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THE CONTRACTUAL AND TAX IMPLICATIONS OF *THE PHANTOM OF THE OPERA*

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INTRODUCTION

The substantive story of Gaston Leroux's *The Phantom of the Opera* (*Le Fantôme de l'Opéra*) is largely about contract analysis and whether the managers and "the phantom" have had a "meeting of the minds"—*consensus ad idem*.

The question is whether the Phantom and the Managers reached a "meeting of the minds" or manifested mutual assent in their contractual remedies. In the end, there was no contract and the managers could have claimed significant losses directly through their contractual terms with the Phantom.

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[*] Author's note.

I. CONTRACT LAW AND THE PHANTOM

The substantive story of Gaston Leroux's *The Phantom of the Opera* (*Le Fantôme de l'Opéra*) is largely about contract analysis and whether the managers and "the phantom" have had a "meeting of the minds"—*consensus ad idem*.

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In short, the plot surrounds new managerial team—Armand Moncharmin and Firmin Richard—at the Palais Garnier have refused to abide by the former managerial team's contract with the Phantom as successors in kind.

The relevant legal facts are that Armand Moncharmin and Firmin Richard have assumed the roles of managers of the Palais Garnier. Gaston Leroux and the Phantom himself often point out that the managers have a lack of experience. Indeed, the Phantom appears to have similar access to private information that was at issue in the Supreme Court case *Laidlaw v. Organ* (1817) and which would be allowed to be used in a negotiation over the mangers.[1]

The landmark contract case, *Laidlaw v. Organ* discussed the depressed land around the Mississippi River during Andrew Jackson's campaign against British forces during the Battle of New Orleans. Organ used his private information network that let him know the peace treaty had been signed and thus the land would be worth more than it would be had the war continued. Organ used his information asymmetry and a subset of moral hazard

[1] *Laidlaw v. Organ*, 15 U.S. (2 Wheat.) 178 (1817).

theory to minimize risk exposure and thus purchased the land.[2] This case is notable because it established caveat emptor as a rule in the United States.

The question is whether the Phantom and the Managers reached a "meeting of the minds" or manifested mutual assent in their contractual remedies.

Meeting fo the minds has been a legal fiction of basic Anglo-American common law since the beginning of the nation. Oliver Wendell Holmes wrote that this manifestation of assent was a fiction in his *The Path of the Law*:

> In the law of contract the use of moral phraseology led to equal confusion, as I have shown in part already, but only in part. Morals deal with the actual internal state of the individual's mind, what he actually intends. From the time of the Romans down to now, this mode of dealing has affected the language of the law as to contract, and the language used has reacted upon the thought. We talk about a contract as a meeting of the minds of the parties, and thence it is inferred in various cases that there is no contract because their minds have not met; that is, because they have intended different things or because one party has not known of the assent of the other. Yet nothing is more certain than that parties may be bound by a contract to things which neither of them intended, and when one does not know of the other's assent. Suppose a contract is executed in due form and in writing to deliver a lecture, mentioning no time. One of the parties thinks that the promise will be construed to mean at once, within a week. The other thinks that it means when he is ready. The court says that it means within a reasonable time. The parties are

[2] "In the legal academy and elsewhere, these questions increasingly are debated within the framework of what in law schools is called law and economics analysis (and elsewhere is called rational choice theory, neoclassical economics, or, sometimes, simply policy analysis). Within that framework, the concept of "moral hazard" is one of the most important, and least well understood, of the analytical tools applied to these and other social responsibility questions. Whether the topic is products liability law, workers' compensation, welfare, health care, banking regulation, bankruptcy law, takings law, or business law, moral hazard is a central part of the law and economics explanation of how things as they are came to be." Tom Baker, *On the Genealogy of Moral Hazard*, 75 Tex. L. Rev. 237 (1996).

