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Recent Cases

A. D.

should be expressly limited within such time that no violation of the rule is possible, under any reasonable construction. This may be done by limiting the duration of the power to a specific length of time within the period of remoteness, or by limiting its duration in reference to lives in being at the time of the testator's death. Should this practical suggestion be generally followed, we might hope to be presented with the problem in Washington courts as rarely in the future as it has apparently arisen in the past.

FREDERICK G. HAMLEY.

RECENT CASES

CORPORATION—TRUST FUND DOCTRINE—RIGHT TO RESCIND STOCK SUBSCRIPTION AFTER INSOLVENCY. An insolvent corporation bought stock on the open market and sold it as treasury stock to the plaintiff, who seeks rescission because of fraudulent misrepresentations. Defendant claimed that plaintiff cannot rescind after insolvency as against the assignee of the corporation because it would reduce the creditor's trust fund. *Held*: A subscriber for the capital stock of a corporation may bring suit after insolvency of the corporation for rescission of his subscription if (1) he has used due diligence and (2) has not profited by the transaction, or (3) misled others to their detriment. The trust fund doctrine has no application to existing creditors and prior indebtedness. *Goodin v. Palace Stores Co.*, 64 Wash. Dec. 538 (1931).

It will be observed that the above case involves a conflict between the rights of creditors and a defrauded stockholder.

The doctrine that the assets of an insolvent corporation are a trust fund for the benefit of all its creditors is said to be an invention of the courts during the panic of the late nineteenth century when there was no federal bankruptcy act. THE TRUST FUND DOCTRINE: A STUDY IN PSYCHOLOGY, 1 Wash. Law Rev. 81. It was established in Washington by the cases of *Thompson v. The Huron Lumber Co.*, 4 Wash. 600, 30 Pac. 741, (1892) *Conover v. Hull*, 10 Wash. 673, 39 Pac. 166, 4 Am. St. Rep. 819 (1895). It continues despite the bankruptcy act; *Dysart v. Colonial Fire Underwriter* 142, Wash. 601, 254 Pac. 240 (1927) often being ground for declaring a preference when that act is not; *Benner v. Scandinavian American Bank*, 73 Wash. 488, 131 Pac. 1149, Ann. Cas. 1914 D 709 (1913) because the good faith of the parties is not gone into; *In re Elliott-O'Brien Co.*, 284 Fed. 507 (1922). Further the test of insolvency is different, *Jones v. Hoquiam Lumber & Shingle Co.*, 98 Wash. 172, 167 Pac. 117 (1917) the bankruptcy act holding a concern insolvent when at a fair valuation the aggregate of its property is insufficient in amount to pay its debts; *Simpson v. Western Hardware & Metal Co.*, 97 Wash. 626, 167 Pac. 113 (1917) and the trust fund theory when it is unable to pay its debts in the due course of business; *Nixon v. Hendy Machine Works*, 51 Wash. 459, 99 Pac. 11 (1909).

The court has limited the theory saying that where there is no depletion of the corporation's assets the basis of the doctrine is removed. *Terhune v. Weise*, 132 Wash. 208, 231 Pac. 954, 38 A. L. R. 94 (1925). Thus in exchange for a contemporaneous loan an insolvent corporation may mortgage all its assets; *Olive v. Tyler*, 257 Fed. 497 5 A. L. R. 557 (1919) though the lender be a stockholder· *Jensen v. American Bank of Spokane*, 157 Wash. 240, 288 Pac. 660 (1930) or an officer, *Terhune v. Wise, supra.* A repayment of a loan for a particular profitable transaction is not a preference; *Hoppe v. First National Bank*, 137 Wash. 41, 241 Pac. 662 (1925) nor is the altering of the character of a creditor's security· *Brinker v. Peoples Savings Bank*, 144 Wash. 93, 256 Pac., 1025 (1927). By paying itself from a corporation's funds which it holds a bank merely takes back a part of what it has contributed; *Smith v. National Bank of Commerce*, 142 Wash. 428, 253 Pac. 644 (1927) but see *Woods v. Metropolitan National Bank*, 126 Wash. 346, 218 Pac. 266 (1923). Under certain circumstances even a private person may obtain a set-off. *Dysart v. Colonial Fire Underwriters, supra.*

