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Provability of Claims for Future Rent for Damages Against a Trustee in Bankruptcy or a Receiver of an Insolvent Tenant upon Abandonment of the Leased Premises, Measure of Damages in Federal Court Receiverships

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PROVABILITY OF CLAIMS FOR FUTURE RENT FOR DAMAGES AGAINST A TRUSTEE IN BANKRUPTCY OR A RECEIVER OF AN INSOLVENT TENANT UPON ABANDONMENT OF THE LEASED PREMISES, MEASURE OF DAMAGES IN FEDERAL COURT RECEIVERSHIPS.

1. INTRODUCTORY NOTE.

The large number of insolvency proceedings during the present economic period throws into relief two legal problems of vital importance to the landlord and the general creditors of the tenant. May the landlord prove a claim against the insolvent tenant's estate for the loss of future rent, or for damages due to the abandonment of the lease upon the insolvency of the tenant, and if such a claim is provable, what is the measure of damages? These problems are acute because of the present extreme deflation in rental values where the involvent's lease has an unexpired term of many years at fixed rentals which in amount may be double the present rental value of the same premises for the balance of the term.

A considerable number of chain stores[1] and other enterprises operating in many states have resorted to receiverships, partially at least to mitigate the high rent factor in their fixed operating cost through the disaffirmance of leases by the receiver. In the end the business is often returned to the same hands from which the receiver took it. Receivership frequently serves as a method of reorganization.[2] The courts have thus, in many instances, served as a clearing house of the depression, where old liabilities and fixed charges are liquidated and deflated in an orderly way under the sanction of the law, by a pro rata distribution of assets (i. e., the present deflated market value of the assets) to creditors of the estate in the receiver's hands. How does the landlord fare in these proceedings?

[1] See Bulletin No. 10, Commerce Clearing House, Inc., Oct. 1932, p. 333, "The Rent Cost Deflation". Business Week for Oct. 5, 1932. Examples of receivership: *United Cigar Stores Co.*, 900 retail cigar stores; *Whelan Drug Co.*, over 200 stores; *F & W Grand 5-10-25c Stores, Hartman Furniture & Carpet Co.*

[2] See Note 1, and 45 Harv. L. R. 1394, "Reorganization, Consolidation and Sale."

II. Claims in Bankruptcy and in Receivership

It may be noted at the outset that a claim for damages filed by a landlord under the Bankruptcy Act[3] upon the abandonment of leased premises by the trustee of the tenant, is not provable in bankruptcy[4] even though an attempt be made to provide in the lease for termination thereof upon the bankruptcy of the tenant, and for the allowance of a fixed sum in liquidation of damages.[5]

This conclusion is based upon the common law rule that rent proceeds from the soil and is not earned until occupancy is enjoyed.[6] Future rentals not being due, no debt is deemed to have been owing at the time of the filing of the petition in bankruptcy, and therefore no claim can be proved.[7] The result is that the bankrupt remains bound by the lease, and as to it is not discharged,[8] a result which works hardship on both lessor and lessee, and is only to the advantage of the creditors of the lessee, whose pro rata shares on distribution of assets are naturally increased

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[3] Section 63 (a) (4) Title 11, Sec. 103 (a) (4) U. S. Code Ann., Debts of the bankrupt may be proved and allowed against the estate which are (4) founded upon an open account, or upon a contract express or implied, (b) unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against the estate.

[4] *In re Roth & Appel*, 181 Fed 667 (C. C. A. 2, 1911) *Watson v. Merrill*, 136 Fed. 359, 69 A. L. R. 719 (C. C. A. 8 1905) *Wells v. 21st Street Realty Co.* 12 F (2d) 237 (C. C. A. 6 1926) *In re McAllister Maher Co.* 46 F (2d) 91 (D. C. Ohio 1930) *In re Neff*, 157 Fed. 57 (1907) *McDonnell v. Woods* 298 Fed. 434 (C. C. A. 1 1924) *In re Goldberg*, 52 F (2d) 156 (D. C. N. Y. 1931) *In re Service Appliance Co.*, 45 F (2d) 884 (D. C. N. Y. 1930).

