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Contributors to the May Issue/Notes

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NOTES

BANKRUPTCY—CLAIMS FOR FUTURE RENT—LEASES.—Probably no legal subject has been the object of as much judicial comment and critical discussion as has the matter of *future rent claims* in bankruptcy. This abundance of comment is, of course, in direct relation to the importance of the subject, especially in times when bankruptcies, due to economic conditions, are numerous. The amount of money which may be involved in claims for future rent against but one bankrupt estate can be enormous,¹ while the aggregate of such claims in all bankruptcies reaches astounding proportions.

The direct question of whether or not claims for future rent should be allowed in bankruptcy proceedings cannot be answered categorically because the answer thereto involves the interests of three widely diver-

¹ See an article by John A. Seiff in 9 Am. Bankr. Rev. 342 entitled, "The Recent Chain Store Bankruptcies."

gent groups, all of whom must be protected in order that the broad purposes of the Bankruptcy Act may be effectuated. First, there is the bankrupt person or corporation whom the law seeks to rehabilitate; secondly, there is the landlord claimant; and, lastly, there are the other creditors who have a right to share in the assets. Theoretically, the interest of the bankrupt should favor the *provability* of all claims in order that they might therefore be eligible for discharge, but actually, in the case of corporate bankrupts at least, their interest favor *non-provability*.

The interests of the second and third groups are in direct conflict. When a creditor's share of the assets is in inverse ratio to the number and amount of other claims it naturally follows that said creditor wants as little company as possible when the final distribution of assets is made. This opposition of interest is heightened as between merchandise creditors whose goods make up the tangible assets of the estate and landlords who can trace their claim to no specific assets from which their claim should be paid. No attempt will be made here to decide the equities of the situation or to discuss the general subject of *provability* of claims for future rent.² The purpose of this note

² Future rent claims are contingent and thus, generally, are not provable under section 63a of the Bankruptcy Act. Section 63b provides only for claims otherwise provable under 63a. *Dunbar v. Dunbar*, 190 U. S. 340, 23 S. Ct. 757 (1903). But see *Maynard v. Elliott*, 283 U. S. 273, 51 S. Ct. 390 (1931); and see Judge Learned Hand's interpretation of the *Maynard* case in *Manhattan Properties, Inc. v. Irving Trust Co.*, 66 Fed. (2d) 470 (C. C. A. 2nd. 1933).

For a history of bankruptcy legislation on contingent and unliquidated claims in England and the United States see 33 Col. L. Rev. 217, footnotes 17 and 18.

The following general rules, as stated in 5 Ind. L. Jour. 626, help to explain the situation of a lessor when his lessee becomes bankrupt: "1. If the bankrupt is a tenant of the leased premises his interest in the expired term of the lease will constitute assets of the estate in bankruptcy and pass to the trustee. (Except against the exercise of a right of re-entry reserved.) 2. The trustee is not bound to assume a lease made to the bankrupt unless he thinks it will be for the benefit of the creditors; he has an option to accept or abandon it, but the option must be exercised, title not passing automatically. 3. A lessee's covenant not to assign, mortgage or pledge the lease or underlet the property without the lessor's consent is not violated by the lessee's bankruptcy." Cases are cited in support of each rule. To these rules may be added some generalities of lease law: (1) Dissolution of a corporation does not terminate a lease (*Cumington Realty Associates v. Whitten*, 239 Mass. 313, 132 N. E. 53, 17 A. L. R. 532 (1921)); (2) Rent is paid not for the grant but for the use of the premises (*Fifth Avenue Bldg. Co. v. Kernochan*, 221 N. Y. 370, 117 N. E. 579 (1917)); (3) A landlord who re-enters the premises without the right reserved terminates the lease and can have no claim for future rent (*South Side Trust Co. v. Watson*, 200 Fed. 50, 118 C. C. A. 278 (1912)).

For interpretations of Section 74 (a), as added to by Act of Mar. 3, 1933, c. 204 § 1, 47 Stat. 1467, 11 USCA § 202 (a), see *Manhattan Properties v. Irving Trust Co.*, 54 S. Ct. 385 (1934) (holding that this section applies only to individuals), and *In re Brooks Sample Furniture Co.*, 4 Fed. Supp. 858 (D. C. D.

is to collate the types of leases or covenants in leases which have been drawn to circumvent the general rule that claims for future rent are not provable in bankruptcy proceedings.³

The importance of anticipating the contingency of a tenant's bankruptcy and providing therefor is borne out by the recent wholesale use of bankruptcy by tenants to avoid costly leases.⁴ In fact the courts have judicially recognized that few creditors of a corporation with non-provable claims have ever collected anything after bankruptcy.⁵

A lease containing no covenants providing for the tenant's bankruptcy affords a landlord no protection. All the historic objections to the effect that the peculiar nature of the obligation to pay rent is contingent makes his claim nonprovable.⁶ Nor do bankruptcy proceedings constitute an anticipatory breach of a covenant to pay rent⁷ though such proceedings have been held to constitute an anticipatory breach of other executory contracts.⁸ The basis for the distinction is the oft-quoted "diversity between duties which touch the realty and the mere personality."⁹ The application of this anachronistic doctrine has been criticized¹⁰ and some courts have refused to follow it;¹¹ yet it still is applied in the majority of cases. It has been suggested that the case of *In re Marshall's Garage*¹² shows that the

Conn., 1933) (holding that claims for future rent are made provable only for purpose of extension proposal provided for by such section). See, also 9 Notre Dame Lawy. 291, at 301.

³ See 33 Col. L. Rev. 241, for a discussion of covenants in leases that seek to provide for a breach by bankruptcy, especially note 144, at page 246, containing suggested covenants.

⁴ Though it is true that because ordinarily bankruptcy proceedings do not ipso facto terminate a lease, and since nonprovable claims are not discharged the landlord is not theoretically injured, yet in the case of corporate lessees bankruptcy is usually accompanied by dissolution or reorganization so that by the time the landlord matures his claim he is unable to reach any of the assets. 43 Yale L. Jour. 1007. See 7 Univ. of Cin. L. Rev. 165, note 15, for a partial list of corporations that have recently gone into bankruptcy because of lease situations.

⁵ *In re Portage Rubber Co.*, 296 Fed. 289, certiorari denied, 45 S. Ct. 91 (1924).

⁶ *Colman Co. v. Withoft*, 195 Fed. 250, 115 C. C. A. 222 (1912); *Watson v. Merrill*, 136 Fed. 359, 69 C. C. A. 185, 69 A. L. R. 719 (1905).

⁷ *Wells v. 21st Street Realty Co.*, 12 Fed. (2d) 237 (C. C. A. 6th, 1926). This is qualified to be the rule only in states where the common law applies. *In re Goldberg*, 52 Fed. (2d) 156 (S. D. N. Y., 1931).

⁸ *Central Trust Co. of Illinois v. Chicago Auditorium Association*, 240 U. S. 581, 36 S. Ct. 412, (1916).

⁹ *Co. Litt.* 292b § 513.

¹⁰ 42 Yale L. Jour. 1004, note 6. See concurring opinion of Judge Learned Hand in *In re Metropolitan Chain Stores*, 66 Fed. (2d) 487 (C. D. A. 2nd, 1933).

¹¹ *In re Bissinger*, 5 Fed. (2d) 106 (N. D. Ohio, 1925); *Wilson v. National Refining Co.*, 126 Kan. 139, 266 Pac. 941 (1928).

¹² 63 Fed. (2d) 759 (C. C. A. 2nd, 1933).

courts will not apply the above dictum of Coke to all contracts involving real property but only to such contracts that involve the peculiar obligation of paying rent.¹³ In that case the court allowed proof of a claim for the breach of a covenant to purchase the property.

The natural result of such holdings, plus dicta in certain cases¹⁴ to the effect that parties to a lease might by some kind of an agreement make future rent claims provable, has been numerous attempts by lawyers to draw up covenants which will obviate any of the standard objections. Their efforts have met with varying degrees of success depending on the ingenuity of counsel and the Federal district court having jurisdiction of the case. Until very recently, however, most of these attempts have been over-thrown by the courts.

Two of the most frequently used covenants are those calling for indemnity against loss of rent and those accelerating future rent in the event of default. The purpose of such covenants is to disguise a rent claim as one for damages for the breach of some contract other than one for rent. In *In re Roth & Appel*¹⁵ the covenant provided that "In case the lessee is declared bankrupt, the lease shall terminate and the lessor has a right to re-enter, in which case the lessee agrees . . . [to] pay . . . on the first day of each month, as upon rent days, the difference between the rents and sums reserved . . . and those otherwise reserved or with due diligence collectible, on account of rents of the demised premises for the preceding month, up to the end of the term remaining at the time of the entry." A claim filed under this provision was disallowed, the court holding it to be contingent because: (1) It was uncertain whether the lessor would re-enter and terminate the lease; and (2) If the lease was terminated it was uncertain whether there would be any loss in rents. The court clearly stated that the question was not whether rent to accrue in the future is provable against a bankrupt estate, but whether a claim founded on an agreement to indemnify a landlord for loss of rents following the bankruptcy is provable. This case is still the leading case on the subject and any of the infirmities in the above covenant must be expressly avoided.¹⁶ The first objection can be precluded by providing that the tenant's bankruptcy terminate the lease absolutely; any claim for future rent then ceases but the lessee is entitled to damages for the breach of the

¹³ 1 Chicago L. Rev. 341.

¹⁴ Especially in *In re Roth & Appel*, 181 Fed. 667, 31 A. L. R. (N. S.) 270 (C. C. A. 2nd, 1910).

¹⁵ *Op. cit. supra* note 14.

¹⁶ *In re Brooks Sample Furniture Co.*, *op. cit. supra* note 2; *In re United Cigar Stores Co. of America*, 4 Fed. Supp. 859 (D. C. S. D. N. Y., 1933).

lease. This claim is not contingent but arises simultaneously with and is absolutely owing at the time of filing the petition.¹⁷

The case of *In re Metropolitan Chain Stores*¹⁸ was decided on the authority of the second objection given in the *Roth & Appel* case. There, though the breach had occurred before the term was to begin, the court held the damages too speculative to constitute a provable claim. This objection will be considered briefly in a subsequent part of this note when the matter of liquidating future rents will be discussed.

In *In re Rite's Colthes*¹⁹ the covenants of the lease provided for its termination upon the happening of certain conditions but contained no provision for damages. The lessor exercised his right to re-enter because of a breach by the lessee. Later, upon bankruptcy proceedings being filed against the lessee, the lessor attempted to prove a claim for future rent. This was denied on the ground that the landlord having terminated the lease his right to rent was gone. This case is an example of what, for bankruptcy purposes at least, is a poorly drawn lease. From it we may conclude that a claim for damages must be reserved in the lease itself.

A lessee's covenant that "it will indemnify the Lessor against all loss of rent which the Lessor may incur by reason of such termination [by bankruptcy], during the residue of the term" is not sufficient to give the lessor a provable claim. It was so held in *Brown v. Irving Trust Co.*²⁰ How much will ever be due is not readily ascertainable. As the court said: ". . . we cannot recast the words to make them over into a liquidation of damages in the case of bankruptcy. Possibly the full intent was not expressed; if so, the loss must fall upon the lessor, who presumably drafted it."²¹

¹⁷ *In re Pettingill and Co.*, 137 Fed. 143 (1905); *In re Swift*, 112 Fed. 315 (1901); *Taylor Trust v. Kothe*, 30 Fed. (2d) 77 (C. C. A. 1st, 1929) (Reversed under name of *Kothe v. Taylor Trust*, 50 S. Ct. 142, on different grounds). The foregoing statement, which these cases are quoted as supporting, applies to claims for liquidated damages as provided for in the lease and not to a claim for rent. This may sound like *Tweedledum and Tweedledee*, but the distinction is, nevertheless, important.

¹⁸ 66 Fed. (2d) 482 (C. C. A. 2nd, 1933) (Certiorari granted but dismissed on motion of counsel for petitioner, 54 S. Ct. 130, 207). Contra, *In re National Credit Clothing Co.*, 66 Fed. (2d) 371 (C. C. A. 7th, 1933), on the grounds that the breach occurred prior to the filing of the petition.

¹⁹ 49 Fed. (2d) 393 (D. C. S. D. N. Y., 1931).

²⁰ 66 Fed. (2d) 473 (C. C. A. 2nd, 1933).

