# RECENT CASES

**Bankruptcy—Anticipatory Breach of Contract—[Federal].**—Marshall's Garage, Inc., a corporation, was the lessee of garage property, the lease containing a provision held to constitute a contract to purchase the property. During the term of the lease an involuntary petition in bankruptcy was filed against the lessee. No payments had been made on the purchase price and rent was in arrears. The lessor filed claim for rent due to the date the trustee gave up possession to the lessor and for damages for breach of the contract to purchase. *Held*, that bankruptcy was an anticipatory breach of the contract to purchase for which the claimant could prove a claim for damages in the lessee's bankruptcy proceedings. *In re Marshall's Garage, Inc.*, 63 F. (2d) 759 (C.C.A. 2nd 1933).

The decision follows the accepted rule allowing proof of damages for the anticipatory breach of an executory contract in bankruptcy proceedings under section 63a of the Bankruptcy Act of 1898. 30 Stat. 562 (1898), 11 U.S.C. § 103a. The leading case stating this rule is *Central Trust Co. v. Chicago Auditorium*, 240 U.S. 581, 36 Sup. Ct. 412, 60 L. Ed. 811, L.R.A. 1917B, 580 (1916). See also *In re Portage Rubber and Trading Co.*, 296 Fed. 289 (C.C.A. 6th 1924), and *In re Swift*, 112 Fed. 315 (C.C.A. 1st 1901). A dictum in the *Chicago Auditorium* case excludes from the rule of the case the proof of claims for damages for the anticipatory breach of a covenant to pay rent. This has been the usual rule. *In re Roth Appel*, 181 Fed. 667 (C.C.A. 2nd 1911); *Wells v. Twenty-First St. Realty Co.*, 12 F. (2d) 91 (C.C.A. 6th 1926); *In re McAllister-Mohler Co.*, 46 F. (2d) 91 (D.C.S.D. Ohio 1930); *In re Goldberg*, 52 F. (2d) 156 (D.C.S.D. N.Y. 1931).

Recent widespread use of the exception as a device enabling lessees to break leases in a time of depression has brought forth considerable adverse comment. Douglas and Frank, Landlords Claims in Reorganizations, 42 Yale L. Jour. 1003 (1933); 33 Col. L. Rev. 213 (1933); 7 Univ. Cin. L. Rev. 162 (1933); 7 Wash. L. Rev. 307 (1932); and it has been suggested that there is a tendency in the recent cases to depart from the rule refusing to allow claim for after-accruing rent. Douglas and Frank, *supra*, 1007, note 18.

The distinction between the lease cases and the usual contracts rule is founded on the statement of Lord Coke about the "diversity betweene duties which touch the realty, and the meere personalty." Co. Litt., 292b. The Supreme Court has said, ". . . . but the law as to leases is not a matter of logic in vacuo; it is a matter of history that has not forgotten Lord Coke." *Gardiner v. Wm. S. Butler & Co.*, 245 U.S. 603, 38 Sup. Ct. 214 (1917). Several courts have pointed out difficulties arising from the exception. *In re Bissinger Co.*, 5 F. (2d) 106 (D.C.N.D. Ohio 1925); *Matter of Meyer Bros. Studio, Inc.*, 18 Am. B. R. (N.S.) 242 (1931). The cases which allow the lessor to prove in the bankrupt estate for liquidated damages or accelerated rent, when provided for by the lease, cast further doubt upon the soundness of the exception. *Rosenbloom v. Uber*, 256 Fed. 584 (C.C.A. 3rd 1919); *In re Quality Shoe Shop*, 212 Fed. 321 (D.C.E.D. Pa. 1914); *In re Caloris Mfg.*, 179 Fed. 722 (D.C.E.D. Pa. 1910). The exception was further narrowed in *In re Mullins Clothing Co.*, 238 Fed. 58 (C.C.A. 2nd 1916). There

the court held that when bankruptcy of a corporation is attended by dissolution proceedings the repudiation of the lease is complete and the claim for future rent should be allowed against the bankrupt estate. The landlord has no possibility of proceeding against the dissolved corporation at a later date as he can against an individual tenant. Such an action was allowed against a tenant after his discharge in bankruptcy in *Kessler v. Slappey*, 130 S.E. 921 (Ga. App. 1925). Such a decision, however, is the compliment of the rule excluding proof of claim for future rent against the bankrupt estate and cannot be considered as a justification for it.