[5] See *R. C. Taylor Trust Co. v. Kothe*, 30 F (2d) 77 (C. C. A. 1, 1929), where provision in a lease for liquidated damages was sustained by the Circuit Court. (Discussed in 38 Yale L. J. 985, 42 Harv. L. R. 951) The decision was reversed by the U. S. Supreme Court on the grounds that the provision was prejudicial to creditors of the bankrupt and unenforceable in bankruptcy See Justice McReynold's decision in *Kothe v. Taylor Trust Co.* 280 U. S. 224, 74 L. Ed. 382, (1930).

[6] Coke on Littleton, 292 (b) *Bordman v. Osborn*, 23 Pick. 295 (Mass.) (1839) *Gardner v. Butler* 245 U. S. 603, 62 L. Ed. 505 (1918). In *Central Trust Co. v Chicago Auditorium Assn.*, 240 U. S. 581, 60 L. Ed. 811, (1915) the Supreme Court distinguished a claim for breach of an executory contract from a case wherein a landlord's claim for damages on abandonment of a lease is sought to be proved, "Cases of the latter class are distinguished because of the 'diversity' between duties which touch the realty and the mere personalty."

[7] What appears to be an exception to this rule is found in *In re Mullings*, 238 Fed. 59 (C. C. A. 2, 1916), where dissolution proceedings caused a repudiation of the lease before the lessee entered into possession and before petition in bankruptcy was filed, and the lessor was allowed to prove a claim for the difference between the rent reserved and the rental value of the premises. The court distinguished the case from ordinary bankruptcy where the lessee is not discharged and reversed the District Court, which had disallowed the claim in accordance with the general rule 230 Fed. 681 (D. C. Conn., 1916).

[8] *In re Goldberg, supra*, Note 4.

by the absence of the landlord's claim. This result has been much criticized.[9]

A receiver, like a trustee in bankruptcy, has power to adopt or abandon an existing lease.[10] But in receivership cases the courts are not confronted with the statutory limitations which arise in bankruptcy As stated by Mr. Justice Holmes in *Filene's Sons Co. v. Weed,*[11] where a claim against a receiver was sustained upon the basis of an agreed measure of damages in the lease, namely the difference between the rent reserved and the rental value of the premises.

> "When a statutory system is administered the only question for the courts is what the statutes prescribe. But when the courts without statute take possession of all the assets of a corporation under a bill like the present and so make it impossible to collect debts except from the court's hands, they have no warrant for excluding creditors, or for introducing supposed equities other than those determined by the contracts that the debtor was content to make and the creditors to accept. In order to make a distribution possible they must of necessity limit the time for the proof of the claims. But they have no authority to give to the filing of the bill the effect of the filing of a petition in bankruptcy so as to exclude any previously made and lawful claim that matures within a reasonable time before distribution can be made."

In the absence of a "statutory system" in administering receiverships, resulting in wide divergence of opinion among federal courts regarding the provability of claims for damages for disaffirmance of a lease by the receiver,[12] many courts disallow such claims, not on the grounds stated in the bankruptcy cases, but because the damages are said to be speculative and conjectural and incapable

[9] See "Amendment to Bankruptcy Act," McLaughlin, 40 Harv. L. R. (1927) 583,608; "The Provability Against Insolvent Estate of the Landlord's Claim for Future Rent", 41 Harv. L. R. 894. The U. S. Sup. Ct. has allowed proof of a claim for anticipatory breach of an executory contract in *Central Trust Co. v. Chicago Auditorium Assn., supra,* Note 6, following *Roehm v. Horst,* 178 U. S. 1, 44 L. Ed. 953, (1899) and there would seem to be no reason in principle why damages for breach of a lease should not be provable aside from the reasons stated by the Supreme Court in *Gardner v. Butler supra,* Note 6: "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." This reason would seem to apply more correctly in states where the common law rule is strictly in force, such as Ohio and Massachusetts *In re Service Appliance Co., supra,* Note 4, *Filene's Sons Co. v. Weed,* 245 U. S. 603, 62 L. Ed. 505 (1918).

