Fordham Law Review

Volume 7 | Issue 1 Article 7

1938

Recent Statutes

RECENT STATUTES

LANDLORD AND TENANT—LIABILITY OF LANDLORD FOR NEGLIGENCE.—Chapter 907[1] of the Laws of 1937 enunciates a new public policy[2] and abridges freedom of contract to the extent of prohibiting a lessor from incorporating into a lease any covenant exempting him or his servants from liability for negligent maintenance or operation of the demised premises. Collateral agreements to the same effect are similarly proscribed.

Covenants like these have been a powerful weapon for avoiding liabilities which the law has attached to various relationships. While the right of such anticipatory release of liability has been denied to employers,[3] common carriers,[4] and warehousemen,[5]

1. N. Y. Laws 1937, c. 907, adding § 234 to the REAL PROPERTY LAW: *"Agreements exempting lessors from liability for negligence void and unenforceable.* Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable."

2. Up to this time the holding of the Court of Appeals in the case of Kirshenbaum v. General Outdoor Adv. Co. had been law. The court there said: "We think it clear that public policy does not condemn the immunity clause voluntarily agreed upon by these parties." 258 N. Y. 489, 495, 180 N. E. 245, 247 (1932).

3. Roesner v. Herman, 8 Fed. 782 (D. Ind. 1881); E. L. Bruce Co. v. Leake, 176 Ark. 705, 3 S. W. (2d) 988 (1928); Hinrod Coal Co. v. Clark, 197 Ill. 514, 64 N. E. 282 (1902); Atchison, Topeka & S. F. Ry. v. Fronk, 74 Kan. 519, 87 Pac. 698 (1906); Olson v. Nebraska Tel. Co., 83 Neb. 735, 120 N. W. 421 (1909); Johnson v. Fargo, 184 N. Y. 379, 77 N. E. 388 (1906). After an accident, the injured laborer may release his employer from liability for negligence. Lindsay v. Acme Cement Plaster Co., 220 Mich. 367, 190 N. W. 275 (1922).

4. In most American jurisdictions a carrier, acting within the scope of its public service duties cannot stipulate for freedom from liability for negligence. Adams Express Co. v. Croninger, 226 U. S. 491 (1913); American Fruit Distributors v. Hines, 55 Cal. App. 377, 203 Pac. 821 (1921); Cox v. Central Vermont R. R., 170 Mass. 129, 49 N. E. 97 (1898); Paul v. Pennsylvania R. R., 70 N. J. L. 442, 57 Atl. 139 (1904); Straus & Co. v. Canadian Pac. Ry., 254 N. Y. 407, 173 N. E. 564 (1930); N. Y. PERS. PROP. LAW (1911) § 189. This is true even though a special consideration be given for such an agreement. See Kansas City Southern Ry. v. Carl, 227 U. S. 639, 650 (1912); San Giorgio I v. Rheinstrom Co., 294 U. S. 494, 496 (1934). A common carrier may, however, enter into a contract with a shipper of goods by which it is agreed that its liability be limited to a specified amount, even in the event of negligence. Hart v. Pennsylvania R. R., 112 U. S. 331 (1884); 4 WILLISTON, CONTRACTS (Rev. ed. 1936) § 1110. The shipper must be given consideration in the form of lower rates and an option to ship at full liability. Pierce Co. v. Wells, Fargo & Co., 236 U. S. 278 (1915); Straus & Co. v. Canadian Pac. Ry., 254 N. Y. 407, 173 N. E. 564 (1930).

5. 3 UNIFORM LAWS ANN. § 3, which has been incorporated into N. Y. GEN. BUS. LAW (1909) § 91; Morse v. Imperial Grain & Warehouse Co., 40 Cal. App. 574, 181 Pac. 815 (1919); Adler v. Bush Terminal Co., 161 Misc. 509, 291 N. Y. Supp. 435 (Sup. Ct. 1936); Cameron Compress Co. v. Whitington, 280 S. W. 527 (Tex. 1926). However, liability may be limited to an evaluation of the goods agreed upon by the parties, and the depositor will be estopped from recovering more than this amount even if loss is due to warehouseman's negligence. McMullin v. Fireproof Storage Co., 74 Cal. App. 87, 239 Pac. 422 (1925).

it has been exercised with judicial sanction by private carriers,[6] bailees,[7] and suppliers of credit information.[8] Banks have been allowed to exempt themselves from the consequences of their negligent failure to honor stop payment orders,[9] and from liability for the negligence of correspondent banks to which commercial paper has been given for collection.[10]

It is elementary that at common law while a lessor was not obligated to repair leased premises if they developed defects,[11] yet he was under a duty to keep in safe condition those parts of a building which remained in his control.[12] These included such appurtenances as pipes for water[13] and heating,[14] and a roof used in common by several tenants in a building.[15] Negligent maintenance of these premises subjected him to an action, if proximately productive of injury to person or property. Faced with

6. Clough v. Grand Trunk Western Ry., 155 Fed. 81 (C.C.A. 6th, 1907); Ferrari v. New York Cent. & H. R. R., 162 App. Div. 6, 147 N. Y. Supp. 376 (1st Dep't 1914); McKeon v. New York, N. H. & H. R. R., 177 App. Div. 462, 164 N. Y. Supp. 312 (1st Dep't 1917).

7. Interstate Compress Co. v. Agnew, 276 Fed. 882 (C.C.A. 8th, 1921). " . . . there is no principle in our law that would prevent a depositary from contracting not to be liable for any degree of negligence, in which fraud is really absent." STORY, BAILMENTS (9th ed. 1878) § 32. To the effect that a bailee may exempt himself from the consequences of *mere* negligence as distinguished from *gross* negligence see VAN ZILE, BAILMENTS & CARRIERS (2d ed. 1908) § 59. But see Hotel Statler Co. V. Safier, 103 Ohio St. 638, 643, 134 N. E. 460, 462 (1921). It appears to be the general rule that where a statute imposes on bailees for hire the duty of ordinary care they cannot, by contract, release themselves from liability for negligence. Scott Auto & Supply Co. v. McQueen, 111 Okla. 107, 226 Pac. 372 (1924). Such statutes are only declarative of the common law. It is submitted that if they should be held as voiding a bailee's contract of exemption, then the common law of which they are a mere statement should also be held as voiding a bailee's agreement of exculpation.

The basis of this doctrine of anticipatory release from liability is that inasmuch as consent is a good defense to many torts, such consent in advance should be permitted so long as no public interest is involved. Willis, *Right of Bailees to Contract Against Liability for Negligence* (1907) 20 HARV. L. REV. 297.

8. Globe Home Imp. Co. v. Perth Amboy C. of C. Credit Rating Bureau, 116 N. J. L. 168, 182 Atl. 641 (1936); Xiques v. Broadstreet Co., 70 Hun 334, 24 N. Y. Supp. 48 (Sup. Ct. 1893).

9. Tremont Trust Co. v. Burack, 235 Mass. 398, 126 N. E. 782 (1920); Gaita v. Windsor Bank, 251 N. Y. 152, 167 N. E. 203 (1929).

