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THE EXCUSE OF IMPOSSIBILITY IN WEST VIRGINIA CONTRACT LAW

CLYDE L. COLSON

This war, like all others, with its priorities, scarcity of materials and disruption of transportation facilities will make the performance of many contracts impossible. Hence it will not be untimely to consider some aspects of the question of the extent to which impossibility is recognized as an excuse for nonperformance of a contract.

As defined in the Restatement of Contracts, "impossibility means not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved." Note then that impossibility, as used in this connection, does not mean absolute impossibility but rather that performance of the promise has become so impracticable as to make it manifestly unfair and inequitable to enforce it. Though our court has not always kept this in mind, that it does recognize the soundness of the proposition is evidenced by this statement in Paxton Lumber Co., Inc. v. Panther Coal Co.:

"Though, generally speaking, a promisor is bound to comply with the express terms of his agreement, there appears to be manifestly increasing tendency to afford him relief upon equitable principles where great hardship necessarily would ensue by forcing him to do what circumstances have rendered practically impossible of performance."

Obviously this tendency if carried too far would seriously impair the policy of the law favoring security and certainty in

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1 Restatement, Contracts (1932) §454.
matters of commercial law. On the other hand to refuse any relief on the ground of impossibility— to hold the parties to the strict letter of their contract, exacting the pound of flesh unless the parties have expressly provided for an excuse in the event of the particular contingency which has occurred— would mark a return to the period of "strict law" when the function of the court was thought to be the strict enforcement of bargains however harsh rather than the achievement in the particular case of a just and equitable result. The choice of alternatives was well stated by Williston:

"The law must adopt either a strict rule which will require the parties, when they form a contract, to foresee its consequences as accurately as possible, though at the expense of serious hardship to one of them if unforeseen circumstances render it impossible to perform his promise, or a rule giving an excuse under such circumstances. The early cases accepted the former alternative; the later cases tend to adopt the other."4

Note that even under the modern tendency an excuse should and will be allowed only in cases of extreme hardship. Hence mere unforeseen difficulty or increased expense of performance will not constitute an excuse.5 Thus in McCormick v. Jordan6 the added expense and difficulty of drilling an oil well, occasioned by the loss of tools and by the fact that the sand which the driller was supposed to reach was lower than had been anticipated, was held to be no excuse for the driller's failure to complete the well. Although the result reached in this case was correct because the unforeseen difficulty was not so great as to render performance of the promise

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5 "The idea in each case is that a man of full age must take care of himself. There is no legal paternalism or maternalism to save him from himself. If he has made a foolish bargain he must perform his side like a man, for he has but himself to blame; if he has acted, he has done so at his own risk with a duty of keeping his eyes open, and he must abide the appointed consequences. In short he must 'be a good sport' and bear his losses smiling. Hence the stock argument of the strict law for the many harsh rules it enforces is that the situation was produced by the party's own folly and he must abide it. But the whole point of view is that of primitive society, and, despite the eulogies which have been pronounced upon these features of the strict law as molders of strong and self-reliant character, it may be asserted confidently that they were not devised to any such end, that at best they subserve such an end but little, and that they defeat social interests of general security and general morals and individual interests of personality and substance which the law ought to protect." Pound, The End of Law as Developed in Legal Rules and Doctrines (1914) 27 Harv. L. Rev. 195, 212-213.

4 WILLISTON, CONTRACTS (Rev. ed. 1938) § 1931.
5 RESTATEMENT, CONTRACTS §§ 454 and 457.
6 65 W. Va. 86, 63 S. E. 778 (1909).
impossible in the sense of impracticable, the court as is generally true in the older cases stated its holding in much broader and stricter language:

"'It is a well settled rule of law, that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law or the other party. Unforeseen difficulties, however great, will not excuse him....'

This language is subject to two criticisms. In the first place, in stating that unforeseen difficulties "however great" would constitute no defense, the court overlooked the principle recognized in the Paxton Lumber Company case that impracticability by reason of extreme difficulty or hardship may be an excuse. All that the court needed to say to reach its result in the McCormick case was that mere unforeseen difficulty is no excuse. In the second place, this language in its reference to an "act of God" evidences a confusion of terms often found in cases dealing with impossibility. However correct it may be to say that "vis major" or "an act of God" will excuse a common carrier from performance of its duties, it is only misleading to use these terms in respect to impossibility as an excuse for nonperformance of ordinary contractual duties.

