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Damages-Penalty and Liquidation Damages Distinguished-

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On the last point the decided cases seem uniform that a claim for taxes arising in one state is not enforceable by action in the courts of another state. *Colo. v. Harbeck*, 232 N. Y. 71, 133 N. E. 357; *Maryland v. Turner*, 132 N. Y. S. 173; *Sydney v. Bull*, (1909) 1 K. B. 7. The reason for this result seems fundamentally the same as that for the doctrine of extra-territorial importance—that one state is not interested in enforcing the public law of another.

Yet it should be noted that the doctrine of extra-territorial importance (although well supported by the authorities cited by the court, Mechem, Public Offices and Officers, Sec. 508; *McCullough v. Scott*, 182 N. C. 865, 109 S. E. 789; *Kerr v. Moon*, 9 Wheaton 565; *Vaughan v. Northup*, 15 Petersal; *Dixon's Executors v. Ramsey's Executors*, 3 Cranch, 319; and others *Johnson v. Powers*, 139 U. S. 156, 11 S. Ct. 525;) has been whittled down by exceptions. "Statutes are numerous allowing foreign representatives to sue locally under such conditions as the legislature sees fit to impose." Goodrich, Conflict of Laws, 410. Some states by statute make the same exception for receivers. *Ibid*. 439. Further it has been held that a foreign receiver may prove a claim in bankruptcy, *Ex parte Norwood*, Fed. Case No. 10,364; and in any case his incapacity to represent the insolvent seems subject to waiver by the opposing litigant. *Great Western Tel. Co. v. Purdy*, 162 U. S. 329. A state receiver may enforce a stockholder's individual liability outside the appointing state, if expressly so authorized by statute. *Bernheimer v. Converse*, 206 U. S. 516. An editor in 43 Harvard L. R. 805 commenting on these cases says: "The result of these decisions seems to be the establishment of an arbitrary limitation upon the doctrine of extra-territorial importance." The editor seems to regret the general application of the doctrine of extra-territorial importance at least so far as receivers are concerned, and concludes that "the national scope of federal sovereignty makes unnecessary a continuance of this unsatisfactory state of law."

If there is reason for making such exceptions to the doctrine of extra-territorial importance as are outlined above it is submitted that an exception might as logically be made in favor of a state officer such as the plaintiff in this case. The question would then still remain whether the foreign state could refuse to enforce the obligation of the tax as a penal obligation. On this point there seems to be no declaration by the supreme court. 30 F. (2nd) 600. "It is not so clear that the obligation to pay a tax is a penal obligation in the same sense in which that term is used in many of the newer cases, especially *Huntington v. Attrill*, 146 U. S. 657, 13 S. Ct. 224." Goodrich, Conflict of Laws, 116. Learned Hand argues in this same case in 30 F. (2nd) 600 that the obligation is penal and should not therefore be enforced.

J. V. H.

**DAMAGES—PENALTY AND LIQUIDATED DAMAGES DISTINGUISHED—BANKRUPTCY—Claimant, as lessor, granted a lease containing the following clause: "The filing of any petition in bankruptcy—by or against the lessee shall be deemed to constitute a breach of this lease, and thereupon, *ipso facto* and without entry or other action by the lessor, this lease shall become and be terminated; and, notwithstanding any other provisions of this lease the lessor shall forthwith upon such termination be entitled to
recover damages for such breach in an amount equal to the amount of the
rent reserved in this lease for the residue of the term thereof." The lessee
having been adjudged a bankrupt, the lessor filed proof of debt for $5000.00
as damages for the breach of the lease. The lease was to run for two
years at an annual rental of $4000.00. After nine months a petition in
bankruptcy was filed against the lessee. Held: 1. The provision called
for an unenforceable penalty. 2. The provision violated the "broad pur-
pose" of the Bankruptcy Act and the claim asserted was not a provable
6, 1930.)

There are a great number of Indiana cases which have dealt with the
distinction between a penalty and liquidated damages. In J. I. Case
Threshing Machine Co. v. Souders, 48 Ind. App. 503, 96 N. E. 177, the
court said: "Whether the amount stipulated in a contract to be paid by
a party upon failure of performance is to be treated as liquidated damages
or as a penalty has been a fruitful source of litigation, and the subject of
much judicial interpretation." . . . "A contract that fixes a certain sum as
liquidated damages for its breach is valid where such amount is reason-
able proportionate to the actual damages sustained." See also Jaqua v.
Heddington, 114 Ind. 309, 16 N. E. 527; Zenor v. Pryor, 57 Ind. App. 222,
106 N. E. 746. The rule announced in these cases has no application to
a provision for the forfeiture, in the event of a default, of installments
already paid. Miller v. Fletcher Savings & Trust Co., 78 Ind. App. 183,
133 N. E. 174. "Where there is doubt as to whether a sum specified to be
paid on breach of a contract was intended as liquidated damages or a pen-
alty, the courts favor that interpretation which makes such sum a pen-
alty." Zenor v. Pryor, supra. We have no doubt that the rule announced
by the Supreme Court of the United States is in accord with the decided
weight of authority in Indiana. It is submitted that had this case arisen
in our state courts the result would have been the same. 17 C. J. 933
et seq.

