Michigan Law Review

Volume 46 | Issue 2

1947

CONTRACTS--IMPRACTICABILITY OF PERFORMANCE AS AN EXCUSE FOR BREACH OF CONTRACT

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CONTRACTS—IMPRACTICABILITY OF PERFORMANCE AS AN EXCUSE FOR BREACH OF CONTRACT*—In a recent federal case, plaintiff construction company contracted to enlarge a dam for defendants, which would involve, according to the original estimates, the excavation of 30,000 cubic yards of earth. During the performance of the

*This is the second in a series of related comments in the law of Contracts and Restitution, to be published from time to time throughout volume 46 of the REVIEW.

[101] 132 Tenn. 323, 178 S.W. 432 (1915).

[102] 141 Tenn. 556, 213 S.W. 414 (1919).

[103] BRANNAN'S NEGOTIABLE INSTRUMENTS LAW, 6th ed., 399 (1938).

contract, defendants ordered further excavation in order to reach a firm foundation so that ultimately a total of 84,000 cubic yards were removed. It was defendant's claim that the plaintiff was obliged to perform this additional work to fulfill its contract. Plaintiff sued in quantum meruit for the value of labor and materials for the entire project; defendants stood upon the contract, contending that mere unanticipated difficulty or expense did not excuse the plaintiff's late performance of the contract or furnish a basis for additional compensation. Holding that uncontemplated circumstances (presumably unusual soil and rock conditions underlying the surface) had made radical changes in the character, amount, and expense of the work to be performed, the court found that the contract should be deemed abrogated and allowed full recovery on a quantum meruit basis.[1] This decision is noteworthy because not only does it accept the doctrine of impracticability of performance as an excuse for non-performance of contractual duties, but it carries the doctrine to the extreme of charging the promisee with the additional expense incurred in rendering "impracticable" performance.

When and to what extent will impracticability of performance serve as an excuse for breach of contract by the promisor?[2] At the outset it should be observed that the early English case of *Paradine v. Jane*[3] laid down the so-called "rule of absolute promises," taking the position that impossibility of performance does not excuse the promisor, for he might have guarded against such a contingency in his contract. To this general rule several exceptions have long been recognized: (1) that performance of a contract of personal services is excused by the death or serious illness of the promisor;[4] (2) that one who cannot fulfill a promise because a supervening law makes such performance impossible is excused;[5] and (3) that the fortuitous destruction or non-

[1] Transbay Construction Company v. City and County of San Francisco, (D.C. Cal. 1940) 35 F. Supp. 433; reversed, the court pointing out that the theory that the contract was abrogated was erroneous in that the plaintiff had proceeded with the contract without electing to consider it rescinded because of the breach of defendants in unjustifiable delays in the ordering of additional excavation, and that under such circumstances recovery in quantum meruit would extend only to the work performed in excess of that called for by the contract. (C.C.A. 9th, 1943) 134 F. (2d) 468.

[2] The scope of this comment is limited to the analysis of those situations in which the promisor may escape liability for failure to complete his performance. The related problem concerning the promisor's claim for compensation for performance actually executed will be discussed in a companion comment scheduled to appear in a later issue of the REVIEW.

[3] Aleyn 26, 82 Eng. Rep. 897 (1646).

[4] Cutler v. United Shoe Mach. Co., 274 Mass. 341, 174 N.E. 507 (1931); Williams v. Butler, 59 Ind. App. 47, 105 N.E. 387 (1914); see CONTRACTS RESTATEMENT, § 459 (1932).

[5] Baily v. DeCrespigny, L.R. 4 Q.B. 180 (1869); Gammon v. Blaisdell, 45 Kan. 221, 25 P. 580 (1891); CONTRACTS RESTATEMENT, § 458 (1932).

existence of an essential subject matter excuses performance.[6] Often linked with impossibility as an excuse is the doctrine of "frustration of the venture," epitomized in the "coronation cases."[7] There it was held that the postponement of the coronation of King Edward VII put an end to contracts for letting and hiring of seats along the procession route, not because performance had been rendered impossible, but because the supervening circumstance had destroyed or "frustrated" the sole value of the contracts to the promisor-licensees.[8] In these cases the courts seem to be striving to reach an equitable and just result in a situation not provided for in the contract of the parties, but often they have disguised the nature of their intervention by various rationalizations. Sometimes it is said that (a) there was an implied condition in the contract that impossibility would excuse performance,[9] or (b) destruction or non-existence of the subject matter works a "discharge by operation of law,"[10] or (c) there was a failure of consideration,[11] or (d) the promisee assumed the risk of performance.[12]

