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## Life-Care Contracts: Premature Death and Restitution; Assumption of Risk; Failure of Consideration; Frustration; Impossibility

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# NOTES

## “LIFE-CARE” CONTRACTS: Premature Death and Restitution; Assumption of Risk; Failure of Consideration; Frustration; Impossibility

In *Gold v. Salem Lutheran Home*<sup>1</sup> defendant corporation maintained a licensed home for the aged. According to its constitution and by-laws applicants were admitted for a two-month trial period for which the fee was required to be prepaid each month in advance. At the end of this period the officers of the Home had the power to reject or accept the applicant for life-membership. An applicant could be accepted earlier only under special circumstances which apparently did not occur in this case. The life-care contract obligated the Home to provide food, a designated room and required medical care (within specified limits) during the life of the applicant, for which he paid a lump sum determined by the Home by use of life expectancy tables.

Mr. Chouvaldjy paid his first month's trial period fee, received care from the Home in August, and on August 31 paid the fee required for care during the month of September. As a matter of convenience, Chouvaldjy (who will be referred to as *C*), then applied for a "life-care contract." On September 10 his application was approved by the board of directors. By the conduct of the parties it appeared that they did not intend that approval to constitute a contract, but contemplated a later, formal contract document. An unsigned life-care contract form was prepared by the Home and *dated*, in two places, October 1. This form was signed by *C* on September 25, at which time he gave the Home his cashier's check for 8500 dollars, the consideration agreed upon. That same afternoon or the next morning (September 26), the officers of the Home signed the document. *C* then asked for a partial refund of the pre-paid September fee but was told he was not entitled to it. The following day (September 27) *C* suffered a stroke from which he died on September 28. His executor, Gold, brought the action for restitution of the 8500 dollars.<sup>2</sup>

The California Supreme Court found that the contract was in force at the death of *C* even though performance by the Home was not to begin until October 1. The court said that the contract was a life-care contract and therefore the plaintiff had no right in restitution for the amount paid defendant where the beneficiary died before performance by the Home was to begin, and that the doctrine of frustration was not applicable because (1) the frustrating event was reasonably foreseeable, and (2) there was no showing of harm by the frustration.

<sup>1</sup> 53 Cal. 2d 289, 347 P.2d 687, 1 Cal. Rptr. 343 (1959).

<sup>2</sup> See *Gellert v. Bank of Calif.*, 107 Ore. 163, 214 Pac. 377 (1923), allowing restitution in case of impossibility due to death, and 6 WILLISTON, CONTRACTS § 1954 (rev. ed. 1938) at 5478: "The right to restitution of payments already made for a consideration which fails should turn upon the same principle as the right to enforce payments. . . ." See dissent in principle case, 53 Cal. 2d at 292, 294, 347 P.2d at 689, 691, 1 Cal. Rptr. at 345, 347 (dissent).

But this forced *C* to pay twice for care between September 26 and his death—once in his September prepayment and again with his 8500 dollar check.

To understand this case it is necessary to know (1) what legal relations were created by the contract,<sup>3</sup> and (2) the effect of the death of *C*. The first ground of the majority opinion is that the contract was like an annuity contract. Under such a contract there can be no recovery of the premium if the annuitant dies before receiving his first annuity payment.<sup>4</sup> In answer to this, Mr. Justice Peters, dissenting, distinguishes the annuity policy cases by pointing out that in this contract there would be no investment to begin earning interest until October 1 and further notes that according to its constitution and by-laws, the Home had no power to enter an annuity relation until the two-month probationary period expired. Since this appears also to have been the Home's view of the matter on September 27 when they refused *C* a refund for the month of September, the dissent concludes that this is a contract entered on September 26 to commence an annuity relation on October 1.<sup>5</sup>

In evaluating this agreement, it must be asked whether postdating the contract is of any legal significance. Since the controversy arose between the time of *actual* signing and the *express* date of the contract, the court could take notice of the fact that the parties manifested their agreement *in fact* on September 26 and that the purported date of the contract was untrue, causing uncertainty as to the intended meaning of the term "October 1."<sup>6</sup> To resolve this objective ambiguity as to what the parties intended by their act of postdating, the court should be guided by the parties' subjective intent at the time of contracting so far as it can be shown to the court.<sup>7</sup> Other pertinent guides to construction of such an agreement are stated in the Civil Code.<sup>8</sup>

<sup>3</sup> CAL. CIV. CODE § 1654 appears to apply: "In cases of uncertainty . . . the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist . . ."