It is the fact of impossibility and not its cause which constitutes the excuse. For example, take the case of the destruction of the subject matter of a contract to sell specific property, which all courts recognize as an excuse for nonperformance. If A has contracted to sell a specific horse and thereafter the horse is destroyed by fire, A, if not himself at fault, is excused whether the fire was due to an act of God, to the act of a third party, or to any other cause. On the other hand, if A was at fault he would not be excused even though the impossibility was due to an act of God. Thus, in a West Virginia case involving a subcontract for construction of part of a bridge, which contract had already been broken before further delay and expense was caused by the destruction by flood of part of the work, the court said that "'Vis major excuses the party asserting it only when he himself is not at fault.'" Hence it is clear that the decision of a particular case, instead of

7 Id. at 90.
8 § WILKINSON, CONTRACTS § 1936; RESTATEMENT, CONTRACTS § 457, comment c.
turning on whether there was an act of God involved, is controlled by considerations entirely different.

Aside from the fact, however, that the presence or absence of an act of God is in no way controlling, use of the term is likely to lead to an even more serious error. Starting with the law of common carriers where the term is properly applicable, and being mindful of the earlier strict doctrine as to impossibility, courts have often drawn the wholly erroneous conclusion that impossibility due to an act of God is no excuse for the nonperformance of a contract. Thus as late as 1925, in contrast to the directly opposite statement in the McCormick case, we find our court saying,

"It is a well established principle of law that while an 'Act of God', unavoidable accident, or the stress of circumstances may not excuse the non-performance of an obligation created by contract, they will excuse the non-performance of a duty imposed by law."\(^{10}\)

Yet nothing could be clearer than that in the example given above A is excused from the performance of his contract to deliver the horse whether its destruction was due to an act of God or to any other cause. Obviously our thinking would be clearer if we should discard the use of the terms *vis major* and act of God when discussing the problem of impossibility.

Another example of the principle that mere unforeseen difficulty or added expense will constitute no excuse is found in cases where a change in economic conditions renders a contract more burdensome. In *Rice & Co. v. Roberts* the defendant had contracted in 1932 to buy a shipment of jewelry from the plaintiff, but upon its arrival he refused to accept the shipment stating to the plaintiff that "conditions are such at this time we do not feel that we can sell enough of this merchandise to be able to pay you."\(^{11}\) It was quite properly held that the defendant's prospective inability to pay for the goods because of unsatisfactory business conditions was not an excuse for breach of the contract.

This last case also raises the point as to the difference between objective and subjective impossibility. Impossibility of performing a promise may be due either to the nature of the performance or to the inability of the particular person who made the promise. If the performance is in its nature impossible of accomplishment by anyone, we have a case of objective impossibility. On

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\(^{10}\) Chesapeake & O. Ry. v. Board, 100 W. Va. 222, 225, 130 S. E. 524, 44 A. L. R. 826 (1925).

\(^{11}\) 114 W. Va. 549, 550, 172 S. E. 615 (1934).
the other hand if the performance is in its nature capable of accomplishment, but cannot be given because of the inability of the particular promisor, we have a case of subjective impossibility. Mere subjective impossibility is never held to be an excuse. Sometimes, however, as in the case of a contract for personal service which is impossible of performance because of the illness of the promisor, performance is both subjectively and objectively impossible. When this is true the promisor may be excused because of the objective impossibility despite the fact that there is also subjective impossibility. The best example of subjective impossibility is a promisor’s inability to pay a promised consideration, which is never an excuse for nonpayment. In the Rice case the prospective impossibility was really subjective and hence in any event would have been no defense. Another recognition of the principle that subjective impossibility is not an excuse is found in the case of Wheeling Mold & Foundry Co. v. Wheeling Steel & Iron Co., where it was held that a promisor’s failure to complete and deliver machinery within the time specified was not excused by a showing that in his effort to perform he had used due diligence and all the means within his power. Many other examples of subjective impossibility may be found in the West Virginia cases. It should be observed, however, that the parties may by express provision make subjective impossibility an excuse for nonperformance.