The instant case in allowing proof of a claim for damages for the anticipatory breach of a contract to buy land makes it clear that the exception in the lease cases can be defended not as involving contracts relating to land but only because of the peculiar nature of the obligation to pay rent. Modern cases outside of bankruptcy which allow an action for damages for the anticipatory breach of a lease contract as in the case of ordinary executory contracts suggest that this ground is being undermined. *Grayson v. Mixon*, 176 Ark. 1123, 5 S.W. (2d) 312 (1928); *Curran v. Smith-Zollinger Co.*, 157 Atl. 432 (Del. Ch. 1931); *Weir v. Cooper*, 122 Miss. 225, 84 So. 184 (1920); *Leo v. Pearce Stores Co.*, 57 F. (2d) 340 (D.C.E.D. Mich. 1932).

JAMES SHARP

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**Bills and Notes—Knowledge of Fictitious Payee [New York].**—The defendant city depository cashed checks payable to the order of non-existent city employees. Each check contained space for the employee's signature for identification purposes only. The endorsement by employee, presumably made in indorsee's presence, was to correspond to the identification signature. The signatures corresponded but both were made at the same time and not at the time of cashing the checks. *Held*, plaintiff recover the amount of the checks. *City of New York v. Bronx County Trust. et al.*, 261 N.Y. 64, 184 N.E. 495 (1933).

Towards the end of the eighteenth century it became established that a bill of exchange payable, within the knowledge of the maker, to a fictitious person was considered as being payable to bearer. *Minet v. Gibson*, 3 T. R. 481 (1789); *Bennett v. Farnell*, 1 Campbell 129, 180 c. (N.P. 1807); *City of St. Paul v. Merchants Nat. Bank*, 485, 187 N.W. 516 (1922); *Nat. Surety Co. v. Nat. City Bank of Brooklyn*, 184 App. Div. 771, 172 N.Y.S. 413 (1908); *contra Kohn v. Watkins*, 26 Kan. 691 (1882) (holding that the maker is estopped from asserting ignorance as to a fictitious payee); Daniels, Negotiable Instruments (6th ed. 1913) § 139. The Bills of Exchange Act, 45 & 46 Vict., c. 61, § 7 (3) (1882), dispensed with the requirement of such knowledge. *Bank of England v. Vagliano*, [1891] A.C. 107. The Negotiable Instruments Law, however, followed the common law. N. I. L., § 9(3); *Harmon v. Old Detroit National Bank*, 153 Mich. 73, 116 N.W. 617 (1908).

The knowledge possessed by an agent acting fraudulently and for his own purpose and benefit is not imputed to his principal. *Cave v. Cave*, [1880] Ch. Div. 639; Mechem, Agency (2nd ed. 1914), § 1815. It follows that knowledge of the employees drawing the checks as to the fictitious character of the payee would not be imputed to the city. But since it is only required that the "maker" have knowledge, where the agent is considered the maker, the principal is liable if apparent authority existed. *Phillips v. Mercantile Bank*, 140 N.Y. 556, 35 N.E. 982 (1894); *Snyder v. Corn Exch. Nat. Bank*, 221 Pa. 599, 70 Atl. 876 (1908). See also *Hartford v. Greenwich Bank*, 157 App. Div. 448,

142 N.Y.S. 387 (1913) where the clerk who prepared the checks, was in effect held to be the "maker."

In the absence of negligence or estoppel the paying bank may charge the maker's account only according to his orders and direction. *Phoenix Bank v. Risley*, 111 U.S. 125, 4 Sup. Ct. 322, 28 L. Ed. 374 (1884); *Shipman v. Bank of N.Y.*, 126 N.Y. 318, 27 N.E. 371, 12 L.R.A. 711 (1891). The depositor's duty to use care in dealings with the bank extends to the examination of the returned vouchers. *Jordan Marsh Co. v. Nat. Shawmut Bank*, 201 Mass. 397, 87 N.E. 740, 22 L.R.A. (N.S.) 250 (1909); contra *Walker v. Manchester Co.*, 108 L.T. (N.S.) 728 (1903); *Rex v. Bank of Montreal*, 11 Ont. L.R. 595 (1906). The duty does not extend to the examination of the indorsements. *Corn Exch. Bank v. Nassau Bank*, 91 N.Y. 74 (1883); *Nat. Surety Co. v. Manhattan Co.*, 252 N.Y. 247 (1929). Hence plaintiff was not negligent in failing to discover the forgeries sooner. Justices Lehman and Kellog dissenting were of the opinion that the "self-identifying" feature was enough to work an estoppel. The majority, on the facts of the case, came to the conclusion that no reliance in fact had been placed on the identifying device.