<sup>4</sup> *Coyne v. Pacific Mut. Life Ins. Co.*, 8 Cal. App. 2d 104, 47 P.2d 1079 (1935); *Curtis v. New York Life Ins. Co.*, 217 Mass. 47, 104 N.E. 533 (1914).

<sup>5</sup> 53 Cal. 2d at 292, 347 P.2d at 689, 690, 1 Cal. Rptr. at 345, 346.

<sup>6</sup> See CAL. CIV. CODE § 1647: "A contract may be explained by reference to the circumstance under which it was made, and the matter to which it relates." See *Cotton v. Watson*, 124 Cal. 422, 424, 66 Pac. 490, 490 (1901): "The date which is written in an instrument is prima facie its actual date, but, when the rights of a person . . . are measured from the date of an instrument it is competent to show that the date written therein is not its actual date."

<sup>7</sup> CAL. CIV. CODE § 1636: "A contract must be interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." In *Gold v. Salem Lutheran Home*, 53 Cal. 2d 289, 292, 293, 347 P.2d 687, 689, 690, 1 Cal. Rptr. 343, 345, 346 (dissent), the dissent pointed out the Home's lack of power to make a life-care contract, except at the end of the probationary period. This was probably the reason for the postdating. But for purpose of this note, it is assumed that the officers had power to contract with *C* before October 1.

<sup>8</sup> CAL. CIV. CODE §§ 1637, 1639, 1641, 1642, 1647 (text quoted *supra* note 6. See CAL. CIV. CODE § 1649: "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." See also CAL. CIV. CODE §§ 1648, 1650, 1652, 1653, 1654 (text quoted *supra* note 3), 1655, and 1657.

### *Possible Constructions*

Three possible constructions appear:

1. The court could have substituted the actual date, September 26, for the express date, October 1. On the date of signing the Home would have had an immediate duty to care for *C* from then on. If *C* died two days later, the Home would have completely performed its duty under the contract. There would be no failure of consideration, no frustration, no impossibility. If this is the correct interpretation, the court rightly decided that the plaintiff could not recover from the Home.

But there are serious objections to this view. *C* had a prior contract requiring the Home to care for him until October 1 and had been refused a refund on that contract. To say that by this life-care contract *C* was required to pay a second time for care from September 26 to October 1 is imputing less than good faith to the Home. The parties would hardly intend that the Home be under two duties to support *C* until October 1. The contract should be interpreted so that it is reasonable<sup>9</sup> and on the assumption that both parties bargained in good faith.<sup>10</sup> Furthermore, this interpretation fails to give any legal effect to the date, October 1, which was twice inserted in the contract.<sup>11</sup> "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."<sup>12</sup> In addition, the consideration is ineffective to the extent of the Home's pre-existing duty to care for *C* until October 1 as defined in the prior contract. This construction, therefore, seems untenable.

2. The court could have completely disregarded the fact of signing on September 26, looked only at the *express* terms of the contract and found that the agreement imposed *no* duty upon the Home at the time of signing. It was simply an agreement of terms that would become a binding contract on October 1. In the meantime it would be revocable by either party. It might be compared to an offer by either that was not capable of acceptance until October 1. There was a statement of terms on which they would be bound, but they both expressed intent not to be bound until October 1. If *C* revoked his offer by death, or died before the time when he could accept the Home's offer, no contract could result. While this view may be more in accord with the express terms (nothing expressed indicates any legal duties arise before October 1), it is open to the objection that it does not seem to conform to the actual intent of the parties. It gives no effect to the actual act: "pre-signing." The fact that it was signed prior to its express date indicates the parties intended its legal effect to be different than it would have been had they waited until October 1, to sign a contract with a date of October 1.<sup>13</sup> Each party probably intended the agreement to be binding in some way from the date of signing.