Still another common instance of subjective impossibility is worthy of special note—namely, a promise to do an act which cannot be done without the consent or cooperation of a third person. In such a case, in the absence of evidence to the contrary, the one making the promise may fairly be said to assume the risk of his inability to obtain the other’s consent or assistance. His inability to do so will not be an excuse unless the terms or the nature of the contract show that he did not assume the risk. Thus, in Roberts v. American Column & Lumber Co., it was held that a promise to acquire rights of way over the land of third parties, providing access for the cutting of timber, was not discharged by

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12 6 WILLISTON, CONTRACTS § 1932; RESTATEMENT, CONTRACTS § 455.
14 58 W. Va. 62, 51 S. E. 129 (1905).
15 For example, see Young v. Jordan, 106 W. Va. 139, 145 S. E. 41 (1928); Biederman, Inc. v. Henderson, 115 W. Va. 374, 176 S. E. 433 (1934).
17 6 WILLISTON, CONTRACTS § 1932.
18 76 W. Va. 230, 85 S. E. 535 (1915).
a refusal of the third parties to grant the rights of way. This holding is sound enough because mere subjective impossibility is never an excuse. The court, however, did not place its decision on this well recognized ground, but stated broadly that

"'... when the party by his own contract creates a duty or charge upon himself he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract'. . . . three exceptions to the rule are noted: first, where the subsequent impossibility is imposed by law; second, where the continued existence of the subject matter is an implied condition of the contract; third, in contracts for personal services, 'in which there is generally the implied condition that the person who is to render the service is alive and not incapacitated by illness'."

This language admirably illustrates the method by which judges often overrule or modify strict doctrines without admitting even to themselves that they are doing so. The first part of the quotation is a fair statement of the strict view originally taken. Then the attitude of the courts was that the law should not make a new contract for the parties but should enforce the contract as made without modification. This on the theory that one should not complain of his own folly in failing to provide for possible contingencies. It is doubtful whether the law ever enforced this rule without some exceptions. However that may be, the courts have continued to repeat the original strict doctrine as the general rule, but there are so many now well-recognized exceptions that the rule can no longer be said to be of general application. These exceptions have been established under the guise of implied conditions, as witness the second and third exceptions mentioned by our court in the language quoted above.

It is doubtful whether a court fools itself by such a resort to implied or constructive conditions. Does the court really think that it enforces the contract as made by the parties when it reads into the contract an implied condition relieving one of them from the consequence of having failed to guard against an unforeseen or uncontremplated contingency? It should be quite apparent that, to the extent necessary to the achievement of a result consonant with the court's sense of fairness and justice, it is remaking the contract.

19 Id. at 293-294.
20 6 WILLISTON, CONTRACTS § 1931.
21 Id. § 1937.
This is entirely permissible and in line with the modern tendency to stress the relational aspect of contracts, under which the law has much more to say about the terms and consequences of a contract than was permissible when the will or intent of the parties was thought to be controlling. And yet, having read into the contract an implied condition excusing performance in a particular case of impossibility, the court pays lip service to the now discredited "will" theory of contracts by purporting to give effect only to the intent of the parties, as if that intent had been evidenced by an express condition. Actually, by so construing the contract as to find that the parties impliedly intended to provide for an excuse in the particular case of impossibility, the court is merely spelling out the rights and duties of the parties as fixed by law. This becomes clear when it is realized that the conditions read into the contract are conditions implied in law and not in fact.

Having used this doctrine of implied conditions as a means of recognizing impossibility as an excuse under some circumstances, many courts then state flatly that impossibility is not an excuse for failure to perform an absolute or unconditional promise. Such a statement, however, is almost meaningless in view of the fact that until the court has refused to imply the condition, it is never certain that the promise is unconditional. About all that the statement can mean is that whenever from the express language of the contract or from the surrounding circumstances the court is convinced that the promisor has assumed the risk of impossibility, it is not unfair to hold him to that assumption. Or stated another way, if the court finds that the promisor has not assumed that risk, it would be unfair to hold him to a performance "vitaly different from what should reasonably have been within the contemplation of both parties when they entered into the contract." Note that if the promisor is held to such a vitally different performance on the ground that he might have protected himself by express provision in the contract, the court would certainly be enforcing a contract different from the one the parties may reasonably be said to have made; whereas, if he is excused under such circumstances, the court, though to some extent remaking the contract, would come nearer to enforcing the contract as the parties probably intended it to be.