The doctrine accepted in the principal case, that extreme and unforeseen difficulties and expense which render performance impracticable will discharge the promisor, is a fairly recent exception to or extension of the exception to the "rule of absolute promises." It has not yet gained a firm foothold in our law. Not only is the doctrine a departure from the generally accepted principle that mere hardship and difficulty will not relieve one from his contractual duties, but it involves a precarious distinction between degrees of hardship in order to distinguish impracticability from difficulty on the one hand and impossibility on the other.

[6] Matousek v. Galligan, 104 Neb. 731, 178 N.W. 510 (1920); Potts Drug Co. v. Benedict, 156 Cal. 322, 104 P. 432 (1909); CONTRACTS RESTATEMENT, §§ 281, 460 (1932).

[7] For a discussion of the frustration doctrine, see Buckland, "Casus and Frustration in Roman and Common Law," 46 HARV. L. REV. 1281 (1933).

For an application of the doctrine to war-time contracts, see McNair, "Frustration of Contract by War," 56 L. Q. REV. 173 (1940).

[8] Krell v. Henry, [1903] 2 K.B. 740; see 6 WILLISTON, CONTRACTS, § 1954 (1938).

[9] Elliot v. Crutchley, [1906] A.C. (H.L.) 7; Warren v. Wagner, 75 Ala. 188 (1883); Runyon v. Culver, 168 Ky. 45, 181 S.W. 640 (1916).

The theory of implied condition has been criticized as a fiction invented by courts to enable them to make a new contract for the parties. Page, "Development of the Doctrine of Impossibility of Performance," 18 MICH. L. REV. 589 (1920).

[10] "In other words, something must be the subject-matter of every contract. If that something has disappeared, the contract disappears with that on which it was founded." Goddard, J. in Tatem v. Gamboa, [1938] 3 All Eng. Rep. (K.B.) 135 at 143.

[11] Marks Realty Co. v. Hotel Hermitage Co., 170 App. Div. 484, 156 N.Y.S. 179 (1915); Tulsa Opera House Co. v. Mitchell, 165 Okla. 61, 24 P. (2d) 997 (1933).

[12] 6 WILLISTON, CONTRACTS, § 1937 (1938).

It is well settled, as a general rule, that if performance is rendered merely more burdensome, difficult, or expensive than contemplated by the promisor, he is not relieved.[13] The basis for the rule, of course, is that the purpose of a contract is to transfer risk of performance and this purpose would be completely defeated if the law should excuse one who had assumed a greater obligation than he could profitably discharge. Instances of the application of the rule are legion.[14] A striking example is found in building contracts where the building has been destroyed or damaged while in the process of erection. Whether the damage or destruction is caused by weather conditions,[15] defective construction plans,[16] fire,[17] or defective soil,[18] the contractor is not relieved and must build anew. Legal insufficiency of the excuse often is found in the fact that the promisor failed to make his promise conditional upon the contingency which arose,[19] and sometimes in his encountering merely "subjective," rather than "objective," impossibility of performance.[20]

[13] 6 WILLISTON, CONTRACTS, § 1963 (1938); CONTRACTS RESTATEMENT, § 467 (1932).

[14] See cases collected in L.R.A. 1916F 10.

Recent decisions applying the rule include Miller v. Johns, 291 Ky. 126, 163 S.W. (2d) 9 (1942) (unforeseen rocks made excavations more difficult and expensive than anticipated); Bonwit Teller Inc. v. United Parcel Service of New York, Inc., (S. Ct., Spec. Term, N.Y. Co. 1942) 36 N.Y.S. (2d) 304 (picketing about plaintiff's store made it dangerous and difficult for defendant to perform contract to pick up and deliver packages to plaintiff's customers); O'Dell v. Criss & Shaver, Inc., 123 W. Va. 290, 14 S.E. (2d) 767 (1941) (union regulations prevented defendant from performing haulage contracts); Ryan v. Brown Motors, 132 N.J.L. 154, 39 A. (2d) 70 (1944) (federal government regulations restricting sale of automobiles held no defense to breach of employment contract of plaintiff, secretary for an auto sales corporation).