Even though the city had accepted the monthly statements as stated accounts such could be opened by a showing of fraud or mistake. *Nat. Surety Co. v. Manhattan Co.*, *supra*.

KARL HUBER

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**Bulk Sales—"Other Goods and Chattels of the Vendor's Business"**—[Illinois].—The "old" bank sold real estate bonds to complainant and agreed to repurchase at par if requested. Later the old bank transferred all its assets to the "new" bank, which assumed only specified liabilities. Complainant sought to recover the purchase price of the bonds from both institutions, alleging among other things, that the transfer to the "new" bank was void under the Bulk Sales Law. *Held*, the Bulk Sales Law does not apply to the transfer of the assets of a bank since, being in derogation of the common law it should be strictly construed. *Knass v. Madison & Kedzie State Bank and Madison-Kedzie Trust & Savings Bank*, 269 Ill. App. 588 (1933).

The Illinois Bulk Sales Law of 1905, Ill. Laws of 1905, 284, was held unconstitutional because it singled out a class—vendors and purchasers of stocks of merchandise—on which it imposed exceptional burdens. *Off & Co. v. Morehead*, 235 Ill. 40, 85 N.E. 264 (1908). To avoid this objection the statute of 1913 was worded " . . . . the sale, transfer, or assignment . . . . of a stock of merchandise, or merchandise and fixtures or other goods and chattels of the vendor's business. . . . ." Ill. Cahill's Rev. Stats. (1931), c. 121a, § 1. This statute was held constitutional. *Johnson Co. v. Beloosky*, 263 Ill. 363, 105 N.E. 287, Ann. Cas. 1915C, 411 (1914).

There followed a period of uncertainty in interpretation. In *Larson v. Judd*, 200 Ill. App. 420 (1916) the court said that the act covered the sale of the cattle, horses, and equipment of a dairyman. The sale of office furniture, horses, wagons, trucks, harness, farm machinery, hogs, growing corn, etc., by a man engaged in the dray business and farming was within the statute. *Athon v. McAllister*, 205 Ill. App. 41 (1917). On the other hand was a holding that the act related only to businesses where in the ordinary course goods were not sold in bulk, and that the sale of a team of horses and a wagon was exempt from the act's requirements. *Richardson Coal Co. v. Cermak*, 190 Ill. App. 106 (1914). Similarly in *Ettelson v. Sonkopp*, 210 Ill. App. 348 (1918) it was held that

the Bulk Sales Law did not apply to a transaction not involving merchandise, but concerned fixtures, utensils, and a horse and wagon used by the vendor in his butcher shop. Although the decisions of other courts mean little since the Illinois statute is worded more broadly than those of other states, Montgomery, Bulk Sales (2d ed. 1926), 26–27, the last two decisions accord with the weight of authority. *McPartlin v. Clarkson*, 240 Mich. 390, 215 N.W. 338, 54 A.L.R. 1535 (1927); *Swift & Co. v. Tempelos*, 178 N.C. 487, 101 S.E. 8, 7 A.L.R. 1581 (1919). But it has been definitely settled that the Illinois Bulk Sales Law has broader application than that given the statute in other states. *Weskalnies v. Hesterman*, 288 Ill. 199, 123 N.E. 314, 4 A.L.R. 128 (1919) (sale by dairy farmer of his livestock, agricultural, and other implements); *La Salle Opera House Co. v. La Salle Amusement Co.*, 289 Ill. 194, 124 N.E. 454 (1919) (sale by opera house company of lease, furniture, fixtures, etc., together with good will, trade mark, and trade names).