10. Jefferson County Bldg. &. Loan Ass'n v. Southern Bank & T. Co., 225 Ala. 25, 142 So. 66 (1932); Farmers' State Bank v. Union National Bank, 42 N. D. 449, 173 N. W. 789 (1919); see Isler v. National Park Bank, 239 N. Y. 462, 469, 147 N. E. 66, 69 (1925).

11. Sheets v. Selden, 7 Wall. 416 (U. S. 1868); Hill v. Day, 103 Me. 467, 81 Atl. 581 (1911); Phelan v. Fitzpatrick, 188 Mass. 237, 74 N. E. 326 (1905); Laird v. McGeorge, 16 Misc. 70, 37 N. Y. Supp. 631 (Sup. Ct. 1896). The Civil Law, in the absence of covenant to the contrary placed the duty of repair on the landlord. Viterbo v. Friedlander, 120 U. S. 707 (1887).

12. Looney v. McLean, 129 Mass. 33 (1880); Peil v. Reinhart, 127 N. Y. 381, 27 N. E. 1077 (1891); Lorensen v. Klebansky, 118 Misc. 247, 193 N. Y. Supp. 224 (Sup. Ct. 1922); JONES, LANDLORD AND TENANT (1906) § 587.

13. Priest v. Nichols, 116 Mass. 401 (1874).

14. Bryant v. Carr, 52 Misc. 155, 101 N. Y. Supp. 646 (Sup. Ct. 1905).

15. Peats Co. v. Bradley, 166 App. Div. 267, 151 N. Y. Supp. 602 (1st Dep't 1915); 2 MCADAM, LANDLORD AND TENANT (3d ed. 1934) § 307.

these liabilities, landlords could hardly be expected to refrain from using the protective device of a contract relieving them of their common law duties. Thus they early adopted the policy of injecting into leases some kind of provision for immunity.[16]

Exonerating provisions took either a general or specific form. A typical clause of general exculpation would stipulate that the landlord was not to be liable for injuries caused by certain enumerated agencies, such as water or fire, "or otherwise . . . or in any other way or manner. . . . "[17] It contained no express mention of a release from the consequences of negligence, probably because such mention was considered unnecessary in the light of the all-inclusive language used. The distinguishing feature of the other type of clause was the use of terms specifically calling for exemption from negligence.

As regards the clause of general exoneration, the accepted law in most jurisdictions denied that it acquitted the landlord of every type of fault, as its sweeping terms might indicate.[18]

The courts of New York, in line with the holdings in other states, declared that these broad exemptions were to be strictly construed.[19] But, reasoning that the parties must have intended some mitigation of the landlord's liability, judicial construction gave a mild effect to them. They were held to relieve the lessor of liability for passive negligence, meaning a failure to discover and repair defects which by the exercise of diligence might have been found, but to constitute no defense to conduct amounting to affirmative negligence, by which was understood an omission to act in the face of actual notice of a defect.[20]

An interesting ramification of this rule covers the situation where a defect appeared in a section of the premises which a lessor was under no duty to repair, yet which he gratuitously assumed the task of renovating. Generosity could not condone negligence, and having undertaken the work, the common law required diligence in its

16. Worthington v. Parker, 11 Daly 545 (N. Y. 1885); Randolph v. Feist, 23 Misc. 650, 52 N. Y. Supp. 109 (Sup. Ct. 1898); Railton v. Taylor, 20 R. I. 279, 38 Atl. 980 (1897).

17. Railton v. Taylor, 20 R. I. 279, 38 Atl. 980 (1897).

18. Spangler v. Hobson, 212 Ala. 105, 101 So. 828 (1924); Rolfe v. Tufts, 216 Mass. 563, 104 N. E. 341 (1914); Worthington v. Parker, 11 Daly 545 (N. Y. 1885); Randolph v. Feist, 23 Misc. 650, 52 N. Y. Supp. 109 (Sup. Ct. 1898); Railton v. Taylor, 20 R. I. 279, 38 Atl. 980 (1897); Le Vette v. Hardman Estate, 77 Wash. 320, 137 Pac. 454 (1914).

19. Worthington v. Parker, 11 Daly 545 (N. Y. 1885); Randolph v. Feist, 23 Misc. 650, 52 N. Y. Supp. 109 (Sup. Ct. 1898); Drescher Rothberg Co. v. Landeker, 140 N. Y. Supp. 1025 (Sup. Ct. 1913). They " . . . have invariably been held to afford the landlord no protection from his own negligence or wrongful acts." Levin v. Habicht, 45 Misc. 381, 383, 90 N. Y. Supp. 349, 350 (Sup. Ct. 1904).

20. " . . . the clause is certainly intended to provide some protection to the landlord, and the protection intended was to my mind an exemption from liability for failure to protect his tenants from damages which he might have, but did not foresee. . . ." Drescher Rothberg Co. v. Landeker, 140 N. Y. Supp. 1025, 1026 (Sup. Ct. 1913). Accord: Kessler v. The Ansonia, 222 App. Div. 148, 225 N. Y. Supp. 589 (1st Dep't 1927); Lowy & Feffer v. Mor-Ro Realty Corp., 223 App. Div. 621, 229 N. Y. Supp. 169 (1st Dep't 1928). Where lessor had actual notice of defect, but this had not been given in writing as the lease demanded, *held*, failure to repair was only passive negligence. Hirsch v. Radt, 228 N. Y. 100, 126 N. E. 653 (1920). *Contra*: Cannon v. Bresch, 307 Pa. 31, 160 Atl. 595 (1932), where the clause exempted "from all liability for any and all damage caused by water." The court *held* that the word *all* includes everything and excludes nothing, and is obviously broad enough to include exemption from liability even for affirmative negligence.

prosecution.[21] To do the work ineptly, yet to create an appearance of safety, amounted to affirmative negligence which a broad clause of exculpation could not excuse.[22]

But exemption of a landlord by a tenant in no way diminished the lessor's duties to third parties lawfully on the premises.[23]

The growth of cities found urban populaces crowding ill-kept tenements, and the absence of a landlord's duty to keep premises, other than common parts, in good repair prompted legislative action. Tenement House Laws were enacted fixing on landlords a statutory obligation to keep in a habitable condition all parts of houses in which three or more families lived independently of each other.[24] Attempts by landlords to have themselves released by contract from this new duty were declared illegal and unenforceable.[25] However, in spite of the Tenement House Laws, it seems that a lessor of tenement space could still, by the use of general immunity clauses, free himself from liability for passive negligence.[26]

But these statutes had no application to business premises or houses where less than three families lived separately.[27] As regards them, the law still continued to recognize and give effect to exemptions from passive negligence.[28]

The long mooted question as to whether a lessor of other than tenement space could release himself from the consequences of his own affirmative negligence by specifically providing for it, presented itself to the New York courts in the case of *Kirshenbaum v. General Outdoor Adv. Co.*[29] There the lease contained a provision that the landlord was not to be liable for damages from steam, electricity, snow and rain *even though such damages were due to his negligence.* Such a clause was deemed

21. Marks v. Nambil Realty Co., 245 N. Y. 256, 157 N. E. 129 (1927); 2 McAdam, Landlord and Tenant (5th ed. 1934) § 313.

22. Cairnes v. Hillman Drug Co., 214 Ala. 545, 108 So. 362 (1926).

23. A landlord, at common law, is liable, in the event of negligence, even to guests of the tenant lawfully on the premises. Loucks v. Dolan, 211 N. Y. 237, 105 N. E. 411 (1914). A contract by which a lessee releases his lessor from liability for negligence has been held not to apply to an invitee injured while using a part of the building over which the lessor had retained control and which was negligently operated or maintained. Cussen v. Weeks, 232 Mass. 563, 122 N. E. 757 (1919); Griffin v. Manice, 166 N. Y. 188, 59 N. E. 925 (1901). A sublessee taking possession of premises with knowledge of the existence of an exemption clause in the contract between landlord and original lessee has been held bound by its terms. Rodier v. Kline's Inc., 226 Mo. App. 474, 47 S. W. (2d) 230 (1932).