[10] *Pa. Steel Co. v. N. Y. City Ry. Co.,* 198 Fed. 721 (1912) *Sunflower Oil Co. v. Wilson,* 142 U. S. 313, 332, 35 L. Ed. 1025, 1028, (1892).

[11] Cited in Note 9.

[12] A number of decisions deny the right of the receiver to abrogate a lease by disaffirmance and hold the lessee bound by the lease. See *New York etc. v. New York L. E. & W R. Co.* 58 Fed 268, (1893) *Detroit & T. S. L. R. Co. v. Detroit T. & I. R. Co.* 280 Fed. 549, (1923).

of that certainty of proof which the law requires.[13] We should, therefore, determine whether the federal courts will follow the state law in passing upon the landlord's claims, and if so, what the law of Washington is relative thereto.

III. What Law Controls in Federal Court Receiverships, Measure of Damages Under Washington Decisions.

Clearly "in trials at common law" the federal court will follow the state court's decision where the treaties, constitutions or statutes of the United States do not conflict, but the provision of the judicial code cited below[14] does not affect the federal court sitting as a court of equity However, where the action is purely local in character and invokes a rule of property within the state, the federal courts will follow the decisions of state courts, in a court of equity as well as in a court of law [15] Even in cases arising under the federal bankruptcy statutes, a rule of law adopted by the state courts as to the relations of landlord and tenant under a lease of property within the state, is adhered to.[16] Federal courts will likewise follow the state courts' decision in determining the measure of damages and the provability of a claim upon disaffirmance of a lease by a receiver. It was so held by Judge Tuttle in the United States District Court for the Eastern District of Michigan, Northern Division, in the case of *Leo v. Pearce Stores Co.*[17], in

[13] *Pa. Steel Co. v. N. Y City Ry. Co., supra*, Note 10, Circuit Judge Noyes said, at page 759 (198 Fed.) "Who could foretell the results of operation by the owner, the growth of the city, improvements in motive power, or reductions in cost? Who could foresee whether a lease could be made to another railroad company or the terms thereof? The whole matter of future damages was and still is a matter of conjecture and guess work. The claim for such damages was properly disallowed because it was uncertain in amount and there was no method of making it certain. *Pacific States Corp. v. Resenshine*, 113 Cal. App. 266, 298 Pac. 155 (1931). See Comment in Vol. XV Cal. L. Rev. Sept., 1932, page 622.

[14] Title 28, §725, U. S. C. A.

[15] *Mason v. U. S*,. 260 U. S. 545, 67 L. Ed. 396, at 401 (1923) "Here, while the suit is one in equity the statute and decisions relied upon have nothing to do with the general principles of equity or with the federal equity jurisdiction, but simply establish a measure of damages applicable alike to actions at law and suits in equity. The case presented by the bills is primarily one involving title to land, and seeking an injunction against continuing trespasses. The conversion of the oil, for which damages are sought, is incidental and dependent. The entire cause of action is therefore local." However, in the absence of a rule of decision in the state courts, or in the case of conflicting opinions, the Supreme Court has said in *Hines Yellow Pine Trustees v. Martin*, 268 U. S. 458, 69 L. Ed. 1050 (1925) "Both the meaning of statutes of a state and the rules of the unwritten law of a state affecting property within the state are peculiarly questions of local courts."

[16] *In re McAllister-Mohler Co.*, 46 F (2d) 91, at 95 (1930) the court said: "I am bound willy-nilly by the decision of our circuit court of appeals on the question of the application of the common law rule as to leases in the State of Ohio, * * * " *In re Service Appliance Co., Inc., supra*, Note 4. "This court must follow the Massachusetts cases."

[17] 54 Fed. (2d) 92 (1931).

which a receiver for the Pearce Stores Company had been appointed, and shortly thereafter a considerable number of leases on business property in the State of Michigan were disaffirmed by the receiver. Upon the filing of claims as provided by the District Court, the question discussed herein arose and the court said in respect to the law of the case:

> "The decisions of the courts upon this question are in conflict. The courts of some states and of the federal courts sitting in such states deny, while in other states they sustain, the provability of such damages. There is no occasion here to analyze the various arguments and decisions presented in this connection or to determine their relative merits, because I reach the conclusion that the question involved is one of local law on which the federal court will follow the rule adopted by the courts of the particular state where the leasehold premises in question are situated. (Cases cited.) As, therefore, the property here involved is located in Michigan and the leases under consideration are Michigan leases, this court in determining this question will apply the law as established by the court of last resort of that state."

