by a fairy queen); F. Child “Thomas the Rhymer” (1882) (yet another instance where a different man was kidnapped by a different fairy queen).

C. “This is thy negligence. Still thou mistak’st, / Or else committ’st thy knaveries willfully.” (III.ii.364): No Exercise of Diligence on Bottom’s Part Could Have Prevented His Transformation.

In Athens, an act of god is “of such a nature that no amount of foresight, pain, or care, reasonably to have been expected, could have prevented the injury.” *Travelers Ins. Co. v. Randall*, 264 F.2d 1, 3 (5th Cir. 1959) (quoting *Froward v. Pittard* 1 Term Rep 27 (1785)) (internal citations omitted). In this case, Bottom and the Rude Mechanicals could not have taken any reasonable precautions to avoid Bottom’s unfortunate transformation. They had no more ability to protect against an invisible threat than they have to protect themselves from a fast-infecting plague. It was not even clear if preventative measures like masks, gloves, or untested potions, could have shielded any of

the Rude Mechanicals from Puck's supernatural powers.

Bottom and the Rude Mechanicals were not the only victims of Puck's knaveries – a group of confused young lovers congregated in the woods and attempted to sort out their romantic entanglements. Puck deepened this confusion by “noit[ing] an Athenian's eyes” with magical herbs gathered at Oberon's behest. (II.ii.372). This magical substance made loyal Lysander forget his love for fair Hermia in favor of Helena, instead of causing Demetrius to reciprocate Helena's love. In observing the ensuing fracas, Puck remarked: “And so far am I glad it so did sort, / As this their jangling I esteem a sport.” (III.ii.373). The lovers could not uncross their stars alone; it was only through the intervention of Oberon that Lysander loved Hermia again, and Demetrius reciprocated Helen's affection. Likewise, Bottom and the Rude Mechanicals could not restore Bottom's human head without fey intervention, nor could they have taken precautions to avoid Puck's interference in their rehearsals.

Most concerning for the Athenian court system's integrity is the threat Puck made while testifying in District Court proceedings to make it appear that “you have but slumbered here / While these visions did appear. / And this weak and idle theme, / No more yielding but a dream.” (V.i.442-45). Simply put, Puck's magic is potent enough to make an entire roomful of astute observers, including a bench of Athenian judges and a larger than normal number of jurors, doubt the reality of uncontroverted facts and evidence before them. Even Lord Sean Hannity or Lady Rachel Maddow have not had that complete an impact. A mere mortal such as Bottom was powerless in the face

of Puck's wiles, and could not possibly have taken precautions to avoid his transformation.

II. “What do you see? You see an asshead of your own, do you?” (III.1.933) And “may not an ass know when the cart draws the horse?” (King Lear I.iv.231): Alternatively, the Lower Court Properly Granted Quince Summary Judgment on Impossibility Grounds.

If the Court decides that Bottom's metamorphosis is not an act of the gods covered by the relevant *force majeure* clause, it must acknowledge that the contract between Theseus and the Players failed to allocate the risk of any non-enumerated intervening events. This oversight, which Theseus' in-house attorney is surely lamenting to Hades as flames lap at his or her toga, allows Peter Quince to raise an impossibility defense to the instant breach of contract allegations, and all three of its elements are satisfied.

A. “[Quince:] Well, we will have such a prologue; and it shall be written in eight and six. [Bottom:] No, make it two more; let it be written in eight and eight.” (III.i.842): The Legal Standard for Asserting an Impossibility Defense.

Impossibility and impracticability “have merged over time,” since the former encompasses the latter. *Short Bros., PLC v. United States*, 65 Fed. Cl. 695, 782-83 (2005). These twin doctrines apply only if a contract does not allocate the risk that a specific intervening event would happen, and releases the non-performing party's duties, including any obligation to pay damages for breach. *United States v. Gen. Douglas MacArthur Senior Vill., Inc.*, 508 F.2d 377, 381 (2d

Cir. 1974). This approach “enforces what can reasonably be inferred to be the intent of the parties at the time of contract.” *Id.* To prevail on such grounds, invoking parties must establish (i) that a specific supervening event rendered their performance impossible; (ii) the relevant contract assumed its non-occurrence; and (iii) non-involvement in circumstances giving rise to impracticability. *See, e.g., United States v. Winstar Corp.*, 518 U.S. 839, 904-10 (1996); *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1294-95 (Fed. Cir. 2002); *Fla. Power & Light Co. v. Westinghouse Elec. Corp.*, 826 F.2d 239, 264 (4th Cir. 1987).