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23. 6 Williston, Contracts § 1937.
24. Id. § 1931.
The case of *Huminsky v. Gary National Bank* is a good example of the assumption by the promisor of the risk of impossibility. In June 1917 the bank contracted to transmit a sum of money to a bank in Moscow, there to be credited to the account of the plaintiff's wife. Despite the fact that the Russian Revolution had already started in March of that year the bank guaranteed transmission of the money. Performance of the contract was delayed until it became impossible because of the success of the Soviet Revolution. In holding the bank liable, the court said that

"... the obligation assumed by defendant was an absolute one and not subject to any of the qualifications which we find in most of the cases cited by counsel for defendant, such as agreements to remit in the usual and customary way or subject to certain rules and regulations, or contingent on war or other unusual conditions. Therefore, the defendant is not excused. . . ."

Another distinction which should be noted is that between existing and supervening impossibility. Impossibility may be due to facts existing at the time the promise is made or to facts arising subsequently. The former is existing impossibility; the latter, supervening impossibility. Most of the cases dealing with the problem involve supervening rather than existing impossibility. In the comparatively few cases where there was an existing impossibility the courts, sensing the analogy to cases of mistake, have had less difficulty in granting relief. Thus in the *Paxton Lumber Company* case, in holding that where there was a promise to cut 950,000 feet of timber from defendant's land which contained no such amount, nonperformance was excusable on the ground of impossibility, our court said:

"Frequently the impossibility of performing a contract and mutual mistake excusing performance, when interposed in defense of an action thereon, have somewhat similar characteristics, and where the impossibility is due to a circumstance existing at the time of the bargain and relating to the subject matter thereof without the knowledge of either party, it partakes of the nature of a mutual mistake, and excuses performance to the extent the subject matter had no potential existence."

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26 Id. at 663.
27 6 WILLISTON, CONTRACTS §1933; RESTATEMENT, CONTRACTS §§456-457.
The most important result of the distinction between existing and supervening impossibility is the fact that existing impossibility unknown to the parties prevents the creation of any duty whereas supervening impossibility discharges a duty which has already arisen.\(^{29}\) Of course in the case of a known existing impossibility the contract may create a duty if there is a manifest intent to assume the risk of overcoming the impossibility,\(^{30}\) but such cases are rare. In most cases the existing impossibility is unknown and since the parties "deal with reference to unknown existing facts in the same way they do with supervening events,"\(^{31}\) the law does likewise.

With these general observations out of the way let us turn to a more detailed consideration of the West Virginia cases. A good starting point is the language above from the Roberts case in which our court, after stating the general rule to be that impossibility is not an excuse, went on to say that there are three recognized exceptions to this general rule. These exceptions cover so much ground, however, and include numerically so great a majority of the cases in which the question has arisen, it may now be fairly stated that, as is often the case, the exceptions have become the general rule and the former rule the exception. Hence in contrast to the language in the Roberts case Williston's affirmative statement in respect to these same three situations is preferable. After recognizing that not all kinds of impossibility will be an excuse, he goes on to say:

"There are, however, three classes of cases where it is well settled that the promisor will be excused unless he either expressly agreed in the contract to assume the risk of performance whether possible or not, or the impossibility was due to his fault . . . The three classes . . . alluded to are:

(1) Impossibility due to domestic law;
(2) Impossibility due to the death or illness of one who by the terms of the contract was to do an act requiring his personal performance;
(3) Impossibility due to fortuitous destruction or change in character of something to which the contract related, or which by the terms of the contract was made a necessary means of performance."\(^{32}\)

As will be seen, the results reached by our court, if not always its language, amply support Williston's statement of the general rule.