Turning to the rights of a defrauded stockholder, there is no question about his right to sue when the corporation is solvent; *Williams v. Modern Food Stores*, 154 Wash. 358, 282 Pac. 203 (1929) and the eighteen months after the fraud may be a reasonable time within which to bring suit for rescission. *Mulholland v. Washington Match Co.*, 35 Wash. 315, 77 Pac. 497 (1904) When the corporation is insolvent, the stockholder may recover if he meets the conditions set forth in the principal case; *Atwood v. McKenzie-Waterhouse Co.*, 120 Wash. 214, 206 Pac. 973, 41 A. L. R. 650 (1922) which seems definitely to commit Washington to the clear weight of authority· *Annotation* 41 A. L. R. 674, Note, 31 L. R. A. (n. s.) 900. But see *Duke v. Johnson* (involving superadded liability of bank stockholder) 123 Wash. 43, 211 Pac. 710 (1923) and *Cox v. Dickie*, 48 Wash. 264, 93 Pac. 523 (1908) the latter case being distinguished in *Atwood v. McKenzie-Waterhouse Co., supra.*

Adverting to our principal case it would seem at first glance that the trust fund doctrine has been impaired because the fund is depleted to the extent the plaintiff recovers. (Thus differing from the *Atwood* case, *supra*). The court was influenced so far as to set forth various ways by which the corporation was benefited in the transaction. However, in every instance when a new creditor is added and the debtor wastes his contribution, the other creditors receive less. And there is nothing in the trust fund doctrine which forbids an insolvent corporation acquiring more creditors, which is shown by cases like *Jensen v. American Bank*, *supra*, allowing security to later creditors. As the cases of *Johns v. Coffee*, 74 Wash. 189, 133 Pac. 4 (1913) and *Atwood v. McKenzie-Waterhouse Co., supra*, hold that a person induced to buy stock by fraud is a creditor, it is submitted that the principal case is decided in accord with legal principles already established in Washington. A. D.

LIABILITY OF GAS COMPANY—NEGLIGENCE—FAILURE TO NOTIFY USERS OF INTERRUPTION IN PRESSURE. The defendant company supplied gas to about five hundred customers in Puyallup through a single main from its plant in Tacoma. This main developed a leak one winter night, probably because of the unusually extreme cold. Defendant instructed its two agents in Puyallup to warn all customers that had gas furnaces or other appliances with pilot lights to shut them off because an interruption in pressure seemed imminent. The agents notified all such customers, but no others, between 3:30 and 6:30 a. m. Plaintiff was not notified. Defendant was unable to repair the main without cutting off the pressure from about 5 or 6 until nearly 7 a. m. Plaintiff was sleeping in a closed room with a radiant fire gas heater burning. When the gas pressure was resumed the room filled with gas, and plaintiff's lungs were permanently injured as a result.

An action for damages was brought, and the jury returned a verdict for plaintiff. The Supreme Court affirmed a judgment for $10,000, holding that "Illuminating gas is a dangerous thing. The degree of care must be such as an ordinarily prudent person would exercise under like circumstances"· and that "whether the appellant was guilty of negligence in failing to notify the respondent that the gas pressure had discontinued, and in permitting the pressure to be resumed without notification, was plainly a question of fact for the jury" *Senske v. Washington Gas & Electric Co.*, 64 Wash. Dec. 613, 4 Pac. (2d) Adv Sheets 523.