In the *La Salle* case the court did not discuss the question whether or not intangible property was covered by the statute. But the Illinois act has been applied where a debtor assigned accounts, bills receivable, and other evidences of indebtedness for the benefit of creditors. *Danville Auburn Auto Co. v. National Trust & Credit Co.*, 212 Ill. App. 116 (1918). See Hershberger, Illinois Bulk Sales Law and Assignments for Benefit of Creditors, 21 Ill. L. Rev. 153 (1926). The transfer of the assets of one doing business as a partner has also been held to be within the act. *National Trust & Credit Co. v. Kimingham*, 201 Ill. App. 78 (1915); *Marlow v. Ringer*, 79 W.Va. 568, 91 S.E. 386, L.R.A. 1917D 623 (1917); contra *Schoeppel v. Pfannensteil*, 122 Kan. 630, 253 Pac. 567, 51 A.L.R. 398 (1927). However, in a well reasoned opinion the transfer of assets to a successor bank has been held outside the scope of the Illinois Bulk Sales Law: first, because under the rule of *ejusdem generis* the words "other goods and chattels of the vendor's business" refer to tangible personal property; second, because the opinion in *Off & Co. v. Morehead, supra*, in holding the act of 1905 discriminatory, referred only to other kinds of tangible personalty; and third, because other jurisdictions do not apply the act to transfers of intangible personalty. *People ex rel. Nelson v. Sherrard State Bank*, 258 Ill. App. 168 (1930). Decisions of other courts exempt intangible personalty, except in the transfer of a partner's interest. *Starr Piano Co. v. Sammak*, 235 N.Y. 566, 139 N.E. 737 (1923); *Rio Tire Co. v. Spectralite*, 48 S.W. (2d) 367 (Tex. Civ. App. 1932). It would seem that the principal case is rightly decided on this point.

HUBERT C. MERRICK

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**Conflict of Laws—Law Governing Performance of a Covenant to Pay Rent—[Federal].**—L, in Chicago, signed and mailed to T, a Maryland corporation, a lease to a store located in Chicago. T signed the lease in Maryland. In a subsequent bankruptcy proceeding in Maryland it was *held* that the question of apportionability of rent is to be determined by the law of Maryland, the *lex loci contractus*. *In re Newark Shoe Stores*, 2 F. Supp. 384 (D.C.D.Md. 1933).

The court relied upon a recent Circuit Court of Appeals case, *In re Barnett*, 12 F. (2d) 73, (C.C.A. 2d 1926) in which the court said that the obligation to pay rent is an independent covenant and the law of the place of contract will govern what is sufficient performance.

In the Barnett case the court recognized that a lease is in some respects a convey-

ance of an interest in land and in other respects a contract. It also recognized that the conveyancing provisions will be governed by the *lex situs*, but insisted that the contractual provisions should be governed by the *lex loci contractus*. The difficulty in the use of this approach is in determining when a covenant is contractual and when it is a conveyancing covenant. But this difficulty, fortunately, need not detain us, for having recognized the bifurcation intended by the court, we need only ask into which class a covenant to pay rent falls.

A lease as a conveyance of an estate in land results in two estates: the lessee's possessory estate and the lessor's reversion. The rent reserved is an incident to the reversion and is definitely considered an interest in the land; it "issues out of the land." In the familiar but almost meaningless language of *Spencer's Case*, 5 Co. 16a (1583), it "touches or concerns the thing demised" and is not "merely collateral to the land." Or, as another English court put it, a rent-charge is "as much real estate as if, instead of a rent-charge issuing out of the land, land itself to the value of the annual rent-charge had been given." *Chatfield v. Berchtoldt*, L. R. 7 Ch. 192 (1872). Bigelow, The Content of Covenant of Leases, 12 Mich. L. Rev. 639, 657, 658 (1914), puts a covenant to pay rent into a group of covenants "that merely repeat in terms of a contract an already existing obligation running from the covenantor to the convenantee." In determining the liability under a covenant "to pay the rent reserved," it will be necessary to solve the property question, "What rent is due?" The *lex situs* will determine whether all or only a proportion of the monthly rent will issue out of the land; the liability under the covenant is to pay that amount.

The court cites, and is to a degree misled by, cases like *Polson v. Stewart*, 167 Mass. 211, 45 N.E. 737 (1897) and *Atwood v. Walker*, 179 Mass. 514, 61 N.E. 58 (1901). These cases are not in point as they deal with contracts to convey and not conveyances. The true analogy to these cases would be a contract to lease and it is admitted that the validity of this, as any other contract, would be settled by the *lex loci contractus*. In the principal case, and in the Barnett case which is relied upon, the documents in litigation were leases, not contracts for leases.