24. N. Y. Tenement House Law (1909) §§ 2(1), 102; N. Y. Multiple Dwelling Law (1929) §§ 4(3), 78. Of course, before a right of action accrues in favor of a tenant, he must first give notice of such defect within the apartment. Altz v. Leiberson, 233 N. Y. 16, 134 N. E. 703 (1922).

25. 3175 Holding Corp. v. Schmidt, 150 Misc. 853, 270 N. Y. Supp. 663 (Mun. Ct. 1934); W. & B. Hosiery Corporation v. Kapplow, 158 Misc. 872, 286 N. Y. Supp. 724 (Sup. Ct. 1936). In Georgia, the lessor may be relieved of this statutory duty by contract. Ga. Code (1933) § 61-111; Heriot v. Connerat, 12 Ga. App. 203, 76 S. E. 1056 (1913).

26. Kessler v. The Ansonia, 253 N. Y. 453, 171 N. E. 704 (1930).

27. N. Y. Tenement House Law (1909) § 2(1); N. Y. Multiple Dwelling Law (1929) § 4(3); Jarchin v. Rubin, 128 Misc. 437, 218 N. Y. Supp. 269 (Sup. Ct. 1926) (two-family house held not tenement house).

28. Garrity v. Propper, 209 App. Div. 508, 205 N. Y. Supp. 192 (1st Dep't 1924) (premises used as dancing academy).

29. 258 N. Y. 489, 180 N. E. 245 (1932).

valid and not opposed to public policy. The Court of Appeals argued that lessor and lessee stand on equal terms, neither being under any form of compulsion to enter into such agreements, and that the public interest is not affected by such stipulations.[30]

Without questioning the principle that a party should be allowed by contract to exempt himself from the consequences of his negligence when dealing with another of equal bargaining strength,[31] one cannot easily embrace the conclusion of the court that landlord and tenant are on an equal footing. The availability of such an exculpatory device would make its general use by lessors almost inevitable, and this extensive adoption would expose tenants to the *necessity* of acceding to that clause. For a tenant to rent space and yet to escape this undesirable provision, would hardly be possible.

Moreover, the enactment of the Tenement House Laws and the judicial annulment of any effort to suspend their operation by contract exhibited a tenderness toward the tenement-lessee group which could be justified only by predicating their relatively weaker position. It is submitted that business tenants and occupants of small homes are in no stronger a position. The proposition that the occupants of a luxurious apartment[32] need the protection of law in making their lease, and that of the economically harrassed tenants of business premises or modest dwellings are strong enough to bargain effectively, does not commend itself to ready acceptance.

To remedy the unhealthy effect of the *Kirshenbaum* case and to extend to all lessees the protection given to occupants of tenement houses,[33] the legislature has declared the negligence-exempting clause invalid in *any* leasing transaction. No new liability is thereby created. The statute merely states that where liability does exist it cannot be evaded by contractual provision. The microscopic size of these covenants as printed in the ordinary forms often operated to release a landlord without the contracting tenant having noticed the provision. However, the purpose of the statute was not to abolish the *surprise* release only, but *any* release, no matter how fully brought to the attention of the lessee. This is evidenced by the prohibition even against collateral agreements of exemption, where a releasing clause could hardly have escaped notice by a tenant.[34]

In directing itself against "agreements exempting lessors from liability for negli-

30. Other jurisdictions had already held that a contract releasing a lessor from liability for negligence was not opposed to public policy. Clarke v. Ames, 267 Mass. 44, 165 N. E. 696 (1929); Cannon v. Bresch, 307 Pa. 31, 160 Atl. 595 (1932).

31. For a discussion of the significance of comparative bargaining power in the law of exculpation see Comment (1937) 37 COL. L. REV. 248.

32. "A 'tenement house,' as the meaning is enlarged by the definition of the statute, may include the dwellings of the rich." Altz v. Leiberson, 233 N. Y. 16, 18, 134 N. E. 703, 704 (1922). That the TENEMENT HOUSE LAW applies to luxurious apartment houses was iterated in Apartment Hotel Owners' Ass'n v. City of New York, 133 Misc. 881, 233 N. Y. Supp. 553 (Sup. Ct. 1929).

33. A clause similar to that in Kirshenbaum v. General Outdoor Adv. Co., 258 N. Y. 489, 180 N. E. 245 (1932), that is, by its terms expressly calling for release from negligence, and in its effect exempting from affirmative negligence, had been held inoperative as between a landlord and tenant of a multiple dwelling. Excellent Holding Corporation v. Richman, 155 Misc. 257, 279 N. Y. Supp. 587 (Mun. Ct. 1935).

34. An instance of statutory attack on "surprise" covenants in a lease is N. Y. REAL PROP. LAW (1934) § 230, which provides, in effect, that a clause in a lease which states that the term thereof shall be renewed unless the tenant gives notice to the lessor shall be inoperative unless the lessor shall give to the tenant written notice calling the attention of the tenant to the existence of such provision in the lease. This is the well-known "automatic renewal clause."

gence" this new law appears to refer only to such covenants as make specific mention of a release from negligence. The inference is therefore permissible that a clause of general release retains its vigor and that a lessor can still free himself from liability for passive negligence. Yet, there is much strength in the argument that the statute outlaws not only a covenant by its terms releasing from negligence, but any covenant legally operating to exempt from negligence. Under such a view, even the clause of general immunity is voided, since its effect was to exculpate from passive negligence.

TRADE NAMES—IMITATION WITH INTENT TO DECEIVE—INJUNCTION—MISDEMEANOR.—In order to discourage the growing practise of imitating well-known trade names and advertising false addresses, the past session of the New York Legislature added a new section to the Penal Law.[1] The statute is very broad in its language and seems to be unique in state legislation.[2] It declares that any person, firm, or corporation which uses: (1) any name or simulation thereof with intent to deceive the public as to the *identity* of such person, firm or corporation; (2) any name or simulation thereof with intent to deceive the public as to its *connection* with any other person, firm or corporation; (3) any address or location in the community, with intent to deceive the public as to the true *address* of such person, firm or corporation, is guilty of a misdemeanor.