\(^{29}\) Restatement, Contracts §§ 456-457.
\(^{30}\) 6 Williston, Contracts § 1933.
\(^{31}\) Restatement, Contracts §456, comment c.
\(^{32}\) 6 Williston, Contracts §1935.
Consider first the cases in which impossibility is due to a change in domestic law. In these cases the contract when made was legal, but performance has subsequently been prohibited or prevented by law. It should first be noted that the impossibility involved in such a case is ordinarily not impossibility in fact. The contract in most cases could still be performed if the promisor were willing to break the law. He is excused because it would be impracticable and obviously unfair for the law to hold him accountable for his failure to render performance which because of a change in law has become illegal or impossible. An example of the rare case in which there is impossibility in fact is given in the Restatement: A sells land to B who promises that no building shall be erected on it. If the land is then taken by eminent domain for the building of a railroad station, B's performance of his promise would in fact be impossible. Hence his nonperformance would be excused in the absence of facts showing that he intended to assume the risk of this contingency.

Dorr v. Chesapeake & O. Ry. involves a stock illustration of impossibility due to change of law. The railway company in consideration of the granting of a right of way promised to issue an annual pass to the grantor. Later a statute forbade the issuance of such passes. It was held that the company's duty to issue the pass was discharged. Similarly, in another case where the railway company had contracted to haul refuse from the plaintiff's plant without charge, it was held that the company was excused from performance after the passage of a statute which prohibited the furnishing of service for a greater or less compensation than was set forth in its rate tariffs.

Many other West Virginia cases apply the same general principle. In Bunch v. Short it was held that nonperformance of a contract to deposit public funds in a bank without requiring the payment of interest was excused by the enactment of a statute requiring depositories of public funds to pay interest on daily balances. So also, the contract of a county to employ a district road superintendent was discharged when the legislature abolished the office. The case of Appalachian Electric Power Co. v. County

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32 Id. §1938; Restatement, Contracts §458.
34 Restatement, Contracts § 458, Illustration 1.
36 78 W. Va. 764, 90 S. E. 810 (1916).
37 Richardson v. Raleigh County Court, 93 W. Va. 604, 117 S. E. 482 (1923).
Court of Kanawha County, although it contains no discussion of the defense of impossibility, may well be explained on that ground. It was held that the county was released from its contract to purchase electricity for the lighting of a bridge when the legislature transferred jurisdiction of the bridge to the State Road Commission.

There is some difference of opinion among courts generally as to whether prohibition or prevention of performance by judicial, executive or administrative order comes within the principle of impossibility due to change of law. That it should seems clear and our court has so held. For example, in Patton & Shaver v. Elk River Navigation Co., P contracted to cut and deliver to D timber on land claimed by D. After the contract had been partly performed, in a suit by other claimants P was enjoined from delivering a large quantity of logs already cut. In an action for damages in respect to the cutting of these logs, the court gave judgment for P, stating that his default in failing to deliver was excusable because delivery had been prohibited by judicial order. The same result has been reached in the case of administrative orders. Thus, in Carleton Mining & Power Co. v. West Virginia N. Ry., it was held that a contract for the purchase of a railroad was discharged by the refusal of the Interstate Commerce Commission to grant to the purchaser a certificate of convenience and necessity. Similarly, an order of the banking commissioner imposing conditions upon payment of deposits after the reopening of a bank was held to be an excuse for the bank's failure to pay according to the terms of the original deposit. In view of these holdings in respect to judicial and administrative orders it seems reasonable to assume that the same rule would be applied in the case of an executive order rendering performance illegal or impossible.

Impossibility due to a change in foreign law does not come within the principle now under discussion. It does not follow, however, as has often been held that such impossibility is no excuse. There is an impossibility in fact and the modern tendency is to recognize that prohibition or prevention of performance by change of foreign law is an excuse unless the promisor may fairly be said to have assumed the risk of such impossibility.