<sup>9</sup> CAL. CIV. CODE § 1643: "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done without violating the intention of the parties."

<sup>10</sup> "... [S]uch construction of the contract is to be preferred as makes a contract reasonable, fair, and equitable to both parties." *Lane-Wells Co. v. Schlumberger Well Surveying Corp.*, 65 Cal. App. 2d 180, 187, 150 P.2d 251, 254 (1944).

<sup>11</sup> Transcript 9, Exhibit A for defendants.

<sup>12</sup> CAL. CIV. CODE § 1641.

<sup>13</sup> See CAL. CIV. CODE §§ 1636 and 1647 (text quoted note 6 *supra*).

3. The third possible construction is that the parties intended to create a simple contract for a future performance. Each intended to hold the other contractually bound at the moment of signing, but since the Home was already under a duty to support *C* until October 1 and since the agreement was dated October 1, they intended that there be no duty of performance by the Home until October 1. This is interpreting the agreement as the ordinary type of contract which is binding and irrevocable from the moment it is made; the duty created is not a presently enforceable duty, but one to be performed on a future date. This construction gives effect both to the admitted act of signing (creating a binding contract) and the expressed date term (setting time for performance) and satisfies the above noted code requirements for construction of contracts. This view therefore appears more realistic and legally more desirable, giving greater weight to intent of the parties. Since the court stated that the contract was in effect on September 26 and that performance was to begin on October 1, this third construction also appears closer to the court's view of the contract than the second.

#### *Duties Under the Contract*

Just what are the Home's duties under this last interpretation? The Home's performance can be defined by its character (to provide *C* with food, a room of designated quality, and limited medical care as required) and its duration (the period of *C*'s life). The period for rendering this service was determinable at an unpredictable time—the time of *C*'s death. *C* was paying 8500 dollars not for care for the next year or any other certain term but for the uncertain duration of his life. The Home was assuming the risk that he might live to be one hundred and would have to care for him until then. Both the quality of the care and its duration induced *C*'s promise. But when was the Home to begin performing? The court states "... performance of the contract was not to commence until October 1. . . ." <sup>14</sup> There is no hint in the contract that the assumption of risk is to be undertaken at an earlier time than providing care. The conclusion can only be that on October 1 the Home was to begin caring for *C* and to assume the contract risk of *C*'s living beyond his life expectancy. Since the contract terms deal only with immediate performance, by construing the "express date" to be the performance date, according to the above interpretation, the Home could not assume any duties until October 1.

The majority opinion is based on an assumption that this contract is like an annuity contract and cites annuity cases in its support. <sup>15</sup>

<sup>14</sup> 53 Cal. 2d at 290, 347 P.2d at 688, 1 Cal. Rptr. at 344.

<sup>15</sup> See cases cited, *Gold v. Salem Lutheran Home*, 53 Cal. 2d 289, 291, 347 P.2d 687, 689, 1 Cal. Rptr. 343, 345. Corbin also appears to rely on this assumption in his note, 3A CORBIN, CONTRACTS § 728, at 401 (1960), where he states, referring to the opinion of the district court of appeal, "The dissenting judge clearly saw that the case was parallel to that of a life annuity paid for in advance, as in *Coyne v. Pacific Mut. Life Ins. Co.* . . ."