The court then went on to point out that such claims were provable under the law of Michigan, following *McGraw v. Union Trust Co.*[18] in which the landlord was allowed to prove a claim for damages against a receiver upon abandonment of a five-year lease with an unexpired term of approximately two years. The landlord succeeded in reletting the premises after several months, for the balance of the term at a lower rent than that designated in the original lease. He filed and sought to prove a claim for the difference between the rent reserved and the rental secured under the new lease. The court said.

> "The rule appears to be that a receiver may elect whether he will take over and assume, or discard and disavow, outstanding leases of the insolvent party The receiver will naturally take over leased premises which are profitable, and will also seek to surrender leases unprofitable to the tenant, but profitable to the landlord. For this reason the lessor is allowed to himself re-rent the premises, and if there is a deficiency arising out of such re-renting, such amount is a provable claim. * * * There is nothing contingent about the claim of the petitioners. Their claim is absolute. The rent accruing down to March 1, 1903, is absolute and fixed, and the loss of the remaining fourteen months became fixed and absolute when the Malcomson lease was entered into."

What, then, is the law of Washington in respect to the lessor's

[18] 135 Mich. 609, 98 N. W 390 (1904).

right of recovery? In *Dutton v. Christie*,[19] it was held that a deposit made in pursuance of the lease to be applied on the last two months' rent in the event of faithful performance, was consideration for the lease and could be retained on abandonment of the premises by the tenant, and in *Barrett v. Munro*,[20] where a five-year lease was terminated before two years had elapsed, the lessor's right to a deposit of $1,200 was sustained as liquidated damages.[21] The court said, at page 232

> "It is manifest that the parties agreed upon liquidated damages because their exact measurement could not be readily ascertained."

If the lease contained a provision for liquidated damages, no greater amount can be proved,[22] but in the absence of a provision for liquidated damages the Supreme Court of Washington has followed the weight of authority[23] by permitting the landlord to prove the difference between the rent reserved in the lease and the rental value of the premises for the balance of the term, as the measure of his recovery

In the case of *Oldfield v. Angeles Brewing & Malting Co.*,[24] the parties had entered into a contract whereby the plaintiff agreed to erect a building on the premises owned by him, and upon completion thereof, to lease the same to the defendant for five years. The agreement was in the form of a lease and the premises were to be used for a saloon. Before completion of the building, a law was passed forbidding the sale of intoxicating liquors within 300 feet of any state armory The plaintiff's building was within the

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[19] 63 Wash. 372, 115 Pac. 856 (1911).

[20] 69 Wash. 229, 124 Pac. 369 (1912)

[21] See *Stern v. Green*, 127 Wash. 429, 221 Pac. 601 (1923) where the deposit of a liberty bond is distinguished from the above deposit.

[22] *Smith v. Lambert Transfer Co.*, 109 Wash. 529; 187 Pac. 326 (1920) *Pacific & Puget Sound Bottling Co. v. Clithero*, 162 Wash. 156, 298 Pac. 316, (1931).