The cases are legion both at common law[3] and under statute[4] granting an injunc-

1. N. Y. PENAL LAW (1937) § 964. *Use of Name or Address with Intent to Deceive.* No person, firm or corporation shall, with intent to deceive, or mislead the public, assume, adopt or use as, or as part of, a corporate, assumed or trade name, for advertising purposes, or for the purposes of trade, or for any other purpose, any name, designation or style, or any symbol or simulation thereof, which may deceive or mislead the public as to the identity of such person, firm or corporation or as to the connection of such person, firm or corporation with any other person, firm or corporation; nor shall any person, firm or corporation, with like intent, adopt or use as, or as part of, a corporate, assumed or trade names, for advertising purposes, or for the purposes of trade, or for any other purposes, any address or designation of location in the community which may deceive or mislead the public as to the true address or location of such person, firm or corporation. A violation of this section shall be a misdemeanor. Whenever there shall be an actual or threatened violation of this section, an application may be made to a court or justice having jurisdiction to issue an injunction, upon notice to the defendant of not less than five days, to enjoin and restrain said actual or threatened violation; and if it shall appear to the satisfaction of the court or justice that the defendant is in fact assuming, adopting or using such name, or is about to assume, adopt or use such name, and that the assumption, adoption or use of such name may deceive or mislead the public, an injunction may be issued by said court or justice, enjoining and restraining such actual or threatened violation without requiring proof that any person has in fact been deceived or misled thereby.

2. MD. ANN. CODE (Bagby, 1924) art. 27, § 175 is the only statute bearing any resemblance. This statute makes it a misdemeanor "to transact any business" under another's name, whereas the New York statute broadly states "for advertising purposes, or for the purposes of trade, or for any other purpose." No provision is made in the Maryland statute preventing the use of an address with intent to deceive. Moreover, it fails to cover the case of the use of one's own name with intent to defraud which is a recurring situation and against which protection was granted at common law. Landreth v. Landreth, 22 Fed. 41 (C.C.A. 7th, 1884); Westphal v. Westphal, 243 N. Y. 639, 154 N. E. 638 (1926).

3. Standard Oil Co. v. California Peach and Fig Growers, 28 F. (2d) 283 (D. Del., 1928); Nolan Bros. Shoe Co. v. Nolan, 131 Cal. 271, 63 Pac. 480 (1900); Citizens Whole-

tion and damages against a *competitor's* use of the same or similar trade mark or trade name. For a long period, the limit of protection given by the courts was against a competitor in the same business.[5] This doctrine was based on the view originally prevailing that "no man has the right to sell his own goods as the goods of another."[6] A more modern development under the broader laws of unfair competition[7] operates against *non-competing* businesses[8] whose use of a similar mark or name is calculated or likely to confuse the public or whittle away the uniqueness of

sale Supply Co. v. The Golden Rule, 147 Minn. 248, 180 N. W. 95 (1920); Colman v. Crump, 70 N. Y. 573 (1877).

4. Hall v. Holstrom, 106 Cal. App. 563, 289 Pac. 668 (1930); People v. Stricker, 258 Ill. 618, 102 N. E. 216 (1913); Lynch v. John Single Paper Co., 115 App. Div. 911, 101 N. Y. Supp. 824 (4th Dep't 1906).

5. In Borden Ice Cream Co. v. Borden's Condensed Milk Co., 201 Fed. 510, 514 (C.C.A. 7th, 1912) plaintiff, manufacturer of various milk products including malted milk ice cream for hospital use, was denied an injunction against defendant's use of the name "Borden" in the manufacture of commercial ice cream. "The secondary meaning of a name, however, has no legal significance, unless the two persons make or deal in the same kind of goods." Injunction was denied on similar grounds in Atlas Mfg. Co. v. Street and Smith, 204 Fed. 398, (C.C.A. 8th, 1913), the court declaring it could " . . . at most protect only against something in the nature of a periodical publication—*of the same class.*" (italics supplied) *Id.* at 402. Accord: Samson Cordage Works v. Puritan Cordage Mills, 211 Fed. 603 (C.C.A. 6th, 1914); National Picture Theatres v. Foundation Film Corp., 266 Fed. 208 (C.C.A. 2d, 1920); Crump Co. v. Lindsay, 130 Va. 144, 107 S. E. 679 (1921). That there is no real competition between the two clothiers catering to different classes of purchasers. Wallach Bros. v. Wallack, 200 App. Div. 169, 192 N. Y. Supp. 723 (1st Dep't 1922); likewise in Regent Shoe Mfg. Co. v. Haaker, 75 Neb. 426, 106 N. W. 595 (1906), where the plaintiff was engaged in the manufacture and wholesale jobbing of shoes and defendant was in the retail shoe business. *Cf.* Kaufman v. Kaufman, 223 Mass. 104, 111 N. E. 691 (1916); National Grocery Co. v. National Stores Co., 95 N. J. Eq. 588, 128 Atl. 740 (1924), in which cases the courts found that there was no actual competition by confining plaintiff's rights within very narrow geographical limits.

6. Lord Langdale in Croft v. Day (1843), 7 Beav. 84, 88, 49 Eng. Reprints 994, 996; Weinstock v. Marks, 109 Cal. 529, 536, 42 Pac. 142, 145 (1895); Ball v. Broadway Bazaar, 194 N. Y. 429, 435, 87 N. E. 674, 676 (1909); Reddaway v. Banham [1896] A.C. 199, 204, see note 7, *infra.*

7. The laws of unfair competition were not always as wide in their scope as at present. The early definition of unfair competition was the "passing off view" that "nobody has any right to represent his goods as the goods of somebody else." See note 6, *supra.* This early view was found to be inadequate in certain cases and the doctrine has gradually been extended to include "any conduct on the part of one trader which tends unnecessarily to injure another in his business." But see note 29, *infra.* Rogers, *Predatory Price Cutting as Unfair Trade* (1913) 27 HARV. L. REV. 139, 141; NIMS, UNFAIR COMPETITION AND TRADE-MARKS (3d ed. 1936) 23. For good summary of this changing concept in the field of trade mark protection, see Schechter, *The Rational Basis of Trademark Protection* (1927) 40 HARV. L. REV. 813, 819-824.

8. Florence Mfg. Co. v. J. C. Dowd & Co., 178 Fed. 73 (C.C.A. 2d, 1910) (toilet brushes-tooth brushes); Aunt Jemima Mills Co. v. Rigney & Co., 247 Fed. 407 (C.C.A. 2d, 1917), *certiorari denied,* 245 U. S. 672 (1918) (pancake flour-syrup); Vogue Co. v. Thompson-Hudson Co., 300 Fed. 509 (C.C.A. 6th, 1924) (fashion magazine-hats); Beech-Nut Packing Co. v. P. Lorillard Co., 7 F. (2d) 967 (C.C.A. 3d, 1925) (food products-cigarettes); Wall v. Rolls Royce of America, Inc., 4 F. (2d) 333 (C.C.A. 3d, 1925) (automobiles-radio parts); Eastman Kodak Co. v. Kodak Cycle Co., 15 Rep. Pat. Cas. 105 (1898) (cameras-bicycles).

plaintiff's name or mark.[9] This development marked the overthrow of the doctrine that "there can be no unfair competition where there is no competition."[10]

In addition to these common law remedies afforded a prior user of a trade mark or name by an action for damages and an injunction, Congress[11] and all the states[12] have imposed additional restraints upon an imitator of a *trade mark* by means of registration statutes, and in some states, by means of penal laws. Likewise, New York has by statute provided many safeguards for a *trade mark*,[13] but until the past session of the Legislature no appreciable measures had been taken for the protection of *trade names*.[14] The injured party still had his common law action, but this remedy was often ineffectual since considerable time frequently elapsed before an injunction was granted. In the event that a defendant was financially irresponsible, the plaintiff's remedy for the damage already sustained became purely theoretical. Moreover, at the time of this new legislation, the law of trade name protection was in a constant state of flux,[15] so that the injured party could only hazard a guess as to what degree of protection a court would afford him.