But in *Coyne v. Pacific Mut. Life Ins. Co.*, 8 Cal. App. 2d 104, 107, 47 P.2d 1079, 1080 (1935), the facts were: "On May 9, 1932, the defendant issued to . . . Coyne an annuity policy . . . by which it agreed to pay to him \$90.10 on June 9, 1932, if then living. . . . He was then 66 . . . and the policy was issued in consideration of a single premium of \$10,000. . . ." So Professor Corbin has failed to note that in the *Coyne* contract (1) the

The clauses in this contract contemplate that both parties will undertake their performance simultaneously or simultaneously after the condition precedent of *C*'s payment.<sup>16</sup> But the contract's date indicates that performance of the contract was not to commence till October 1. There was nothing indicating that any time was to lapse between *C*'s payment and the Home commencing its care; it appeared by the contract that the parties were to undertake their burdens and were to be entitled to their benefits at the *same* time. It was not the intent of the parties that the Home could receive its benefit of 8500 dollars and for the next five days subject *C* to the liability of having the Home's performance completely excused by his death without receiving one day's care for his money. The duties of both parties were enforceable on October 1, and not before.

*Failure of Consideration; Frustration; Impossibility*

The court questions, "Since performance of the contract was not to commence until October 1, 1956, and Mr. Chouvaldjy died before per-

parties *expressly* agreed that the company's performance was conditional on Coyne's being alive on June 9, and (2) Coyne was under a duty, *enforceable on May 9*, to make his payment in order to receive the company's performance one month later. Compare this with *Gold v. Salem Lutheran Home, supra*, where (1) there was *no* expression that the Home's performance was conditional on *C*'s being alive on October 1, and to imply such a limitation is to say that the parties intended *C* to pay twice for care for the last week of September. Such a construction does not impute good faith to the Home or reasonableness to *C* (see notes 9 and 10, *supra*); (2) whereas Coyne had a duty to pay on May 9 in order to receive a benefit on June 9, *C* did not have to pay until October 1 for a benefit to be received on October 1. The Coyne contract expressed separate performance dates for each party. The Salem Home contract had terms of immediate performance for *both* parties but the contract was postdated to the date they intended their concurrent performances to be enforceable. *C* was not under a duty to pay on September 26; his paying at that time was only for convenience. Since *C* was not required to perform earlier than the Home, he would not have been liable if he had given a check postdated to October 1. Therefore, his executor should have been entitled to the return of the money unless *C* had assumed the risk of his own early death. As noted above, to imply such an assumption is completely unreasonable where *C* had a prior contract for care until October 1. Professor Corbin feels the risk was assumed by *C*, "... since the defendant certainly assumed the risk that the old man would outlive his expectancy." 3A CORBIN, CONTRACTS § 728, at 401 (1960). This should be modified to "defendant certainly assumed the risk—from October 1 on." The Home was to assume no risk until October 1, by which time assumption became impossible. The Home was to assume the risk that *C* would live *longer* than his life expectancy, and *C* was to assume the risk that he would live a *shorter* time than his life expectancy, but the only reasonable construction is that assuming these risks were part of the performance to be begun by both on October 1.

<sup>16</sup> Transcript 9, Defendant's Exhibit A, quoting the contract:

"That for and in consideration of the sum of (eighty-five hundred) dollars . . . , to be paid by said Guest, and in further consideration of the covenants and conditions hereinafter contained, the Home Association agrees to provide said Guest with food, lodging and care as hereinafter set forth, and in accordance with the Home Association Regulations, House Rules, By-Laws and Articles of Incorporation . . . [which are] made a part of this contract as though set out at length herein.

"2. Said Guest may occupy during the remainder of (his) life Room Number 31 . . . , and said Home Association shall, during the remainder of the life of said Guest, provide said Guest with food and lodging and such medical care . . . as is ordinarily and customarily furnished Guests of said Home Association. . . ."

formance was to commence, (a) was there a failure of consideration for the contract or (b) was the doctrine of frustration applicable?<sup>17</sup> Since it was a contract for future performance, what legal effect resulted from C's death before the performance date?<sup>18</sup>

