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CONTRACTS--EFFECT OF STIPULATION FOR RE-NEGOTIATION UPON STATED CONTINGENCY--IMPOSSIBILITY OF PERFORMANCE

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CONTRACTS—EFFECT OF STIPULATION FOR RE-NEGOTIATION UPON STATED CONTINGENCY—IMPOSSIBILITY OF PERFORMANCE—Plaintiff, popular star of "western" motion pictures, was under contract to defendant, extended by successive options through March 6, 1944, to act in eight pictures per year, at a graduated salary which would become $14,000 per picture during the last year of the contract. In May, 1942, a further contract was made, by which defendant secured an option on plaintiff's services for another year, which option it duly exercised. This later contract provided that if plaintiff went into military service, the parties would "agree upon their mutual rights and obligations" under the two contracts in view of that fact. This was a compromise provision in lieu of plaintiff's requested provision that the contracts be terminated upon that contingency. Plaintiff enlisted in the Army in July, 1942, with thirteen pictures still to be made under the first contract and eight more under the second. Negotiations to arrange for filming three of these, with Army permission, were unsuccessful. While still in the Army, plaintiff brought suit for a declaration of rights and duties under the contracts. The trial court, affirmed by an intermediate appellate court, ruled that he would be bound to resume performance of the contracts following his discharge. On further appeal, *Held*, reversed. Plaintiff has no duty to continue performance after discharge from service. *Autry v. Republic Productions, Inc.*, (Cal. 1947) 180 P. (2d) 888.

The court seems to have followed alternately two separate lines of reasoning, and finally to have joined them in support of its decision. Primarily it seems to say that the stipulation for further agreement as to obligations under the two contracts and the occurrence of the contingency upon which it depended constituted an abrogation of the terms of the first contract, and the failure to agree on new terms did not revive the old ones, but left the terms undecided and therefore unenforceable. This conclusion may appear contrary to the general rule that an agreement to agree in the future,[1] or one in which the terms are too indefinite,[2] is completely ineffective and cannot be enforced. However, a contract is to be interpreted according to the intentions of the parties, and may be construed, when ambiguous in its terms, by reference to the conduct of the parties.[3] A contract may be discharged or abrogated by a new contract altering the old or rescinding it altogether.[4] In the principal case, the court combined these various ideas and concluded that the stipulation in question, as understood by the parties, had abrogated the terms of the first contract so that plaintiff should not be required to resume performance on those terms. In view of defendant's refusal to agree that the contracts should be terminated by plaintiff's entering military service and its attempts to have the contract performed on the old terms even after he had done so, this interpretation seems very doubtful. The court stated, however, that regardless of the

[1] 1 WILLISTON, CONTRACTS, rev ed., § 45 (1938).

[2] 1 WILLISTON CONTRACTS, rev. ed., § 37 (1938); GRISMORE, CONTRACTS, § 25 (1947).

[3] 3 WILLISTON, CONTRACTS, rev. ed., § 623 (1938); 1 CONTRACTS RESTATEMENT, § 235 (e) (1932); GRISMORE, CONTRACTS, § 103 (1947).

[4] Housekeeper Publishing Co. v. Swift, (C.C.A. 8th, 1899) 97 F. 290 at 294; Smith v. Kelley, Maus & Co., 115 Mich. 411, 73 N.W. 385 (1897); GRISMORE, CONTRACTS, § 207 (1947).

effect given the "further agreement" proviso, its decision would stand on a second ground: that performance had become temporarily impossible and that further performance, after the impossibility had been removed, was excused because, in view of the reduced period during which plaintiff could expect to perform successfully in "western" roles and considering the general price inflation, it would impose upon him a substantially greater burden than he had contemplated. Again the court seems to have made a questionable application of recognized contract principles. From the original rule that impossibility arising subsequent to the making of a contract does not excuse non-performance,[5] the courts have developed [6] a number of "exceptions to the general rule," [7] by which they manage to grant relief when changed circumstances have made performance actually impossible or very burdensome as a practical matter. One special aspect of the development has been the growth of the doctrine of "frustration of adventure," beginning with the Coronation cases,[8] and since applied under many circumstances involving a disappearance of the value of the consideration for one of the parties, though performance would still be possible.[9] Another is the rule governing cases of temporary impossibility where performance cannot be given at the time when it is due but subsequently becomes possible: that further performance will be required unless it would be, in effect, a thing different from that for which the parties contracted.[10] The principal case illustrates the difficulty of applying impossibility concepts as now established. The court seems correct in saying that the doctrine of frustration, as generally understood, does not apply to such a case as this;[11] but it seems to be setting a dangerous precedent for involving itself in complicated problems as to the burdensomeness of resuming performance after temporary impossibility. It may be equitable to excuse performance for something less than the total disappearance