40 6 WILLISTON, CONTRACTS § 1939.
41 13 W. Va. 259 (1878).
42 106 W. Va. 126, 145 S. E. 42 (1928).
44 6 WILLISTON, CONTRACTS § 1938.
Consider next Williston's second group of cases in which the courts have recognized the defense of impossibility. From earliest times it has been held that, in the case of a contract for personal service, the death or illness of the one who is to render the service is an excuse for nonperformance.\(^45\) Although normally it is the promisor who is to render the service, as in the case of an ordinary contract of employment, he sometimes contracts that another person shall do so. In such case the death or illness of the other person will be an excuse, just as the promisor's own death or incapacity would in the ordinary case. This rule is so well established that there has been comparatively little litigation on the point in West Virginia. When a case does arise the decision will turn on the question whether in the particular contract the services were of such a personal nature as to come within the rule, rather than on any question as to the correctness of the rule itself. In *Kelly v. Thompson Land Co.*, which held that a promise to form and promote a corporation was personal in nature, we find this statement:

"Where the acts stipulated in an agreement require the exercise of special knowledge, genius, skill, taste, ability, experience, judgment, discretion, integrity or other personal qualifications of one or both parties the agreement is said to be of a personal nature. It seems to be an accepted rule that in contracts of this kind the death of one who was to perform a personal service shall dissolve the contract...."

"... So all that concerns us now is whether the undertaking of Thompson, yet unperformed, was personal."\(^46\)

In the third group of cases mentioned by Williston impossibility was due to the destruction or nonexistence of specific property necessary for performance. Although from very early times the law recognized as an excuse impossibility due to change of law or to the death or illness of one who was to render personal services, "it was not until after the middle of the nineteenth century that it was held that the destruction or non-existence of inanimate subject matter to which a contract related would excuse a promisor from liability."\(^47\) Despite the comparatively recent origin of this principle its soundness is now generally admitted. The expressions of our court in the few West Virginia cases containing any discussion of the point are for the most part in accord with the general rule. A limited statement of the principle is found in the quotation

\(^{45}\) Id. §§ 1931 and 1940; Restatement, Contracts § 459.  
\(^{46}\) 112 W. Va. 454, 458, 164 S. E. 667 (1932).  
\(^{47}\) 6 Williston, Contracts § 1931.
from the Roberts case, discussed and criticized above, to the effect that impossibility is an excuse "where the continued existence of the subject matter is an implied condition of the contract." The typical example is a contract to sell specific goods which are fortuitously destroyed before time for delivery. Though no West Virginia case was found expressly holding that under such circumstances the seller’s failure to deliver was excused, there can be little doubt that our court would so hold.

Although the statement in the Roberts case covers supervening impossibility due to the destruction of the subject matter it is not broad enough to cover the case of existing impossibility due to non-existence of the subject matter. It is clear, however, that such existing impossibility is an excuse. In the Paxton Lumber Company case which involved only a partial existing impossibility there was a contract to sell 950,000 feet of timber from a particular tract. Unknown to the parties the tract contained considerably less than the amount contracted for. After the seller had delivered all of the existing timber he was sued because of his failure to deliver the balance. It was held that he was excused, the court stating that:

"If the parties to a contract enter into it under the belief that the subject matter is in existence, and in effect condition their contract thereon, no contract exists if the subject matter is not then in existence, and if it exists in part only, performance after exhaustion of such part will be excused."

Recognition of the same principle is implicit in the later case of Taylor v. Thomas. The actual holding in this case was that under a coal lease providing for minimum royalty payments, exhaustion of the coal was no excuse for failure to pay the rental so long as the lessee retained possession for the purpose of using a right of way to remove coal from adjoining land. The intimation is clear that had the lessee surrendered possession after the coal was exhausted he would have been discharged from further liability under the lease. The situation in the Taylor case should be distinguished from that found in cases like National Coal Co. v. Overholt. The agreement in the Overholt case, though in the form of a lease with provision for payment of minimum royalties, was under

48 Roberts v. American Column & Lumber Co., 76 W. Va. 290, 293, 85 S. E. 535 (1915). See also 6 Williston, Contracts §§ 1946-1950; Restatement, Contracts § 460.
50 106 W. Va. 376, 145 S. E. 633 (1928).
51 81 W. Va. 427, 94 S. E. 735 (1917).
established West Virginia principles construed to be not a true lease but a sale of the coal in place, subject to the condition that the coal be removed during the term of the lease. Note that this was not a sale of a definite amount of coal but was a sale of all existing coal without any guarantee as to amount. The purchase price for the coal was to be the total minimum royalty plus such additional sum as might become due if the lessee should mine more coal than was covered by the minimum royalty. Under these circumstances it was very properly held that the exhaustion of the coal did not discharge the purchaser's promise to pay the agreed price. This is simply an application of the general principle that the law does not inquire into the adequacy of consideration.\footnote{\textit{Williston, Contracts} \S 115.}