[15] Brent v. Head, Westervelt & Co., 138 Iowa, 146, 115 N.W. 1106 (1908) (settling of foundations due to freezing weather); Cannon v. Hunt, 113 Ga. 501, 38 S.E. 983 (1901) (unusual heavy rains delayed completion of building contract); J. D. Harms, Inc. v. Meade, 186 Wash. 287, 57 P. (2d) 1052 (1936) (road building delayed by wet weather and light snows).

[16] N.J. Magnan Co. v. Fuller, 222 Mass. 530, 111 N.E. 399 (1916) (plans so impracticable that grandstand, if erected, would be unsafe); Board of Education v. Empire State Surety Co., 83 N.J.L. 293, 85 A. 223 (1912) (specifications so unsubstantial that building would fall during work or soon thereafter); see 21 MINN. L. REV. 70 (1936).

[17] Albus v. Ford, (Tex. Civ. App. 1927) 296 S.W. 981; Sands and Oliver v. Quigg, 111 Va. 476, 69 S.E. 440 (1910).

[18] Carlson v. Sheehan, 157 Cal. 692, 109 P. 29 (1910); Ford v. Shepard Co., 36 R. I. 497, 90 A. 805 (1914).

[19] Usually courts express this idea by a paraphrase of the words found in Paradine v. Jane, Aleyn 26, 82 Eng. Rep. 897 (1646), such as the following: But where the party by his contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.

[20] A distinction is drawn between "objective" impossibility ("it cannot be done"), which will excuse non-performance, and "subjective" impossibility ("I cannot do it"),

Lying somewhere between the poles of difficulty and impossibility is a middleground of impracticability. The phrase must be defined if it is to serve as a criterion in determining excuse for non-performance. What does "impracticability" mean? The *Restatement of Contracts* describes, rather than defines, the term as follows:

> "In the Restatement of this Subject impossibility means not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury, or loss involved. "*Comment:* A statement that it is only when facts make performance impossible that they have the operation stated in this chapter must be interpreted to be correct. 'Impossible' must be given a practical rather than a scientifically exact meaning."[21]

Professor Williston rejects the distinction between impossibility and difficulty in these words:

> "The true distinction is not between difficulty and impossibility. A man may contract to do what is impossible as well as what is difficult, and be liable for failure to perform. The important question is whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract. If so, the risk should not fairly be thrown upon the promisor."[22]

Implicit in these statements is the idea that impracticability, like impossibility, will never excuse if the promisor has assumed the risk of performance. If he should have foreseen the supervening "unreasonable difficulty, expense, injury, or loss," he must perform according to his contract or respond in damages.[23] Similarly, difficulties and

which generally is said to be no excuse. For an application of this distinction, see Freeto v. State Highway Commission, 161 Kan. 7, 166 P. (2d) 728 (1946), and generally, 6 WILLISTON, CONTRACTS, § 1932 (1938).

[21] CONTRACTS RESTATEMENT, § 454 (1932).

[22] 6 WILLISTON, CONTRACTS, § 1931, p. 5411 (1938). "The difficulty with this statement [by Professor Williston] is that it is not unequivocal (for what exactly does 'vitally different' mean?), and that there is found in English law, side by side and consistently with the rule that supervening difficulty does not discharge, the principle that a change of circumstances may, though the performance still remains apparently within the capability of the promisor, make the only performance available in reality something quite different from what was contemplated by the contract. Williston would probably call such circumstances 'vitally different' within the meaning of his rule. But in fact the vital difference still seems to be that between impossibility and difficulty." Wade, "The Principle of Impossibility in Contract," 56 L.Q. 519 at 553 (1940).