[5] Paradine v. Jane, Aleyn 26, 82 Eng. Rep. 897 (1646).

[6] For a brief but authoritative analysis of the growth of doctrines of impossibility, see Page, "The Development of the Doctrine of Impossibility of Performance," 18 Mich L. Rev. 589 (1920); 46 MICH. L. REV. 401 (1947).

[7] Baily v. De Crespigny, L.R. 4 Q.B. 180 (1869); Texas Co. v. Hogarth Shipping Co., Ltd., 256 U.S. 619, 41 S. Ct. 612 (1921); Kentucky Lumber & Millwork Co. v. G. H. Rommell Co., 257 Ky. 371, 78 S.W. (2d) 52 (1934); Wolfe v. Howes, 20 N.Y. 197 (1859); 6 WILLISTON, CONTRACTS, § 1935 (1938); 2 CONTRACTS RESTATEMENT, §§ 458-461 (1932); GRISMORE, CONTRACTS, §§ 170-174 (1947); annotation in 137 A.L.R. 1199 (1942) listing many cases of wartime impossibility of performance.

[8] The leading case is Krell v. Henry, [1903] 2 K.B. 740, 18 T.L.R. 823.

[9] Gulf & S.I. R. Co. v. Horn, 135 Miss. 804, 100 S. 381 (1924); La Cumbre Golf & Country Club v. Santa Barbara Hotel Co., 205 Cal. 422, 271 P. 4, 6 (1928).

[10] Allanwilde Transport Co. v. Vacuum Oil Co., 248 U.S. 377, 39 S. Ct. 147 (1919); Mawhinney v. Millbrook Woolen Mills, 234 N.Y. 244, 137 N.E. 318 (1922); 6 WILLISTON, CONTRACTS, § 1957 (1938) and cases cited; also see New York Life Insurance Co. v. Statham, 93 U.S. 24 (1876), as to revival of contracts suspended by war; and Balter, "Impossibility of Performance Due to War Measures—Is Contract Dissolved or Merely Suspended?" 18 CAL. S.B.J. 86 (1943).

[11] Moreland v. Credit Guide Publishing Co., 255 Mass. 469, 152 N.E. 62 (1926); Retail Merchants' Business Expansion Co. v. Randall, 103 Vt. 268, 153 A. 357 (1931).

of the value of consideration which characterizes the frustration cases; but performance should not be excused, merely because one party might, at the time of suit, reasonably demand a greater return than he would receive under the existing contract.[12] Courts in states less accustomed than California to the fabulous salaries paid to motion picture stars might well say that resumption of performance under these circumstances did not impose on the plaintiff a burden substantially greater than he had contracted to undertake. Thus, both grounds for the decision seem to be open to attack in their application of the rules which the court purports to follow. In addition, some confusion is introduced by the court's failure to make clear on which ground the decision was based, or which set of principles it thought properly applicable. Because of this, the decision may stand either as a doubtful case of implied rescision or abrogation of a contract by subsequent agreement, or as an extreme application of impossibility concepts.

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[12] Gans Steamship Line v. Wilhelmsen, (C.C.A. 2d, 1921) 275 F. 254 at 264; Commonwealth v. Bader, 271 Pa. 308, 114 A. 266 (1921); 6 WILLISTON, CONTRACTS, §§ 1931, 1963 (1938), and cases there cited; GRISMORE, CONTRACTS, § 175 (1947).