The court follows the general rule of liability of gas companies for injuries caused by escaping gas. It is well settled that a gas company is not an insurer· *Gould v. Winona Gas Co.*, 100 Minn. 258, 111 N. W 254, 10 L. R. A. (N.S.) 889 (1907) is liable only for failure to use ordinary care under the circumstances; *Holly v. Boston Gas Light Co.*, 8 Gray 123, 69 Am. Dec. 233 (Mass. 1857) is not liable where leak is caused by trespasser· *McKenna v. Bridgewater Gas Co.*, 193 Pa. St. 633, 45 Atl. 52, 47 L. R. A. 790 (1899) or by defective pipes within sole control of customer *Reid v. Westchester Lighting Co.*, 236 N. Y. 322, 140 N. E. 712, 29 A. L. R. 1247 (1923) Once notified of a leak, however, the gas company must repair it with diligence. *McClure v. Hoopeston Gas & Electric Co.*, 303 Ill. 89, 135 N. E. 43, 25 A. L. R. 250 (1922).

There is no general rule requiring a public utility to notify its customers in advance of even voluntary interruptions in service. The reports contain very few cases on this point, possibly because material damage rarely results. An electric company has been held not liable for shutting off the current at 2 a. m. without notifying plaintiff who was undergoing a surgical operation at the time. *Stroup v. Alabama Power Co.*, 216 Ala. 290, 113 So. 18, 52 A. L. R. 1075 (1927) A water company is under no duty to warn users of its intention to shut off the water during the day in the absence of proof that it knows or should know that gas water heaters are being used at the time. *Brame v. Light, Heat & Water Co.*, 95 Miss. 26, 48 So. 728, 21 L. R. A. (N.S.) 468, 20 Ann. Cas. 1293 (1909). As indicated in the latter case, the foreseeability of danger to customers would seem to be the proper test. Thus a gas company is bound to know that some of its customers are relying on gas as the sole means of heating their homes, and must therefore give notice in advance of a voluntary cessation of pressure. *Hoehle v. Allegheny Heating Co.*, 5 Pa. Super. Ct. 21 (1897). This doctrine has no application to the instant case because here the interruption in service was involuntary, and further, the lack of advance notice was not the proximate cause of plaintiff's injury.

The second ground stated by the court, the resumption of pressure without notice, is the real basis of the case. Undoubtedly, where pressure is cut off from a particular user temporarily, the gas company is under a duty to notify him before resuming it. *Beyer v. Consolidated Gas Co.*, 44 App. Div. 158, 60 N. Y. Supp. 628 (1899). Probably this duty would be imposed in all cases where there is a reasonable probability of open gas jets. It will be observed that in the instant case defendant undertook to warn all furnace users. The real question is whether it was foreseeable that other customers would be using gas at that hour in the morning. The jury evidently found that it was.

The primary duty of a public utility is to furnish its service to the public; and if in time of emergency this can be done only at the risk of injuring individuals, such injury will be *damnum absque injuria*. A gas company is under no duty to shut off pressure from a city which is being ravaged by a city-wide fire, even though many mains have been broken and the danger of explosion is great. *Hutchinson v. Boston Gas Light Co.*, 122 Mass. 219 (1877). And in this state it would appear that an electric company is under no duty to shut off the current from electric wires which have blown down in city streets under a severe storm. See *Johnson v. Grays Harbor R. & Light Co.*, 142 Wash. 520, 253 Pac. 819 (1927). The same rule is applied in situations involving much less inconvenience to the community. An electric company is not liable for the death of a fireman caused by live wires in a burning building, being under no duty to cut off the current from an entire district when a fire breaks out therein. *Pennebaker v. San Joaquin Light & Power Co.*, 158 Cal. 579, 112 Pac. 459, 31 L. R. A. (N.S.) 1099 (1910). An electric company is not negligent where its servant closes a main switch in the power station which has kicked open, without making any attempt to locate the cause of the broken circuit, even though two men who have picked up the grounded wire are killed when the current is resumed. *Kentucky Utilities Co. v. Moore*, 224 Ky. 33, 5 S. W (2d) 283, 57 A. L. R. 1054 (1928). But *contra* where it appears defendant knows the location of the grounded wire and can shut off that particular circuit temporarily for repair. *Kidd v. Kansas City Light & Power Co.*, 239 S. W 584 (Mo. App., 1922). The reasoning of the courts in this group of cases leads one to infer that in each instance the utility company must weigh the inconvenience to the community against the danger to the individual, and act promptly and at its peril.