[23] Lloyd v. Murphy, 25 Cal. (2d) 48, 153 P. (2d) 47 (1944), where federal restrictions on the sale of new cars making payment of rental of an auto sales room

hardship which render performance extremely expensive do not justify an additional charge for extra work if it can fairly be found that the promisor assumed the risk.[24]

How far has the idea of impracticability been equated with that of impossibility to serve as an excuse for breach of contract? Although dicta may be found in a few cases[25] which seem to encourage the doctrine, it has generally been rejected in England.[26] The doctrine has gained a tenuous foothold in some American courts. Cases may be found in California,[27] Iowa,[28] Illinois,[29] West Virginia,[30] Oklahoma,[31] and the federal courts[32] in which the definitive concept of impracticabili-

extremely difficult, held to be no excuse, for "the risk of war and resulting effect on leases and market for cars should have been anticipated"; Freeto v. State Highway Commission, 161 Kan. 7, 166 P. (2d) 728 (1946), in which the court held that government requisitioning of defendant's road construction equipment was no ground for cancellation of contract to build a road, for war should have been foreseen.

[24] Cannon v. Wildman, 28 Conn. 472 (1859); cf. the principal case.

[25] See F. A. Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co., [1916] 2 A.C. 397 at 405, 406; and Moss v. Smith, [1850] 9 C.B. 94 at 103, where this dictum is found: "In matters of business a thing is said to be impossible when it is not practicable; and a thing is impracticable when it can only be done at an excessive or unreasonable cost."

[26] Wade, "Impossibility in Contract," 56 L. Q. REV. 519 (1940), and cases cited by McNair's "War-time Impossibility of Performance of Contract," 35 L. Q. REV. 84 at 97 (1919).

[27] Mineral Park Land Co. v. Howard, 172 Cal. 289, 156 P. 458 (1916), discussed infra; Eucalyptus Growers Assn. v. Orange County N. & L. Co., 174 Cal. 330, 163 P. 45 (1917), where defendant was excused from breach of contract to plant eucalyptus trees because the soil contained so much alkali that trees would not grow unless alkali was eliminated by flooding; Christin v. Superior Ct., 9 Cal. (2d) 526, 71 P. (2d) 205 (1937) (dictum).

[28] Mahaska County State Bank v. Brown, 159 Iowa 577, 141 N.W. 459 (1913) (bankruptcy of mortgagor excused advancement of funds by the mortgagee); Harrison v. Harrison, 124 Iowa 525, 100 N.W. 344 (1904) (death of father before all debts paid excused daughter from performance of contract to help manage farm); see generally, IOWA ANNOTATIONS TO THE CONTRACTS RESTATEMENT, § 454 (1934).

[29] Fisher v. U.S. Fidelity and Guaranty Co., 313 Ill. App. 66, 39 N.E. (2d) 67 (1942) (ordinance prohibiting production of theatrical productions within two hundred feet of any church held to discharge a contract to demolish an old building and construct a theater, the court emphasizing the impracticability of performance and quoting § 454 of CONTRACTS RESTATEMENT, a portion of which is set out supra, p. 228.

[30] Paxton Lumber Co. v. Panther Coal Co., 83 W.Va. 341, 98 S.E. 563 (1919), where defendant was excused from supplying lumber because his timber holdings proved insufficient to satisfy the contract needs: "there appears to be manifestly increasing tendency to afford him [the promisor] relief upon equitable principles where great hardship would ensue by forcing him to do what is practically impossible of performance."

[31] Cosden Oil and Gas Co. v. Moss, 131 Okla. 49, 267 P. 855 (1928), where defendant was relieved from drilling oil and gas wells to maximum depth because rock formations made drilling impracticable.

[32] Vernon Lumber Corp. v. Harcen Const. Co., (D.C. N.Y. 1945) 60 F. Supp.

ty has been utilized as an excuse for failure to perform contractual obligations. In numerous other jurisdictions, similar results have been reached through the use of fictions. To avoid establishing a new "exception" to an already badly riddled rule, courts have often excused performance which supervening circumstances have made impracticable by bringing the facts within the operation of well-known rules of impossibility.