This line of reasoning was all that was necessary to a decision and we may properly discount certain statements found in the case in reference to true leases, particularly so since they are inconsistent with the principle recognized in the \textit{Taylor} case and applied in the \textit{Paxton Lumber Company} case.

The principle under discussion will not only excuse the promisor when the subject matter of the contract is nonexistent or is subsequently destroyed, but is also broad enough to excuse him when specific property necessary to the performance of the contract has been destroyed.\footnote{\textit{Id.} \S 1948.} A common example is a contract to repair or do work on an existing building which is destroyed or materially damaged before the repairs have been begun or completed. It is generally held that the contract is discharged and even if the owner should rebuild there would be no further duty on the part of the contractor.\footnote{\textit{Id.} \S 1965.} Such a case is to be distinguished from that of a contract to erect a building. There the risk of the destruction of the building before completion of the work is generally said to have been assumed by the builder.\footnote{\textit{Id.} \S 1964.}

The West Virginia law on this point is not clear. In \textit{Chapman v. J. W. Beltz & Sons Co.},\footnote{48 W. Va. 1, 35 S. E. 1013 (1900).} there was a contract for the remodeling and rebuilding of a store, some of the old walls to be used in the erection of the new building. After much of the work had been done but before its completion, the building collapsed without any fault on the part of the contractor. The owner notified the contractor that he would restore the building to its original condition.

\footnotesize{\textit{Id.} \S 1948.}
and would then expect completion of the work. Overruling the contractor’s contention that he was discharged, the court held him guilty of a breach of contract for refusing to complete the building. This holding is not only inconsistent with the general rule as stated above but is also at variance with the case of Hysell v. Sterling Coal & Manufacturing Co., decided only one year before. In that case there was a contract to put a roof on a house which was destroyed during the course of the work. The jury having found for the contractor on the issue whether the fire was due to his negligence, the court held that he was excused from further performance under the contract and that he was entitled to recover in quantum meruit for the part of the roof which was completed before the fire.

Query whether this correct holding was overruled only one year later. The cases might conceivably be distinguished on the ground that the repairs in the Chapman case were so extensive that the contract was really one for the erection rather than for the repair of a building, whereas in the Hysell case we have a true repair contract. What makes this as well as any other effort to distinguish the cases doubtful is the fact that the court did not even mention the Hysell case in its later opinion. Consequently, about all that can be said is that it remains to be seen which case the court will follow when the point is again presented.

It also remains to be seen whether in line with the Restatement and with the recent trend noted by Williston, our court is prepared to extend the doctrine of impossibility to additional situations. Take for example the fourth class of cases mentioned by Williston, “where impossibility is due to the failure of some means of performance, contemplated but not contracted for.” According to the Restatement this should be an excuse unless an intent was manifested to assume the risk of such failure. In Virginian Export Coal Co. v. Rowland Land Co., the lessee of coal lands sought to rescind the lease on the ground that at the time it was made both parties contemplated that the lessee would be able to obtain railroad connections for shipment of the coal, which he was unable to do. The court intimated quite clearly that even if this were true, the lessee would not be released, it being “the duty of the contracting parties to provide against contingencies”.