> bound by the contract as it is interpreted by the court, yet neither of them meant what the court declares that they have said. In my opinion no one will understand the true theory of contract or be able even to discuss some fundamental questions intelligently until he has understood that all contracts are formal, that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs — not on the parties' having meant the same thing but on their having said the same thing.[3]

Indeed, this rule was long established in English law. The case of *Household Fire and Carriage Accident Insurance Co Ltd v. Grant* (1879) by The Rt Hon. Lord Justice Thesiger, states that

> Now, whatever in abstract discussion may be said as to the legal notion of its being necessary, in order to the effecting of a valid and binding contract, that the minds of the parties should be brought together at one and the same moment, that notion is practically the foundation of English law upon the subject of the formation of contracts. Unless therefore a contract constituted by correspondence is absolutely concluded at the moment that the continuing offer is accepted by the person to whom the offer is addressed, it is difficult to see how the two minds are ever to be brought together at one and the same moment... But on the other hand it is a principle of law, as well established as the legal notion to which I have referred, that the minds of the two parties must be brought together by mutual communication. An acceptance, which only remains in the breast of the acceptor without being actually and by legal implication communicated to the offerer, is no binding acceptance.[4]

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[3] Oliver Wendell Holmes Jr., *The Path of the Law*, 10 Harvard Law Review 457 (1897).
[4] *Household Fire and Carriage Accident Insurance Co Ltd v. Grant*, 4 Ex D 216 (1879).

In another classic law student case book example, the famous *Carlill v. Carbolic Smoke Ball Company* (1893), Charles Synge Christopher Bowen, Baron Bowen[5] penned of the meeting of the minds doctrine that,

> One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless this is done the two minds may be apart, and there is not that consensus which is necessary according to the English law - I say nothing about the laws of other countries - to make a contract.[6]

However, the US Supreme Court in *Baltimore & Ohio R. Co. v. United States* (1923) wrote that implied contractual obligations can exist when,

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[5] Perhaps one of the most famous literary and legal judges of the 19th century. He also penned the oft quoted:
"The rain it raineth on the just
And also on the unjust fella;
But chiefly on the just, because
The unjust hath the just's umbrella."

Which is perhaps a play on the famous quote from the famous song from Shakespeare's Twelfth Night:

When that I was and a little tiny boy,
With hey, ho, the wind and the rain,
A foolish thing was but a toy,
For the rain it raineth every day.

But when I came to man's estate,
With hey, ho, the wind and the rain,
'Gainst knaves and thieves men shut their gate,
For the rain it raineth every day.

But when I came, alas! to wive,
With hey, ho, the wind and the rain,
By swaggering could I never thrive,
For the rain it raineth every day.

But when I came unto my beds,
With hey, ho, the wind and the rain,
With toss-pots still had drunken heads,
For the rain it raineth every day.

A great while ago the world begun,
With hey, ho, the wind and the rain,
But that's all one, our play is done,
And we'll strive to please you every day.

[6] *Carlill v. Carbolic Smoke Ball Company*, 1 QB 256 (1893).

> [A]n agreement ... founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.
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> However, regarding the classical Holmesian idea of the "formalist theory of contract law,
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> This classic Holmesian statement of the formalist theory of contract interpretation begs several questions. This Comment will tackle just one: how is silence interpreted according to "the usage of a normal speaker of English"? Is silence to be interpreted as an assumption of risk by one party, or carelessness that the judiciary must fix? Is silence active or passive, aware or negligent, in the English language? The doctrine of impossibility requires the judicial system to answer these questions when performance under a contract is rendered impossible by an event that the contract did not address; the cost of the impossibility is allocated based on this ex post interpretation.[7]

Here, in the story of Leroux's investigation of *Le Fantôme de l'Opéra* whilst working as a reporter for L'Echo de Paris and under the influence of Sir Arthur Conan Doyle's own Holemsian—Sherlock Holmes—method of analysis and literature—describes that the Phantom and the new managerial team do not ever come in contact. This is fine under the rules of offer and acceptance and the implication of the mailbox rule. For the mailbox rule to be valid—as a matter of policy—parties need not meet, as long as their contract is within the statute of frauds.