²¹ The leading case of *In re Service Appliance Co.*, 39 Fed. (2d) 632 (D. C. N. D. N. Y., 1930), is of little value to this discussion for the lease involved contained no provision for bankruptcy. Similarly, *In re McAllister-Mohler Co.*, 46 Fed. (2d) 91 (D. C. S. D. Ohio, 1930), except for the dictum that the landlord could have protected himself by appropriate covenants.

*Kothe v. Taylor Trust*²² involved a lease containing an acceleration clause. By the terms of the lease the filing of any proceedings in bankruptcy against the tenant constituted a breach of the lease whereupon the lease was to terminate and the lessor was to recover damages for such breach "equal to the amount of the rent reserved in this lease for the residue of the term." The Circuit Court of Appeals held this claim provable in that it was not contingent but for a definite sum then due and owing. The Supreme Court reversed this holding on the grounds that such damages were unreasonable and constituted an unenforceable penalty. The court did not discuss the adequacy of such a provision as a basis for a claim by a landlord but confined itself entirely to the amount of damages involved. This illustrates one of the dangers to be provided against in drawing this type of covenant. It is true, however, that it is only when such damages are grossly excessive that they are considered penalties. Thus, properly drawn, an acceleration clause may be used as a measure of damages. It may be well to point out here that some form of liquidated damages must be provided for as being immediately due and owing not only because of the bankruptcy law but because of such decisions as *Hermitage Co. v. Levine*²³ and *Hand v. Rjkin*²⁴ to the effect that the loss which the landlord may suffer through the tenant's default cannot be ascertained until the end of the term denominated in the lease.

In the case of *In re United Cigar Stores Co. of America*²⁵ a claim was filed under a covenant in a lease which stipulated that the landlord confessed judgment for the rent reserved for the whole term "with stay of judgment until the several days of payment . . . and judgment may be entered for all rent in arrears." This was in addition to a clause allowing the lessor, at his option, to terminate the lease upon the bankruptcy of the lessee. The latter clause, of course, fell before the authority of the *Roth & Appel* case even though the property was situated in Pennsylvania, where the claimant contended a different rule applied. The claim based on the confessed judgment was also denied because other provisions for part payment of rent and the stay of execution until the several days of payment made it apparent that the parties did not consider the rent for the entire term payable in advance. Conceding that this clause could be construed as being exactly what it purported to be, however, the court held that the landlord could not prove a claim for the entire rent "without conceding that the leasehold was an asset of the bankrupt estate to be enjoyed free from further claims for rent"; that, further, the landlord

²² *Op. cit. supra* note 17.

²³ 248 N. Y. 333, 162 N. E. 97, 59 A. L. R. 1015 (1928).

²⁴ 189 N. E. 476 (N. Y. 1934).

²⁵ *Op. cit. supra* note 16.

by re-entering and keeping the rentals from the new tenant did not intend to make such a concession.

From the foregoing case it may be argued that in states where such a clause in a lease is valid a landlord may prove his claim for rent thereunder if he wishes to give up his premises to the trustee for the remainder of the term. The right to prove a claim under such circumstances might or might not be of value. Many factors, unforeseeable at the time the lease is made, such as the size of the fund available for distribution, the length of the remainder of the term, and general economic conditions, would determine the efficacy of such a provision from the landlord's viewpoint. Then, too, the case does not determine whether under such a provision the landlord would be bound to surrender his lease to the trustee and be relegated to the sole remedy of proving his claim under the confessed judgment.

As indicated in the *United Cigar Store* case, the courts will not allow the landlord to "eat his cake and have it." In fact in *In re Barnett*²⁶ the court held that in Pennsylvania if the lessor accepts a surrender of a lease upon the bankruptcy of a tenant all unmaturred claims are terminated, including a claim based upon an acceleration clause in the lease. If he chooses not to accept the surrender he can prove only as a general creditor. This, however, does not mean that a landlord is not entitled to be indemnified for any loss resulting from the breach if he has provided for such indemnity in his lease, but it does mean that his claim will be limited as strictly as possible to indemnity alone.

In a number of instances the claims have been allowed. In the case of *In re National Credit Clothing Co.*²⁷ the fact that the breach of the lease occurred before the filing of bankruptcy proceedings and that under a covenant in the lease a valid claim for damages existed influenced the court to allow the claim. The computation of the amount due was not considered as too difficult or too dependent upon contingencies to make the claim provable. In *In re Mullings*²⁸ the claim

²⁶ 12 Fed. (2d) 73 (C. C. A. 2nd, 1926). See also *In re Herrick*, 200 Fed. 50 (1912).

²⁷ *Op. cit. supra* note 18. The third and the seventh circuits have usually held such claims provable. This must be borne in mind when drafting covenants to be used in other circuits.

²⁸ 238 Fed. 58 (C. C. A. 2nd, 1916). See, also, *Kalkhoff v. Nelson*, 60 Minn. 284, 62 N. W. 332 (1895).

The case of *Filene's Sons Co. v. Weed*, 245 U. S. 597, 38 S. Ct. 211 (1918), is also interesting in this connection, though not strictly in point being a receivership action. The covenants in the lease are too long and involved to quote here. They provided in substance, for a payment upon breach in certain named ways, including bankruptcy, of twenty thousand dollars a year for the remainder of the term. This was in addition to the covenant providing for an annual rental at the same sum. The court allowed the claim since it was "not for rent at all but was a personal covenant that liquidated the damages."

was also allowed, receivership proceedings prior to the bankruptcy being held to constitute a sufficient breach to give rise to a provable cause of action. The fact that the bankrupt was a corporation about to be dissolved also influenced this case. The lease involved in *In re Pittsburg Drug Co.*²⁹ provided that in case "bankruptcy proceedings be begun by or against said lessee . . . or a receiver appointed, the entire balance of the term of the lease . . . shall thereupon become due and payable. . ." A receiver for the lessee was first appointed, followed by bankruptcy. The landlord's claim was allowed in the bankruptcy proceedings, but the prior receivership was held to have made the sum claimed fall due so that it was "a fixed liability absolutely owing at the time of filing of the bankruptcy petition."³⁰

One of the best ways of showing how one kind of a covenant in a lease will allow a landlord to prove a claim for future rent while another will fail of its objective is to compare the two recent cases of *In re Outfitters' Operating Realty Co.*³¹ and *Manhattan Properties Inc. v. Irving Trust Co.*³² In the latter case two leases were involved. The first lease contained a covenant that if bankruptcy proceedings should be instituted by or against the tenant, the landlord might without notice re-enter the premises; and, after obtaining possession, relet as agent for the tenant, for the whole or any part of the term, and "The tenant agrees to pay each month to the landlord the deficit accruing from the difference between the amount to be paid as rent as herein reserved and the amount of rent which shall be collected and received from the demised premises for such month during the residue of the term herein provided for after the taking possession by the landlord. . . ." There was a further provision authorizing the landlord, after breach by the tenant, to release the tenant from all further obligations upon which neither landlord nor tenant were to have any further rights under the lease. The other lease was similar, providing that after breach by bankruptcy ". . . the Lessee . . . will indemnify the Lessor against all loss of rent which the Lessor may incur by reason of such termination, during the residue of the term. . . ." Claims

²⁹ 164 Fed. 482 (D. C. W. D. Pa., 1908). See, also, *Rosenblum v. Uber*, 256 Fed. 584 (C. C. A. 3rd, 1919), and *Wilson v. Pa. Trust Co.*, 114 Fed. 742 (1902), for a special form of lease drawn to take advantage of a local statute allowing rent claims.

³⁰ In *In re Schecter*, 39 Fed. (2d) 18 (C. C. A. 3rd, 1930), the lease read: "If at any time proceedings in bankruptcy shall be instituted by or against the lessee then the rent for the balance of the term shall become due and payable as if by the terms of the lease it were payable in advance." Held, The liability of the tenant for the accelerated rent was fixed and absolute at the time of the petition and the claim could be proved. See, also, *In re Chakos*, 24 Fed. (2d) 482 (C. C. A. 7th, 1928). See note 27, *supra*.

³¹ 69 Fed. (2d) 90 (C. C. A. 2nd, 1934).

³² 54 S. Ct. 385 (1934).

under both leases were held not provable because: (1) The lessor had a choice of whether or not to terminate the lease; and (2) “. . . the landlord does not rely upon the destruction of his contract by bankruptcy; he initiates a new contract of indemnity by the affirmative step of re-entry which must occur at a date subsequent to the filing of the petition. *There can be no debt provable in bankruptcy arising out of a contract which becomes effective only at the claimant's option and after the inception of the proceedings the fulfillment of which is contingent on what may happen from month to month or up to the end of the original term.* Such a covenant is not the equivalent of an agreement that bankruptcy shall be a breach of the lease and the consequent damages be measured by the difference between the present value of the remainder of the term and the total rent to fall due in the future.” (Italics mine.)

In the *Outfitters' Operating Realty Co.* case the lease was apparently drawn with the dictum in the *Manhattan Realty* case in mind. Because of its importance the covenant will be quoted in full as follows: “For the more effectual securing to the Lessor of the rent and the other payments herein provided, it is agreed as a further condition of this lease that the filing of any petition in bankruptcy or insolvency by or against the Lessee shall be deemed to constitute a breach of this lease, and thereupon, ipso facto, and without entry or other action by the Lessor, this lease shall become terminated; and, notwithstanding any other provisions of this lease, the Lessor shall forthwith upon such termination be entitled to recover damages for such breach in an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof, less the fair rental value of the premises for the residue of said term.” The lessee became bankrupt and the claim of the lessor under this provision was expunged by the trustee. The judge affirmed the order. Upon appeal, the Circuit Court of Appeals for the Second Circuit reversed the holding, and, in a decision written by Circuit Judge Learned Hand, held that under this provision the claim was provable.

The reasons for the holding may be analyzed as follows: (1) Claims for future rent are not provable because they are contingent;³³ and (2) Under this provision the claim is not contingent in right because the mere filing of the bankruptcy petition ends the lease; nor is it contingent in amount because both the fact that there is a loss and the amount of the loss are at once ascertainable. The provision making bankruptcy ipso facto terminate the lease without any necessity or choice of re-entry precludes the objection which was raised in the *Manhattan* case that the claim was not due and owing at the time

³³ But see Judge Learned Hand's deduction from the *Maynard* case in *Manhattan Properties v. Irving Trust Co.*, 66 Fed. (2d) 470, at 471.

the petition was filed.³⁴ The second part of the provision is more subtle but none the less effective. By establishing definitely the fact of the loss and providing a workable scheme for liquidation it obviates the objections raised against the claim in the *Manhattan* case. To quote: "It is the uncertainty in fact of the loss (in other cases) that invalidates the claim; that is not remedied by an approximation which the law will accept in other connections. *But when the parties have agreed that the lessee shall pay a sum to be ascertained by an accessible standard, the bankruptcy court is not liquidating a future loss at all; in its place the parties have substituted a promise, which does not look to the future, which is to pay the difference between two amounts presently ascertainable.*" (Italics mine.) The gist of the matter is that under this clause the claim is immediately liquidated or at least capable of liquidation by the application of a formula agreed to by the parties which is, in effect, as simple as *A over B*.

The fact that the value of the rent reserved is to be used in computing the damages does not make the claim one for rent so as to be affected by the mysterious "diversity between the duties which touch the realty and the mere personality." The objection that the clause provided for a penalty was disposed of on the grounds that the court was free to measure the damages in accordance with the patent general purpose to give the lessor indemnity and no more.

Thus it has been established that when the fact of the loss is certain the court will not hesitate to measure the damages even though this involves a determination of the difference between the amount of the rent reserved and the fair rental value of the premises. This holding is consistent with decisions in cases involving suits for the breach of a lease by a prospective lessee,³⁵ receiverships,³⁶ and dissolution proceedings.³⁷ The holding of the Supreme Court in *Maynard v. Elliott*³⁸ further supports this holding for in that case the holder of certain notes endorsed by the bankrupt was allowed to prove his claim. It is submitted that the liquidation of the amount of such a claim is much more difficult than is the fixing of the amount of loss due to the breach of a lease.³⁹

³⁴ See note 17, *supra*.

³⁵ *Addieg v. Tull*, 187 Fed. 101 (C. C. A. 2nd, 1911).

³⁶ *Leo v. Pearce Stores Co.*, 57 Fed. (2d) 340 (E. D. Mich., 1932).

