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Governmental Regulations: Not an Excuse for Nonperformance of a Lease

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he did not take the witness stand and testify under oath. Therefore, in the opinion of the writer, in any case where the prosecuting attorney makes a direct comment on the failure of the defendant to testify, the jury should be dismissed. The same should be true in a case where an indirect comment has been made by means of a statement of the prosecutor that certain evidence of the Commonwealth had not been refuted or that the defense had failed to introduce testimony concerning a particular fact, if in each of these cases it would be reasonably apparent to the jury that the defendant himself is the only person who could deny that evidence or testify to the particular fact. The jury should be dismissed in these instances even though from all the evidence the defendant is clearly guilty of the crime with which he is charged. A failure to do so would result in a conviction which was obtained through unlawful procedure. The fact that the court admonishes the jury not to consider the comment and even repeats the admonition in the instructions is immaterial. The harm is already done, and the admonition by the court serves only to emphasize the fact that the defendant has not taken the witness stand and further imbeds that fact in the minds of the jury. Of course, if the defendant is to take advantage of such an error, he must object at the time and ask that the jury be dismissed.

Due to the great number of cases arising under KRS 455.090 it appears that the Court of Appeals of Kentucky should clearly and finally state how this statute is to be interpreted by the trial courts, overruling any cases which are in conflict.

ROBERT M. SPRAGENS

GOVERNMENTAL REGULATIONS: NOT AN EXCUSE FOR NONPERFORMANCE OF A LEASE

Recent governmental regulations and restrictions for the promotion of the war effort have wrought havoc with certain types of businesses, for example, the garage business. Rationing of tires and gasoline and restrictions on the sale of automobiles and trucks have all played their part in making a once-lucrative business less profitable. The question has arisen whether or not the lessee of a building rented for the purpose of selling cars or operating a filling station will be discharged from his obligation solely because his business has become commercially unprofitable, i. e., because there has been a partial failure of the purpose for which the building was rented.

It is clear that this is not a case of strict impossibility. The lessee may still perform his part of the contract by paying rent, although he is limited by his contract to a certain type of business and this use is now limited by circumstances beyond his control. But, it may be argued, that he may be excused from performance of his contract under the relatively new theory of impracticability or

that he may be excused under the doctrine of "commercial frustration."

By the theory of impracticability, impossibility has been enlarged so as to include not only strict impossibility but also "impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved."[1] Usually it is said that physical impossibility means practical impossibility according to the knowledge of the day.[2] However, mere unanticipated difficulty not amounting to impracticability will not excuse performance of the contract.[3]

One of the leading cases excusing performance of the contract because of impracticability is *Mineral Park Land Co.* v. *Howard.*[4] The defendants contracted with the plaintiffs to take all the gravel and earth needed for certain purposes from the plaintiffs' land, but because of unanticipated water, the cost of obtaining much of the gravel greatly exceeded its value. The court said that in determing whether the gravel was available, conditions had to be viewed in a practical and reasonable way. "But, where the difference in cost is so great as here, and has the effect, as found, of making performance impracticable, the situation is not different from that of a total absence of earth and gravel."[5]

In the problem under discussion, the lease does not fall within this modern exception. In the gravel case, *supra,* there was actual difficulty and *impracticability of performance,* whereas in the case of the lease, there is no such difficulty. Nothing in the governmental restrictions prevents the lessee from occupying and using the premises as before, and nothing prevents him from paying rent. Therefore, the lessee cannot be excused under the theory that performance has become impractical.

The doctrine of commercial frustration obtains where the benefit or purpose of the contract, known to both parties, has been destroyed by an unanticipated event which, had the parties thought of it, would have been stipulated against in the contract. The theory was first applied in the Coronation cases in England;[6] and

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[1] RESTATEMENT, CONTRACTS (1933) Sec. 454.

[2] Fisher et al v. U. S. Fidelity & Guaranty Co., 313 Ill. App. 66, 39 N. E. (2d) 67 (1942), State ex. rel. Davisson v. Hillis et al., Ind. App. —, 124 N. E. 515 (1919), Cosden Oil & Gas Co. v. Moss et al., 131 Okla. 49, 267 Pac. 855 (1928)

[3] RESTATEMENT, CONTRACTS (1933) Sec. 454*a*.

[4] 172 Cal. 289, 156 Pac. 458, L.R.A. 1916F 1 (1916).

[5] *Id.* at —, 156 Pac. 458, 460.

[6] The leading case is that of Krell v. Henry (1903, C.A.) 2 K.B. 740. It was held that a supervening circumstance excused performance of contracts even though it did not make their performance (the hiring and renting of seats) impossible or even difficult, but deprived it of the value (giving a view of the coronation processional) which, quite obviously, was the only reason for entering into the contracts.

has since been adopted by the American courts under a variety of circumstances, as for example, in the Yatch Club cases.[7]

Obviously, the doctrine of commercial frustration does not apply to a situation such as the one in question in which the tenant seeks to be excused from his lease. The unanticipated event must be of such a nature that the parties, if they had thought of it, would have stipulated against it. But even if the landlord of the garage had anticipated governmental regulations restricting the sale of cars, etc., it is not likely he would have stipulated that in such event the tenant might be released. It seems unreasonable to throw the risk of loss from one party to another when both are equally innocent.

