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Termination of Lease Containing Covenant to Repair or Rebuild by Subsequent Building Code making Impossible Repair of Rebuild by Subsequent Building Code Making Impossible Repairs or Rebuilding except by more Expensive Structure

TERMINATION OF LEASE CONTAINING COVENANT TO REPAIR OF REBUILD BY SUBSEQUENT BUILDING CODE MAKING IMPOSSIBLE REPAIRS OR REBUILDING EXCEPT BY MORE EXPENSIVE STRUCTURE.—Ds were owners of real estate in South Bend on which was located a store building. Mayerfield (P) was the owner of an unexpired lease for a term of 25 years which lease had been previously assigned to him. The lease provided that in case the premises should be rendered unfit for occupancy, by reason of fire or other casualty, the Ds would at once repair or rebuild such portion of the building at D's expense, and that the rent should be abated during such period that the premises should be rendered unfit for occupancy. In 1920 Mayerfield sublet the premises to Kuehn (P) until 1930. The original lease was executed in 1905, at which time there was no building code ordinance. In 1922 the City Council enacted an ordinance zoning the city into fireproof limits and prohibiting the rebuilding of a building damaged more than 60 per cent by fire. In 1926 the store building was damaged more than 60 per cent by fire. Ds applied for a permit to rebuild which was refused by the building commissioners under the ordinance noted. Ds tore the damaged buliding down and erected a new one which they rented to other persons. Mayerfield brought an action for damages for breach of the lease and eviction, and Kuehn filed a cross complaint asking damages for eviction. *Held,* for Ds, that performance of the lease was rendered impossible by operation of law. *Poledor v. Mayerfield, App. Ct. of Ind. in Banc. November, 18, 1930,* 173 N. E. 292.

The question presented by this case is: was the passage of the zoning ordinance of such character that the covenantor is discharged from his covenant because of impossibility of performance by operation of law, or was the covenant an unqualified one and the passage of the ordinance an event which could have been anticipated and guarded against in that contract? If the obligation which it is sought to enforce is one which is created by the express agreement of the promisor, it is laid down as a general rule, subject to exceptions, that subsequent impossibility does not excuse performance. *Northern P. R. Co. v. American Trading Co.,* 195 U. S. 439; *Stewart v. Stone,* 127 N. Y. 500; *Pratter v. Latshaw,* 188 Ind. 204; *Rowe v. Peabody,* 207 Mass. 226; *Barry v. U. S.,* 229 U. S. 47; *Central Trust Co. v. Wabash St. L. & P. Ry. Co.,* 31 Fed 440; *Berg v. Erickson,* 234 Fed. 817; *Carter v. Wilson,* 102 Kan. 200; *Hay v. Holt,* 91 Pa. St. 88; *Parker v. Macowder,* 17 R. I. 674. One of the well recognized exceptions to this rule is that where the law forbids or prevents the performance of a promise, legal when made, the promisor is freed from liability. *Schaub v. Wright,* 79 Ind. App. 56; *Burgett v. Larb,* 43 Ind. App. 657; *Jamieson v. Indiana Natural Gas and*

Oil Co., 128 Ind. 555; *Board of Commissioners v. Young*, 59 Fed. 108. Such a change of law operates as a discharge of prior contracts which are thus made illegal, since otherwise the law would enforce a penalty against the promisor if he performed and award damages against him if he did not. 5 *Page on Contracts*, Sec. 2697. While the courts are well in accord as to the statement of the rule, a conflict arises in determining what the parties might have anticipated and guarded against. Two cases similar to the principal case were decided in Iowa and Michigan in the same year. In the Iowa case a leasee of a frame building had bound himself to replace it in case of destruction by fire, and it was held that he was bound to build a brick or stone building after a city ordinance had been passed prohibiting the erection of wooden buildings. The court argued that the parties must have known that the city could pass such an ordinance at the time they entered into the contract. If they intended that the passage of such an ordinance should exonerate the lessee from his covenant they should have so stipulated. The ordinance does not render the performance of the covenant impossible; it simply makes it more burdensome and expensive and that has never been an excuse for nonperformance. *David v. Ryan*, 47 Iowa 642. An opposite result was reached in the Michigan case in regard to a similar covenant by the lessor on the ground that the lessor had undertaken to do something which by change in the law had become illegal. The court emphasized the view that the lessor only undertook to replace the destroyed building with a similar structure, and that would be inconvenient if not impossible. *Cordes v. Miller*, 39 Mich. 581. These two cases illustrate the conflict. It has been said that any subsequent act or event which prevents performance must be regarded as an operative impossibility which will discharge the contract as it appears that the parties intended such act or event as an implied condition subsequent upon the happening of which the contract should be discharged. *Reed v. U. S.*, 78 U. S. 591. *Dow v. Sleepy Eye State Bank*, 88 Minn. 355; *Dexter v. Norton*, 47 N. Y. 62; *American Mercantile Exch. Co. v. Blurt*, 102 Me. 128; *Harper v. Mueller*, 158 Mich. 595; *Heart v. East Tennessee Brewing Co.*, 121 Tenn. 69. Or, if the act or event which prevents performance is one which is not fairly within the meaning of the contract and which the parties cannot be assumed to have contemplated when they entered into the contract, such act or event amounts to an operative impossibility and discharges performance. *Chicago, Milwaukee & St. Paul Ry. v. Hayt*, 149 U. S. 1; *Stewart v. Stone*, 127 N. Y. 500; *Dexter v. Norton*, 47 N. Y. 62; *Parker v. Macomber*, 17 R. I. 674. A party may by absolute contract bind himself or itself to perform things which subsequently become impossible or pay damages for the non-performance, and such construction is to be put upon an unqualified promise, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such character that it cannot be supposed to have been in contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens. *Chicago, Milwaukee & St. P. Ry. Co. v. Hogt*, 149 U. S. 1; *Berg v. Enikson*, 234 Fed. 817. The court in the principal case is sustained by the Michigan

case in its interpretation of what the parties did not contemplate or anticipate, but, as the Iowa case shows, an opposite result may be reached by a different interpretation. The ultimate question then is in deciding what parties to contract might anticipate and guard against or what they cannot be assumed to have anticipated and guarded against. C. F. B.