This is apparently the first case of its kind in this country, but its value as precedent is limited. All that it holds on the point under discussion is that defendant's negligence is purely a question of fact for the jury.

J. B. S.

TAXATION—PENALTIES—EFFECT OF STATUTE. A statute providing a penalty for delinquent taxes in Washington fixed the rate at 12%. (Rem.

1927 Supp. §§ 11097-83.) On June 11, 1931, an amendment went into effect reducing the rate to 10%. (Chap. 113, Laws of 1931, p. 341.) On July 10, 1931, plaintiff tendered to defendant county treasurer the 1928 tax on certain real property, plus 10% interest. Defendant refused to accept the amount and demanded that plaintiff pay the tax with 12% interest for the period before the statute went into effect and 10% thereafter. *Held*, that plaintiff's tender was correct. *Henry v. McKay*, 64 Wash. Dec. 447, 3 P (2d) 145 (1931).

A penalty for failure to pay taxes when due is not interest but a punishment for disobedience to the law. *State ex rel. First Thought Gold Mine v. Superior Court*, 93 Wash. 433, 161 P 77 (1916) *Behrens v. Commercial Waterway Dist. No.* 1, 107 Wash. 135, 181 P 892 (1919) *Town of Belvidere v. Warren R. Co.*, 34 N. J. L. 193, (1869) *Commonwealth v. Standard Oil Co.*, 101 Pa. 119 (1882) COOLEY, TAXATION, (4th ed.) §1374. But statutes imposing such penalties are not within the provision of the Federal Constitution forbidding *ex post facto* laws, since such provision applies only to criminal statutes; *Calder v. Bull*, 3 U. S. 386, 1 L. Ed. 648 (1798) and numerous cases affirming; and no courts have as yet held that such statutes are part of the criminal law Statutes are not void merely because they are retroactive. *League v. Texas*, 184 U. S. 156, 22 Sup. Ct. 457, 46 L. Ed. 478 (1901) A tax is not a contract debt, thus the decision in the principle case involves no impairment of contract rights. *New Whatcom v. Roeder* 22 Wash. 570, 61 Pac. 767 (1900) *Everett v. Adamson*, 106 Wash. 355, 180 P 144 (1919) *Maryland v. Baltimore & Ohio R. Co.*, 44 U. S. 534, 11 L. Ed. 714 (1845) There are no vested rights in mere modes of procedure. *Everett v. Adamson, supra, Webster v. Auditor General*, 121 Mich. 668, 80 N. W 705 (1899) *Louisville Car Wheel etc., Co. v. Louisville*, 146 Ky 573, 142 S. W 1043 (1912) *Norris v. Crocker* 54 U. S. 429, 14 L. Ed. 210 (1851) *Backus v. Ft. St. Union Depot Co.*, 169 U. S. 557, 42 L. Ed. 853, 18 Sup. Ct. 445 (1897). *Contra, State v. Jersey City*, 37 N. J. L.39 (1874) *Ryan v. State*, 5 Neb. 276 (1877) And even if in the instant case the defendants were correct in claiming that the state had a vested right to the 12% penalty, the statute in question amounted to a waiver by the state of any such right to the extra 2%, since a state may waive its rights the same as an individual.