Further, a lease is treated differently from an ordinary executory contract. An agreement to rent is a unilateral contract made in consideration of a conveyance. The lessee bargains for an estate in land and that is all. Consequently, when he receives that estate, he has everything to which he is entitled, and if a loss results, it is but an incident of that ownership and he must bear that loss.[8] Thus a lessee will not be released because clay is not suitable to one or two manufacturing purposes or because there is considerable and increasing difficulty and expense in removing it,[9] and a mining lessee will be obliged to pay rentals notwithstanding falling prices make mining unprofitable.[10] Performance by a lessee under a lease of motion picture apparatus will not be excused by destruction of the theater by fire.[11] Where a federal order prohibits the use of an illuminated sign except on one night a week, a lease of such a sign will not be terminated.[12]

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[7] Marks Realty Co. v. Hotel Hermitage Co., 170 App. Div. 484, 156 N.Y. Supp. 179 (1915), Marks Realty Co. v. "Churchills," 90 Misc. 370, 153 N.Y. Supp. 264 (1915), Marks Realty Co. v. Smith Serrell Co., 154 N.Y. Supp. 1109 (App. Term, 1915). In these cases it was agreed that advertisements should be printed in a souvenir program of an international yacht race. Because of war the race was abandoned. The advertisers were discharged from their contracts because the whole purpose of the contracts was frustrated by this unanticipated event.

[8] 1 TIFFANY, LANDLORD AND TENANT (1910) Sec. 182m (1) at p. 1195. See, Yellow Cab Co. v. Stafford-Smith Co., 320 Ill. 294, 150 N. E. 670 (1926) (Taking of a part of leased premises by eminent domain does not release tenant from payment of any part of rent.), Fowler et al v. Bott, 6 Mass. 62 (1809) (Tenant not relieved from obligation to pay rent although mill destroyed by fire and not rebuilt by lessor.), Bunting v. Orendorf, 52 Miss. 327, 120 So. 182 (1929) (Tenant liable for rent of land despite the fact floods prevented him from putting in a crop.)

[9] Libby v. National Sewer Pipe Co., 196 Ia. 1320, 195 N.W 749 (1923)

[10] Laurence E. Tierney Land Co. v. Kingston-Pocahontas Coal Co., 241 Ky 101, 43 S.W (2d) 517 (1931)

[11] General Talking Pictures Corp. v. Rinas, 248 App. Div. 164, 288 N.Y. Supp. 266 (1936).

[12] Federal Sign System v. Palmer, 176 N.Y. Supp. 565 (App. Term, 1919).

In *O'Byrne* v. *Henley*, where premises were leased for saloon purposes, it was said:

> "He (lessee) could in law and in fact have continued to use the premises as a saloon though he could not have sold intoxicating drinks or beverages. His business might not, and, as it was shown by the evidence, would not, have continued to be as profitable as if he could sell intoxicants; nevertheless he could have continued to sell soft drinks, cigars, cigarettes, tobacco, etc., as he did before. That his business would not be as good after as before the law went (into) effect was no more the fault of the landlord than it was of the tenant. The contract of lease not having provided against such contingency, which both parties knew could happen, as it provided against other contingencies, we must leave the liability and loss, if any, where the law leaves it, to wit, upon the tenant. The mere fact that the law might cause the tenant to suffer a loss when without it he would have made a profit is no more reason to annul the contract on that account, or to allow the tenant to avoid it, than the passage of a law which increased the tenant's profits, and thereby made the lease more valuable, would authorize the landlord to annul the lease, and require a new one under the new law."

It may be noted in passing, however, that it has been held that where there was a lease for saloon purposes *only* and the prohibition law prevented further use of the premises for that purpose, the tenant would be relieved of his liability to pay rent.[14] It is said that the purpose of the contract has now become illegal and that the tenant will not be made to perform by doing an unlawful act. But there is a failure to distinguish between performance of the contract and the purpose of that contract. Performance is the payment of rent, not the carrying on of the saloon business.

It appears that despite the apparent hardship upon the lessee of a garage, he will have no standing in a court of law either upon the theory of impracticability or of commercial frustration. Whether or not equity would afford him a remedy is another question and not within the scope of this paper.

HELEN STEPHENSON

APPEALS FROM CIVIL CONTEMPT IN KENTUCKY—DOES $200 LIMITATION APPLY?

The plaintiffs, owners of a franchise granted by the state authorizing the operation of passenger busses over certain routes, obtained a temporary injunction restraining the defendant taxi-cab operators from picking up passengers along the routes covered by the franchise belonging to the plaintiffs. On motion of the plaintiffs a rule was issued requiring the defendants to show cause why they

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[13] 161 Ala. 620, 50 So. 83, 85 (1909).

[14] Doherty v. Monroe-Eckstein Brewing Co., 198 App. Div. 708, 191 N.Y. Supp. 59 (1921), Heart v. East Tennessee Brewing Co., 121 Tenn. 69, 113 S.W 364 (1908), The Stratford Inc. v. Seattle Brewing Co., 94 Wash. 125, 162 Pac. 31 (1916).