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Article 12

Contracts - Impossibility Existing at the Time of the Formation of the Contract No Defense

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with other issues, i.e., the statute controlling licensing of the exhibiting of motion pictures,[17] and a criminal statute.[18] In any event, the court held that "nudity in itself and without lewdness or dirtiness is not obscenity in law or in common sense"[19] and appears not to adhere to the possible extension of obscenity to that which provokes lustful or lascivious thoughts, as it quotes the following from the decision rendered in *People* v. *Muller:*

> If the test of obscenity or indecency in a picture or statue is its capability of suggesting impure thoughts, then indeed all such representations might be considered as indecent or obscene.[20]

That the decisions of the Supreme Court in *Roth* and *Alberts* have crystallized some of the concepts and removed many of the ambiguities existing in the treatment of obscene publications is evident. To what degree they have set the stage for indiscriminate and arbitrary censorship remains to be seen.

[17] N.Y. Education Law (McKinney, 1953) c. 16, §§ 122 and 124 give the Regents the duty of licensing motion pictures unless the film or a part thereof is "obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime."

[18] Ibid., at c. 39, § 1140(b), making any person guilty of a misdemeanor ". . . who in any place wilfully exposes his private parts in the presence of two or more persons of the opposite sex whose private parts are similarly exposed. . . ." This statute mentions neither movies nor nudism.

[19] Authority cited note 16 supra at 241 and 34.

[20] 96 N.Y. 408, 411 (1884).

CONTRACTS–IMPOSSIBILITY EXISTING AT THE TIME OF THE FORMATION OF THE CONTRACT NO DEFENSE

On February 19, 1942, Dr. Zellmer was sued for divorce. The decree stipulated that Dr. Zellmer pay the premiums on several life insurance policies, and make his children, one of whom was the plaintiff, beneficiaries of the policies. At the time of the promise the policies had been lapsed for non-payment of premiums for eleven years and therefore performance of the promise was impossible when made. Dr. Zellmer died and the policy was uncollectible. The named insured filed the present claim against Dr. Zellmer's estate for breach of contract. The estate's defense of existing impossibility was overruled and the claim was allowed for the amount of the policy. *In re Estate of Zellmer*, 1 Wis. 2d 46, 82 N.W. 2d 891 (1957).

Although this precise point of law has seldom been encountered in the courts of this country, the *Zellmer* case illustrates a fundamental point in impossibility law. The governing principle of law is stated in the Re-

statement of Contracts.[1] It states that a promise to perform an impossible act is binding, where the impossibility existed at the time of the contract and where the promisor knew or should have known of the impossibility. In the instant case, eleven years prior to the time Dr. Zellmer promised to pay the premiums on the policy, said policy had lapsed because of non-payment of a premium. Dr. Zellmer's promise was binding even though performance was impossible since Dr. Zellmer had occasion to know or should have known of the existing impossibility.

Impossibility may exist at the time a bargain is entered into or may be due to subsequent events. If the impossibility exists at the time the contract is entered into, there may or may not be liability; liability is dependent upon whether or not the promisor knew or had cause to know of the existence of the impossibility. In the instant case the court held Dr. Zellmer's estate liable notwithstanding the fact that actual performance was impossible. If Dr. Zellmer, however, had had no reason to know, and did not in fact know of the existence of the impossibility, he would not have been liable.[2]

It is ordinarily supervening impossibility that is referred to when the question of impossibility, as a defense to contracts, is considered.[3] In cases of supervening impossibility, liability always exists at the time the contract is entered into, whereas in cases of existing impossibility, liability may or may not exist at the time the contract is entered into. The types of supervening impossibility which excuse performance are: impossibility by local law,[4] impossibility caused by death or serious illness of a promisor whose promise is personal,[5] non-existence of a specific thing necessary for performance of the contract[6] and non-existence of essential facts or circumstances other than specific things or persons.[7] The *Zellmer* case illustrates an example of existing impossibility wherein the promisor was held liable because he knew or should have known of the existing impossibility. His liability, therefore, could not be excused. In cases involving supervening impossibility, the liability exists at the time the contract is entered into but it is subsequently discharged.

The Wisconsin Court in the instant case discussed the recently decided

[1] "Except as stated in sec. 455, or where a contrary intention is manifested, a promise imposes no duty if performance of the promise is impossible because of facts existing when the promise is made of *which the promisor neither knows nor has reason to know*." Rest., Contracts § 456 (1932) (italics added).

[2] Ibid.

[3] 6 Williston, Contracts § 1933 (1938).

[4] Rest., Contracts § 458 (1932).

[5] Rest., Contracts § 459 (1932).

[6] Rest., Contracts § 460 (1932).

[7] Rest., Contracts § 461 (1932).