The repeal of an act imposing a penalty destroys all right to enforce it. *Belvidere v. Warren R. Co., supra, Norris v. Crocker supra,* COOLEY, *op. cit.* § 1273. *Contra, Cedar Rapids & Missouri River R. Co. v. Carroll Co.*, 41 Iowa 648 (1875) *City of Hartford v. Champion*, 58 Conn. 268, 20 Atl. 471 (1899) When the 1931 statute referred to in the principal case went into effect, it impliedly repealed the earlier act, the right to the 12% penalty on all taxes then unpaid was gone and it was the duty of defendant to apply the law in force at the time of the tender. A. A. K.

DURESS—BUSINESS COMPULSION. Plaintiff brought action for royalties due under a patent license agreement. Defendant set up that it was building a garage on money being advanced on a mortgage of its leasehold, that plaintiff, by threats of suits against the mortgagee, caused the mortgagee to refuse to advance further money until the license agreement was executed; that defendant had no way other than through the mortgage of getting money to continue construction; that such continuance was essential if defendant was to avoid bankruptcy· and that to avoid bankruptcy and the loss of all its investments defendant executed the license agreement. *Held*, that the facts pleaded by defendant were good against demurrer on the ground of "business compulsion." *Ramp Buildings Corp. v. Northwest Building Co.*, 64 Wash. Dec. 516, 4 P (2d) 507 (1931).

Under the strict common law rule, an act could be avoided for duress *per minas* only when the threatened danger was either loss of life, loss of member, mayhem, or imprisonment. *Cornwall v. Anderson*, 85 Wash. 369, 375, 148 Pac. 1 (1915) *Brown v. Pierce*, 74 U. S. (7 Wall.) 205, 19 L. Ed. 134 (1868). The doctrine was gradually extended so as to recognize duress of property as a sort of moral duress which might, equally with duress of the person, constitute a defense to a contract induced thereby or entitle a party to recover back money paid under its influence. *Joannin v. Ogilvie*,

49 Minn. 564, 52 N. W 217, 16 L. R. A. 376, 32 Am. St. Rep. 581 (1892) Modernly the general holding is that there is duress where a person is deprived from the exercise of his free will by an act, or threat to do some act, which the threatening party has no right to do: some illegal exaction or some fraud or deception. *Siverson v. Clanton*, 88 Ore. 261, 170 Pac. 933 (1918) *Cornwall v. Anderson, supra*, and authorities there collected.

Tested by even this modern doctrine, the acts of the plaintiff in the instant case hardly seem to amount to duress. Threats of civil action were the only steps it took. To such threats a person has a perfect right to resort. *Zent v. Lewis*, 90 Wash. 651, 156 Pac. 848 (1916). Defendant's troubles seem to have been brought about by the stopping of payment due under the mortgage. No right on the part of the mortgagee to withhold the money is apparent. Without the money, defendant was faced with the loss of its investments and bankruptcy. These facts seem amply sufficient to bring the case within the rule that the actual or threatened exercise of power, possessed or believed to be possessed, by one person over the person or property of another, who is thereby rendered apprehensive of injury to his business interests, and has no other means of immediate relief than by doing the demanded act or making the demanded payment, will constitute such duress as will avoid a contract or make a payment involuntary. *McGuire & Co. v. H. G. Vogel Co.*, 86 Misc. 22, 148 N. Y. S. 176 (1914) note, Ann. Cas. 1918 B 516. With this doctrine Washington has been in complete accord, *Olympia Brewing Co. v. State*, 102 Wash. 494, 173 Pac. 430(1918) *Sunset Copper Co. v. Black*, 115 Wash. 132, 196 Pac. 640 (1921). Hence as against the mortgagee, defendant would have a good defense.

Long established in this field of law is a line of cases holding that the duress of a third party may be pleaded against one knowing of it at the time he received advantages thereunder. *Cram v. Powell*, 100 Ore. 708, 197 Pac. 280 (1921) notes, 4 A. L. R. 864, 62 A. L. R. 1477. An even stronger reason for allowing the defense exists here in that the duress by the third party was actually instigated by the threats of the plaintiff. *Lapman, Wolfe & Co. v. Phoenix Assur Co.* (C. C. A.), 9th Cir., 258 Fed. 544 (1919).