And, finally, the assumed rule, of conflict of laws dividing the leases into property and contract provisions, may be attacked by the argument of convenience: it is better to have a more uniform construction of an instrument conveying an interest in land, and as the law of the situs is necessarily applicable to part, it should apply to the whole of the instrument.

BEN GRODSKY

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**Constitutional Law—Revocation of Extradition Warrant—Mandatory Injunction—[Federal].**—One De Grazier of Illinois was held in custody by the defendant sheriff awaiting extradition to Illinois where De Grazier was wanted for the commission of an extraditable offense. When plaintiff messenger from Illinois appeared to receive De Grazier, defendant refused to turn him over on the ground that the original extradition warrant had been revoked by the Governor of Texas. The Governor assigned as reason for the revocation "that the prosecution of the defendant in the case was for the sole purpose of collecting a civil debt." *Held*, mandatory injunction would not lie to compel surrender of prisoner to plaintiff. *Downey v. Schmidt*, 4 F. Supp. 1 (N.D. Texas, 1933).

As between component parts of a domestic system the term *rendition* seems more apt

than *extradition* which connotes dealings between independent nations. 2 Moore, Extradition (1891), 1 ff. The duty of rendition is absolute, and the governor of the asylum state has no discretion in the matter once the act of Congress, 18 U.S.C. § 662 (1926), has been complied with. *Ky. v. Dennison*, 65 U.S. 66 (1860); *Johnston v. Riley*, 13 Ga. 97 (1853); *In re opinion of Justices to Governor and Council*, 201 Mass. 609, 89 N.E. 174 (1909); *Ex parte Graves*, 236 Mass. 493, 128 N.E. 867 (1920); *In re Panmore*, 96 N.J. Eq. 397, 125 Atl. 926 (1924); *People v. Moore*, 217 N.Y. 632, 112 N.E. 1070 (1916); *People v. Pinkerton*, 17 Hun. 199 (N.Y. 1879); *Ex parte Van Vleck*, 6 Ohio Dec. 636 (1878). Upon the "theory of discretion" however, it is asserted by some authority, judicial and legislative, that the duty to render is not absolute. *State v. Eberstein*, 105 Neb. 833, 182 N.W. 500 (1921); see Mass. Pub. Statutes 1882, c. 177 and Mass. Gen. Laws 1932, c. 226, §§ 12, 13, authorizing the attorney general to advise or give opinion as to the "legality or expediency" of complying with the demand for the fugitive; case of *Kimpton* (1878) discussed in Moore, *op. cit.*, 613. Since, by the weight of authority, the duty of rendition is absolute and ministerial in nature, it must follow that once the extradition warrant has been issued it cannot be revoked except in the case of a defective requisition. *Hosmer v. Loveland*, 19 Barb. 111 (N.Y. 1854). The court in the instant case leans toward the minority view for it rests its decision in part upon *State v. Toole*, 69 Minn. 104, 72 N.W. 53, 38 L.R.A. 224 (1897) which in turn relied upon *Work v. Corrington*, 34 Ohio St. 64, 32 Am. Rep. 345 (1877). It was stated in the latter case that the power of revocation was not limited to cases where the requisition was insufficient on its face. See also *State v. Eberstein, supra;* Moore, *op. cit., supra*, § 620. It would seem that the power to revoke a warrant cannot exist when there does not also exist the power to exercise discretion in its issuance. *Hosmer v. Loveland, supra.*

Though the governor of the asylum state is under a positive "duty" to deliver up a fugitive, it is certain the federal judiciary will not order him to perform it. *Ky. v. Dennison, supra.* As was expressed in *Ex parte Virginia*, 100 U.S. 339 (1879) concerning the rendition section of the Constitution, Art. 4, § 2, it "is only declaratory of the moral duty of the state" with no power of enforcement by the central government. An anomaly and a legal *impasse* result: a "duty" that cannot be enforced and a "right" without a remedy.

NEWELL A. CLAPP

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**Insurance—Duty Arising from Life Insurance Application—[Federal].**—Plaintiffs, as executors of applicant for life insurance, petitioned to recover damages from the defendant in tort on the ground of failure to act on the application within a reasonable time. The deceased had made an advance payment of the required premium and had satisfactorily passed a medical examination. The plaintiffs asserted that the defendant had neither accepted nor rejected the application dated February 1, 1932 prior to the applicant's death on April 7, 1932. Upon notice of the death the defendant stated that the application had been declined March 1, 1932. Defendant demurred. *Held*, demurrer sustained. *Munger et al. v. Equitable Life Assur. Soc. of the United States*, 2 F. Supp. 914 (D.C. W. D. Mo., 1933).