A. *Impracticability Due to Destruction or Non-Existence of Subject Matter.* The adaptation of the rule that destruction or non-existence of essential subject matter excuses performance[33] to cases where performance has become unduly difficult or expensive is best exemplified in *Mineral Park Company v. Howard.*[34] There it was held that the defendant, who had contracted to take from the plaintiff's land all the gravel necessary to construct a bridge, was excused after partial performance because the remaining gravel was below water level and removable only at an expense of at least ten times the contemplated cost. The court held that by "gravel" the parties meant "available gravel," and the defendant was released when the "available gravel" was exhausted.[35] The reasoning by which the court construes the contract to make it conditional upon the assumed existence of essential subject matter has been prominently employed in cases involving the leasing of mining privileges. If minerals are found only in quantities and of a quality making it unprofitable to mine, the lessee has been relieved of his obligation to pay royalties by the court's reading into the contract a duty only to mine "clear and merchantable" minerals.[36]

Similarly, impracticable performance has been excused on the ground of non-existence or destruction of the subject matter where crops could not grow advantageously because of sub-standard soil,[37]

555, where it was held that plaintiff must show "every reasonable attempt" to find alternative source of lumber to fill defendant's contract needs in order to be relieved from breach of contract. See principal case.

[33] See note 5, supra.

[34] 172 Cal. 289, 156 P. 458 (1916), noted in 4 CAL. L. REV. 407 (1916).

[35] This reasoning was buttressed by a frank acceptance of the concept that: "A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can be done only at an excessive and unreasonable cost." 172 Cal. 289 at 293.

[36] Muhlenberg v. Henning, 116 Pa. St. 138, 9 A. 144 (1887); Virginia Iron Co. v. Graham, 124 Va. 692, 98 S.E. 659 (1919); Brick Co. v. Pond, 38 Ohio St. 65 (1882); Van Liew v. Norwood-White Coal Co., 190 Iowa 79, 179 N.W. 860 (1920).

[37] Eucalyptus Growers Assn. v. Orange County N. & L. Co., 174 Cal. 330, 163 P. 45 (1917) (defendant excused from contract to plant and grow trees in soil containing so much alkali that trees would not grow unless alkali was eliminated by flooding, on theory that alkali-free soil had been contemplated by parties and was "non-existent").

or unusually bad weather conditions prevented profitable production.[38] To the same effect are cases where building[39] or drilling operations[40] have been hindered unduly by geologic formations which were undetected at the time the parties entered into their contract.

B. *Impracticability Due to Operation of Law.* As we have seen, when a statute or governmental authority forbids or prevents the performance of a contract which was legal when the promise was made, the promisor is excused from liability.[41] Adaptation of this principle to release one from contractual duties which have become unreasonably harsh or profitless by reason of supervening acts of the state, is seen most clearly in war-time. Thus in *Autry v. Republic Productions*[42] a prominent "cowboy" movie actor under contract to make photoplays was inducted into the Army where he served for three years. Upon his discharge from service he brought an action to have his contract declared terminated, despite the plea of his employer that the temporary impossibility which had suspended performance of the agreement during the war had been removed by the actor's release from the Army. The court found that the plaintiff's war service had rendered performance impossible according to the contract and, by strictly construing its employment provisions, concluded that post-war completion of the agreement would constitute "performance wholly outside the original agreement."[43]

When a lessee was drafted into the armed forces he was found to have been relieved from his obligation to pay rent although the lessor's suit was brought after his release from service,[44] and governmental requisitioning which reduces the supply of available materials has relieved one who failed to meet contract requirements.[45] Supervening city ordinances which do not prohibit execution of construction con-

[38] St. Joseph Hay Co. v. Brewster, (Mo. App. 1917) 195 S.W. 71 (1917) (in contract to deliver 3000 bushels of wheat breach excused when excessive rainfall caused a short wheat crop, on ground that contemplated crop was non-existant due to "Act of God").

[39] Kinzey Const. Co. v. State, 264 N.Y. 381, 97 N.E. 871 (1912).

[40] Cosden Oil and Gas Co. v. Moss, 131 Okla. 49, 267 P. 855 (1928).

[41] See note 4, supra.

[42] (Cal. App. 1946) 170 P. (2d) 977.

[43] Id. at 984.

[44] State Realty Co. v. Greenfield, 110 Misc. 270, 181 N.Y.S. 511 (1920); Jefferson Estates, Inc. v. Wilson, (Manhattan Ct. 3d D., 1942) 35 N.Y.S. (2d) 582.