[23] California: *Imperial Water Co. No. 8 v. Cameron*, 67 Cal. App. 591, 228 Pac. 678 (1924) *Silva v. Barr* 141 Cal. 599, 75 Pac. 162 (1904) *Bradbury v. Higginson*, 162 Cal. 602, 123 Pac. 797 (1912). Kansas: *Wilson v. National Refining Co.*, 126 Kan. 139, 266 Pac. 941 (1928) *Post v. Davis*, Kan. App. 217, 52 Pac. 903 (1898) Idaho: *Porter v. Allen*, 81 Ida. 358, 69 Pac. 105, (1902). Texas: *Smith v. Irwin* Ct. of Civil App. of Tex. 289 S. W 113 (1926) *Dulin v. Knechtel*, Ct. of Civil App. of Tex., 51 S. W 350 (1899) South Carolina. *Burkhelter v. Townsend*, 139 S. C. 324, 138 S. E. 34 (1927) *Simon v. Kirkpatrick*, 141 S. C. 251, 139 S. E. 614 (1927) North Carolina: *Monger v. Lutterloh*, 195 N. C. 274, 142 S. E. 12 (1928). Michigan, *Leo v. Pearce Stores Co.*, 57 F (2d) 340, (1932) *McGraw v. Union Trust Co.* 135 Mich. 609, 98 N. W 390, (1904) Illinois: *Smith v. Goodman*, 149 Ill. 75, 36 N. E. 621, (1893) *Chemical Nat. Bank v. Hartford Deposit Co.*, 156 Ill. 522, 41 N. E. 225 (1895). Pennsylvania. *In re Reading Iron Works* 150 Pa. 369, 24 Atl. 617, (1892). New Jersey· *Bolles v. Crescent Drug Co.*, 53 N. J. Eq. 614, 32 Atl. 1061 (1895) New York: *People v. St. Nicholas Bank of N Y.*, 151 N. Y. 592, 45 N. E. 1129 (1897).

[24] 62 Wash. 260, 263, 113 Pac. 630 (1911)

prohibition of the statute. As the defendant refused to take possession, the relation of landlord and tenant never arose. The plaintiff brought suit, founding his action on a claim for rent up to the time of filing suit, and was given judgment therefor below. In reversing the lower court the Supreme Court said.

> "* * * the great weight of authority is to the effect that the true measure of damages, for failure to take possession, is the difference between the amount stipulated in the contract and the sum for which the premises would rent to other parties during the stipulated term, and in this connection the rule is the same as in leases or agreements to lease. * * * There is but one breach, and there should be but one recovery for that breach."

Upon retrial of the case, plaintiff failed to amend the complaint, which was still founded on a claim for rent, and over the objection of the defendant was permitted to prove the difference between the rent reserved in the lease and the rental value of the premises. The case was again appealed to the Supreme Court,[25] where the court again reversed the lower court on the ground that the allegations in the complaint did not permit such proof.[26] The case was then tried for the third time wth proper amendments to the complaint, and the plaintiff in endeavoring to prove damages sought to show the rental value of the premises for the balance of the term, from period to period, that is, from April, 1909, to April, 1910, etc. This was held to be error and the lower court was again reversed, the Supreme Court saying·

> " * * * the question to be tried was this, Was the rental value of the premises for the term, that is for five years, in April, 1909, of greater or less value than the rent reserved in the lease? If the former, the respondent was not damaged, if the latter, his damage was the difference between the two amounts to be fixed at the time the breach occurred. That this is the true measure of damages is the logic of both of these cases. It is also the rule supported by the great weight of authority "[27]

This series of decisions defines clearly the measure of damages for refusal to take possession of leased premises, and the Supreme Court stated in its first decision that the same measure of damages would be applied whether or not the tenant had entered into possession. Any academic doubts which might have arisen on this

[25] 72 Wash. 168, 129 Pac. 1098 (1913).

[26] The appointment of a receiver for the defendant company before the second appeal, did not affect the cause of action. It may be inferred in passing that the plaintiff's judgment would be paid out of assets in the hands of the receiver, that is, by sharing in the pro rata distribution to creditors, although this does not appear in the decision.

[27] 77 Wash. 158, 160, 137 Pac. 469 (1913).

point, due to the fact that no relation of landlord and tenant existed in the *Oldfield* case, *supra,* were dispelled by the decision in *Brown v. Hayes* (1916), 92 Wash. 300,[28] in which the rule of the *Oldfield* case was applied in an action by the lessor on abandonment of premises by the tenant, the court saying:

> "It is just as well established as is the general rule that, when a tenant abandons the premises without just cause and refuses to pay rent, the landlord may either treat the term as still subsisting and sue for the installments of rent reserved as they accrue, or, treating the lease as terminated by the tenant's breach, re-enter and sue for damages for the breach. * * * If the landlord pursues the latter course, his damages are measured, not by the amount of the rent reserved, but by the difference between that amount and the rental value of the premises to the end of the term."