³⁷ *In re Mullings Clothing Co.*, *op. cit. supra* note 28.

³⁸ *Op. cit. supra* note 2.

³⁹ See, also, *Filene's Sons v. Weed*, *op. cit. supra* note 28.

In 33 Col. L. Rev. 213, at page 235, the authors, Messers Schwabacher and Weinstein, have this to say: "Executory contract and lease claims should be valued not by determining what will become due and discounting the sum so ascertained to its value at the time of the filing of the petition; but (as performance has become impractical) by determining what would have come due had the contract of lease been performed, and by crediting that sum against the

Because of the unsettled state of the law on this subject it is impossible to formulate any hard and fast rules to be observed but the following conclusions may well be borne in mind by one about to draw up a lease for a landlord:

1. Unless the lease contains some special provision to be operative in the event of the tenant's bankruptcy, a claim for future rent in the bankruptcy proceedings will not be allowed.

2. The termination of the lease upon the bankruptcy of the lessee must not be optional with the lessor or dependent upon the exercise of his right of re-entry. The filing of bankruptcy proceedings must ipso facto end the lease and give rise to a cause of action for the breach thereof.

3. Provision must be made for some form of liquidated damages.

4. The lessor's right to damages must not be based upon a claim for future damages *as such* for this makes it problematical whether or not anything will ever be due. This follows from conclusion two, that is, since the bankruptcy ends the lease the landlord's claim must be for damages not for rent.

5. The measure of damages reserved may be the difference between the present value of the remainder of the term and the total rent to fall due in the future but it must be clear that this is only a measure of damages and not the claim itself.

6. The damages provided for must not be so excessive as to constitute a penalty. Indemnity should be all that is sought. This includes discounting future payments to their present value.

Thos. L. McKeivitt.

CONTRACTS—ANTICIPATORY BREACH—RENUNCIATION.—Ordinarily no breach of contract can occur, and no action can be maintained on a contract until after the time for performance has passed. Yet this is not always the case. If one party repudiates his contract the law does not force the other party to wait until after performance should have been made before he can obtain relief. In such a situation the innocent party may pursue any one of three courses. In the first place

value of the performance retained by the claimant. Though it is bankruptcy and not a breach that excuses further performance and gives rise to the right of valuation, the rules of valuation employed in ordinary law cases can be applied by analogy in bankruptcy, and a claim should be held provable if it can be so valued. . . . It is difficult to see why stricter rules of valuation should be applied in bankruptcy than at law . . . for the effective realization of the policies of the act urgently demands valuation."

he may rescind the contract altogether, and bring an action to recover for any performance he has already made. Secondly, he may elect to consider the repudiation as a breach of contract, and bring an action immediately to recover for the damages that he has suffered and will suffer because of the breach. Finally, he may await the time when performance should have been made and then bring an action on the contract. In view of this doctrine of anticipatory breach of contract as it has been established in most jurisdictions, it often becomes important, and sometimes very difficult, to determine just what will amount to a sufficient repudiation to give the other party the right to consider it as a breach and maintain his action on the contract before the time for performance has arrived. It should be noted at the outset that the courts will not apply the doctrine to unilateral or unconditional obligations. It is only where the contract is bilateral and the promises are dependent that the doctrine has any application. It is also inapplicable where the contract, although originally bilateral, has become unilateral by full performance on one side.

In a recent Federal case, *Suburban Improvement Co. v. Scott Lumber Co.*¹ the defendant contracted to purchase certain lots from the plaintiff. The defendant duly took and paid for all of the lots it was obliged to take during the year 1928. In the spring of 1929, however, a dispute arose between the parties as to the proper interpretation of the contract. The defendant contended, erroneously as was later decided by the court, that it was not bound to purchase any of the lots, but that the contract merely gave it the option to purchase the lots if it so desired. On May 4 defendant wrote a letter to the plaintiff setting forth this contention and stating with regard to making further purchases during 1929, "With reference to the last paragraph in your letter as previously noted in this letter the matter of taking additional lots has not been under consideration by our Board of Directors, and according to the terms of the option, we see no reason for taking the matter up with the Board of Directors at this time, as according to the terms of the option, we are allowed the entire time of the calendar year 1929 in which to exercise our rights to take additional lots." The plaintiff brought suit for specific performance on the ground that this amounted to an anticipatory breach of contract. The court gave judgment for the defendant, deciding that the defendant had not unequivocally refused to perform its contract, and that there had not been a sufficient repudiation to justify the plaintiff in electing to consider the contract as breached. The defendant did not refuse to take the lots that it was obliged to purchase during 1929; it merely stated that it did not deem it necessary at that time to determine whether it would purchase the lots or not. It might well be

¹ 67 Fed. (2d) 335 (1933).

argued, however, that the defendant did unequivocally repudiate its contract. It denied all liability on its part to purchase any of the lots that it was bound to purchase during the year 1929. If it did decide to purchase more lots later in the year it would not be performing the contract that actually existed; it would rather be exercising a right which it thought it had under an option contract that did not exist. Nevertheless, the possibility that the defendant might decide to purchase more lots later on in the year was sufficient, in the mind of the court, to prevent this from being an anticipatory breach of contract.

In *Dingley v. Oler*,² one of the early cases decided by the United States Supreme Court on this question, the plaintiff and defendant made a contract by which the plaintiff delivered several cargoes of ice to the defendant during the season of 1879, and the defendant was to redeliver a like quantity of ice to the plaintiff during the season closing in September, 1880. Ice was worth 50 cents a ton when the plaintiff delivered it to the defendant, and it was worth \$5 a ton at the time for redelivery to the plaintiff. In July, 1880, the defendant wrote a letter to the plaintiff which concluded as follows: "We must therefore decline to ship the ice for you this season, and claim as our right to pay you for the ice in cash at the price you offered other parties here (that is 50 cents) or give you ice when the market reaches that point." The court held this not to be a sufficient repudiation to amount to an anticipatory breach of contract. The defendant did not positively refuse to perform; he merely refused to perform unless the market value of ice went down to 50 cents a ton. It is true that it was very unlikely that the market value of ice would go down to 50 cents a ton within the time in which performance of this contract was to be made. At the time the letter was written ice was worth \$5 a ton. The defendant refused to perform unless it declined to one tenth of its value within a period of less than three months. However, unlikely this might be it was sufficient to prevent this from being an anticipatory breach.³

The question may also come up as to whether a statement by one party that he will be unable to perform, as distinguished from a statement that he will not perform whether he is able or not, is sufficient to amount to an anticipatory breach. In *Johnston v. Milling*⁴ such a statement was held not to be an anticipatory breach. In that case *A.* had leased certain premises to *B.* for a period of 21 years

² 117 U. S. 490, 503, 6 S. Ct. 850, 29 L. Ed. 984 (1886).

³ Full performance had been made by the plaintiff in this case at the time the alleged anticipatory breach took place, and the defendant's obligation was then unconditional. However, the court did not consider this point in refusing to hold that an anticipatory breach had occurred.

⁴ 16 Q. B. Div. 460 (1886).

subject to *B.*'s right to terminate the lease at the end of four years on giving six months notice. *A.* covenanted that at the end of the first four years of the term he would rebuild the premises in the manner specified, if he received six months notice from *B.* requiring him to do so. *A.* repeatedly told *B.* he was unable to get the money to rebuild the premises according to the terms of his covenant. The court held that these statements did not amount to an anticipatory breach on the ground that they were not a declaration that whatever happened, whether *A.* came into money or not, he did not intend to rebuild the premises.⁵ Other courts, however, have considered such a statement sufficient to constitute an anticipatory breach. In *Louisville Packing Co. v. Crain*⁶ the defendant contracted to purchase a certain quantity of meat from the plaintiff during the year 1908. In February of that year the defendant wrote to the plaintiff stating that he was unable to pay for any more meat at that time and did not know when he would be able to do so, but that when he was able he would. The letter also contained a request to ship the remainder of the meat called for by the contract. The court held this to be a sufficient repudiation to amount to an anticipatory breach. There seems to be no good reason for making a distinction between inability to perform and unwillingness to perform in deciding what amounts to an anticipatory breach. Both are followed by practically the same results.⁷

In *Central Trust Co. v. Chicago Auditorium Association*⁸ the United States Supreme Court held that an anticipatory breach of contract occurred where an involuntary petition in bankruptcy was filed against a firm that had an executory contract outstanding. In that case the Scott Transfer Company made a contract with the Chicago Auditorium Association whereby the Association granted to the Transfer Company for a period of five years the baggage and livery privilege of the Auditorium hotel in Chicago. The Transfer Company was to pay \$6,000 in monthly instalments of \$100 each for the baggage privilege, and \$15,000 in monthly instalments of \$250 each for the livery privilege. After part performance the transfer Company became bankrupt and the trustee did not elect to complete the performance of the contract. The court held this to be an anticipatory breach, saying: "In short, it must be deemed an implied term of every contract that the promisor will not permit himself, through insolvency or acts of bankruptcy, to be disabled from making performance; and in this view bankruptcy proceedings are but the natural and legal consequence

⁵ The decision was also based on the points that plaintiff had not elected to consider these statements as an anticipatory breach, and that defendant's obligation was independent.

⁶ 141 Ky. 379, 132 S. W. 575 (1910).

⁷ See Williston on Contracts, Vol. 3, § 1326.

⁸ 240 U. S. 581, 36 S. Ct. 412, 60 L. Ed. 811, L. R. A. 1917 B, 580 (1916).

of something done or omitted to be done by the bankrupt, in violation of his engagement. . . . We conclude that proceedings whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement within the doctrine. . . ." In considering bankruptcy as an anticipatory breach it must be so considered as of the time of the filing of the petition, because only claims existing at that time are provable against the bankrupt's estate.

In addition to the above ways in which a repudiation amounting to an anticipatory breach may be made it is quite generally agreed that the selling of land or goods to which the contract relates before the time for performance has arrived will amount to an anticipatory breach of contract.⁹ Furthermore, any act on the part of one of the parties which makes it impossible for him to perform his part of the contract is sufficient to warrant the other party in considering it as an anticipatory breach and bringing suit.

After considering these cases it may be stated that to constitute a repudiation sufficient to justify the other party in electing to consider it as an anticipatory breach, it must be an absolute refusal to perform the obligations to arise under the contract in the future. Courts are unwilling to permit a person to maintain an action on a contract before the time for the other party to perform has arrived, unless it is reasonably certain that that other party is not going to perform. Where one party merely states "I do not think that I shall perform," that may be sufficient to justify the other party in refraining from any further performance on his part, but it is not sufficient to justify him in bringing an action immediately to recover damages for breach of contract.

John A. Berry.

GUARANTY—CONSIDERATION—FORBEARANCE.—A guaranty promise is no exception to the general rule that a promise, to be enforceable at law, must be supported by a sufficient consideration. Consideration may be defined as some benefit received by the promisor as a price for his promise, or some detriment suffered by the promisee in reliance upon the promise. The term gratuitous surety or guarantor is somewhat misleading in that it might be taken to mean that there is no consideration to support the promisor's promise in such cases, or that the promise is binding upon the promisor in the absence of con-

⁹ *Roehm v. Horst*, 178 U. S. 1, 20 S. Ct. 780, 44 L. Ed. 953 (1900); *Adams v. Bridges*, 141 Ga. 418, 81 S. E. 203 (1914).

sideration. This of course is not true. The term has very likely become a part of the nomenclature of the law because of the fact that a person who makes such a promise of guaranty usually does not receive any direct benefit for his promise. It serves the useful purpose of distinguishing such a promisor from a paid surety, one who is in the business of making such promises and receives a money compensation for assuming the risk of the promise.

In the case of a gratuitous guarantor we ordinarily must look to the detriment side of our definition of consideration to find the basis of holding the promisor to his promise. In the usual case the guaranty promise is made at the same time that the promisee loans the money or extends the credit to the principal debtor. In this case the consideration for the guaranty contract is the same as the consideration for the principal contract. The promisee suffers the detriment of parting with his money in reliance upon the guarantor's promise.