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[7] Shirley R. Brener, *Outgrowing Impossibility: Examining the Impossibility Doctrine in the Wake of Hurricane Katrina*, 56 Emory L.J. 461, 463 (2006). *Cf.* Alan Schwartz, Robert E. Scott, *Contract Interpretation Redux*, 119 Yale L.J. 926, 929 (2010).

The managers seemed to have no idea about the existence of the terms–despite their having been present in the former manager's contact. Assuming that the managers did not know about this, they could argue *non est factum*—which would be the Latin of "it is not deed" or "it is not my deed." This would allow the parties to a contract to renege on performance, which is fundamentally different from that they intended to execute. Assuming there was no mistake of fact or any other such thing, Armand Moncharmin and Firmin Richard could perhaps escape performance under this rule of law.[8]

Indeed, as a defense to formation, when the managers—Armand Moncharmin and Firmin Richard—do indeed sign with the phantom of the Opera, they should cite to duress and undue influence. The concept of undue influence is that one with power uses that over the other parties to force a signature of a contract.[9] According to Black's Law Dictionary, duress "is any unlawful threat or coercion used... to induce another to act [or not act] in a manner [they] otherwise would not [or would]"."[10] This too could be a defense to the managers.

Analysis of the *The Phantom of the Opera* is important and fitting. January 2019 148th anniversary of the victory of the Prussians over the French ending the Franco-Prussian War and leading to Otto von Bismarck's proclamation of the German Empire the same day in the Hall of Mirrors in Versailles. The artistic interpretation of the ending of the Gaston Louis Alfred Leroux's *Le Fantôme de l'Opéra* as well as Andrew Lloyd Weber's interpretation in his 1986 musical are infinitely memorable in this *coup de grâce*. At the end

[8] Such a rule has been upheld by the House of Lords (Supreme Court) of the United Kingdom as recent as 1970. *Saunders v. Anglia Building Society*, [1970] UKHL 5, [1971] AC 1004, House of Lords (UK). Moreover, the High Court of Australia has also brought up this point as well. *Petelin v. Cullen*, [1975] HCA 24, (1975) 132 CLR 355, High Court (Australia).
[9] The concept of undue influence in contract law has origins to the early 1800s before the re-organization of Europe in the wake of the 1848 revolutions. *Dent v. Bennett*, (1839) 4 My & Cr 269; 41 ER 105; *Williams v. Johnson*, [1937] 4 All ER 34. The High Court of Australia has upheld this at a minimum since 1936. *Johnson v. Buttress*, [1936] HCA 41, (1936) 56 CLR 113 (17 August 1936), High Court (Australia).
[10] Black's Law Dictionary (6th ed.).

as the chandelier falls down in an ultimate climax, the phantom is revealed by Christine Daaé, Viscount Raoul de Chagny finds out she loves him, and the phantom realizes Christine doesn't love him whilst at the same time the German troops are supposedly outside firing cannons taking over Paris in an unfortunate götterdämmerung. Usually in performances at Broadway, Prussian troops are slowly entering the stage. Seeing the chandelier fall down represents all these things and rightly is the twilight of the angel of music in the musical. One can attest the L'opéra Garnier and indeed the Paris Opera house are doing just fine and all chandeliers work well. One historical anachronisms is that, L'opéra Garnier actually opened January 5, 1875, which was four years after the 1871 invasion of Paris. In a truly Hegelian *sublated* fashion of aesthetic and literary interpretation, the Prussians enter, the Phantom's life falls apart, the chandelier representing the garish (but unique) aspect of the Second French Empire falling apart whilst the Prussian Empire becomes unified under Otto von Bismarck's rule. This had all been completed by January 25, 1871.

In the end, there was no contract.