57 46 W. Va. 158, 33 S. E. 95 (1899).
58 6 WILLISTON, CONTRACTS §1935.
59 RESTATEMENT, CONTRACTS §460, comment d.
60 100 W. Va. 559, 131 S. E. 253 (1926).
61 Id. at 577.
holding of the case, however, was much narrower and was not inconsistent with the rule of the Restatement. The court first called attention to a rider attached to the lease, providing that if the lessee should be unable to obtain the contemplated railroad connections with the Virginian Railway because of a clause in the lease giving certain preferences to the Chesapeake & Ohio, he should have the right to surrender the lease within ninety days. The court then held that the lessee by executing this rider had manifested an intent to assume the risk of his inability to procure the connections for any other reason. Despite the fact that this holding is consistent with the rule as set forth in the Restatement, it is doubtful that our court is yet prepared to accept the doctrine that impossibility is an excuse when due to the failure of a contemplated means of performance. This conclusion is based not only on the intimation to that effect in the opinion in the principal case but also on the fact that our court has consistently stated the rule as to impossibility in its original strict form, and has dealt with the situations where impossibility is an excuse as exceptional. This method of approach naturally tends to delay recognition of additional situations where impossibility should constitute an excuse.

In the background of all the discussion so far has been the implicit if not expressed qualification that it "is only fortuitous impossibility that excuses from liability." If the promisor is himself the cause of the impossibility or if it is due to his fault, he should not be excused. An interesting example of this is found in the recent case of Odefl v. Criss & Shaver, Inc. The plaintiff, who carried on a nonunion trucking business, contracted to do some hauling for the defendant. After the making of this contract but before performance was due, defendant's plant was unionized. In the agreement which defendant signed with the union, his employees were privileged to refuse to load nonunion trucks. As a consequence, the defendant was unable to perform his contract with the plaintiff. When sued he claimed the defense of impossibility, but was quite properly held liable. The court placed its decision on the ground that this was not a case of impossibility but of mere unforeseen difficulty. This proposition is at least debatable and it would seem to be a better explanation to say that impossibility, and a fortiori mere unforeseen difficulty, of performance is not an excuse when it is due to the voluntary act of the promisor, as here his signing of the union contract.

62 6 WILLSTON, CONTRACTS §1959.
63 14 S. E. (2d) 767 (W. Va. 1941).
Attention should also be called to another general principle applicable to all cases of impossibility. The law does not require that the impossibility should actually occur. It is enough that there be a reasonable apprehension of impossibility. As is said in the Restatement,

"Where a promisor apprehends before or during the time for performance of a promise in a bargain that there will be such impracticability of performance as would discharge or suspend a duty under the promise or that performance will seriously jeopardize his own life or health or that of others, he is not liable, unless a contrary intention is manifested or he is guilty of contributing fault, for failing to begin or to continue performance while such apprehension exists, if the failure to begin or to continue performance is reasonable." 1

Note that this recognizes the impracticability of requiring performance which will endanger life or health. In the case of Vale v. Suiter & Dunbar, our court overlooked this principle. Under a contract which called for the steady operation of a saw mill, it was held that the existence of a smallpox epidemic in the neighborhood would not excuse performance unless the promisor could show that he was unable by the exercise of due diligence to procure employees who were willing to assume the risk of catching the disease. This holding is certainly in conflict with the spirit if not the letter of the Restatement rule.

The West Virginia cases are in accord with the general view that when part performance has been rendered under a contract which is discharged by impossibility, the party receiving the part performance must pay its reasonable value unless what he received can be returned within a reasonable time.6 This is true without regard to which party was excused by the impossibility. Thus in the Hysell case, where the promisor was excused from his duty to put a roof on a house which was destroyed by fire he was allowed to recover the value of that part of the roof which had been completed before the fire.67 On the other hand, in Bell v. Kanawha Traction & Electric Co.,68 where it was held that the duty of the carrier to issue an annual pass was excused by subsequent change of law, the other party was allowed to recover the value of the right of way conveyed to the carrier as consideration for its promise.

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1Restatement, Contracts §465.
258 W. Va. 353, 52 S. E. 313 (1905).
36 Williston, Contracts §1972; Restatement, Contracts §468.
For the most part the results reached by our court are in accord with the rules as stated by Williston and the Restatement in so far as those rules have received general recognition. The present indication is that our court will at least be slow in following the recent trend extending the excuse of impossibility to other and newer situations. This reluctance to be among the first to change the law is not open to serious criticism, particularly so since our court has not yet shown any inclination to be among "the last to lay the old aside."

69 For other cases not discussed or cited in this article, see those collected by Donley in Restatement, Contracts, W. Va. Annot. (1938) §§454-469.