Assuming that the parties intended a present contract for a future performance and assuming that the contracting purpose of C was frustrated, still C or his representatives may be liable for his performance if the frustrating event was so foreseeable that he as a reasonable man, should have provided for it in his contract. The majority determined that since C was eighty-four years old, death was reasonably foreseeable, and foreseeability prevented application of the doctrine of excuse of performance by frustration.<sup>19</sup> Such discussion assumes that there would have been a frustration by C's death if it had not been foreseeable. There appeared to the dissenting Justice to be an implied condition that C be alive on October 1 in order to carry out this contract contemplating a personal relation. The final statement of the dissent, observing a failure of an implied condition of possibility,<sup>20</sup> suggests that perhaps the doctrine of impossibility rather than frustration might have been more appropriately considered by the majority. In discussing the effect of C's death, the court bypassed an opportunity to clarify California law on the various doctrines of excuse of performance, *i.e.*, impossibility, failure of consideration, and frustration, and dismissed the case with the finding that neither failure of consideration nor frustration applied.

At common law a promisor was held absolutely liable for his promise. Since each party assumed the risk that his performance would be made

<sup>17</sup> 53 Cal. 2d at 290, 347 P.2d at 688, 1 Cal. Rptr. at 344. In answer to question (a) the court made the general statement: "No. A life-care contract is not subject to rescission or cancellation, or to recovery back of the amount paid therefor, because the beneficiary dies before performance of the contract is to commence." If, by "life-care" contract the court means the usual properly dated annuity-type contract (expressing an immediate liability of the annuitant to have his payments terminated by his death), then the statement cannot be questioned. However, this is not the usual life-care contract, but rather a postdated one. Performance is not to begin until a future time, thus making it a present contract for a future performance. Considering these facts, it appears that the court's statement could be cited for the inaccurate proposition that *any* "life-care" contract, irrespective of whether the duties of the "insurer" were to begin immediately or in the future, is capable of termination by the death of the beneficiary.

<sup>18</sup> The court stated, "Defendant's promise to furnish . . . care to decedent 'for the remainder of his life' constituted consideration for the agreement, and the fact that decedent died before performance of the contract was to commence did not give the estate the right to recover — on the ground that there was a failure of consideration." 53 Cal. 2d at 290, 347 P.2d at 689, 1 Cal. Rptr. at 345. This in effect says that each promise was the consideration for the other's promise, which is true. Unfortunately, the statement might possibly be taken to imply that when it became impossible to commence performance, this did not give a right to recover on the ground of failure of consideration, because there was consideration which did not fail when each gave his promise. What excuses performance of course is not the failure to give a promise as consideration, but rather the failure to perform the promise. An implication that, because there were two promises given in consideration for each other, there can be no excuse by "failure of consideration" is one not warranted by the use of that doctrine in California or elsewhere.

<sup>19</sup> 53 Cal. 2d at 291, 347 P.2d at 689, 1 Cal. Rptr. at 345.

<sup>20</sup> *Id.* at 293, 295, 347 P.2d at 689, 691, 1 Cal. Rptr. at 345, 347.

impossible by some supervening event, each party was in effect a warrantor. But the "logic" of this argument overlooked the fact that neither party had considered the event sufficiently probable to provide for it in their agreement. The result was that on the occurrence of the event preventing a performance, a contractor was nevertheless liable for his performance even though he now would not get what he bargained for and even though his performance became more a windfall to the other than a bargained exchange. So the doctrine of impossibility was developed by which the contractor who could not perform was excused. In a contract where the extent of performance is conditioned on the happening of an unpredictable event, the doctrine of excuse of performance because of impossibility can apply. What was originally dependent on chance could become certain, thereby destroying the risk. A certain ship may arrive in port,<sup>21</sup> a man might die on September 28, a miner might strike gold<sup>22</sup>—all these are possibilities—mere chances only—the day before they occur. They are all events on which a promise may be conditioned, and a promisor may assume a risk as to when they will happen. But is there any risk to assume the day after these events occur?

When the event occurs, what was formerly chance is now certain. The *fortuitous element* of a fortuitous event is *destroyed when the event occurs*. Is it possible for the Home to perform its promise on October 1 by assuming a risk or conditioning the duration of its performance on a possibility that C can be a centenarian when he has already died at age eighty-four on September 28? Where performance amounts to assuming a risk performance must be impossible when that risk no longer exists to be assumed.