No reason was given by the court for its holding in the instant case. The opinion stated merely the conclusion that "business compulsion" existed. However the decision can well be justified, as developed above, on the ground that duress by the mortgagee may be pleaded by the defendant against the plaintiff.

Attention should be called in passing to the term "business compulsion" which seems to have been used by no other court but has appeared in a number of opinions in this state. *Duke v. Force*, 120 Wash. 599, 620, 208 Pac. 67 (1922) *Alwen v. Tramontin*, 131 Wash. 78, 228 Pac. 851 (1924) *Jacobsen v. Nicholas*, 155 Wash. 234, 283 Pac. 684 (1930) *Johnson v. Townsend & Co.*, 161 Wash. 332, 296 Pac. 1046 (1931).

F LeS.

PURCHASE ON MARGIN—GAMBLING TRANSACTIONS—INTENTION OF PARTIES. Ferro, a bank clerk with a salary of $150.00 per month and small assets, on much less than the customary margin, ordered of Eder & Co., securities to a total of nearly $78,000.00. Eder & Co., a brokerage company, belonged to no organized stock exchange but dealt in securities for customers through a member of the New York Stock Exchange. Ferro's account at one time showed a loss of more than his total assets, but subsequent trading reduced the balance against him to $370.00. Ferro refused to pay this balance on the grounds that it was a gambling contract. The trial court found that there was no intention to deliver, that it was a contract to pay differences only, and, under Rem. Comp. Statutes, Sections 2475 and 2476, defining bucket-shops, void as a gambling contract. Affirmed by the Supreme Court. Walter Coughlin, as receiver of George Eder & Co., Appellant v. C. M. Ferro, Respondent. 64 Wash. Dec. 61, 1 Pac. (2d) 910 (1931).

The court leaves the situation in some confusion, for it appears to treat this contract as one for future delivery, whereas it describes the trans-

action as one in which Eder acted as broker or agent rather than as seller for future delivery

By the general rule where the broker purchases securities for a margin customer, the relationship between them is that of pledgee and pledgor and the property in the stock—though not to any particular share—is in the customer. *Katz v. Nast*, 187 Fed. 529, 109 C. C. A. 295 (1910) *Douglass v. Carpenter* 17 App. Div. 329, 45 N. Y. S. 219 (1897) note in 41 A. L. R. 1258. If the title to the stock is in the customer, then, when the broker receives it pursuant to the intention of the customer, delivery has been made, not to the principal, but to the agent for the principal. *Hatch v. Douglass*, 48 Conn. 116, 40 Am. Rep. 154 (1880). Where this view is followed, once delivery has been made to the broker the problem is no longer one of future delivery By the minority view the title to the stock is in the broker and the relation is that of creditor and debtor. *Bentinck v. London Joint Stock Bank*, 2 Ch. (Eng.) 120 (1893) *Hall v. Paine*, 230 Mass. 62, 119 N. E. 664 (1918) *Furber v. Dane*, 204 Mass. 412, 90 N. E. 859, 27 L. R. A. (N. S.) 808 (1910).

Assuming that, either by reason of the above minority view or because the court believes that Eder was not acting as broker but as seller for future delivery then by the great weight of authority if neither party intended an actual delivery it is a wagering contract and void. *Irwin v. Williar* 110 U. S. 499, 4 S. Ct. 160, 28 L. Ed. 225 (1884) However, there are well recognized exceptions to this rule for it is held where the intention is to close the transaction by sales before the date of delivery or by "set-off," or "ringing-off," there is no wagering contract. *Board of Trade of Chicago v. Christie Grain Co.*, 198 U. S. 236, 25 S. Ct. 637, 49 L. Ed. 1031 (1905) *Gettys v. Newburger* 272 Fed. 209 (1921).