It is interesting to note that, although an amendment to the Penal Law, the new section incorporates a civil remedy by permitting an application to be made for an injunction whenever there shall be an actual or *threatened* violation thereof, without requiring proof that anyone has in fact been deceived. This penal-equitable com-

9. This idea was first advocated in this country by the late Frank I. Schechter, *Rational Basis of Trademark Protection* (1927) 40 HARV. L. REV. 813, 832.

10. Bertram Willcox referred to this doctrine as a judicially fashioned "straitjacket," having the potentialities of causing disastrous effects unless a more liberal attitude were adopted by the courts. Willcox, *Protection of a Trade Name in New York State* (1928) 3 ST. JOHN'S L. REV. 1.

11. See provisions of Federal Trade Mark Act, whereby Congressional regulations are made under the power to regulate interstate commerce. For a more complete discussion see Liddy, *Has Congress the Constitutional Power to Legislate on the Substantive Law of Trade Marks?* (1937) 6 FORDHAM L. REV. 408.

12. See DERENBERG, TRADE-MARK PROTECTION AND UNFAIR TRADING (1936) 861-1011, for a collection of the trade mark statutes of the forty-eight states.

13. N. Y. PENAL LAW (1909) § 2354(6), declares it a misdemeanor to make or sell an article of merchandise with a false or fraudulent trade mark or label. N. Y. GEN. BUS. LAW (1909) art. 24 contains provisions relating chiefly to labels on packaged and bottled goods. N. Y. LABOR LAW (1927) § 208 relates to the use of a union label. N. Y. LABOR LAW (1909) § 209 prohibits: 1. the use of a genuine label without authority, 2. counterfeiting a label, 3. knowingly having goods bearing the counterfeit label with intent to sell them.

14. N. Y. PENAL LAW (1909) § 936 prohibits the fraudulent use of the name of a secret fraternity or imitation thereof so nearly resembling it as to be calculated to deceive. N. Y. PENAL LAW (1909) § 948 similarily prohibits the use of the name or an imitation thereof of a benevolent, humane, or charitable corporation. N. Y. PENAL LAW (1909) § 440 relates to filing of a certificate when business is being conducted under an assumed name. See, also N. Y. PART. LAW (1919) § 82; N. Y. PENAL LAW (1909) § 924; N. Y. GEN. CORP. LAW (1929) § 9.

15. "Many earlier dicta, probably some earlier decisions, are now safe guides." Potter-Wrightington v. Ward Baking Co., 288 Fed. 597, 603 (D. Mass. 1923). "There is no part of the law which is more plastic than unfair competition, and what was not reckoned an actionable wrong twenty-five years ago may have become such today." Ely-Norris Safe Co. v. Mosler Safe Co., 7 F. (2d) 603, 604 (C.C.A. 2d, 1925); Schechter, *Trade Morals and Regulation: The American Scene* (1937), 6 FORDHAM L. REV. 190, 198-207.

bination is not an innovation in New York law.[16] The portion of the new statute relating to an injunction is nearly identical in form and language to a prior section of the same article relating to the unlawful use of the name of a charitable corporation.[17] Both sections provide for an injunction even where the violation is only *threatened*, which is in accord with the well established principle that equity may enjoin a threatened wrong.[18] Similarly, both sections provide for an injunction without requiring proof that any person has in fact been deceived or misled. The common law of trade names has long recognized that proof of a specific instance of deception of the public is not a requisite for equitable relief.[19]

The most important question raised by the new statute is its effect upon the common law of trade names in New York. The discussion of this should first consider the intent required to be proved before the statute applies. With regard to intent, the literal wording of the statute[20] would seem to indicate that an actual intent to deceive or mislead the public is requisite to constitute a misdemeanor or to justify the issuance of an injunction. For a long period there was hopeless confusion at common law as to whether proof of an intent to deceive was an essential element where an injunction was sought.[21] This conclusion was due chiefly to the language found in the opinions, rather than to conflicting holdings. New York is in accord with the generally accepted view that an intent to deceive need not be shown.[22] Those courts which hold that the defendant must be guilty of *mala fides* will presume that such an intent to deceive exists,[23] once identity or similarity of names has been shown so as to be likely to deceive the public. It is probable that the new statute in New York will not, as a practical matter, prove to be any narrower in respect to intent since the courts will most likely follow the practice of presuming that the intent existed,[24] when an injunction only is sought. To constitute a misdemeanor, however, the statute makes it clear that an intent to deceive must be proved.

16. N. Y. CIVIL RIGHTS LAW (1909) §§ 50, 51; N. Y. PENAL LAW (1909) § 948.

17. N. Y. PENAL LAW (1909) § 948.

18. HIGH, INJUNCTIONS (4th ed. 1905) 25.

19. Reasonable probability of loss of business by the plaintiff constitutes the ground for the intervention of a court of equity. See Fisher v. Star Co., 231 N. Y. 414, 427, 132 N. E. 133, 137 (1921); Eastern Construction Co., Inc. v. Eastern Engineering Corp., 246 N. Y. 459, 465, 159 N. E. 397, 398 (1927).

20. It could be argued that although an intent to deceive is requisite for the misdemeanor, it is not needed to warrant an injunction. The statute says that for an injunction there must be a violation of the section. Technically, for a violation of the section, there would have to be an intent to deceive, but the statute says merely that where there is a violation and where defendant is *in fact* assuming a name which may deceive the public, an injunction should issue.

21. That intent is immaterial: Holmes, Booth & Haydens v. Holmes, Booth & Atwood Mfg. Co., 37 Conn. 278 (1870); Ainsworth v. Walmsley, L. R. 1 Eq. 518, 525 (1866). That intent must be proven was the Federal rule: McLean v. Fleming, 96 U. S. 245 (1877); Lawrence Mfg. Co. v. Tennessee Mfg. Co., 138 U. S. 537 (1891).

22. Vulcan v. Myers, 58 Hun 161 (N. Y. 1890); Colman v. Crump, 70 N. Y. 573 (1877).

23. American Waltham Watch Co. v. United States Watch Co., 173 Mass. 85, 53 N. E. 141 (1899). In Photoplay Pub. Co. v. La Verne Pub. Co., 269 Fed. 730, 733 (C.C.A. 3d, 1921) the court expressly stated that proof of intent in unfair competition cases need not be shown, and suggested the query "What is the commercial effect of what he [defendant] is doing?" NIMS, UNFAIR COMPETITION AND TRADE-MARKS (3d ed. 1936) 895.