Where the guarantor makes his promise after the principal contract is made the consideration for the principal contract cannot furnish the consideration for the contract of guaranty. The promisee has already parted with his money or extended the credit to the principal debtor, and he did not do this in reliance upon the guarantor's promise. Consequently, some new consideration is needed to make the promise binding. If the principal debt is due, a forbearance on the part of the creditor from bringing suit against the principal debtor will furnish a sufficient consideration to support a third person's promise to pay the debt if the principal debtor fails to do so. We come now to a consideration of the principal question of this note: Is it necessary that the creditor bind himself to forbear from bringing suit against the principal debtor for a definite length of time in order to furnish a sufficient consideration to make the guarantor's promise binding? Or, is it enough if the creditor actually does refrain from bringing suit for a reasonable length of time?

In a recent New York case ¹ one Johnson owed a debt to the bank, which was due and for which the bank was pressing Johnson for payment. The bank finally consented not to press Johnson for payment if Scherer would guarantee the payment of the debt. As a result, Scherer sent the following writing to the bank: "For value received and to enable Edmund C. Johnson of Eggertsville, New York . . . to obtain credit, from time to time of the East Side National Bank, of Buffalo, N. Y., I hereby request said bank to extend from time to time to said debtor such credit as said bank may deem proper, and I hereby guarantee the full and proper payment to said bank at maturity . . . to the extent of ten thousand and 00/100 dollars . . ."

¹ Scherer v. East Side Nat. Bank of Buffalo, 188 N. E. 645 (N. Y. 1934).

The bank made no agreement to refrain from bringing suit against Johnson for any definite time, but in fact did refrain from doing so for a period of from five to eight months. Scherer brought suit against the bank to recover \$10,000 which was due to him as a depositor of the bank. The bank pleaded a counterclaim, setting up the fact that the amount claimed by the plaintiff was applied to the sum owing the bank on his written guaranty. The court decided in favor of the defendant bank, holding that there was a sufficient consideration to support the plaintiff's guaranty promise. In so holding the court said: "To furnish a valuable consideration, one in the nature of forbearance, it was not necessary that a definite time should be fixed as the limit or the extent of the forbearance. . . . The fact that Scherer by his guaranty requested an extension of credit for Johnson, and that the bank thereafter, acting upon his written promise, extended the time and carried the loan for from five to eight months, was sufficient to make Scherer's promise binding at law."

In contending that there was no consideration to support his promise the plaintiff relied chiefly on a former New York case, *Strong v. Sheffield*.² In that case the defendant's husband owed a debt to the plaintiff which was past due. The husband executed a demand note payable to the plaintiff for the amount of the debt, and the defendant indorsed this note in consideration of the plaintiff's promise to hold it until such time as he wanted his money. In an action brought by the plaintiff on the note the court held that there was no consideration for the defendant's indorsement of the note. The court reasoned as follows: "It would have been no violation of the plaintiff's promise if, immediately on receiving the note, he had commenced suit upon it. Such a suit would have been an assertion that he wanted the money and would have fulfilled the condition of forbearance. The debtor and the defendant, when they became parties to the note, may have had the hope or expectation that forbearance would follow, and there was forbearance in fact. But there was no agreement to forbear for a fixed time or for a reasonable time, but an agreement to forbear for such time as the plaintiff should elect. The consideration is to be tested by the agreement, and not by what was done under it. It was a case of mutual promises, and so intended. We think the evidence failed to disclose any consideration for the defendant's indorsement, and that the trial court erred in refusing so to rule."

While these two cases may at first seem to be conflicting, upon a closer examination it will be seen that such is not the fact. In the first case the agreement takes the form of a unilateral contract. The guarantor made an offer that if the creditor would forbear from bringing suit against the principal debtor, then he would pay the debt

² 144 N. Y. 392, 39 N. E. 330 (1895).

if the principal debtor failed to do so. This offer called for acceptance by the doing of the thing specified therein—the forbearing from bringing suit against the principal debtor. It is true that no definite time was specified during which the creditor was to refrain from bringing suit; but in such a case the law will imply that the creditor must forbear for a reasonable time in order to accept the offer and form the contract. The creditor performed the act called for by the offer by refraining from bringing suit for a period of from five to eight months. As in all unilateral contracts, the doing of the thing which the offer called for furnished a sufficient consideration to make the offeror's promise binding.

In the second case the agreement took the form of a bilateral contract. An offeror has the right to specify in what manner acceptance is to be made; he may call for acceptance by an act, or acceptance by a return promise. The guarantor made an offer in this case that if the creditor would promise to refrain from bringing suit against the principal debtor, he would pay the debt if the principal debtor failed to do so. The creditor promised to refrain from bringing suit until such time as he wanted his money. This was in fact no promise at all. He could decide that he wanted his money the very next instant, and bring suit immediately. The creditor was in the same position as if he had not made the promise. Since no time was specified in the offer for which the creditor was to promise to forbear, it must be interpreted as requiring the creditor to promise to forbear for a reasonable time. The creditor failed to make such a promise, and no binding contract was formed.³

John A. Berry.

INJUNCTIONS—ACTIONS OR PROCEEDINGS IN OTHER STATES.—In the recent case of *Alsbaugh v. New York, C. & S. L. R. Co.*¹ the general rule was applied, that courts will enjoin its own citizens, over whom it has jurisdiction from prosecuting an action in another state where it appears that such suit would be inequitable. This rule is now followed by most of the courts whether a suit has been commenced or not. The right of a state to restrain a person over whom it has jurisdiction from bringing a suit is unquestioned.² But the earlier view of the courts was that such action was inconsistent with inter-state harmony where the suit had already been commenced.³ In *Harris v.*

³ See 28 C. J. 922, "Guaranty."

¹ 188 N. E. 869 (Ind. 1934).

² *Royal League v. Kavanaugh*, 233 Ill. 175 (1908).

³ *Engle v. Scheuberman*, 40 Ga. 206 (1869).

*Pullman*⁴ the court said, after referring to the English practice of allowing suits already begun to be enjoined: "But it has been held, in this country, that, after suits are commenced in one of the states, it is inconsistent with inter-state harmony that their prosecution should be controlled by courts of another state."

This view has not been followed where it is shown that better justice will be obtained between the parties. The later view is that it is not an attempt to control the courts of another state. A state has the power to compel its own citizens to respect its laws even beyond its territorial limits. The injunction operates to restrain the person who is within the jurisdiction of the court and is not an attempt to control the courts of another state.⁵

Because of the nature of this power and the danger of an abuse of it, courts consider carefully the advisability of issuing an injunction to restrain such proceedings.⁶ It must be shown that the court has jurisdiction and that the suit will be inequitable, as where the suit will result in fraud, gross wrong or oppression,⁷ an evasion of the laws of the state,⁸ or where the suit is vexatious or brought to harass the plaintiff,⁹ or where the bringing of the suit in another jurisdiction will be a serious inconvenience to the plaintiff or hamper the administration of justice.¹⁰ In *Wabash Ry. Co. v. Peterson*¹¹ it was

⁴ 84 Ill. 20 (1876).

⁵ *Wabash Ry. Co. v. Peterson*, 187 Ia. 1331.

⁶ *Wabash Ry. Co. v. Peterson*, *op. cit. supra* note 5.

⁷ *Reed v. Holingsworth*, 135 N. W. 37 (Ia. 1912) (The defendants, who were officers of a mining corporation, had fraudulently allowed contracts held by the corporation for the purchase of mining land to be forfeited without the knowledge of the stockholders, later purchasing the contracts themselves. They then brought actions in Colorado to have a receiver appointed for the corporation and to quiet title to the land in question. The plaintiffs as stockholders pray that the actions in Colorado be enjoined. Held, An injunction will lie to restrain a resident of a state from prosecuting fraudulent, collusive, or unlawful proceedings in another jurisdiction.).

⁸ *Culp v. Butler*, 122 N. E. 684 (Ind. 1919) (The defendant brought an action against the plaintiff in Illinois for malicious prosecution. The statute of limitations had run in Indiana, barring defendant's cause of action. Held, A citizen of a state will be enjoined from prosecuting another citizen of the same state, in a foreign state for the purpose of evading the laws of his own state.).

⁹ *Gaunt v. Nemours Trading Corp.*, 194 App. Div. 668 (N. Y. 1921) (The corporation brought an action at law against Gaunt, who filed a bond for the payment of any judgment that might be recovered. The corporation then instituted a suit in equity in Massachusetts on the ground that Gaunt had not enough leivable property to satisfy the debt. Held, The commencement of the foreign action is vexatious harassing of the opposite party, and will be restrained.).

¹⁰ *Mason v. Harlow*, 114 Pac. 218 (Kan. 1911) (Mason, acting as an attorney for the plaintiff of a suit pending in Kansas against Harlow, went into Arkansas to take depositions in that suit. While in Arkansas for this purpose, Harlow brought an action for libel for the purpose of hindering the suit pend-

held that compelling the defendant to sustain nontaxable expense of bringing witnesses a long way or make out a defense by deposition is an irreparable injury which may be enjoined.

An injunction will not be granted where the parties are not within the jurisdiction of the court,¹² and merely voluntarily appearing in court for the purpose of the suit is not sufficient to give jurisdiction.¹³ Neither will the injunction be granted because the laws of the sister state are not so favorable to the defendant as those of the state where the injunction is sought.¹⁴ Starting a suit in one jurisdiction and then dismissing it and bringing a second in another jurisdiction is not sufficient ground to enjoin the second action.¹⁵

Injunctions against suits in another state do not violate the provisions of the constitution as to comity and full faith and credit,¹⁶ the theory being that the judgment of the sister state is not attacked for irregularity or error, but only on the ground of jurisdiction, fraud, or imposition, and therefore receives the same credit as it is entitled to in the state where it was pronounced.

By statute courts of the United States are prohibited from granting injunctions to stay proceedings in a court of a state except as

ing in Kansas. Held, Equity will enjoin the prosecution of an action in a foreign state when it has been brought to harass the opposite party and interfere with the administration of justice in a suit pending in the jurisdiction where the injunction is sought.)

¹¹ *Op. cit. supra* note 5.

¹² *Federal Trust Co. v. Conklin*, 99 Atl. 109 (N. J. Eq. 1916) (Conklin, a resident of New Jersey, was appointed assignee for the benefit of creditors of Conti. Conti had on deposit a sum with the Trust Co. and the Trust Co. held notes of Conti. Conklin brought suit in New York for the amount of the deposits. Held, The suit was brought in the official capacity as assignee of a New York estate. His failure to prosecute the case would lead to his removal and the injunction would be unenforceable against anyone not a resident of New Jersey.)

¹³ *Carpenter Baggot & Co. v. Hanes*, 77 S. E. 1101 (N. C. 1913) (The Company instituted an action in New York, obtained jurisdiction by attachment, and then instituted this action. The defendant alleges that there was no personal service of the defendant in the New York case and both parties, being properly in court, the plaintiff bringing the action and the defendant by personal service, the defendant asks that the New York action be enjoined. Held, The power cannot be exerted to enjoin the prosecution of a foreign action where the parties are not domiciled in the jurisdiction of the court merely on the ground that the party has come into court by bringing an action therein.)

¹⁴ *Illinois Life Insurance Co. v. Prentiss*, 277 Ill. 383 (1917) (The Insurance Co. issued a policy to a resident of Illinois. The assignee of the policy instituted a suit in Illinois and a second in Missouri. The Missouri statute allowed a verdict to be rendered by nine of twelve jurors. Held, It is not sufficient ground for the granting of an injunction that the laws of the foreign state are not so favorable to the defendant as those of the forum.)

¹⁵ *Hammond v. Baker*, 3 Sandf. 704 (1851).

¹⁶ *Cole v. Conningham*, 133 U. S. 107 (1890).

authorized by law relating to bankruptcy proceedings.¹⁷ The basis of this statute is the avoidance of conflict between courts whose jurisdiction may embrace the same property and persons.¹⁸ It applies only to proceedings first commenced in state courts, and is confined to cases where the jurisdiction of the federal court is originally invoked to stay proceedings in the state court. The same rule is observed by the state courts toward the courts of the United States without statutory obligation. In *Hemsly v. Myers*¹⁹ Caldwell, J., said: "The state courts observe the rule towards the courts of the United States upon principle, and without any statute requiring them to do so. It is not merely a rule of comity, but an absolute rule of law, obligatory on the courts of both jurisdictions, and absolutely essential to the maintenance of harmonious relations between the state and the United States courts, and indispensable to the due and orderly administration of justice in both."

Paul F. O'Neil.