[45] Moore & Tierney, Inc. v. Roxford Knitting Co., (D.C. N.Y. 1918) 250 F. 278 (governmental requisitioning of some but not all of the goods of the promisor-seller, who could have manufactured required quantity after completion of the government work); Vernon Lumber Corp. v. Harcen Const. Co., (D.C. N.Y. 1945) 60 F. Supp. 555 (Navy requistioning of lumber required to fill contract would excuse if promisor showed that it had tried "every reasonable alternative source."

tracts but require substantially different or more expensive performance have been held to relieve liability.[46] These decisions seem contrary to the general rule that governmental activities which make performance of a contract less profitable or more difficult do not discharge liability if performance remains physically possible.[47] Impracticability, rather than objective impossibility, would seem to be the true basis for these decisions.

C. *Impracticability Due to Death, Sickness, or Danger of Life.* To some extent courts have excused duties which have become extremely difficult or dangerous by bringing the facts of the case within the rule that sickness or death of the promisor relieves his breach of contract. Thus in *In re Ford's Estate*,[48] in consideration of a promise by the vendor in a land contract to accept from the purchaser the first four installments of interest in the form of four notes, decedent promised in writing to indorse the notes and become responsible for their payment to the vendor. The surety died before the first of the notes was to be indorsed. Although the obligation could have been performed by an agent of the surety during his life and thus could have been performed by his personal representative after his death, the court held that the decedent's estate was discharged from liability on the ground that decedent's undertaking was purely personal and ended with his death. To the same effect are cases where defendant is released from obligations under a lease by reason of holding over after the expiration of a term on account of sickness of a member of his family.[49] And where an epidemic makes performance of a contract dangerous to the health of workmen,[50] or to the community,[51] or where

[46] In Cordes v. Miller, 39 Mich. 581 (1878), a covenant in a lease to rebuild was excused by a building law forbidding use of wood of which the previous building had been constructed, although covenant did not specify a wooden construction.

In Fisher v. U.S. Fidelity & Guaranty Co., 313 Ill. App. 66, 39 N.E. (2d) 67 (1942), a city ordinance forbidding holding of theatrical production near any church was held to relieve surety's liability on a contract to demolish old building and construct a theater on spot; for alternative ground for decision, the court said that performance was "impracticable."

[47] Otto v. Orange Screen Co., (D.C. N.J. 1944) 57 F. Supp. 134; Freeto v. State Highway Commission, 161 Kan. 7, 166 P. (2d) 728 (1946); Town of North Hempstead v. Public Service Corp., 192 App. Div. 924, 182 N.Y.S. 954 (1919). See annotation L.R.A. 1916F 10 at 66.

[48] 255 Mich. 266, 238 N.W. 275 (1931), criticized in 30 MICH. L. REV. 809 (1932).

[49] Herter v. Mullen, 159 N.Y. 28, 53 N.E. 700 (1899).

[50] Lakeman v. Pollard, 43 Me. 463 (1857) (worker excused from quitting employment by reason of danger of cholera in vicinity of employer's lumber mills).

[51] Hanford v. Connecticut Fair Assn., 92 Conn. 621 (1918) (epidemic of infantile paralysis relieved breach of contract to hold a baby show).

a state of war endangers the lives of passengers and the crew of an unprotected ship at sea,[52] breach of contract has been excused despite the objective "possibility" of the promised performance. Similarly, the impracticability of marriage at a particular time between a venereally infected man and a healthy woman has been treated as if it were an impossibility,[53] and employees have been excused from employment contracts because of threatened physical injury to them by strikers and pickets.[54]

D. *Impracticability Due to "Mistake."* A promise is excused generally if performance is rendered impossible because the parties mistakenly base their contract upon material facts which do not exist.[55] The mistake doctrine has been utilized in cases where performance, although possible, is commercially impracticable due to the "nonexistence" of subject matter requisite to make the contract profitable.[56] A further example is found in *Watson v. Brown*,[57] where the defendant had agreed to form a corporation to produce wire fences with plaintiff's machines and to pay plaintiff's services in wages and stock in the enterprize. When subsequent tests showed that the machines could weave only inferior fence materials which would fare poorly on the market, the court relieved defendant of his obligation because there had been a "mistake as to the nature or fundamental qualities of the subject matter" which made the "subject matter contracted for essentially different in kind from the thing as it actually existed." Similar relief has been given one who breached his contract to supply lumber on the ground that there had been a "mistaken" assumption that the promisor's timber holdings would satisfy the needs of the promisee,[58] and to one who failed to drill through a geologic mass formation to reach gas and oil when the parties had "assumed" that a test well could be