Contrary to the orthodox basis of liability in reference to insurance contracts, the theory asserted in the petitition was that an unreasonable delay in declining the appli-

cation is a breach of duty owing an applicant for insurance which subjects the company to liability in tort. Such theory of tort liability is relatively novel in the law, inasmuch as insurance contracts have been written for centuries and relatively few cases have caused this basis of liability to be adjudicated. While the petition cites many of the cases of this nature, four undertake to demonstrate the pre-existing legal duty, none of which were controlling in the jurisdiction of the court.

Briefly they state the insurer's liability arises: (1) from the equitable principle that that which ought to have been done will be considered as having been done, *Carter v. Life Ins. Co.*, 11 Hawaii 69 (1897); (2) from the fact that insurance companies have a franchise from the state which was granted in the public interest; (3) from the fact that insurance companies impliedly agree to act honestly and fairly on applications submitted to them; (4) from the fact that where there has been an advance payment of the premium that an unreasonable delay in acting is a breach of the trust, in which the premium is held, *Duffie v. Bankers' Life Ass'n.*, 160 Iowa 19, 139 N.W. 1087 (1913); (5) from the fact that "some kind of a consensual relationship" has been entered into by the applicant and the company, *Kukuska v. Insurance Co.*, 204 Wis. 166, 235 N.W. 403 (1931); (6), from the value of the risk; (7) from the fact that the insurance company, having pre-empted the field, should not retain control of the situation and the applicant's funds indefinitely, *Strand v. Bankers' Life Ins. Co.*, 115 Neb. 357, 213 N.W. 349 (1927).

Until the application is accepted by the insurer, a promise to pay or payment is conditional upon the acceptance, and the application is still no more than a proposition to take and to pay for insurance should the company accept. The payment of the premium when the application is signed does not bind the company to accept his terms, and of course the applicant may recover the payment upon rejection. These are fundamental rules of the law of contracts which cannot be ignored. But the immediate inquiry is whether or not a decision against the insurance company because of alleged unreasonable delay in rejecting the application or serving notice of such rejection should expose it to tort liability. Arkansas, as well as the instant case, has flatly rejected the doctrine of tort liability. *National Union Fire Ins. Co. v. School Dist.*, 122 Ark. 179, 182 S.W. 547, L.R.A. 1916D, 238 (1916). Illinois has refused recovery although judgment was for the defendant solely on the ground that under the facts of the case the applicant's administrator had no right of action. *Bradley v. Fed. Life Ins. Co.*, 295 Ill. 381, 129 N.E. 171, 15 A.L.R. 1021 (1920). See also *Savage v. Insurance Co.*, 154 Miss. 89, 121 So. 487 (1929); *Thornton v. National Council, etc.*, 110 W.Va. 412, 158 S.E. 507 (1931).

The present case indicates the rise of a comparatively new social problem, the issue being, simply, whether or not the courts should recognize a duty on the part of insurance companies to reasonably act on insurance applications. See generally for the judicial technique in handling this sort of issue in other types of tort cases Green, The Duty Problem, 28 Col. L. Rev. 1014 (1928), 29 Col. L. Rev. 255 (1929). Moreover, the tendency in these cases seems to be to shift wherever possible the burden of loss due to accident or catastrophe from the shoulders of the individual to those of the community or of a group of the community. Funk, Duty of Insurer to Act Promptly on Insurance Applications, 75 Univ. Pa. L. Rev. 207 (1926). See also Vance, Insurance (2nd ed. 1930) 190 ff.

HAROLD LIPTON

Practice—Service upon Foreign Corporations—[Federal].—The petitioner, a foreign corporation, had never been licensed to do business in Wisconsin, had no place of business or property there, and had no agent there. The president of the corporation came to Wisconsin to induce an attorney to refrain from seeking final judgment in a suit he was then prosecuting against the corporation and to deposit bonds of the corporation with a bondholders' committee. While in the attorney's offices he was served with summonses addressed to the corporation in suits to recover on some of the bonds. A petition for a writ of prohibition sought in the Wisconsin Supreme Court was denied and the matter was appealed. *Held*, judgment reversed and remanded. *Consolidated Textile Corp. v. Gregory, Judge*, 289 U.S. 85, 53 Sup. Ct. 529 (1933).