NEGLIGENCE—LIABILITY OF MANUFACTURERS AND VENDORS OF CHATTELS.—In a recent case, *Genesee County Patrons Fire Relief Ass'n. v. L. Sonneborn Sons*,¹ the principle established in the *MacPherson v. Buick Motor Co.*² case has been further extended. Charles J. Call owned a farm. He contracted with the defendant Rib-Stone Concrete Corporation to build and install a waterproof tank in one of his barns. After completion an employee was engaged in applying a waterproofing preparation manufactured by the defendant L. Sonneborn Sons, and known as "Hydrocide No. 889," to the interior of the tank. Upon taking an ordinary farm lantern into the tank to furnish light, an explosion and fire occurred resulting in the destruction of the barn and certain personal property. The fumes of the preparation coming into contact with the flame caused the explosion. The plaintiff's insurance companies carried fire insurance policies on the property destroyed. They paid the loss and became subrogated to the rights of the insured against the defendants. The action was by the insurance company to recover the amount paid to the insured, on the theory that the loss was occasioned by the negligence of the defendants. At the trial, the complaint against the defendant Rib-Stone was dismissed; while a verdict against the defendant Sonneborn was re-

¹⁷ Rev. Stats. § 720.

¹⁸ *Pacific Tel. and Telegraph Co. v. Star Pub. Co.*, 2 Fed. (2d) 151 (1924).

¹⁹ 45 Fed. 283 (1891).

¹ 189 N. E. 551, 263 N. Y. 463 (1934).

² 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916F, 696 (1916).

turned, and affirmed by the Appellate Division. In the trial court two questions were submitted to the jury: First, whether Hydrocide No. 889 is an inherently dangerous commodity. Second, if so, whether the defendant Sonneborn was negligent in failing to give notice to the users of the preparation that it was inflammable and should not be brought into contact with an open flame. The two gallons of "Hydrocide Colorless Waterproofing," which is used for outside work where a colorless material is required, were shipped in gallon cans, each having a label which read in part, "Do not use near flame." The shipment also contained a one gallon can of Hydrocide No. 889, with a label which read "Hydrocide No. 889." This label did not contain any warning or notice that the contents were inflammable and should not be used near an open flame. Rib-Stone had never used the preparation and had no knowledge about it. The defendant wrote that it could be applied in the same manner as paint, either with a brush or spraying machine. When applied with a brush, by an employee of Rib-Stone, it exploded and destroyed property. It was conceded that the commodity was a secret preparation which contained 52 per cent benzine and 6.7 per cent kerosene and was highly inflammable. The employee using it at the time of the accident testified that he did not distinguish the odor of benzine, but to him it smelled like paint. Expert testimony showed that Hydrocide No. 889 was highly volatile and inflammable. In rendering the decision, Judge Hubbs cites a case recently decided in England, which extended the rule of liability to cover property damages. To quote from his opinion: "In *Anglo-Celtic Shipping Co. v. Elliott & Jeffery*, 42 T. L. R. 297, the facts were that a secret preparation manufactured by the defendants was used near a lighted candle by a third person not the defendant vendee. An explosion occurred which resulted in the burning of plaintiff's ship. A recovery was permitted for the property damage. The preparation was sold without warning of its dangerous nature. The case cannot be distinguished from the present case at bar on the facts." It was held, in the English case, that privity of contract between manufacturer and person injured through use of manufactured article is not necessary to justify recovery of damages for manufacturer's negligence.

Professor Harper, in his late work on Torts, says: "Several cases have established a duty on the part of manufacturers of patent medicines and other compounds made under a secret formula which is similar to that under discussion. This duty is, in substance, to adopt reasonable means of giving such information and instructions as will make it reasonably safe for those intended to use it."³

The starting point of any discussion of the duty owed by a manufacturer or vendor of a chattel to persons likely to sustain harm

³ Harper, *Law on Torts*, § 106.

from the defective manufacture or condition thereof is the Doctrine of *Winterbottom v. Wright*,⁴ which states the principle that there is no duty to anyone other than to the immediate vendee to employ reasonable care to discover dangerous qualities or defects in the article.⁵

In *Thomas v. Winchester*⁶ the liability of the manufacturer was extended. Here the defendant sold to a druggist a poisonous drug labelled "extract of dandelion." The druggist resold it to the plaintiff who was allowed to recover. The defendant knowing the dangerous character of the drug owed the duty to all who were liable to sustain harm therefrom to advise them correctly of its dangerous properties.

The leading case on liability of manufacturer or dealer for personal injuries caused by defects in automobiles is *MacPherson v. Buick Motor Company*, wherein it is held that the manufacturer of an automobile, who purchased the wheels from a reputable maker, is liable to one who purchases a car from a retailer for an injury caused by the collapse of a wheel because of defects which would have been discoverable by reasonable inspection. The view taken by the court in this case that, if the nature of the thing manufactured is such that it is reasonably certain to place life and limb in peril when negligently made, and the manufacturer knows that the product will be used by purchasers without testing its fitness, he owes the purchaser a duty to exercise care in making it; this is in accordance with the weight of authority.⁷

Prior to this case "It had been held that an affirmative obligation to use care in manufacturing an article applied, so far as persons other than the immediate vendee were concerned, only to manufacturers of articles which were 'inherently dangerous' to or which were designed to 'affect' life and limb. This limitation never supported by any rational considerations, has been definitely abandoned by the more liberal courts."⁸

In referring to the *MacPherson* case, Professor Harper says: "The test is not whether the article is dangerous when carefully con-

⁴ 10 M. & W. 109, 152 Eng. Rep. 402, Bohlen, Cases on Torts (3rd ed.) 466 (1842).

⁵ Bohlen, Liability of Manufacturers to Persons Other Than Their Immediate Vendees (1929) 45 L. Quar. Rev. 455.

⁶ 6 N. Y. 397, 52 Am. Dec. 455 (1852).

⁷ Annotation to *Mac Pherson v. Buick Motor Co.*, L. R. A. 1916F, 704.

⁸ Harper, Law on Torts, § 106; Heckel v. Fort Motor Co., 101 N. J. L. 385, 128 Atl. 332, 39 A. L. R. 989 (1925); Johnson v. Cadillac Motor Car Co., 216 Fed. 878, 8 A. L. R. 1033 (1919). Contra: Ford Motor v. Liberty, 160 Pac. 901 (Okla. 1916); Lewis v. Terry, 111 Cal. 39, 43 Pac. 398, 53 Am. St. Rep. 146 (1896); Burkett v. Studebaker Bros. Mfg. Co., 126 Tenn. 467, 150 S. W. 421 (1912); Standard Oil Co. v. Murnary, 119 Fed. 572 (1902).

structed but, whether it is likely to cause serious bodily harm if carelessly made." ⁹ But in *Parsier v. Wappler Electric Co.*¹⁰ the complaint alleged that the defendant manufactured and sold to one Geiser a machine which they knew was to be used by him in treating persons for the removal of superfluous hair, and the defendants knew that the machine when so used would cause injuries, severe pain and distress. A motion was made under the rules of Civil Practice to dismiss the complaint for failure to state facts sufficient to constitute a cause of action. The Supreme Court of New York denied the motion, the court saying, after referring to the *MacPherson* case: "It cannot be that the defendants would be liable, if the dangerous character of the machines were due to negligence in their construction, and yet would not be liable if the machine were to their knowledge dangerous though constructed with due care and without negligence."¹¹ So the test, in such cases, is not only whether the article is dangerous when carefully constructed but also whether it is likely, to the manufacturer's knowledge, to cause serious bodily harm, even if carefully made.

William J. Klima, Jr.

NEGLIGENCE—OWNERS AND OCCUPIERS OF REAL ESTATE—LIABILITY TOWARDS PERSONS AND PROPERTY OUTSIDE THE PREMISES.—Two recent decisions call for a discussion of the subject of liability of an occupier or possessor of real estate to persons outside the premises for harm caused by conditions thereon. Previous to a discussion of these cases the writer will consider the principles of liability that are set forth in the cases and in the *Restatement of the Law of Torts*. As a general rule the *common law* does not impose upon one person the duty to act for the protection of others; and a possessor of land is under no duty to make his land safe with respect to persons outside the premises or upon adjoining highways except as to such conditions thereon which have resulted from an earlier human activity.¹ "This may be due to a survival, often found where the rights and liabilities of the owners and possessors of land are concerned, of an early general theory that activity is essential to liability, or it may be due to the concept that those who take possession of land or establish highways must bear the natural disadvantages which the location of the land or highway involves."² To this general rule there are exceptions which will be considered herein.

⁹ Notre Dame Lawy. Vol. IX, No. 3, p. 360, n. 11.

¹⁰ Notre Dame Lawy. Vol. IX, No. 3, p. 360, n. 12.

¹¹ *Op. cit. supra* note 9.

¹ See Explanatory Notes on Torts, Tentative Draft No. 4, 30.

² *Op. cit. supra* note 1.

Liability of a possessor of land to persons outside the premises for harm caused by natural conditions thereon. There are a few American cases which are authority for the principle that the owner or occupier of real estate is not subject to liability for harm caused to others outside the premises by *conditions* upon the premises that are due to *natural* causes. Thus in *Roberts v. Harrison*³ there was a petition filed by a number of persons to compel the removal of a pond of water which had collected upon the premises of *H.* The accumulation of the water was due to natural causes and not to any *act* of *H.* It was held that there was no nuisance and so there could be no order of abatement. Clearly, under this decision, there would be no civil liability to persons outside the premises on the ground that the pond was a nuisance. In *Barring v. Commonwealth*⁴ the authorities of the city of *C.* had elevated the grade of a street above the natural surface of the defendant's lot, and the owner of an adjoining lot on the side of the natural drainage filled up his lot to the level of the street; neither the city nor this owner had made any provision for the escape of water from the defendant's lot, in consequence of which the water accumulated into a noxious pond. It was held that these acts did not render the defendant liable for continuing a nuisance. He had done no act towards creation of the pond. The lot was at its natural level; and the house upon it was built upon that surface. The defendant, in this case, was the *owner*, but not the *occupier*, of the lot upon which the alleged nuisance existed. Here again is authority for the rule that the owner or occupier is not subject to civil liability for the *natural condition* of his premises. There are a few cases "dealing with statutes which require landowners to take active steps to prevent the *natural condition* of the land from injuring their neighbors and which deal with the constitutionality of such statutes, a question which could not arise if the common law required the possessors of land to take such action."⁵ Thus in *Missouri, K. & T. R. Co. v. May*⁶ a Texas statute imposing a penalty upon railroads for allowing Johnson grass or Russian thistles to mature and go to seed upon their roads was held not to deny the railway companies equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

³ 101 Ga. 773, 28 S. E. 995 (1897); *op. cit. supra* note 1.

⁴ 63 Ky. (2 Duv.) 95 (1865); *op. cit. supra* note 1.

⁵ Explanatory Notes on Torts, *op. cit. supra* note 1, at p. 31, citing: *Wurts v. Hoagland*, 114 U. S. 606 (1885); *Missouri K. & T. Ry. Co. v. May*, 194 U. S. 267 (1904); *Nickerson v. Boston*, 131 Mass. 306 (1881); *St. Louis v. Gulath*, 179 Mo. 38, 77 S. W. 744 (1903); *Hartwell v. Armstrong*, 19 Barb. 166 (1854).

"The text-writers who have mentioned the matter are clear to the effect that there can be no liability unless the nature of the property is changed by the act of man; Salmond [Law of Torts] (3d ed.) 205; Clerk & Lindsell, Law of Torts (7th ed.) 420; Wood, Nuisances, 116." Explanatory Notes on Torts, *supra*.

⁶ *Op. cit. supra* note 5.

Liability of a possessor of land to persons outside the premises for harm caused by forces of nature operating upon his land made receptive thereto by normal acts of husbandry. Where the condition which causes the harm is a *natural* one the possessor is not liable although it was the husbandry of the possessor which induced the natural condition.⁷ Thus in *Giles v. Walker*⁸ the court held that there was no duty on a possessor to cut thistles, which sprang up when the ground was plowed, and so prevent their spread to adjoining land. And in *Middlesex Co. v. McCue*⁹ the owner of land was held to have the right to cultivate it in a reasonable and usual manner even though as a result some of the loosened earth was washed into plaintiff's mill pond, filling it up, to plaintiff's damage. The courts apparently feel that natural husbandry is a thing to be encouraged and that neither party being at fault, the one being harmed must bear the expense.