B. “Merry and tragical! Tedious and brief! That is, hot ice and wondrous strange snow. How shall we find the concord of this discord?” (V.i.1840): Peter Quince Satisfied all Three Elements of the Impossibility Defense at the Summary Judgment Stage.

1. “[Puck:] [I] left sweet Pyramus translated there. When in that moment, so it came to pass, Titiana waked and straightaway loved an ass.” (III.ii.1044): *An Intervening Event Rendered Performance Impossible.*

The magical transformation of Bottom into a man with an ass’ head, and subsequent dispersal of the Rude Mechanicals, is a textbook example of a supervening event capable of rendering performance impossible. *See, e.g., CAN Intern. Reins. Co., Ltd. v. Phoenix*, 678 So.2d 378 (Fla. Dist. Ct. App. 1996) (starring actor unavailability due to death from accidental drug overdose rendered completion of a movie impossible); *Autry v. Republic Prods.*, 30 Cal.2d 144, 148-49 (1947) (“At the time of the 1938 agreement, the contingency of the entry of the United States into the second World

War was not expressly contemplated by the parties. Looking at that agreement alone, the war and the plaintiff's [unavailability due to] military service were supervening fortuitous events which rendered performance impossible."); Marilyn Monroe (1962) (Marilyn Monroe was hired to star in "Something's Got to Give," but got fired for shirking her professional obligations. She was eventually rehired, but her August 1962 drug overdose death ended the film's hopes of ever making it to the big screen.).

2. *Flute: "If he come not, then the play is marred; it goes not forward, doth it?": (IV. ii. 5).*

The intervening event of Bottom's transformation into a man with an ass' head does not end the inquiry. To win summary judgment on impossibility grounds, the Rude Mechanicals also had to prove that Bottom's metamorphosis prevented them from fulfilling their contractual obligations to Theseus. The record shows that Quince met this burden with flying colors, unlike Icarus' wax wings. Theseus claimed that the Players' impossibility defense did not apply for three reasons. First, "[a]ccording to Theseus, Bottom was always an ass, and the play could have gone on with Bottom appearing in his ass' 'costume[.]'" Second, Theseus alleged that Quince could have continued "with another player taking the part of Pyramus, since all the actors were completely fungible." And, third, "Theseus argued that if the Players could not perform *Pyramus and Thisbe*, they were obligated to substitute another play." These Sisyphean contentions ignore fundamental truths found in the record of lower court proceedings, and must be ignored. *Order* at 2-3.

Initially, it cannot be said that Nick Bottom was actually an ass – he merely, from time to time, acted

like one. A person's occasional behavior is no more the same as their overall persona than, as the Mad Hatter once said, "I see what I eat is the same as I eat what I see." L. Carroll, "Alice's Adventures in Wonderland," Ch. VII (1865). If Theseus' statement was applied to his own government, namely statements made by his legislators, the Athenian Assembly and Council would consist of nothing but four-legged brayers. While that may someday be an apt political party symbol, it is not a persuasive argument against impossibility.

Additionally, the record proves, beyond any doubt, that the Rude Mechanicals' adaptation of *Pyramus and Thisbe* could not have gone on with Bottom in his altered state. A mule headed and handed actor could not squeeze his snout through the hole in the play's Wall, and surely could not place a sweet kiss upon the cheek of Thisbe (with drool flying into the audience), or hold a sword to kill himself upon a mistaken belief that his love was snacked upon by a lion. Snorts and "hee-haws" do not sweet nothings make. And when the Rude Mechanicals debated portrayal of said lion, Bottom himself insisted on seeing at least part of the actor's face, saying: "Nay, you must name his name, and half his face must be seen through the lion's neck[.]" (III.i.851). Bottom's sense of self (as exemplified by his remark that "[i]f you think I come hither as a lion, it were pity of my life: no I am no such thing; I am a man as other men are[.]") and vanity mean he would never go on stage with an ass' head, let alone on the future Athenian King's wedding night. *Id.*