The broker has contractual relationships both with his customer and with the member of the Stock Exchange. The majority of the states will permit the customer to show that his contract with the broker was a wager to pay the difference between contract and market price at time for delivery even though he intended that the broker should effect an actual purchase on the Exchange. *Jamieson v. Wallace*, 167 Ill. 388, 47 N. E. 762 (1897) *Carson v. Milwaukee Produce Co.*, 133 Wis. 85, 113 N. W 393 (1907) *Waite v. Frank*, 14 S. D. 626, 86 N. W 645 (1901) *Snider v. Harvey*, 215 Pa. 538, 64 Atl. 687 (1906) 3 Williston on Contracts, Secs. 1672, 173.

It should be noted, however, that in a number of the cases in which the above distinction was made, the court was much influenced by a doubt that any actual purchases or sales were made even on the Exchange; and those decisions might well be supported on the ground that the broker did not show full performance of his contract, whatever the intention as to delivery to the customer might have been. *Waite v. Frank, supra, Snider v. Harvey, supra.* The same doubt was stressed in an earlier Washington case, *Glasgow v. Nichols*, 124 Wash. 281, 214 Pac. 165 (1923) which in that respect may be distinguished from the instant case in which the court apparently assumes that the purchases and sales were made by the broker. Cf. *Chandler v. Prince*, 214 Mass. 180, 100 N. E. 1029 (1913) *Houghton v. Keveney*, 230 Mass. 49, 119 N. E. 447 (1918)

In contrast with the above view, in England if the customer intends the broker to effect an actual purchase or sale on the Exchange, and the broker does so, this is conclusive of the validity of the contract between broker and customer. *Thacker v. Hardy*, 48 L. J. Q. B. 289, 4 Q. B. D. 685, 39 L. T. 595, 27 W R. 158 (1878) *Forget v. Ostigny*, 64 L. J. P C. 62, (1895) A. C. 318, 11 R. 474 P C., 72 L. T. 399, 43 W R. 590 (1895) reviewed in 20 L. Q. R. 59 The same result would probably be reached in New York. *Hurd v. Taylor* 181 N. Y. 231, 73 N. E. 977 (1905) *Springs v. James*, 137 N. Y. App. D. 110, 121 N. Y. S. 1054, 202 N. Y. 603, 96 N. E. 1131 (1910)

By the English view the validity of the contract seems to be determined by the application of the economic distinction between a wager and a speculation. Incident to every actual investment is a possibility of loss or gain. If the broker is willing to make the investment himself, to be compensated by a commission and secured by a margin, and let the cus-

tomer by contract assume the loss or gain which is incident to this actual investment, there would seem to be no logical reason why the intention not to deliver the stock to the customer should convert their contract into a wager. The inherent vice of a wagering contract is the creation of a fictitious loss or profit and not the shifting of a real one.

The majority view ignores the economic distinction and pursues a paternalistic public policy which endeavors to protect from loss the man of slender means who must speculate on a small margin or not at all.

In the instant case the Washington Court approves the view that the inadequacy of the customer's assets is strong evidence that neither party intended an actual delivery. *Jamieson v. Wallace, supra; Waite v. Frank, supra.* But it would seem to be evidence that the broker did not intend to buy and prepare for delivery, rather than that he would not deliver if he did buy. If the broker actually does make the purchase that should rebut the intention not to deliver. *Chandler v. Prince, supra.* And to some courts pecuniary inability of a customer does not indicate an intention to gamble but merely indicates that he is buying for speculation and not for a permanent investment. *Winward v. Lincoln,* 23 R. I. 476, 51 Atl. 106, 64 L. R. A. 160 (1902).

No sound distinction can be drawn between the purchase of securities on margin and the purchase of real estate on installments. The purchaser is commonly unable financially to pay in full for either. The courts have frowned upon the former for practical and social rather than legal or logical reasons. W F S.