Liability of a possessor of land to persons outside the premises for harm due to the creation or maintenance of dangerous artificial conditions. Having considered the liability of a possessor of land to those outside the land for ordinary *natural* conditions on the land and for *natural* conditions aroused by the possessor's activity, the next step would seem to be a consideration of his liability for dangerous *artificial* conditions created or maintained on the land. Four divisions of this problem are suggested by the *Restatement of the Law of Torts*.¹⁰ These are considered in order, with the second and third divisions grouped together for convenience.

First, the possessor is liable who creates such a condition upon his land if he knows of its danger or is negligent in not knowing of its danger. In *Crowhurst v. American Burial Board*¹¹ the owner planted a yew tree on his land and as it grew the branches extended over the adjoining land. A horse on the adjoining land ate the leaves and was poisoned thereby. The court held that the defendant-possessor was liable in damages for the loss although he did not know that the tree was poisonous. It would seem, also, that one who plants some noxious growth on his own land, which spreads, would be liable for the resulting damage.¹² In *Crow v. Colson*¹³ a hotel owner placed screens over windows which were also equipped with ropes and other appliances for escape in case of fire. The screens were not fastened so that they could be swung aside but had to be knocked out in order

⁷ Explanatory Notes on Torts, *op. cit. supra* note 1, at p. 31.

⁸ 24 Q. B. D. 656 (1890).

⁹ 149 Mass. 103, 21 N. E. 230 (1889).

¹⁰ Restatement of the Law of Torts, Tentative Draft No. 4, § 213.

¹¹ 4 Ex. Div. 5 (1878).

¹² See dictum in *Gulf C. & S. F. Ry. Co. v. Oakes*, 94 Tex. 155, 58 S. W. 999 (1900).

¹³ 256 Pac. 971 (Kan. 1927).

to escape in that manner. A fire occurred and a guest in escaping necessarily knocked the screen out and it fell to the street, killing the plaintiff's husband, a policeman. The court held that the hotel owner was liable for the injury caused by the maintenance of the dangerous screening. Back of the decisions seems to be the idea that the owner is getting the *benefit* of his *own* undertakings and must take such benefit with the restriction that he not harm others whom he knows he will harm or whom he should, as a reasonable man, know he will be likely to harm.

Secondly, the possessor is also liable for a dangerous artificial condition on his land placed by another with his consent, or without his consent if he knows of its existence or is negligent in not knowing of it. In *O'Connor v. Curtis*¹⁴ the owner of a building was held liable for personal injuries suffered by one in the street when the cornice of the building fell. The cause of the cornice giving way was the pulling of an electric wire attached to it by another. It was held that the owner was liable if he knew, or could have known, by the exercise of ordinary diligence, of the danger. The basis of the liability in these cases is the right of *control* over premises. The possessor is the most likely person to discover the danger; he has the power to remove it and no one else has the right. But above all, he has the power to prevent the danger by barring others from the premises who would cause the dangerous condition. Therein lies the difference between dangerous conditions caused by third persons and those caused by nature. The possessor has absolute control over his own premises and the law demands that he exercise this control by preventing third persons from doing that which he could not do himself. But the only preventative measures he could take against natural forces would be a restriction of his own natural and ordinary use of his land, and this the law does not demand.

Lastly, one who takes possession of land on which a dangerous artificial condition has been created is held liable for resulting damages if he learns of the condition or failed to use ordinary care to learn of it. In *Klepper v. Seymour House*¹⁵ the defendants bought a hotel which they leased to another, reserving to themselves *general control* over the building. The roof was at such an angle that it often discharged large amounts of snow and ice into the street. The plaintiff was injured by snow falling. The court held the defendants liable on the grounds that they had owned the hotel a sufficient length of time to be charged with notice of the danger since the snow and ice fell in this manner frequently each winter. Here again the liability is justly fixed upon the possessor because of the benefit he derives from the earlier

¹⁴ 18 S. W. 953 (Tex. 1892).

¹⁵ 158 N. E. 29 (N. Y. 1927).

activity and the control he exercises over the premises. The liability having arisen out of possession, must pass with possession.¹⁶

Liability of a possessor of land to persons outside the premises for dangerous disrepair of a structure or other artificial condition thereon. What duty has a possessor of land towards those outside the land, to keep a safe artificial condition from becoming dangerous through disrepair? The answer, it seems, is that the possessor must use *reasonable care to discover the "disrepair" and after discovery must use ordinary care to make it reasonably safe.*¹⁷ In *Atkins v. Busch*¹⁸ strands of a barbed wire fence became detached from the post and fell into the highway. A passer-by was injured by the loose wire. The court held that the possessor of the land owed the public a duty to inspect and repair the fence, and failure to know of the danger did not excuse him from the duty to keep the fence in good repair. In *Bannigan v. Woodbury*¹⁹ the administrator of an estate, being legally in control and possession of a building, was held liable when, due to disrepair, a glass window fell out injuring a passer-by on the street below. The burden imposed on the possessor in such cases is a fair one. The danger of a dilapidated structure to passers-by is obvious. The possessor cannot benefit by the use of his structure and allow it to become a danger to the public while he has control over it. The right of an individual to profit from his holdings must ever be with the restriction that they do not involve an unreasonable risk to others.

Liability of a possessor of land to those outside the land for activities carried on upon the premises. "A possessor of land is subject to liability for bodily harm to others outside the land caused by an activity carried on by him thereon which he realizes or should realize as involving an unreasonable risk of bodily harm to them under the same conditions as though the activity were carried on at a neutral place."²⁰ (By "neutral place" is meant one in which both parties have an equal right to be, such as a public dance-hall or highway.) He is negligent then if he conducts activities which he should realize as a reasonable man involve an unreasonable risk to those outside the premises. As the *Restatement of the Law of Torts*²¹ points out, "The public interest in a possessor's free use of his land may be a factor in determining whether the risk involved in his act is reasonable or unreasonable." In *Wolf v. Des Moines Elevator Co.*,²² a leading case on the subject, these principles are clearly brought out. The defendant operated a

¹⁶ Explanatory Notes on Torts, *op. cit. supra* note 1, at pp. 38, 39, 40.

¹⁷ Restatement of the Law of Torts § 235.

¹⁸ 141 La. 180, 74 So. 897, L. R. A. 1917 E, 809 (1917).

¹⁹ 166 Mich. 491, 122 N. W. 531 (1909).

²⁰ Restatement of the Law of Torts § 241.

²¹ *Op. cit. supra* note 20.

²² 126 Iowa 659, 98 N. W. 301, 102 N. W. 517 (1905).

gasoline engine in connection with its elevator. The premises were close to a railway and a generally traveled road. The plaintiff was driving a team of horses on the road, when loud exhaust noises coming from the engine frightened the horses which ran away and caused the injury complained of. The plaintiff pointed out that the defendant could have muffled this noise effectively by various means and that it was negligence not to have so done. The court held that it was properly a question of negligence for the jury. As the court observed, ordinary noises and inconveniences caused by industrial plants must be endured by the traveling public, since present day demands "are such that the establishment and operation of such plants not only subserve the convenience of our people, but, in the larger part, they are matters of necessity." But the traveling public has definite rights, and if these rights are *unreasonably* interfered with by the activity of the possessor of land he is liable for the resulting damage. And, as the court said, the question for the jury in these cases is this: "Was the use being made of the adjacent property such in character as to be unnecessary interference with, or unnecessarily dangerous to, persons making lawful use of the street or highway?" In *Cox v. U. S. Coal & Coke Co.*²³ the plaintiff was walking along a railroad track adjacent to the defendant's property. Employees were at work on defendant's premises picking slate or "bone" out of coal as it was being loaded into a railroad car. One employee threw a large piece of "bone" striking the plaintiff on the head causing the injury complained of. The court held that the defendant's employee, having knowledge that people frequently walked on the railroad track, must use reasonable care not to injure them; and that to throw large pieces of slate in the general direction of the tracks without using care to avoid injuring such pedestrians is negligence.

The preceding general discussions on the liability of a possessor of land towards those outside the land are given as a basis for an understanding of the problem suggested by two recent Federal decisions.²⁴ The problem is the liability of the possessor of land to persons outside the premises for harm caused by trees standing thereon. In *Chambers v. Whelan*²⁵ the plaintiff was injured as the result of the falling of a dead tree which had been standing close to the road on the defendant's premises. The court held that the defendant-owner of rural lands is under no duty to inspect trees growing naturally on rural lands, to determine whether through natural processes of decay they have become dangerous to those on the highway. But in *Brandywine Hundred*

²³ 80 W. Va. 295, 92 S. E. 559 (1918).

²⁴ *Chambers v. Whelan*, 44 Fed. (2d) 340 (1930); *Brandywine Hundred Realty Co. v. Cotillo*, 55 Fed. (2d) 231 (1931).

²⁵ *Op. cit. supra* note 24.

*Realty Co. v. Cotillo*²⁶ where a dead chestnut tree on defendant's suburban premises fell upon a passing traveler, in an ordinary wind, the defendant-owner was held liable for his failure to make the tree safe, if he knew or *could have known by the exercise of ordinary care* of the danger. Neither of these two cases was decided by strict conformity to the general rules previously discussed, and the latter case, it seems, is directly opposite to them. For, under the general rules, the first inquiry would be whether or not the tree was planted by the defendant, or was artificially maintained in its old age by the defendant, or was the product of natural growth. When the tree is of natural growth, under the rule of *Giles v. Walker*,²⁷ the possessor of the premises would not be subject to liability even if the danger is known to him. If the tree were planted, or artificially maintained in its old age in a dangerous manner, there would be liability for the resulting damage if the possessor of the premises knew of the condition, or was negligent in not knowing of it.²⁸ If planted in a safe condition, the possessor would be held liable for damage resulting from its *decay* if he failed to make it safe when he knew or should have known of the danger.²⁹ Both of these Federal cases were concerned with danger caused by the decay of trees. In *Chambers v. Whelan*³⁰ the doctrine of *Giles v. Walker* was actually followed without considering whether or not the tree was planted or was the product of natural growth. But since the tree was in the country and the court spoke of it as growing naturally it seems that the doctrine of *Giles v. Walker* was properly applied. In *Brandywine Hundred Realty Co. v. Cotillo*,³¹ however, the tree was part of a suburban forest which would indicate that it was a natural growth. Yet the court held the owner to a duty of inspection and repair.

In the light of the general rules, the two Federal cases are in direct conflict with each other. This would suggest that perhaps the general rules are not found applicable to *tree* cases. And in *Brandywine Hundred Realty Co. v. Cotillo* the court says: "We gain little, if any, help from the many cases where liability of abutting property owners to those using a street or highway are considered, for each case depends on its own particular facts, which are not the facts in the present case. After all is said and done, this case turns on the application of the time honored principle of law, 'sic utere tuo ut alienum non laedas'—so use your own as not to injure another." The court in this case reasons that even though the condition is a natural one it is within the

²⁶ *Op. cit. supra* note 24.

²⁷ *Op. cit. supra* note 8.

²⁸ *Op. cit. supra* note 10.

²⁹ *Op. cit. supra* note 17.

³⁰ *Op. cit. supra* note 24.

³¹ *Op. cit. supra* note 24.

power of the possessor of land to remove it, and if he does not it leaves the adjacent land-owner or travelers on the adjacent highways helplessly subject to a great danger. This argument is ably answered in the *Restatement of the Law of Torts*.³² It points out that as to adjoining land-owners the law has always been that they take the land as they find it in its *natural* state. As to highways, the responsibility for trees close to the road falls on those charged with keeping the road safe. The possessor of land could not object to such officials entering his land for that purpose. It would be similar to the privilege of an adjoining land-owner to enter and cut over-hanging branches. The merits of this position in relation to land in the country is apparent. The burden on the owner would be great while the road officials could readily handle the situation. But, continues the *Restatement of the Law of Torts*, the objection is raised that in the *city* the danger is greater, and the burden to the holder of small city tracts to inspect trees would be comparatively slight. Here, again, answers the *Restatement of the Law of Torts*, the general principles are adequate. First, it is probable that trees on city property are either artificially maintained or planted. In either case the possessor must answer for any damage caused by them. Secondly, most cities provide for proper officials to inspect such trees.