24. See note 23, *supra*.

In the second place, the scope of the statute is worthy of investigation. In respect to the factual situations within its contemplation, the statute places a prohibition on the simulation of a name with intent to deceive the public as to: (1) identity, (2) connection, (3) address. Let us consider each of these separately.

(1) Where *X Co.* is engaged in a particular trade and subsequently *Y Co.* commences to engage in the same trade under a practically identical name, there is a likelihood that the public will be deceived as to the *identity* of the two concerns. In this situation, at common law and in New York, *Y Co.* would be enjoined from a continued use of the name.[25] The same result would follow under the new statute. This situation is covered therein by the express words of the statute.

(2) Where *X Co.* is engaged in the manufacture of a product under a nationally known name and subsequently *Y Co.* commences to engage in the manufacture of an entirely different product under the same name, there is little likelihood that the public will be deceived as to the identity of the concerns. There is, however a probability that the public will be deceived as to some *connection* between the two concerns. In this situation also at common law in New York, *Y Co.* would be restrained from a continued use of the name.[26] The same result would follow under the new statute by express language.

(3) Likewise, where *X Co.* and *Y Co.* are engaged in the same business, under dissimilar names, *X Co.* having made its street address well known, and *Y Co.* commences to falsely advertise itself as being located at the same address, there is a possibility that the public will be deceived both as to the identity of the parties and the *address* of *Y Co.* In this situation at common law in New York, *Y Co.* would be restrained from a continued use of the designation of location.[27] The same result would follow under the new statute.

But in respect to a different situation involving the use of an *address*, the new statute seems to extend a remedy which did not appear at common law. The use of a name or address with intent to deceive the public as to the true location of a firm is chiefly a problem which has arisen with the establishment of large buildings or developments which have become nationally known. To illustrate, the designation by a person, firm or corporation of its address in Tudor City, the Woolworth Building, the Empire State Building, or Radio City, when such is in fact not the case, may very conceivably work a fraud upon the public and, if the practice becomes widespread, do great harm. Especially acute can the problem become when a person desiring to do a mail order business, publishes his business as located, for example, in Radio City when possibly he has merely arranged to receive mail through one of the employees in the building. The prestige and reliability which such an address carries with it, established by the careful selection of tenants, will be rapidly dissipated if irresponsible parties are permitted to encroach in this fashion. Such appears to be the third evil which the statute under consideration would declare enjoinable in addition to being a misdemeanor. It is in respect to such a factual situation that the new statute seems to go beyond the common law principles of trade names.

Apparently, where there is deceit as to address, an injunction will issue no matter how dissimilar the business activities of the plaintiff and defendant are. Is such an injunction to be found at common law? Even under the broadest definitions of unfair competition.[28] to warrant the issuance of an injunction it would seem that the

25. Burns Bros. v. Bruns Bros., Inc., 162 Misc. 702, 295 N. Y. Supp. 184 (Sup. Ct. 1937).

26. Philadelphia Storage Battery Co. v. Mindlin, 163 Misc. 52, 296 N. Y. Supp. 176 (Sup. Ct. 1937).

27. Glen & Hall Mfg. Co. v. Hall, 61 N. Y. 226 (1874).

28. See note 7, *supra*.

plaintiff and defendant would have to be traders, or at least engaged in some form of production for public consumption.[29] It also seems to grant to both a landlord and a *bona fide* tenant of the advertised address the right to an injunction, regardless of the dissimilarity of their businesses from that of the wrongful user. Whereas the landlord is injured in a property right, a tenant may be damaged due to the stigma placed on its address due to its use by an unreliable advertiser. Such an injunction was unknown at common law.

From the foregoing examples, it will be seen that the common law of trade names in New York is left virtually unaltered. If an appropriation was likely to deceive or mislead the public as to identity or connection, within the discretion of the court, an injunction would issue at common law. The discretion of the court operates in the same manner under the statute.[30]

Heretofore, a pirate of a trade name has gambled little in expectation of great gains. All that was ventured was the possible risk of being enjoined from further use of the name, and in some cases of being subject to the payment of damages. On the other hand, the gain might be abundant. The imitator's business would thrive, largely irrespective of the merits of his product, because of the reputation and good will which the rightful user of the name had built up through expensive advertising and reliable service. In any event, even if an injunction were granted, the defendant would nevertheless be free to turn his parasitic scheme immediately toward other reputable concerns, which process might well continue endlessly until crowned with success. However, this new statute, once it has been given sufficient notoriety, ought to materially decrease the number of trade name infringements, since the gamble, at its very inception, will carry with it a criminal liability.

WASTE—AMENDMENT TO THE REAL PROPERTY LAW IN RELATION TO.—It is one of the redeeming features of our system that whenever the courts impede the economic growth of the state through a too slavish respect for *stare decisis,* the legislature may by enactment remove the obstacle. An example of such an enactment is to be found in the statute which on September 1, 1937[1] changed the law of waste as heretofore

29. But note language in Fisher v. Star Co., 231 N. Y. 414, 427, 132 N. E. 133, 137 (1921). "The courts are not confined in the exercise of their equitable powers to preventing unfair competition among the manufacturers of and dealers in goods. The controlling question in all cases where the equitable power of the courts is invoked is, whether the acts complained of are fair or unfair."

30. " . . . if it shall appear *to the satisfaction of the court"* that defendant was using a name which *"may* deceive or mislead the public, an injunction *may be* issued . . . " (italics supplied) N. Y. PENAL LAW (1937) § 964.

1. N. Y. REAL PROP. LAW (1937) § 537. *Alterations or replacements of structures by person having estate for life or years.* When a person having an estate for life or for years in land, proposes to make an alteration in, or a replacement of a structure or structures located thereon, then the owner of a future interest in such land can neither recover damages for, nor enjoin the alteration or replacement, if the person proposing to make such alteration or replacement complies with the requirements hereinafter stated as to the giving of security and establishes the following facts:

(1) That the proposed alteration or replacement is one which a prudent owner of an estate in fee simple absolute in the affected land, would be likely to make in view of the conditions existing on or in the neighborhood of the affected land; and

(2) That the proposed alteration or replacement, when completed, will not reduce the market value of the interests in such land subsequent to the estate for life or for years; and

laid down by decisions of the New York courts. Thereby, a serious barrier to the improvement of real property within the state was destroyed.[2]

The law of waste[3] deals with the rights and liabilities of a possessor as against another who holds the reversion in the property when the premises have been changed or allowed to deteriorate. Waste can be of three kinds: *voluntary,* an affirmative act which changes the premises; *permissive,* allowing the property to go to ruin; and *equitable,* involving defacement of structures by a tenant whose estate is expressly "without impeachment of waste."[4] The question of waste can arise between life tenant and remainderman,[5] mortgagee and mortgagor,[6] tenant for years and owner,[7] or between co-tenants.[8] It should be noted, however, that the new statute affects only

(3) That the proposed alteration or replacement, is not in violation of the terms of any agreement or other instrument regulating the conduct of the owner of the estate for life or for years or restricting the land in question; and

(4) That the life expectancy of the owner of the estate for life or the unexpired term of the estate for years is not less than five years.