LANDLORD AND TENANT—CONSTRUCTIVE EVICTION. A leased office rooms to B for one year. Before the expiration of the year B notified A of his intention to abandon the lease, whereupon A wrote B asserting his right to the rent for the unexpired period. B paid the rent for two months after abandoning and then refused to make further payments and returned the keys claiming A's use of the premises to store lumber and a removal of part of B's sign constituted a constructive eviction. On receiving such notice, A disclaimed knowledge of the removal of the sign and offered to replace the portion removed and turn the premises back to B, and again asserted his claim to rent. *Held*: The evidence did not show such acts as would amount to a constructive eviction. *Washington Securities Co. v. Oppenheimer & Co.*, 63 Wash. Dec. 255 (1931)

The decision in the principal case turns upon whether or not there has been a constructive eviction by the landlord. Upon the facts of this case it is clear that the acceptance of the keys by the landlord could not amount to an acceptance of the surrender by the tenant since the landlord at all times asserted his right to hold the tenant for the rent under the lease. *Brown v. Hayes,* 92 Wash. 300, 159 Pac. 89 (1916) *Scott v. Bucher* 91 Mich. 590, 52 N. W 20 (1892). Hence this point may be disposed of without further consideration.

Tiffany in his treatise on LANDLORD AND TENANT, Vol. 2 at page 1258, defines a constructive eviction as "acts of interference with his (tenants) enjoyment resulting in his relinquishment of possession." Chief Justice, Lord Jervis, speaking of a constructive eviction, says: "I think it may now be taken to mean this—not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises." *Upton v. Townsend,* 84 Eng. C. L. 30 (1855).

The cases recognize that an actual physical expulsion is not necessary to constitute an eviction. Any act by the landlord which is of a grave and permanent character and which interferes with the tenants' possession will amount to an eviction. *Thompson v. R. B. Realty Co.*, 105 Wash. 376, 177 Pac. 769 (1919) *Wusthoff v. Schwartz,* 32 Wash. 337, 73 Pac. 407 (1903) *Skally v. Shute,* 132 Mass. 367 (1881) *Keating v. Springer,* 146 Ill. 481, 34 N. E. 805, 22 L. R. A. 544, 37 Am. S. Rep. 175 (1893) *Kellog v. Lowe,* 38 Wash. 293, 80 Pac. 458 (1905) 22 A. L. R. 833, 22 Harvard Law Rev. 148. But the tenant must relinquish possession because of the act claimed to constitute a constructive eviction. *Carolina T. Paterno Corp. v. Grossman,* 175 N. Y. S. 510 (1919) 4 A. L. R. 1464, *Skally v. Shute, supra.*

The question arises as to whether or not there may be a constructive eviction when the lessee has, of his own volition, abandoned the premises. The great bulk of cases which might involve this question are disposed of on the theory of surrender by the tenant and acceptance of the surrender by the landlord. On principal there is little doubt but that there may be a constructive eviction, even though the tenant is out of possession since it would be impossible to have a constructive possession and an actual possession at the same time. The authorities on this point are very few, but the courts have recognized the principal suggested. *Hough v. Brown*, 104 Mich. 109, 62 N. W 143 (1895) *Biggs v. Thompson*, 9 Pa. 338 (1848) *Magaw v. Lambert*, 3 Barr 444 (Pa.) (1846) *Day v. Watson*, 8 Mich. 535 (1860)

There is the further question whether acts of the landlord which admittedly amount to an eviction when the tenant is in possession also amount to an eviction if he has surrendered his possession? Whether the courts would be willing to recognize this distinction cannot be definitely stated as no reported case has been found where it has been presented for consideration. Logically, however, such a line of demarcation might be drawn and acts which justify a holding of a constructive eviction when the tenant is in possession might be argued to constitute only a trespass if the tenant was out of possession. R. W M.