There is as yet no decision squarely in point in Washington like that of *McGraw v. Union Trust Co., supra,* in Michigan, which applies the measure of damages of the foregoing decisions to the proof of a claim for disaffirmance of a lease by the receiver.[29] It could scarcely be contended, however, that the court would refuse to apply this measure of damages to proof of a claim in receivership. As stated in *McGraw v. Union Trust Co.*

> "The bank had the right to make the lease when it did, and had it continued in business and abandoned the premises, and the lessor, in accordance with the terms of the lease, had re-entered and re-let the premises at a loss, there could be no question but the lessor would have a remedy over against the bank. The following cases—and we think they are in accord with the weight of authorities —recognize the same right in the lessor where the prem-

[28] 92 Wash. 300, 302, 159 Pac. 89 (1916) The question of whether or not the landlord has accepted the surrender of the premises, or whether or not surrender by operation of law is present, thus terminating any right which the landlord might have had to recover against the tenant, is usually present in cases of this sort and is discussed in *Brown v. Hayes.* This matter is beyond the scope of this article, although vital in the landlord's action against the tenant. See: Notes 3, A. L. R. 1080; 52 A. L. R. 154, L. R. A. 1917A 208; *Martin v. Seigley* 123 Wash. 683, 212 Pac. 1057, (1923) *Washington Securities Co. v. Oppenheimer & Co.* 163 Wash. 338, 1 Pac. (2d) 236, (1931)

[29] In the case of *Crescent Mfg. Co. v. Friedenthal,* 124 Wash. 682, 215 Pac. 19 (1923) a lessor was permitted to retain a deposit of $380 against the contention of the tenant's receiver that it should be applied against rental due for the period of the tenant's and the receiver's occupancy. It was the lessor's contention that the $380 equalled the difference between the rent reserved in the lease and the amount for which he was able to rent the premises to another tenant. This position was impliedly sustained, but no authorities are cited and the case is not carefully considered.

> ises are vacated because of the insolvency of the corporation and the appointment of a receiver * * * "[30]

It is submitted then that a claim for damages by a landlord upon disaffirmance of a lease by a tenant's receiver can be proved in Washington, and that the measure of damages is the difference between the rent reserved in the lease and the rental value of the premises for the balance of the term.[31]

It is submitted that the same measure of damages would be applied in the proof of a claim in the federal court upon disaffirmance of a federal receiver of a lease of property within the State of Washington, as held by Judge Tuttle in *Leo v. Pearce Stores Co., supra.*

IV Measure of Damages During the "Depression."

Having determined what is believed to be the logic of this matter, we refer again to the introductory note of this article, and recall the almost unprecedented deflation of rental values confronting us today In the *Oldfield* case, *supra,* damages were proved for a period of five years, in the *McGraw* and *Brown* cases, *supra,* for shorter periods, but what would be the effect of applying the same measure of damages in a receivership proceeding where the receiver has disaffirmed, let us say, a twenty-year lease on property which we shall assume was rented for $1,000 a month for the full term? The lease has been disaffirmed. The rental value of the premises may now be $500 a month or less, such depreciation being not at all unusual.[32] The landlord must then be allowed a claim amounting to $500 a month for twenty years, or a total of $120,000, a suggestion which would leave general creditors somewhat aghast. A few claims of this size against the receiver would eat up the assets and reduce the pro rata distribution to general creditors to

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[30] 135 Mich. 609, 68 N. W 390, 392 (1904). The court cited the following decisions: *People v. St. Nicholas Bank,* 151 N. Y. 592, 45 N. E. 1129; *Reading Iron Works,* 150 Pa. 369. 24 Atl. 617 *People v. Nat. Trust Co.,* 82 N. Y. 283; *Chemical Bank v. Deposit Co.,* 156 Ill. 522, 41 N. E. 225, *Bolles v. Crescent Drug Co.,* 53 N. J. Eq. 614, 32 Atl. 1061. See Note 19 above. See also *Kalkhoff v. Nelson,* 62 N. W 1024 (1895) (Minn.) *Minneapolis Baseball Co. v. City Bank,* 76 N. W 1024 (1898) (Minn.)