(5) That the person proposing to make such alteration or replacement, not less than thirty days prior to commencement thereof, served upon each owner of a future interest, who is in being and ascertained, a written notice of his intention to make such alteration or replacement specifying the nature thereof, which notice was served personally or by registered mail sent to the last known address of each such owner of a future interest.

When the owner of a future interest in the affected land demands security that the proposed alteration or replacement, if begun, will be completed and that he be protected against responsibilty for expenditures incident to the making of the proposed alteration or replacement, the court in which the action to recover damages or to enjoin the alteration or replacement is pending, or if no such action is pending, the supreme court, on application thereto, on such notice to the interested parties as the court may direct, shall fix the amount and terms of the security reasonably necessary to satisfy such demand. The furnishing of the security so fixed shall be a condition precedent to making of the proposed alteration or replacement.

2. It will be noted that in its final form the statute gives relief only to tenants whose lease or life expectancy is five years or more. At first blush it might be supposed that this provision still leaves the way open for injustice to be worked upon the short term tenant. But it must be remembered that a possessory owner whose term has less than five years to run will not be likely to make, or desire to make, very extensive changes in the property.

3. Waste is not necessarily the product of acts that make for depreciation. True, Bouvier defines waste as "spoil or destruction, done or permitted, to lands, houses, or other corporeal hereditaments, by the tenant thereof to the prejudice of the heir or of him in reversion or remainder" but he also notes that the "building of a house [by the tenant] where there was none before was, by the strict rules of the common law, said to be waste." 3 BOUVIER, LAW DICTIONARY (8th ed. 1914) 3433, 3434. In Klie v. Von Broock, 56 N. J. Eq. 18, 27, 37 Atl. 469, 473 (1897), the court said: "An alteration of buildings which changes their nature and character is waste, even although the value of the premises be thereby increased."

4. WILLIAMS & EASTWOOD, REAL PROPERTY (25th ed. 1933) 158-169. There is a fourth type of waste, ameliorating, in which the act of the tenant improves rather than injures the reversion. New York, O. & W. Ry. v. Livingston, 238 N. Y. 300 (1924).

5. Sweeney v. Schoneberger, 111 Misc. 718, 186 N. Y. Supp. 707 (Sup. Ct. 1919); Ivey v. Lewis, 133 Va. 122, 112 S. E. 712 (1922).

6. Delano v. Smith, 206 Mass. 365, 92 N. E. 500 (1910).

7. F. W. Woolworth Co. v. Nelson, 204 Ala. 172, 85 So. 449 (1920); Cawley v. Northern Waste Co., 239 Mass. 540, 132 N. E. 365 (1921).

8. Walshe v. Dwight Mfg. Co., 178 Ala. 310, 59 So. 630 (1912); Hennes v. Charles

the relationships between a remainderman or reversioner and a tenant for life or for years and concerns only the right of such tenant to change structures on the property.

Our law of waste was modeled after the medieval English law,[9] in the shaping of which two factors predominated: the life of the people was primarily agricultural, and their government feudal.[10] Most of the early rules were, consequently, applied to farm lands and rigorously restricted their change by the tenant or possessory owner. A tenant could not remove a wainscot, door or any other thing affixed to the house; nor could he cut away timber except that necessary for firewood or repairs.[11] A tenant could not convert a wood, meadow, or pasture into arable land, or turn arable land into another kind of land even though the value of the property was thereby increased.[12] The owner of the future interest could, almost at whim, prevent his tenant from committing voluntary waste.[13] As Lord Coke observed, a tenant could do nothing which would either "change the course of husbandry or [change] the evidence of the estate."[14]

During the last century the English law of waste has been greatly relaxed.[15] In this country, however, while decisions of some states reveal a liberal trend, other states remain unyielding in their allegiance to the old law. In the strict jurisdictions almost any change which the tenant attempts to make over the objection of the reversioner, is considered waste. In Massachusetts, for instance, a life tenant allowed wood to grow on land which had been a meadow at the time he took possession. He was enjoined from cutting this timber.[16] In Oregon, a lessee with express authority to change the premises to adjust them to any business purposes other than that of a livery stable, was prevented from tearing down a building and erecting in its place a larger one for the purpose of housing Chinese.[17] In New Jersey the possessory owner was forced

Hebard & Sons, 169 Mich. 670, 135 N. W. 1073 (1912); Hoolihan v. Hoolihan, 193 N. Y. 197, 85 N. E. 1103 (1908); Buchanan v. Jencks, 38 R. I. 443, 96 Atl. 307 (1916).

9. Two medieval English statutes on waste were the Statute of Marlbridge, 1267, 52 HENRY III, c. 23 and the Statute of Gloucester, 1278, 6 EDWARD I, c. 5.

10. Under the feudal system it was naturally to the advantage of the ruling class, the lords of the manors, that the tenant be prevented from exhausting the land.

11. 2 BL. COMM.* 281 (1800).

12. 2 BL. COMM.* 281 (1800). But although a tenant could not dig new mines upon the land he could work those already started. Saunder's Case, 5 Co. Rep. 12a, 77 Eng. Reprints 66 (1588).

13. Allowing a house to fall for want of necessary repairs was permissive waste as opposed to tearing it down which would constitute voluntary waste, 2 BL. COMM.* 281 (1800).

14. I COKE'S INSTITUTES 53. By this is meant that the tenant could make no change which would cause the appearance of the estate to vary. If arable land was changed to meadow or new buildings were erected, the witnesses who were present at the conveyance might not be able to recognize the land if later called upon. But as Lord Blackburn pointed out in Doherty v. Allman, 3 L. R. App. Cas. 709 (1878), our modern system of conveyancing and recording makes any damages to the owner's evidence of title purely theoretical.

15. Pulling down a useless barn was permitted. Doe Dem. Grubb v. Burlington 5 B. & Ald. 507, 110 Eng. Reprints 878 (1833). The erection of a new barn when none had stood before was allowed. Huntley v. Russell, 132 B. 572, 116 Eng. Reprints 1381 (1849). Land used for the growing of timber for sale was allowed to be used by the tenant for the same purpose. Bagot v. Bagot, 32 Beav. 509, 55 Eng. Reprints 200 (1863). As early as 1805 there was no longer any action for permissive waste. Gibson v. Wells, 1 Bos. & Pul. (N. R.) 290, 127 Eng. Reprints 473 (1805). Except against a tenant for years (not from year to year or by lease) Davies v. Davies, 38 Ch. Div. 499 (1885).