[52] The Kronprinzessin Cecilie, 244 U.S. 12, 37 S.Ct. 490 (1917), where master of a ship was excused from delivering gold in England at the cost of capture of ship, crew, and passengers during World War I.

[53] Trammel v. Vaughan, 158 Mo. 214, 59 S.W. 79 (1900).

[54] Walsh v. Fisher, 102 Wis. 172. 78 N.W. 437 (1899); cf. Bonwit Teller, Inc. v. United Parcel Service of New York, (S.Ct., Spec. Term, N.Y. Co. 1942) 36 N.Y.S. (2d) 304, where picketing of plaintiff's store was held to be no excuse for failure of defendant to pick up and deliver packages to plaintiff's customers.

[55] See CONTRACTS RESTATEMENT, § 456 (1932), and 6 WILLISTON, CONTRACTS, § 1937 (1938).

[56] See notes 32-39, supra.

[57] 113 Iowa 308, 85 N.W. 28 (1901). It would seem that the result here reached could logically be based on the doctrine of "frustration" on the ground that the facts involve a failure of consideration despite the possibility of literal compliance.

[58] Paxton Lumber Co. v. Panther Coal Co., 83 W. Va. 341, 98 S.E. 563 (1919), which as an alternative ground for decision was rested on impracticability of performance.

drilled to the desired depth without encountering such a formation.[59] The "mistake" in such cases would seem to be the promisor's failure to anticipate and guard against risks and difficulties inherent in executing his agreement, rather than the false assumption by the parties of facts essential to the existence of their contract.

An examination of the cases shows that the excuse afforded by impracticability, due to unforeseen and unreasonable "difficulty, expense, injury, or loss," is a new and growing concept in contract law. Because impracticability often masquerades in the better known form of impossibility, its scope and substance are as yet undetermined. Certainly the doctrine will serve as little more than an ill-defined equitable implement to relieve one of a "hard bargain" until courts develop criteria by declaring when and how far impracticability shall be accepted as an excuse. The prevailing practice of calling "impossible" what is merely "impracticable" in order to give relief for failure to perform onerous contractual duties serves to fictionalize legal rights and confuse judicial precedent. If liability is excused because performance of the contract has become impracticable, it would seem eminently desirable that courts frankly gauge the excuse in undisguised terms.

As a matter of judicial policy, there is danger of introducing great uncertainty into contractual relations through the doctrine of impracticability. In a practical sense most contracts are entered into as a form of insurance by which either party attempts to cast the risk of performance upon the other. Each has generally been accorded the right to the protection of his contract when the other has most desired to discard it. When a promisor is beset with such unexpected hardship and expense in carrying out his promise that he abandons performance, the law may make him pay damages or throw the loss upon the innocent promisee.[60] For centuries courts have followed the former course. It is submitted that seldom may the law relieve hardship through the excuse of impracticability without violating historic fundamentals in the law of contracts. *Ira M. Price, II, S.Ed.*

[59] Cosden Oil and Gas Co. v. Moss, 131 Okla. 49, 267 P. 855 (1928), which rested also on the ground that performance had become practically impossible.

[60] "Performance which proves to be more than twice as costly as expected may well be considered unreasonably expensive, but promisors have been held bound by such promises. . . . Is the principle different when the expense can be fixed at ten times the normal? What the promisor actually does when he finds that the increased cost of performance will exceed the damages he will have to pay for failing to perform, is to choose the latter course. Beyond the point where damages and increased expense are equal, the size of such increase produces no added hardship upon the promisor, who pays the same damages whether the cost of performance be double or a hundred times what he expected." Parkinson, "Excuse of Performance by Existence of Condition Causing Unforeseen Expense," 4 CAL. L. Rev. 407 at 409 (1916).