The petitioner, a foreign corporation, in 1926, qualified to do business in the State of Washington and under statute appointed a resident agent to accept service of process. Wash. Rem. Comp. Stats. Ann. (1922), § 3854. In 1929 the corporation ceased business in the state and formally withdrew. The same year the corporation dissolved and the agent left the state although his agency was never revoked. In 1932, in a suit against the corporation, a summons was served on the Secretary of State. No notice was forwarded to the corporation, nor was it required by statute. Petitioner sought a writ of prohibition after a motion to quash service was overruled. The state Supreme Court refused and the corporation appealed. *Held*, the judgment affirmed. *State of Washington ex rel. Bond & Goodwin & Tucker, Inc. v. Superior Court for Spokane County*, 289 U.S. 361, 53 Sup. Ct. 624 (1933).

The court relied on different theories of jurisdiction in reaching the results of the two cases.

In the first case the court discussed the ultimate issue of whether or not the writ of prohibition should be granted from the point of view that jurisdiction, if it existed, would be based on the presence theory and the idea that the corporation was doing business in the state. Cahill, Jurisdiction over Foreign Corporations, 30 Harv. L. Rev. 676, 686–696 (1917); Fead, Jurisdiction over Foreign Corporations, 24 Mich. L. Rev. 633, 636 (1926). In the case of *Chambe v. Delaware and Hudson Ry. Co.*, 288 Pa. St. 240, 246, 135 Atl. 755, 757 (1927) the court made a comprehensive attempt to devise a formula for determining when a foreign corporation is doing business in a state. All of the considerations there listed are not called into question but it seems that in the principal case the "business engaged in" was not sufficient in quantity and quality. See Farrier, Jurisdiction over Foreign Corporations, 17 Minn. L. Rev. 270, 293–298 (1933). This is the view the United States Supreme Court took of the situation and the cases of *Rosenberg Co. v. Curtis Brown Co.*, 260 U.S. 516, 43 Sup. Ct. 170, 67 L. Ed. 372 (1922) and *James-Dickinson Co. v. Harry*, 273 U.S. 119, 122, 47 Sup. Ct. 308, 309, 71 L. Ed. 569 (1926) cited in the opinion seem amply to justify the holding. For the Wisconsin Supreme Court decision, see *Consolidated Textile Corp. v. Gregory, Judge*, 209 Wis. 476, 245 N.W. 194 (1932).

The second case goes to rather extreme limits on the doctrine of jurisdiction based on consent to a form of substituted service. The court based its opinion on the ground that the corporation *could* be excluded from operating in the state. *Bank of Augusta v. Earl*, 13 Pet. 519, 38 U.S. 519, 10 L. Ed. 274 (1839); *Lafayette Ins. Co. v. French*, 18 How. 404, 407, 59 U.S. 404, 407, 15 L. Ed. 451 (1855). Hence, "Admission might be conditioned upon . . . . the terms that if the corporation had failed to appoint or maintain an agent service should be upon a state officer. *American Railway Express Co. v. Royster Co.*, 273 U.S. 274, 280." Also, liability to be served in this manner might

by statute continue after a corporation had ceased to do business in, and had withdrawn all agents from the state. *Mutual Reserve Fund Life Assn. v. Phelps*, 190 U.S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987 (1903). By applying the combined propositions as to substituted service and liability to service after removal from state, the court concluded that the service was proper in the principal case. However, the Washington statute made no provision for notice being sent by the state officer designated to be served to the foreign corporation. In this the statute differed from those under consideration by the court in the two cases cited by it as sustaining the above propositions. *American Railway Express Co. v. Royster*, *supra* and *Mutual Reserve Fund Life Assur. v. Phelps*, *supra*. Seemingly, the instant decision goes beyond prior holdings in the field of substituted service upon foreign corporations. See Washington Supreme Court decision in principal case, 169 Wash. 688, 15 P. (2d) 660 (1932), commented on in 33 Col. L. Rev. 359 (1933), 81 Univ. Pa. L. Rev. 469 (1933).

JOHN P. BARNES, JR.