The cases are not at all uniform, but the majority seem to follow *Chambers v. Whelan* and the *Restatement of the Law of Torts*. That is, the general principles of the liability of the possessor to those outside the land are applied to tree cases as well. Thus, in *Reed v. Smith*³³ it was held that an owner of land who *knows* that a tree is decayed, and dangerous to a neighbor's house (and there should be no difference in the duty owed towards those in a highway from the duty towards those on neighboring land) is not obliged to remove the danger and is not liable for damages caused by a subsequent fall of the tree. The court agreed that since the tree was a *natural condition*, the rule of *Giles v. Walker* applied. MacDonald, C. J. A., said: "I think there is no warrant for saying that, at common law, one who allows his land to remain in its natural state (neither he nor his predecessors in title having changed that state), is under any obligation to his neighbor in respect to what is standing or growing thereon." This ruling which relieves the owner of a "natural" tree from not only the duty of inspection but also the duty of removing the dangerous tree when he *knows of the danger*, though proper under the rule of *Giles v. Walker*, seems a little harsh when applied to trees which endanger persons as well as property. No other cases have been found which deal with the problem of danger from a "natural" tree which the own-

³² Explanatory Notes on Torts, *op. cit. supra* note 1, at pp. 37, 38.

³³ 19 B. C. 139, 17 D. L. R. 92 (1914).

er actually knows about but the *Restatement of the Law of Torts* suggests that failure to act then might be negligence under certain circumstances.³⁴

In *Madeiros v. Honomu Sugar Co.*³⁵ the court said: "The duty which the owner of a building or other structure abutting on a street or other public highway owes to the public and the duty of the owner of land on which he permits a tree to remain near the public highway are the same in principle." This decision ignores *Giles v. Walker* in that it looks upon all trees as *structures* whether natural or artificial.

Where the tree was placed by man so that from the outset it was a dangerous condition, the general rules³⁶ concerning *created dangerous conditions* have been applied. In *Smith v. Bonner*³⁷ a tree was planted over a cess-pool and was left unsupported by the caving-in of the cess-pool. A strong wind blew the tree over upon a passing traveler. The owner of the land was held answerable in damages since the planting of the tree in such a dangerous condition was the proximate cause of the injury.

The application of the rules³⁸ concerning the repair of structures to tree cases is illustrated in *Weller v. McCormick*.³⁹ In that case the tree was planted on the sidewalk (the fee being in the defendant, subject to the public easement) by a former owner. The court held that the defendant, when he purchased the land, obtained the power of control over the tree and must be held responsible for injuries resulting from failure to keep it in a safe condition. Also, in *Brown v. Milwaukee Terminal Ry. Co.*⁴⁰ the same tests for liability are applied although the court called the dangerous condition a nuisance. The following are the words of Stevens, J.: "The planting of shade trees in public streets, outside the limits of travel either upon the paved portion of the street or upon the sidewalk, does not ordinarily result in injury or damage to any who use the streets. Such trees, properly placed do not constitute nuisances. But when such a tree through decay or because of any change in the structure of the tree or in its surroundings becomes a menace to the safety of those who travel the street such tree may become a nuisance which will render the owner of the adjoining lot liable for injuries which may be caused to those who lawfully use the streets. In such cases where danger results, not from the planting of the tree, but through subsequent changes for which the defendant is not responsible, it is essential to liability that

³⁴ § 233, *Caveat* and Comment to *Caveat*.

³⁵ 21 Hawaii 155, (1912).

³⁶ *Op. cit. supra* note 10.

³⁷ 63 Mont. 571, 208 Pac. 603 (1922).

³⁸ *Op. cit. supra* note 17.

³⁹ 52 N. J. Law 470, 19 Atl. 1101 (1890).

⁴⁰ 227 N. W. 385 (Wis. 1929).

it be shown either that the defendant knew of the danger incident to the maintenance of the tree or that such condition had existed for such a length of time that, by the exercise of ordinary care, the defendant ought to have discovered the danger and to have removed it before injuries were sustained by the plaintiff."

When the possessor of land cuts down or permits the cutting down of a tree on his land he must use the same care that it not injure those outside the land that he must use in conducting any other activity on his land.⁴¹ In *Ver-Vac Bottling Co. v. Hinson*⁴² it was held that "one who directs a tree to be felled so near a public highway that possible danger to the traveling public may reasonably be anticipated as a natural consequence thereof is bound to use at least ordinary care possible, under the circumstances to prevent any such injury."

Robert Devine.

RAILROADS—ACCIDENTS AT CROSSINGS—DUTY TO STOP, LOOK, AND LISTEN.—The recent case of *Pokora v. Wabash Railroad Co.*¹ has held that the duty of a traveler to stop, as well as to look and listen, at a railroad crossing is conditional on the presence of impediments rendering sight and hearing inadequate for his protection, and that a failure to stop does not make the traveler or motorist contributorily negligent as a matter of law. The decision of this case is in direct variance with the previously accepted view of the United States Supreme Court.²

An analysis of the judicial opinions and texts on this subject opens the door to many ramifications of what is commonly spoken of as the "stop, look, and listen" rule. The invariable rule is that one approaching a railroad crossing must exercise such care as an ordinary prudent person would under the circumstances. But the effect of a failure to stop, look, and listen is viewed differently in many states. Some courts have held that such a failure is not negligence *per se*, but is only evidence of negligence to be considered by the jury, while other courts have held that such failure is, or may be, negligence as a matter of law. Of this latter group the majority of the states hold that a failure to stop, look, and listen is not necessarily, in all cases, negligence *per se*. While the minority of these jurisdictions look upon such failure as negligence as a matter of law under any and all cir-

⁴¹ *Op. cit. supra* note 20.

⁴² 147 Md. 267, 128 Atl. 48 (1925).

¹ 54 S. Ct. 580 (1934).

² *The Baltimore & Ohio Railroad Co. v. Goodman*, 275 U. S. 66 (1927).

cumstances.³ There is no jurisdiction in which the courts have, in every instance, held that a failure to stop, look, and listen, before crossing a railroad track was negligence *per se*, irrespective of the surrounding circumstances. In Pennsylvania, however, the rule is so strictly applied that it is almost without exception.⁴

Such a failure is always negligence *per se* under certain circumstances, as, for example, in the Federal courts where all the later cases on the question hold that it is negligence *per se* not to stop, look, and listen where the view is obstructed.⁵

Some states have adopted statutes which make it unlawful to cross a railroad *without stopping*. In the interpretation of these statutes the courts have, in some instances, regarded the statute as *mandatory* and have held that a violation thereof prevents recovery.⁶ Other courts have held that a violation of such a statute does not constitute negligence as a matter of law.⁷

The Supreme Court of Mississippi, in the case of *Yazoo & M. V. R. Co. v. Williams*,⁸ held that one who undertakes to cross a railroad track without first looking or listening or taking any other precaution whatsoever is, as a matter of law, guilty of gross negligence. This court, one year later, in the case of *Gulf & S. I. R. Co. v. Adkinson*,⁹ held that a person traveling upon a road crossing the defendant's track was grossly negligent in proceeding to cross the tracks without stopping, looking, and listening.

In Pennsylvania the rule that one must *stop* before crossing a railroad crossing finds its strictest application. In this jurisdiction the courts impose an unyielding duty to stop, as well as to look and listen, no matter how clear the crossing or the tracks on either side may be.¹⁰ Alabama, in the case of *Birmingham Belt R. Co. v. Nelson*,¹¹ makes the motorist guilty of contributory negligence for not stopping, looking, and listening.

In Illinois it is a question of fact for the jury as to whether a person is guilty of contributory negligence in crossing a railroad track without stopping and looking out for an approaching train.¹² This

³ Note, 1 A. L. R. 203.

⁴ Note, 1 A. L. R. 203, 218.

⁵ Note, 1 A. L. R. 203, 204.

⁶ *Louisville R. Co. v. Anderson*, 15 S. W. (2d) 753 (Tenn. 1929).

⁷ *Fortune v. New York R. Co.*, 170 N. E. 923 (Mass. 1930).

⁸ 74 So. 835 (Miss. 1917).

⁹ 77 So. 954 (Miss. 1918).

¹⁰ *Benner v. Philadelphia & R. Ry. Co.*, 105 Atl. 283 (Pa. 1918); *Thompson v. Pennsylvania R. Co.*, 64 Atl. 323 (Pa. 1906); *Pennsylvania R. Co. v. Yingling*, 129 Atl. 36 (Md. 1925).

¹¹ 112 So. 422 (Ala. 1927).

¹² *Chicago, B. and Q. R. R. Co. v. Reith*, 65 Ill. App. 461 (1895).

view is also followed in Indiana,¹³ Maryland,¹⁴ Missouri,¹⁵ and New York.¹⁶ The majority of the courts apply the rule prevailing in Montana¹⁷ that failure to stop, look, and listen is not negligence as a matter of law. But the holding of the United States Supreme Court, in *Baltimore & Ohio Railroad Co. v. Goddman*,¹⁸ has made violent inroads into judicial opinion. This old view seems to look to the fact that the accident would have been avoided if the traveler had descended from his vehicle and looked rather than to the action a reasonably prudent man would have taken under the same circumstances. The strict view seems to overlook the fact that the process of getting out of an automobile and looking for an approaching train might prove just as disastrous to the motorist as if he had not done so. The driver of the car might be hit by another passing vehicle, he might be hit by the train even after a diligent effort to ascertain its relative position, if any, due to the fact that a period of time has elapsed since he first approached the track. The hazards of modern motoring are too complicated to set any hard and fast rule of conduct, and it seems to us that to make it negligence as a matter of law for one not to stop and get out and look for an approaching train is a rule that has no foundation in practical application. Our main case sees this difficulty, and the learned Justice Cardozo has seen fit to put the horse once more before the cart. It is hoped that this decision will have due effect upon the decisions of the several states.

Donald F. Wise.

TRUSTS—CONSTRUCTIVE TRUSTS IN WILLS.—In the recent case of *Thomas v. Briggs*¹ the Indiana Appellate Court has taken a long step beyond the precedent set by other courts in imposing constructive trusts in wills. The will here had been refused probate and although the reason for its refusal was not given it is to be presumed that there was defective execution of the instrument.

According to the evidence the testatrix was a married woman of some seventy-five years. She had been visited by the plaintiff a short time after her wedding, in 1929, and at the time, in the presence of the defendant, her husband, had expressed her intention of making

¹³ Pitt. C. C. and St. Louis Ry. Co. v. Terrell, 95 N. E. 1109 (Ind. 1911).

¹⁴ Brehm v. Philadelphia, B. & W. R. Co., 79 Atl. 592 (Md. 1911).

¹⁵ Hook v. Missouri Pacific Ry. Co., 63 S. W. 362 (Mo. 1901).

¹⁶ Dolan v. Delaware and H. Canal Co. 71 N. Y. 285 (1877).

¹⁷ Walters v. Chicago, M. & P. S. R. Co., 133 Pac. 357 (Mont. 1913). See note 37 L. R. A. (N. S.) 135, 145, and cases cited.

¹⁸ *Op. cit. supra* note 2.

¹ 189 N. E. 389 (Ind. 1934).

the plaintiff a devisee in her will. On April 12, 1930, while of sound mind and body, she wrote out the will in question, so informing her husband. The next day she was taken ill and during that day and the next few following days she repeatedly asked the defendant to procure witnesses, in order that she might execute the will. To each of these requests the defendant promised compliance without acting to comply. On April 19, 1930, the testatrix sank into a stupor, and on that day the defendant brought in witnesses, and the will was executed. The following day the testatrix died. Shortly thereafter the defendant cut the names of the witnesses off the will. He then asked the witnesses to keep silence respecting the will, promising them that "they would not lose anything" thereby. The will was not propounded for probate, and on April 24, 1930, the defendant was appointed administrator of the deceased's estate. In May, 1930, the plaintiff obtained a court order commanding the defendant to bring the will into court and submit it for probate. But probate was refused the will, upon the defendant's objections. And now the plaintiff comes into equity, seeking to have a constructive trust imposed on the defendant in favor of the beneficiaries under the will, on the grounds of fraud.

As I have said, the reasons for which the will was refused probate were presumably faulty execution of the instrument. The cutting off of witnesses' names could have had no effect under the Indiana Statute,² which provides that revocation of a will shall not be valid "unless the testator, or some other person in his presence and by his direction, with intent to revoke, shall destroy or mutilate the same. . ." But the statute also provides that the will to be valid must be "attested and subscribed in his [the testator's] presence."³ And the act could not be said to be in the presence of the testatrix when she was in a stupor; and in all probability it was on this ground that the will was considered defective.