American common law has long recognized that if a certain person was essential to the performance of a contract, the death or illness of that person excused performance since the contemplated performance was no longer possible.<sup>23</sup> The dissent in the Gold case noted this as another ground for its opinion.<sup>24</sup> The amount of medical care and food required for care of C was determinable only by his and no other person's needs. Even if the Home wanted to perform, it would have been unable to set aside a certain amount of food or money and say that that would meet the requirements of C. That the parties regarded it as a personal relation can also be shown by the contract.<sup>25</sup>

In other cases where the beneficiary of a personal service contract became ill or died, the courts have allowed relief.<sup>26</sup> But in those cases, it was

<sup>21</sup> See *Randall v. Johnson*, 59 Miss. 317, 42 Am. Rep. 365 (1881).

<sup>22</sup> See *Embola v. Tuppela*, 127 Wash. 285, 220 Pac. 789 (1923).

<sup>23</sup> See *John Soley & Sons v. Jones*, 208 Mass. 561, 95 N.E. 94 (1911).

<sup>24</sup> 53 Cal. 2d. at 292, 294, 347 P.2d at 689, 690, 1 Cal. Rptr. at 345, 346.

<sup>25</sup> Transcript 9, Defendant's Exhibit A, Contract: "... 9. Neither this contract nor any right hereby granted to said Guest can be transferred and all benefits hereby granted to said Guest are personal and for the benefit of said Guest only."

<sup>26</sup> *Rayner v. McCabe*, 319 Mass. 311, 313, 65 N.E.2d 417, 418 (1946), "The plaintiff was required by her contract to live with her aunt and to render personal service to her; but before the plaintiff had done so the aunt had been taken to a hospital, and any performance by the plaintiff of her contract then became impossible and the contract terminated on the death of the aunt." See *Inches v. Butcher*, 104 N.W.2d 556 (N.D. 1960); *Bucklin v. Morton*, 105 Misc. 46, 172 N.Y.S. 344 (Sup. Ct. 1918); *John Soley & Sons v. Jones*, 208 Mass. 561, 95 N.E. 94 (1911).

not the beneficiary but the party providing care who was relieved of his duty by *impossibility*. The beneficiary, the authorities agree, is released from his duty by *failure of consideration*.<sup>27</sup>

Failure of consideration has been defined as failure to receive the performance bargained for<sup>28</sup> (as when the other party repudiates and fails to perform or when the other's performance becomes impossible) as well as failure to receive the value of the performance bargained for.<sup>29</sup> According to California Civil Code section 1689:

A party to a contract may rescind . . . (2) if through the fault of the other the consideration for his obligation fails in whole or in part, (3) if such consideration becomes entirely void from any cause, or (4) if such consideration, before it is rendered to him, fails in a material respect, from any cause.

Sub-section (3) would include the two situations of a failure either through a repudiation by the other party or a failure due to the performance of the other becoming impossible.

It is suggested that the Code section should have been applied to these facts. The performance of the Home became impossible because (1) the fortuitous event on which its performance was to be terminated had lost its fortuitous element at the time performance was to be begun, or to view it another way, the risk it was to assume had been destroyed, and (2) the beneficiary of the personal service contract had died, making its performance impossible. This impossibility served to excuse any performance by the Home. Because the Home's performance became impossible, C's executor should have had a right to rescind, C's performance should have been excused, and restitution given to the plaintiff.

Frustration, on the other hand, has been sharply distinguished from impossibility, and occurs when the *value* of the performance bargained for is destroyed by a supervening event, even though literal performance is possible.<sup>30</sup> While the value of the Home's service is certainly destroyed by the supervening event of C's death, literal performance by the Home is no longer possible for the two reasons stated above. It appears that the doctrine of impossibility, then, is more appropriate to these facts than the doctrine of frustration.<sup>31</sup> Unless it could be shown that C warranted his performance, he could claim that he was excused by failure of consideration, due to impossibility of the Home's performance.<sup>32</sup>

<sup>27</sup> 6 CORBIN, CONTRACTS § 1335 (1951); 6 WILLISTON, CONTRACTS § 1940 (rev. ed. 1960). See RESTATEMENT, CONTRACTS 274, 397 (1932); 12 CAL. JUR. (SECOND), *Contracts* § 238 (1953).