16. Clark v. Holden, 7 Gray 8 (Mass. 1856).

17. Davenport v. Magoon, 13 Ore. 3, 4 Pac. 299 (1884). The general dislike of the Chinese in this jurisdiction should be considered in weighing the importance of this case.

to wall up a doorway which he had already cut, even though he agreed to post security that it would be restored at the end of his term.[18] The records of other jurisdictions also contain cases which follow the rigid law of medieval England.[19]

In contrast to these strict limitations upon those in occupation of premises, the liberal trend in this country indicates an attempt to break away from the English decisions and to adapt the law to the needs of a growing nation. The courts maintaining the liberal view were consequently more lenient in determining what acts on the part of a tenant constituted waste, and a possessory owner was given more freedom when he came to make changes in the property. This liberal trend found its earliest expression in timber cases, which adopted the rule of "good husbandry." A Vermont case[20] furnishes an early example of the application of this rule.[21] Other liberal jurisdictions permitted a tenant to erect buildings upon ground where none formerly stood,[22] to alter already existing structures,[23] or to demolish old buildings and erect new ones in their place.[24] An examination of these cases discloses that it is usually required that the change must not depreciate the value of the remainder.

New York has adopted neither of these conflicting rules *in toto*. In timber cases the courts of this state have followed those more enlightened decisions which adopted the "good husbandry" rule.[25] But in the matter of erecting new or changing existing structures upon the land our tribunals have not, unfortunately, been as practical in outlook. Tenants have been allowed to erect buildings upon land that was formerly vacant,[26] but in cases of improving the property by: (1) altering existing buildings, or (2) tearing down old structures to erect new ones; even life tenants have been subject to the whim of the remainderman or reversioner.

In the first type of case, that of altering an existing building, the New York law of waste has forced the courts of this state to issue obviously inequitable decrees.[27] Suppose that *A* leases an old building to *B* who renovates it, transforming it into several stores. After *B* has subleased the more valuable building at a profit, *A*, at his own caprice, may secure an injunction directing *B* to remove the improvements.[28]

18. Klie v. Van Broock, 56 N. J. Eq. 18, 37 Atl. 469 (1897).

19. The following cases were decided against the tenant in possession: F. W. Woolworth Co. v. Nelson, 204 Ala. 172, 85 So. 449 (1920) (tenant though allowed to erect partitions could not cut door); Peer v. Wadsworth, 67 N. J. Eq. 191, 48 Atl. 379 (1904) (changing windows into doors and constructing bridges between buildings); Hamburger & Dreyling v. Settegast, 62 Tex. Civ. App. 446, 131 S. W. 639 (1910) (cutting opening in party wall); Brock v. Dole, 66 Wis. 142, 28 N. W. 334 (1886) (building chimney).

20. Kuhn v. Eastman, 11 Vt. 293 (1839).

21. Courts of other states also adopted the "good husbandry" rule. Rutherford v. Wilson, 95 Ark. 246, 129 S. W. 534 (1910); Learned v. Ogden, 80 Miss. 769, 32 So. 278 (1902); Lambeth v. Warner, 55 N. C. 165 (1855); Norris v. Laws, 150 N. C. 599, 64 S. E. 499 (1909); Beam v. Wollridge, 3 Pa. Co. Ct. R. 17 (1887).

22. Pynchon v. Stearns, 11 Met. 304 (Mass. 1846).

23. Abel v. Wueston *et al.*, 141 Ky. 766, 133 S. W. 774 (1911); Jurek v. Walton, 135 Wash. 105, 236 Pac. 805 (1925).

24. Northern Trust Co. v. Thompson, 336 Ill. 137, 178 N. E. 116 (1929).

25. Jackson v. Brownson, 7 Johns. 227 (N. Y. 1810); Harder v. Harder, 26 Barb. 409 (N. Y. 1858).

26. Winship v. Pitts, 3 Paige 259 (N. Y. 1832); Rice v. Culver, 172 N. Y. 60, 64 N. E. 761 (1902); Lehmeyer v. Moses, 69 Misc. 476, 127 N. Y. Supp. 253 (City Ct. 1910).

27. Agate v. Lowenbein, 57 N. Y. 604 (1874); Andrews v. Day Button Co., 132 N. Y. 348, 30 N. E. 831 (1892).

28. McDonald v. O'Hara, 117 Misc. 517, 192 N. Y. Supp. 545 (Sup. Ct. 1921). It is interesting to note that the modern English cases have relaxed their strict medieval law,

Similar decrees have been handed down in the second type of case,[29] that of removing old structures to erect new improvements. Suppose that *A* is a tenant for life of an old building which he is forced to carry at a considerable loss per year. He proposes to tear this building down and erect on the site a modern structure which will not only net him an annual profit, but will treble the value of the reversion. If *B*, the reversioner, objects, the court will be forced to protect his interests, however remote, and enjoin *A* from making the contemplated improvements.[30]

From these illustrations it can be seen that the decrees which the courts have been forced to issue under the common law have worked considerable injustice upon the tenant. But under the new statute a tenant is allowed to make the proposed changes if he complies with certain requirements. He must first show that the contemplated alteration or replacement is one which under the existing conditions of the neighborhood would have been made by a prudent owner.[31] In determining what constitutes a neighborhood the test used by one court,[32] indicates that a neighborhood is circumscribed by the common interests to which the property therein is devoted. Secondly, the tenant would have to prove (probably through the testimony of expert witnesses) that the property would not decrease in market value if the changes were made;[33] and thirdly, it would be upon him to show that the alteration would not breach any agreement in respect to the land or his tenancy.[34] Then, if his lease, in the case of a tenant for years, or his life expectancy,[35] in the case of a tenant for life, was not less than five years,[36] he would be allowed to make the contemplated changes as soon as he had given notice to the reversioner and deposited security with him.[37]

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while we who copied it, still cling to it. In McDonald v. O'Hara, *supra*, decided in 1921, the tenant was prevented from making the proposed improvements in the building; while in Doherty v. Allman, 3 L. R. App. Cas. 709 (1878), the English court allowed a tenant for years to alter the building.

29. Brokaw v. Fairchild, 135 Misc. 70, 237 N. Y. Supp. 6 (Sup. Ct. 1929). This case furnishes a good example of the injustice which the new statute was designed to correct.

30. It should be noted that although the tenant in such a case would be allowed to make the changes under the statute today, he would have to post with the reversioner security guaranteeing the construction of the new building after he had torn down the old. See note 2, *supra*. The difficulty in attempting to force a tenant to rebuild will consequently never arise. The court cited this difficulty as a reason for enjoining the tenant in a case under the common law. See Agate v. Lowenbein, 57 N. Y. 604, 614 (1874).

31. N. Y. REAL PROP. LAW (1937) § 537 (1) whether an act would have been done by a prudent owner will, in all likelihood, be a question for the jury.

32. In Lindsay Irrigation Co. v. Mehrtens *et al.*, 97 Cal. 676, 681, 32 Pac. 802, 803 (1893), Harrison, J. defined a neighorhood as: "a region in which there are several tracts . . . which can be regarded as a whole with reference to a common interest."

33. N. Y. REAL PROP. LAW (1937) § 537 (2).

34. N. Y. REAL PROP. LAW (1937) § 537 (3).

35. Life expectancy is determined in New York from the American Experience table of Mortality. N. Y. RULES CIV. PRAC. § 30.

36. N. Y. REAL PROP. LAW (1937) § 537 (4).

37. N. Y. REAL PROP. LAW (1937) § 537 (5).