While the record clarifies that Bottom might have been capable of playing other roles (he offered to play Thisbe and the Lion) (*See* I.ii.) the opposite is not true. The other Rude Mechanicals could barely execute the simple parts that they were assigned. Snout, playing

the Wall, needed only stand still. Snug, portraying the Lion, needed only roar once, and could scarcely recall that task. And Starveling, as Moonshine, just needed to hold a lamp. Also, Quince identified Bottom as the only one who could play the part of Pyramus in Theseus' wedding play, telling Bottom: "You can play no part but Pyramus; for Pyramus is a sweet-faced man; a proper man, as one shall see in a summer's day; a most lovely gentleman-like man; therefore you must needs play Pyramus." (I.ii.345). Here, Quince meant Bottom was uniquely capable of expressing key traits for that role. As only Marlon Brando could play Lord Corleone, Sylvester Stallone the gladiator Rocky, and Elizabeth Taylor the enchanting Cleopatra, so no one in the realm could portray the pathos and nuance of Pyramus, a part Bottom was born to play. And this perspective could not be replaced, for, as Bottom said, "the eye of man hath not heard, the ear of man hath not seen, man's hand is not able to taste, his tongue to conceive, nor his heart to report, what my dream was." (IV.1.1762). It is true, as Jaques once remarked, that "[a]ll the world's a stage; And all the men and women merely players; They have their exits and their entrances; and one man in his time plays many parts." (As You Like It II.7.1040). But, notwithstanding Theseus' contrary assertions before the lower court, parts cannot be played by many people.

As above, Theseus cannot prevail on grounds that the Players had to substitute another play when Bottom's new ass' head caused their production of *Pyramus and Thisbe* to hit the skids faster than Menelaus' attempts to reclaim Helen after she eloped with Paris. Even if Theseus now claims that he would have gladly substituted another play, perhaps *Shrek* or *Sylvester and the Magic Pebble*, where Bottom's transformation

could properly be cast, that was obviously not the case when Puck changed Bottom into a half-ass. Theseus' wedding guests, a star-studded collection of Athenian nobles, had bought, and paid in full for, 300 *Pyramus and Thisbe*-specific tickets, and threatened very costly lawsuits the minute it became apparent they would not get what they had paid for. At this time, Theseus' bank account had been depleted by earlier litigation regarding his failure to pay for a ship taken on a round trip voyage to Minos, as well as expenses associated with his upcoming wedding. Given his dire financial straits, Theseus would not have been willing to face potential liabilities equal to a considerable percentage of his remaining net worth as a result of litigation by Athenian nobles feeling cheated by a subpar replacement play, let alone the attendant political repercussions engendered by such a case. Hence, it is unlikely that Theseus would have accepted production of a different show in lieu of *Pyramus and Thisbe* after Puck transformed Bottom's head into that of an ass.

3. *“Now the hungry lion roars, and the wolf howls the moon; Whilst the heavy ploughman snores, all with weary task fordone.” (V.i.390): Respondents Were Not Involved In the Unforeseeable Events that Made Performance Impossible.*

The Players also proved their contract with Theseus assumed no one would be magically changed into an inverse centaur, and that they had no part in this incident. Regarding the first criteria, in preparation for Theseus' wedding night, Quince “brought the Mechanicals to the forest north of Athens where they usually rehearsed.” *Order 1*. And “[t]here were others in the forest, too. The mischievous woodland fairies lived and frolicked there, *unseen by human eyes.*” *Id.*

(emphasis added). If Theseus, or the Players, had been aware of an invisible menace with a considerable proclivity for ill-timed mischief at Quince's rehearsal location, they would undoubtedly have mentioned it in their play contract, or taken preventive measures – such as masks and gloves – against contact with any airborne substance that could infect them and cause their human visages to transform into strange hybrid beings. Regarding the second element, because Puck changed Bottom into a half-ass of his own accord, it is obvious that the Rude Mechanicals had no role in this incident. As such, the two remaining elements of the impossibility defense were satisfied at the summary judgment stage.

CONCLUSION

For the foregoing reasons, the Court must reverse the lower court's holding that Puck's transformation of Bottom into a half-ass was not an act of the gods, and affirm the lower court's summary judgment that the Players validly raised an impossibility defense to Theseus' breach of contract lawsuit.

Respectfully submitted.

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