<sup>28</sup> 6 CORBIN, CONTRACTS, *op. cit. supra* note 27, § 1326. See also CAL. CIV. CODE § 1689, and cases collected in nn. 86-95 under § 1689 in the West's Annotated Edition.

<sup>29</sup> *Ibid.* See especially *Dorn v. Goetz*, 85 Cal. App. 2d 407, 193 P.2d 121 (1948), equating failure of consideration so defined to California's "commercial frustration doctrine."

<sup>30</sup> *Autry v. Republic Prod.*, 30 Cal. 2d 144, 180 P.2d 888 (1947); *Lloyd v. Murphy*, 25 Cal. 2d 48, 153 P.2d 47 (1944). 6 CORBIN, CONTRACTS *op. cit. supra* note 27 § 1332; SIMPSON, CONTRACTS § 140 (1954).

<sup>31</sup> Professor Corbin believes this is a case of impossibility rather than frustration. 3A CORBIN, CONTRACTS § 728 (2d ed. 1960), 6 CORBIN, CONTRACTS § 1328, n. 40 (1960 Pock. Supp.); § 1354, n. 3 (1960 Pock. Supp.).

<sup>32</sup> If C warranted performance, he could not claim excuse for any reason. *Wilmington*

As a means of deciding which party should bear a burden of performance in a particular situation, the courts have used the devices "implied condition" and "foreseeability" to reach an equitable result.<sup>33</sup> Other nations have apparently come against the same problem in their administration of contract law.<sup>34</sup> Foreseeability has been widely used in "frustration" cases, especially in California.<sup>35</sup>

But the purpose of the "foreseeability" test is to place the burden where the court feels it equitably should be.<sup>36</sup> The court has felt that a promisor who had it within his knowledge and capacity to foresee an intervening event should be held responsible for his obligation when that event greatly reduces the value of the benefit he is to receive. In *Gold*, the court found death of an eighty-four year old man within one week after signing the contract to be foreseeable. Since the parties brought out that C had a life expectancy of 3.65 years or even longer if he stayed at the Home, the odds were overwhelming that C would not die within a week.<sup>37</sup> Obviously, such an early death could not be foreseeable as a probability but only as a remote possibility. Previous cases have held that events that amounted almost to a possibility were foreseeable,<sup>38</sup> but this is perhaps the farthest that the court has gone in holding a remote possibility to be "foreseeable." It appears that if an event was foreseeable at all at the time of contracting, regardless of the fact that there is only a remote possibility that it would happen, the court may say that it was foreseeable. With such an extension of the doctrine, the line to be drawn between cases where performance is or is not excused is a line that practicing attorneys and lower court judges will find difficult to follow, and an appellate court ruling will be needed in each case as to whether a particular event was in fact foreseeable. Can it be shown where the death of C within one week is more foreseeable than the illness of a king on his coronation day<sup>39</sup> or that a hotel would burn?<sup>40</sup> Other nations have used the "gap-filling" method of implying a clause that the parties would have agreed upon at the time of contracting had they realized the possibility of the intervening event.<sup>41</sup> But this would appear to be sub-

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ton Transp. Co. v. O'Neil, 98 Cal. 1, 32 Pac. 706 (1893), 6 CORBIN, CONTRACTS, *op. cit. supra* note 27, § 1327.

<sup>33</sup> 6 CORBIN, CONTRACTS, *op. cit. supra* note 27, § 1331. See cases collected in notes in 12 CAL. JUR. (SECOND) *Contracts* §§ 241, 242 (1953).

