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Contracts—Impossibility of Performance

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Undoubtedly the decision is not precedent value for the proposition that a similar penalty provision in a contract would be upheld in an action at law for damages. Furthermore, the strong dissent by three members of the Court of Appeals indicates a disfavor with any similar provision even if awarded within the framework of arbitration. Had the "penalty" been a fixed sum, or the percentage range been at a higher bracket, or if the arbitrator had made his award on the basis of 10% rather than 2% this writer believes the award would not have been allowed as liquidated damages.

Impossibility of Performance

In 1647 a general rule was expounded that the parties to a contract ought not be excused from their self-created duties because a subsequent event had rendered performance impossible.⁴² The contract should have provided for such contingencies. This strict rule has since been hacked away by many exceptions. The feeling now prevails that at least a portion of the risk of disappointment from supervening unforeseen events should be allocated to the promisee.⁴³ It is recognized that if the law prevents performance on the part of the promisor he should not be penalized for yielding to its commands.⁴⁴ This rationale will also apply to judicial orders and decrees instituted by a third party, unless the proceedings were a result of the defendants own negligence or breach of duty to others, and if no means of avoiding such interference with performance are reasonably available.⁴⁵ Under the latter circumstances the event could not be said to be fortuitous.

With this background in mind it is not difficult to follow the extreme logic of the Court of Appeals when it disallowed the defense of impossibility in *General Aniline Film Corp. v. Bayer Co.*⁴⁶

The plaintiff brought suit on a contract its assignor's had executed with the defendant. The U. S. Government instituted anti-trust proceedings against the defendant and on a consent decree issued an injunction restraining the defendant from performing any terms of the agreement. The plaintiff had not been made a party to the anti-trust action. The court spoke in terms of the effect of a consent decree, its admissability in evidence, and its validity. They concluded that the plaintiff would be deprived

42. *Pardine v. Jane*, Aley 26 (1647).

43. 6 CORBIN, CONTRACTS § 1320.

44. *Id.* § 1343.

45. *Id.* § 1346.

46. 305 N. Y. 479, 113 N. E. 2d 844 (1953).

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of his day in court. The rationale was simple; allowing a decree to be entered on consent made the defendant a party to the restraining order, therefore, he had not made reasonable effort to prevent the interference.⁴⁷

The fact which makes the defense fail is the consent decree. It was indicated by Judge Fuld that there might possibly be a different result had the injunction been issued otherwise. The reasoning in the case should be examined in the light of the fact that the defendant was faced with an anti-trust suit in which its position was untenable. In order to save costs and time litigation was avoided by allowing the order to be issued against them uncontested. Now, it finds it is faced with a suit on the very contract it has been enjoined from performing. The corporation is told, however, that it may still defend on the basis of illegality in order that the promisee will have an opportunity to try the merits of the contract in court. Yet, even if the decision of this court is rendered in favor of the plaintiff, the defendant would still be lawfully enjoined from carrying out the terms of the contract.

Furthermore, the defense of illegality does not always present the same relief as impossibility. The former leaves the parties where the court found them and paid in consideration may not be recouped.⁴⁸ The latter allows for the recouping of consideration paid in over that allocable to that part of the performance which has been executed.⁴⁹

Insurance Policy Interpretation

Two insurance policies beset the Court of Appeals this term with problems of interpretation.

In *Wagman v. American Fidelity and Casualty Co.*⁵⁰ the court specifically adopted the "complete operation doctrine"⁵¹ as a guide for construing problems involving "load and unload" provisions⁵² of "use" clauses normally included in automobile lia-

47. "However willing defendants may have been to relinquish their own rights under that contract, however ready to absolve themselves from liability, they certainly had no authority or power to extinguish Analine's claim." *supra* note 46 at 484, 113 N. E. 2d at 847.

48. See *Van Schaick v. Manhattan Sav. Inst.*, 273 N. Y. 37, 6 N. E. 2d 88 (1936); *O'Mara v. Dentinger*, 271 App. Div. 22, 62 N. Y. S. 2d 282 (4th Dep't 1946); RESTATEMENT, CONTRACTS § 598.

49. 6 WILLISTON, CONTRACTS § 1974 (Rev. ed. 1938); RESTATEMENT, CONTRACTS § 468; RESTATEMENT, RESTITUTION § 108 (c) (1937).

50. 304 N. Y. 490, 109 N. E. 2d 592 (1953).

51. E.g., see Note, 160 A. L. R. 1251 for a complete analysis of the doctrine.

52. A agrees to defend and indemnify G against claims for damages for accidental injury or death arising out of the ownership maintenance or use of G's trucks. *The use of the trucks includes the loading and unloading thereof.*