Australian case of *MacRae v. Commonwealth Disposals Commission.*[8] A brief summary of the facts reveals that during World War II a number of ships became wrecked or stranded in the waters adjacent to New Guinea. After the war, the defendant commission had the function of disposing of these ships as it saw fit. The commission advertised for sale "an oil tanker on Jourmaund Reef approximately one hundred miles north of Samarai (New Guinea)." The plaintiffs tendered a bid for the purchase of the tanker which was accepted by the commission, resulting in a contract for the sale of the vessel to the plaintiffs. There was no ship answering the description of the tanker lying near the location indicated. The court held that the commission had been guilty of "the grossest negligence" in advertising for sale a ship that did not exist. Since there was no such tanker in existence, there had been a breach of contract and the plaintiffs were held entitled to recover damages for the breach.

The Australian case and the instant case both dealt with contracts that were impossible of performance when made. In the *Zellmer* case the policy had lapsed prior to the making of the contract and in the *MacRae* case the ship, for all practical purposes, had no existence. In both cases the contracts were enforced. The Australian court based its decision on an interpretation of the contract rather than on the inapplicability of any principles of impossibility of performance. The gist of the Australian court's holding was that "the only proper construction of the contract is that it included a promise by the commission that there was a tanker in the position specified."[9]

The Wisconsin court referred to a discussion of the Australian case in the *Modern Law Review.*[10] The author in stating his approval of the Australian decision, states:

> The way is becoming clearer towards explanation of the relevant principles in terms of construction and offer and acceptance rather than within the framework of an independent and spurious category of mistake.[11]

The Wisconsin court, however, preferred to follow the view expressed by the *Restatement of Contracts*[12] and refused to base liability on an interpretation of the contract. In explanation of this contention the court stated:

> To interpret the instant contract as containing a promise by Dr. Zellmer that the policy in question was in force and effect at the time of entering into the stipulation, is to invoke a legal fiction. . . . Therefore, we prefer to ground our

[8] 84 Commonwealth Law Rep. 377 (1951).

[9] 25 Australian Law. J. 425, 430 (1951).

[10] 15 Modern L. Rev. 229 (1952).

[11] Ibid., at 232.

[12] Authority cited note 1 supra.

decision in the instant case squarely upon the principle enunciated in 2 Restatement Contracts, sec. 456, supra. A promisor should not be excused from responding in damages for breach of contract on the ground of impossibility of performance due to mistake in a situation, where, due to his own negligence, he had failed to discover at the time of entering into the contract the nonexistence of the fact or thing which made performance by him impossible. It is on this basis that we determine that Dr. Zellmer's estate must be held liable to the claimant.[13]

[13] In re Estate of Zellmer, 1 Wis. 2d 46, 51, 82 N.W. 2d 891, 894 (1957).

CRIMINAL LAW–REFUSAL TO ORDER SANITY HEARING ABUSE OF JUDICIAL DISCRETION

Defendant was convicted of murder. Prior to and at the time of trial, defendant rejected appointed counsel and conducted his own defense with counsel present to lend assistance. Defendant's counsel suggested, in his opening argument, that the defendant was possibly insane. The remark was objected to, and in an argument in chambers, defendant strenuously denied he was then or had ever been insane, and stated he would not plead insanity in any case. Defendant conducted his defense in a very unorthodox manner with frequent religious allusions and intimidation of his counsel. The court refused two tendered instructions on insanity by appointed counsel. The question of defendant's sanity was also raised in a motion for a new trial. In overruling the motion, the court stated that it believed the defendant to be sane. It was held on appeal that the record raised serious doubt as to defendant's sanity at the time of the trial and the trial court abused its discretion in refusing to direct a sanity hearing. The judgment was reversed and remanded for a new trial. *People v. Burson*, 11 Ill. 2d 360, 143 N.E. 2d 239 (1957).

At common law, a person, while insane, cannot be tried, sentenced or executed.[1] The test for present insanity is stated as an appraisal of the present ability of the accused to so understand the nature and purpose of the proceedings taken against him as to be able to conduct his own defense in a rational manner.[2] The common law rule has been codified in all jurisdictions with various procedural methods of determining present insanity.[3] Perhaps the most progressive statute regarding present insanity is the famed "Briggs Law" of Massachusetts which provides:

[1] People v. Maynard, 347 Ill. 422, 179 N.E. 833 (1932); 14 Am. Jur., Criminal Law, § 44 (1938); 23 C.J.S., Criminal Law, § 940 (1940).

[2] 14 Am. Jur., Criminal Law, § 45 (1938); 44 C.J.S., Insane Persons, § 127 (1940); 3 A.L.R. 94.

[3] The Illinois Statute provides, "A person that becomes lunatic or insane after the commission of a crime or misdemeanor shall not be tried for the offense during the continuance of the lunacy or insanity. . . . In all of these cases, it shall be the duty of the court to impanel a jury to try the question whether the accused be, at the time of the impaneling, insane or lunatic." Ill. Rev. Stat. (1955) c. 38, § 593.