<sup>34</sup> See foreign, English and American cases cited in Smit, *Frustration of Contract: A Comparative Attempt at Consolidation*, 58 COLUM. L. REV. 287 (1958).

<sup>35</sup> 12 CAL. JUR. (SECOND) *Contracts* § 241, n. 4, at 467 (1953).

<sup>36</sup> *Lloyd v. Murphy*, 25 Cal. 2d 48, 54, 153 P.2d 47, 50 (1944).

<sup>37</sup> Transcript, p. 42, parties stipulated that C had a life expectancy of 3.65 years, plus an 'experience' factor of 2.54 years.

<sup>38</sup> *Lloyd v. Murphy*, *supra* note 35, *Glens Falls Indem. Co. v. Perscallo*, 96 Cal. App. 2d 799, 216 P.2d 567 (1950), *McCulloch v. Liquori*, 88 Cal. App. 2d 407, 199 Pac. 255 (1948).

<sup>39</sup> *Krell v. Henry*, [1903] 2 K. B. 740.

<sup>40</sup> *LaCumbre Golf Club & Country Club v. Santa Barbara Hotel*, 205 Cal. 422, 271 Pac. 476 (1928).

<sup>41</sup> See Smit, *Frustration of Contract: A Comparative Attempt at Consolidation*, *supra*, note 34.

ject to the same defect of requiring an appellate review on each new set of facts.<sup>42</sup>

But the courts have restricted the use of the foreseeability doctrine to frustration cases. While the impossibility doctrine is prevented from operating by an event within the knowledge or control of the promisor or one that occurred because of his fault, the foreseeability test has not been applied to impossibility cases. A leading case in England in which the event was easily foreseeable allowed the doctrine of impossibility to apply.<sup>43</sup> The reason that the foreseeability issue has not been raised in other cases of death of a beneficiary of a personal service contract is that they have been considered as cases of impossibility rather than frustration.<sup>44</sup>

When a performance is prevented by objective impossibility there is no question that there is a *total* failure of consideration for the other's promise. In these cases there is neither need nor benefit in a "foreseeability" limitation. While every contracting party has the burden of performing his promise in spite of unforeseeable handicaps, he has not been, and should not be, forced to perform when the other is going to give nothing at all in return. The more equitable holding in the impossibility cases is to allow rescission rather than forcing a completely uncompensated performance. The result may be otherwise if the event was the fault of or partly controlled by the promisor, if the probability of the event was better known to him, if he did not act in good faith, if he warranted his performance, or if the promisee had substantially relied on the expectation of performance. Is it better to return any consideration paid and excuse performance with the result that the parties lose only the benefit of their bargain? Or is it better to force the promisor to give complete performance because he was unable to foresee all the contingencies hidden in the future? Neither party was bargaining for contingencies. The promisee did not hope for getting his benefits while giving nothing, and the promisor did not suspect that on some contingency he should completely perform and receive nothing. It is more equitable to put the parties in status quo and call off the bargain, than force such a gift performance. The fact that it might have been possible for the Home to completely perform by giving one hour or one minute of care (had C died October 1) should not have prevented application of the law of failure of consideration from repaying C's estate, when that one minute of care became impossible to perform.

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<sup>42</sup> The following may be a more concrete guide: If (1) the value was almost totally destroyed, (2) if the promisor did not warrant his performance, (3) if the intervening event was not the promisor's fault, (4) if the promisor had no more knowledge than the promisee of the probability of the event's occurrence, or time of occurrence, (5) if the event was not within the promisor's capacity to control, (6) if the promisor acted in good faith, and (7) if there was no substantial economic reliance on the promise by the promisee at the time the event occurred, then the promisor should be relieved of his duty by the frustrating event. This is believed to be a more objective guide, which can give an equitable result on facts more easily obtained than the facts of "foreseeability."

<sup>43</sup> *Fibrosa Spolka Akcyjna v. Fairbairn*, [1943] A.C. 32, [1942] 2 A11 E.R. 122.

<sup>44</sup> See cases in note 26 *supra*.

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