Since, however, the defendant's cutting off of the witnesses' names had no effect, in what way was he guilty of fraud so as to warrant the imposition of a constructive trust upon the estate? It is the accusation of the plaintiff that the defendant's *promising* to aid in the execution of the will and subsequent delay in doing so constituted fraud. The question, then, narrows down to this: Does the giving of a promise, without consideration, to aid in the execution of a will raise such a duty upon the promisor that mere delay in complying will constitute fraud?

First let us see whether the defendant is liable in tort. In *Thorne v. Deas*⁴ it was held that a promisor without consideration is not liable

² Ind. Ann. Stat. (Burns, 1926) § 3455.

³ Ind. Ann. Stat. (Burns, 1926) § 3452.

⁴ 4 Johns. 84 (1809).

for *nonfeasance*; and that only once he undertakes performance is he liable for misfeasance. So that here the defendant would not be liable for mere delay in performance. And once he began performance he was without fault, for he brought the proper witnesses. There may be a distinction between *Thorne v. Deas* and the present case, because of the interest of the defendant in the suppression of the will. However, upon close observation I believe that it will be found that this is a distinction without a difference.

But now let us see what has been the history of constructive trusts in wills. In the beginning constructive trusts were imposed, says Professor Ames, for the following reasons: "The spectacle of one retaining for himself a legal title which he had received on the faith that he would hold it for the benefit of another, was so shocking to the sense of natural justice that the chancellor at length compelled the faithless legal owner to perform his agreement."⁵

This constituted one class of cases represented by *Thynn v. Thynn*,⁶ and later on, in the states, by *Dowd v. Tucker*.⁷ In the American case a nephew promised an aunt on her deathbed that he would deed part of her property, willed entirely to him, to a niece, and by this promise dissuaded the aunt from executing a codicil she had written which would have effected this change in her will. The court said: ". . . the case is clearly one of fraud. It is the case of one obtaining a conveyance of property by a promise, which he has no intention at the time to fulfill. It follows therefore that the respondent . . . is bound in equity and good conscience to make the conveyance."

In line with this view is the case of *Ransdell v. Moore*.⁸ Here the court gave a comprehensive list of cases, both English and American, to uphold their view. But there seems to be no analogy of situation between the present case and any of those cited. For in the other cases the fraud upon which the imposition of the trust was based arose out of the assent, either actual or implied, of the trustee to comply with the testator's wishes. And in this case no action was taken in the husband's favor upon the strength of any promise made by him. And the fact that he would acquire an interest by not acting after promising to do so would not be material since no property right comes upon the strength of his promise, but rather it is acquired upon the failure of the testatrix to devise the property to someone else. It seems pertinent to ask whether there is any material difference if the property comes to him through a gratuitous promise which he has not

⁵ Ames, *Lectures on Legal History*, 247.

⁶ 1 Vern. 296 (1684).

⁷ 41 Conn. 197 (1874).

⁸ 153 Ind. 393 (1899).

performed or comes because of the failure of the testatrix to devise the property elsewhere due to his failure to perform that promise.

The courts have also held that if by virtue of a confidential relationship a party is given an interest with the understanding that it will be distributed according to the testator's wishes he thereby becomes a trustee for the benefit of those who would have been devisees under a will, if a will had been made.⁹ Again, however, there is no analogy to the present case. Here the fraud arises from the inaction of the one made trustee.

Perhaps the closest analogy lies in those cases where the deceased was by force kept from making a will. In *Dixon v. Olmius*¹⁰ an heir kept an ancestor locked in a room to prevent execution of any testamentary document. The court held that this constituted fraud, and imposed a constructive trust upon the property. But at best it would need a troublesome stretch of the imagination to identify this sort of positive action with the inaction of the defendant in the instant case.

The learned judge in the principal case seems to be conscious of the incongruity of his decision. He quotes the Indiana rule in point: "When an heir or a devisee in a will prevents the testator from providing for one for whom he would have provided for but for the interference of the heir or devisee, such heir or trustee will be deemed a trustee, by operation of law, of the property. . ." ¹¹ Then to support his decision the learned judge interprets the defendant's failure to act as *interference*. In fine, "to interfere" means "to fail to act." This should be received with some excitement among grammatical, as well as legal, circles.

In conclusion, the decision seems to have only a moral basis. As we have seen, there is no liability in tort at common law; and never before has a constructive trust been imposed on one failing to act where he is under no duty to do so.

Joseph A. McCabe.

WILLS—VALIDITY OF CONDITIONS.—When testator devises an estate for life, "or so long as devisee remains unmarried," is the alternative a condition subsequent? When he devises a limited estate to continue as long as the devisee remains unmarried, is this a limitation? Limitations are always valid; conditions subsequent are valid only if they are reasonable. If the condition is unreasonable, the devisee takes the original estate not subject to it.

⁹ *Barron v. Stuart*, 136 Ark. 431 (1918).

¹⁰ 1 Cox Eq. 414 (1787).

¹¹ *Op. cit. supra* note 8; *Vance v. Grow*, 185 N. E. 335 (Ind. 1933).

This rather arbitrary and much criticized distinction between a condition subsequent and a limitation gathers greater importance in Indiana because of an unusual statute: "A devise or bequest to a wife with a condition in restraint of marriage shall stand, but the condition shall be void."¹ Practically all other courts hold that a condition subsequent in general restraint of marriage of the testator's widow is a good condition.

In *Newton v. Wyatt*,² a recent Indiana case, the following bequest was considered: "Item 1 of my estate I give devise and bequeath all my estate real personal and mixed and the income of it to my wife, Jane Wyatt, after the debts, taxes and repairs have been paid and two hundred fifty dollars and not over three hundred dollars has been paid for a monument to be erected to mark my resting place, for and during her natural life, or so long as she remains my widow." The court held that the condition, *or so long as she remains my widow*, was void as against public policy and that the wife took a life estate not subject to the condition. In disposing of the case, the court said: ". . . having first given her the life-estate, the testator could not cut it down by a condition in restraint of marriage. The condition may not be expressed in terms in the will, but is contained in it as fully as if the language had been 'during her natural life, provided she shall not again marry.'"

The appellant (defendant below) insisted that *Thompson v. Patten*³ controlled this case. In that decision the bequest was as follows: "I will, devise and bequeath all of my property real and personal to my wife Hannah Thompson to be and remain her absolute property as long as she remains my widow." In construing this provision, the court said: ". . . a husband may devise to his wife an estate to continue during her widowhood, and . . . he is not obliged to devise to her a larger estate. We have no hesitancy in saying that the provisions of the will now under consideration are not conditions in restraint of marriage, but amount only to a limitation of the estate devised . . ."

The two bequests are readily distinguishable. In the *Newton v. Wyatt*, Smith, J., has this to say: "In the Thompson Case, the testator does not give to his wife a definite estate, and then attempt to impose a condition upon it by limiting the devise to her so long as she remains his widow, but gives her a limited estate during widowhood. In the instant case, testator devises a life estate to his wife; then imposes a condition which is in direct violation of the statute [Ind. Ann. Stat. (Burns, 1926) § 3502] . . ."

The important question is: Has the testator given a specific and definite estate before imposing the restriction? This seems to be the

¹ Ind. Ann. Stat. (Burns, 1926) § 3502.

² 188 N. E. 697 (Ind. App. 1934).

³ 70 Ind. App. 490, 123 N. E. 705 (1917).

most important consideration in determining whether it is a condition subsequent or a limitation. If he has given a specific estate it is a condition subsequent; if not, it is a limitation. This distinction is more forcefully brought out by several other Indiana cases.

In *Coon v. Bean*⁴ the devise was as follows: "To my beloved wife, I give and devise, in lieu of her interest in my lands, the farm on which we now reside, situate in the county of Fayette and State of Indiana, containing about one hundred acres, *during her natural life, or so long as she may remain my widow.*" The court disposed of the case in the following words: "We have no doubt that she took a life-estate. Her subsequent marriage, therefore, did not terminate the estate vested in her. It is very clear that the testator intended that she should have a life-estate, unless she should marry again. By the will a life-estate is first given, and then this is attempted to be conditionally cut down, in the same sentence, by the alternative words, 'or so long as she may remain my widow.' If he had given her the estate simply as long as she might remain his widow, the case would have been like that of *Harmon v. Brown*. . . ." In *Harmon v. Brown*⁵ the bequest was: "I give and bequeath unto my beloved wife, Penina, during her widowhood, all my real and personal estate, to be held and freely possessed and enjoyed during her widowhood. . . . I also order that when my beloved wife, Penina, ceases to be my widow, and my youngest children come of age, all my real estate be divided equally among all my heirs." The court held that this was a limitation, not a condition, saying: "The words employed by the testator, however, in defining the quantity of estate to be taken by the widow, are words of limitation and not of condition. The estate was limited to her during her widowhood. No greater estate was devised to her. The estate thus devised to her was not attempted by the will to be cut down by any condition whatever."

When called upon to do so other courts have employed similar sophistry to get around an unpopular rule of law. In a Pennsylvania case, *Hotz's Estate*,⁶ the testator gave \$5,000 to his executors in trust and ordered them to pay the interest " . . . unto my daughter-in-law, (Mary K.) Hotz, wife of my son Peter, if she shall then be living, and the wife or widow of my said son, for her sole or separate use, upon her own receipt, for and during all the time she shall continue the wife or widow of my said son. . ." The court said that it was obvious that the testator meant to give his daughter-in-law a limited estate (until she no longer remains his son's widow) and not a larger estate subject to the condition that she should not remarry.

⁴ 69 Ind. 474 (1880).

⁵ 58 Ind. 207 (1877). See, also, *Summit v. Yount*, 109 Ind. 506, 9 N. E. 582 (1886).

⁶ 38 Pa. St. 422, 80 Am. Dec. 490 (1861).

In *Shaw v. Shaw*⁷ a testator devised the residue of his estate to his wife, so long as she remained his widow and then two-thirds of what was left was to go to testator's heirs. The court held that the wife did not take the fee in the property, but only an estate subject to her subsequent marriage. A Connecticut case, *Bennett v. Packer*,⁸ has construed a similar devise in the same manner.

One more question naturally presents itself: What importance is to be attached to the intention of the testator? It does not seem to have much significance. In practically every case the intention of the testator is the same: To provide for his wife until she remarries and no longer. The courts are not controlled by this intention but by an arbitrary construction of phrases in which that intention is couched. A Virginia case, *Meek v. Fox*,⁹ has expressed this view in the following words: "The great weight of authority is to the effect that conditions annexed to a bequest or a devise, the tendency of which is unduly to restrict or restrain marriage, are contrary to public policy and void, and it must be conceded that the intention of the testator in making the condition is immaterial, however praiseworthy that intent may have been."

We have seen that the validity of a condition subsequent depends on its reasonableness. What is reasonable is, of course, a matter of fact and no hard and fast rule for its determination can be laid down.

Courts have generally held that a condition in general restraint of marriage is unreasonable.¹⁰ Thus a provision restraining the devisee, an unmarried person, from marrying at all has been held to be unreasonable and void, and the title of the donee was not divested upon her subsequent marriage.¹¹

In *Phillipps v. Ferguson*¹² the following devise was held to be a reasonable restraint and, therefore, a valid condition: "If either one of my children [unmarried] above named in my will should marry in T. W. Phillipps' family, I only give him or her the sum of \$3, to be their part, and to be all that him or her is to receive under the will, and the foregoing *clase* of this will that leaves them anything to be revoked, and all other portions of this will that provides for same child."

A devise made on condition that the devisee shall not marry until he or she attains a certain age has been held not to be an unreasonable

⁷ 115 Iowa 193, 88 N. W. 327 (1901).

⁸ 73 Conn. 72, 39 Atl. 739, 66 Am. St. Rep. 112 (1898).

⁹ *Meek v. Fox*, 118 Va. 774, 88 S. E. 161, L. R. A. 1916 D, 1194 (1916).

¹⁰ *Crawford v. Thompson*, 91 Ind. 266, 46 Am. Rep. 598 (1883); *Bostick v. Blades*, 59 Md. 231, 43 Am. Rep. 281 (1883).

¹¹ *Williams v. Cowden* 13 Mo. 211, 53 Am. Dec. 143 (1850).

¹² 85 Va. 509, 8 S. E. 241, 1 L. R. A. 837 (1888).