[31] It would seem that the proof of the rental value of the premises for the balance of the term could be most firmly established by showing a bona fide lease to a new tenant for the full term, as in *McGraw v. Union Trust Co., supra,* but in the absence of a lease, expert testimony as to the rental value for the balance of the term is apparently authorized by *Oldfield v. Angeles Brewing & Malting Co., supra,* although not expressly mentioned by the court. No lease was introduced and the plaintiff apparently relied upon expert testimony.

[32] The writer has recently attended hearings in a federal court receivership in which the rental values of certain business properties were shown by expert testimony to have depreciated much more than 50 per cent since the execution, in 1929 and 1930, of the leases disaffirmed by the receiver.

a fraction of what it would be if the landlord's claim were not allowed in the full measure to which the *Oldfield* case would entitle him. The implication of such a situation had apparently not occurred to Judge Tuttle in *Leo v. Pearce Stores Co., supra,* for he said in his first decision on this case

> "For the reasons stated, I reach the conclusion that these lessors are entitled to recover their damages resulting from the anticipatory breach of the leases on which their claims are based, and the contention of the receiver to the contrary must be overruled. As the argument of the receiver with respect to these claims has been confined to the question of their provability, and it does not appear that there is, or will be, any dispute between the receiver and the claimants concerning the proper measure or amount of the damages recoverable, I shall assume, until the contrary appears, that the interested parties will be able to agree on the amount of such damages, and that it will not be necessary for this court to determine such amount."[33]

The assumption proved to be wrong, for the case was again before the same judge in March of 1932. The court for the first time faced the problem of applying the measure of damages established in his preceding decision to a lease with an unexpired term of twenty years, and confronted, too, the depreciation of rental values between 1929 and 1931, a depreciation according to expert witnesses, of 25% to 30% After considering the evidence and the estimates of real estate experts as to the rental value of the premises for the unexpired term of the lease (which in the absence of a *bona fide* lease for the full balance of the term is the only proof obtainable), the court said

> "Evidence of the fair rental value of a lease on premises for a period extending eighteen years into the future does not, especially during the present period of abnormally low values of which this court will take judicial notice,[34] indicate the fair rental value of such premises during such future period of eighteen years, if leased for periods of less than that duration, as it would manifestly be the duty of the lessor to do if reasonably possible, and as this record wholly fails to show is impossible or improbable. Clearly, the evidence falls far short of meeting the burden, resting upon the claimant lessor, of proving, with the certainty required by law, the amount of the damages suf-

[33] 54 Fed. (2d) 92, 94 (1931).

[34] The United States Supreme Court has taken judicial notice of the depression in an interstate commerce rate case: *Atchison & S. F R. Co. v. U. S.*, 284 U. S. 248 at 260 (1931)

> fered by him and recoverable under the applicable measure of damages already mentioned."[35]

Strictly speaking, if this conclusion were correct, the claimant would take nothing, but the court concludes

> "* * * in view of the equities of the parties of which this court may properly take cognizance in this equitable proceeding, concluded that the rights of all parties concerned will be properly protected by an allowance to the claimant lessor of the sum of $7,500 as representing an amount which will fairly compensate him for all of his damages reasonably to be anticipated as a result of the breach of this lease by the lessee defendant here."[36]

Seldom has a retreat to "the equities of the parties" been more understandable. The court had only one of two possible courses to follow, between which there is no logical medium ground. (1) It could apply the correct measure of damages, accept the opinion of experts as to the value of the unexpired term, and allow damages in full for the difference between that value and the rent reserved in the lease, thus swelling the landlord's share of the pro rata distribution to the very great prejudice of general creditors, or (2) It could disallow the claim on the ground that damages were not proved with sufficient certainty, to the great prejudice of the landlord. Impaled upon its former decision, the court could not take the latter course. In view of "the equities of the parties" it could not take the former. Perhaps, after all, the decision lies within the ancient jurisdiction of Equity defined by Aristotle as the "correction of the law, where by reason of its universality, it is deficient."

NORMAN M. LITTELL.*

[35] 57 Fed. (2d) 340, 341 (1932).
[36] Ibid at p. 342.
*Of the Seattle Bar.