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**Torts—Gross Negligence—Interpretation of "Host-Guest" Automobile Statutes—**[Nebraska].—P was a guest in D's automobile. Against P's admonition D drove at 65 miles per hour and lost control of the car which crashed injuring P. *Held*, under a statute providing that a host shall not be liable to a guest injured in the former's automobile unless his driving was grossly negligent, that judgment for P be affirmed. *Morris v. Erskine*, 248 N.W. 96 (Neb. 1933).

Several states have adopted "host-guest" statutes respecting automobiles incorporating such phrases as: "intoxication . . . . or wilful misconduct," Cal. Deering's Gen. Laws, Act 5128 (1931), § 141¾; "intentional injury . . . . heedlessness . . . . or reckless disregard," Conn. Gen. Stats. (1930), § 1628; "wilful and wanton misconduct," Ill. Smith-Hurd's Rev. Stats. (1933), c. 121, § 243; "intoxication or reckless operation," Iowa Code (1931), c. 251, § 5026; "gross negligence or wilful and wanton misconduct," Mich. Comp. Laws (1929), c. 73 § 4648; "under influence of intoxicating liquor or gross negligence," Neb. Laws of 1931, c. 105; "intentional . . . . gross negligence . . . . intoxication . . . . reckless disregard," Ore. Code Ann. (1930), §§ 55–1209.

"Guest" is variously defined in these statutes, but usually refers to a non-paying invited passenger. See *Russell v. Parlee*, 115 Conn. 687, 163 Atl. 404 (1932). Aside from such statutes the general rule is that the host owes his invited guest the duty of exercising ordinary and reasonable care. See 12 Mich. L. Rev. 685 (1914). Quite apparently the legislative purpose is to abandon the general rule and to expose the host to an action only when he has created an extraordinary hazard. *Naudzius v. Lahr*, 253 Mich. 216, 234 N.W. 581 (1931).

The main issue in applying such statutes is the interpretation of the phrases: "gross negligence," "wanton and wilful misconduct," et cetera. *Slobodnjak v. Coyne*, 116 Conn. 545, 165 Atl. 681 (1933).

Under a "host-guest" statute employing the term "wilful or wanton misconduct" one might expect a court in applying it to hold to be actionable only deliberate and intentionally committed wrongs. But, surprisingly enough, not only have statutes reading "wilful and wanton" been construed to include acts of gross negligence, but the concept of gross negligence has been interpreted as being "wilful and wanton." *Oxenger v. Ward*, 256 Mich. 499, 240 N.W. 55 (1932); *Denman v. Johnson*, 85 Mich. 389, 48 N.W. 565 (1891); 42 C.J. 892.

The idea that "gross negligence" is an anomaly is widespread. This view is exemplified by the dictum of Baron Rolfe in *Wilson v. Brett*, 11 M. & W. 115: "I said I could see no difference between negligence and 'gross' negligence; that it was the same thing with the addition of a vituperative epithet." On the other hand some consider it as synonymous with "intent," although it is usually styled, euphemistically, as "wilful or wanton misconduct." *Atchison, Topeka, Kansas Ry. Co. v. Baker*, 79 Kan. 183, 98 Pac. 804 (1908). But many courts recognize that "gross negligence" has a meaning as negligence of some sort, distinct from the negligence ordinarily sufficient to warrant a recovery at common law. *Milwaukee & St. Paul Ry. v. Arms et al.*, 91 U.S. 489, 23 L. Ed. 374 (1875); *Denman v. Johnson, supra.*

"Host-guest" statutes open a new field for the use of such concepts as "gross negligence," "recklessness," and "heedlessness." Seemingly the terms signify a type of negligence lying between ordinary negligence actionable apart from statutes and intentional injury. See *Rauch v. Stecklein* 20 P. (2d) 387 (Ore. 1933); *Castro v. Lingh* 21 P. (2d) 169 (Cal. 1933); *Slobodnjak v. Coyne, supra.* If this were not so, these laws would need only to abolish the host's duty of any care toward his guest, since no provision is essential to support the latter's recovery for deliberately imposed injuries. In view of the changing attitude towards the feasibility of "comparing negligences" for other purposes, the notions that there can be no degrees of negligence, and that gross negligence is an anomaly, are becoming questionable. See Bohlen, Studies in the Law of Torts (1926), 536–543; Mole and Wilson, A Study of Comparative Negligence, 17 Corn. L. Quar. 333, 604 (1932).

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