The court might have stopped here and based its decision upon the
ground that the provision in the lease stipulated for an unenforceable
penalty and could not be a "provable claim" within the meaning of the
Federal Bankruptcy Act and that a court of equity will give relief against
it. In re Scholtz-Mutual Drug Co., 298 Fed. 539. The court, however,
assigned another reason, saying: " . . . The parties were consciously
undertaking to contract for payment to be made out of the assets of a
bankrupt estate—not for something which the lessee personally would be
required to discharge. He, therefore, had little, if any, immediate con-
cern with the amount of the claim to be presented; most probably, that
would affect only those entitled to share in the proceeds of property beyond
his control." The court then said that this violated the "broad purpose"
of the Bankruptcy Act and that it was "plain enough that the real design
of the challenged provision was to insure to the lessor preferential treat-
ment in the event of bankruptcy."

It is to be noted that the court did not say that the provision in ques-
tion was invalid. This raises some nice questions with regard to leases
in bankruptcy proceedings. A few general rules may be briefly stated.
1. If the bankrupt is a tenant of the leased premises, his interest in the
unexpired term of the lease will constitute assets of the estate in bankruptcy and pass to the trustee. 

Crowe v. Baumann, 190 Fed. 399; Olden v. Sassman, 68 N. J. Eq. 799, 64 Atl. 1134; Wildman v. Taylor, Fed. Cas. No. 17,654. 2. The trustee is not bound to assume a lease made to the bankrupt unless he thinks it will be for the benefit of the creditors; he has an option either to accept it or abandon it. In re Chambers, Calder & Co. 98 Fed. 865; In re Frazin, 183 Fed. 28; Summerville v. Kelliher, 144 Cal. 155, 77 Pac. 889; but the option must be exercised, title not passing automatically. In re Kreiger, 15 Fed. (2d) 90, affirmed, 16 Fed. (2d) 554. Nor can a landlord file a claim for damages arising out of the trustee's refusal to take up the lease. Slocum et al. v. Soliday, 183 Fed. 410; In re Shaffer, 124 Fed. 111; In re Roth and Appel, 181 Fed. 667. 3. A lessee's covenant not to assign, mortgage, or pledge the lease, or underlet the property, without the lessor's consent, is not violated by the lessee's bankruptcy. In re Frazin, 174 Fed. 713; In re Bush, 126 Fed. 878; In re Prudential Lithograph Co., 265 Fed. 869, affirmed 270 Fed. 469, and certiorari denied Samuel Vernon Estate v. Lyttle, 41 Sup. Ct. Rep. 534, 256 U. S. 692; In re Tidus, 4 Fed. (2d) 558; Armour & Co. v. Callahan, 25 Fed. (2d) 548; In re Ehehardt, 19 Fed. (2d) 405; Gazlay v. Williams, 210 U. S. 41, 62 L. Ed. 950, 28 Sup. Ct. 687. 4. A clause in a lease providing for forfeiture if a receiver or trustee "shall be appointed of the lessee's property" was held to be valid against a trustee in bankruptcy in In re Scholz-Mutual Drug Co., 298 Fed. 539; Empress Theatre Co. v. Horton, 266 Fed. 657; In re Georagal Bros., 245 Fed. 129; Galbraith v. Wood, 124 Minn. 210, 144 N. W. 945; In re Frazin, supra; Jandrew v. Bouche, 29 Fed. (2d) 346; Sproul v. Help Yourself Store, 16 Fed. (2d) 554. See also In re Famous Fain Co., 10 Fed. (2d) 540. We call particular attention to the fourth classification since we are informed that the rule announced in the cases therein listed is not followed generally in the Federal courts of Indiana. Can the principal case be taken as an authority in favor of the validity of such a provision as against the trustee?

The principal case raises the further question as to whether rents to accrue in the future are provable debts within the meaning of the Bankruptcy Act. The claim here asserted was held by the Circuit Court of Appeals for the First Circuit to be valid and allowable under section 63a (4) of the Bankruptcy Act of 1898, 30 Stat. 563 (U. S. C. A. title 11, c. 7, paragraph 103 (a); see 30 F. (2d) 77). The Supreme Court of the United States did not pass upon this question as the case was there decided upon the ground that the provision in the lease called for a penalty. It is submitted that the weight of authority is against the Circuit Court on this point. See Collier on Bankruptcy (ninth edition), page 878 et seq. and the cases cited there. At page 880 of this volume we find the following statement: "It has been held that a covenant in a lease, making rent for the entire period fall due upon a breach by the lease (lessee?), creates a fixed liability within the meaning of Sec. 63a (1)." In support of this statement Matter of Pittsburgh Drug Co., 164 Fed. 482, and Martin v. Orgain, 174 Fed. 772, are cited as authorities. We shall not extend this note with a detailed analysis of the last two cases, other than say that each of the cases turned on a state statute which came within the contemplation of Sec. 64b (7) of the Bankruptcy Act, giving priorities to
claims having such priority under the "laws of the States of the United States." The decision in In re Pittsburgh Drug Co. is based upon the interpretation which the Pennsylvania court gave to the state statute in Platt v. Johnson, 168 Pa. 47, 31 Atl. 935. The case of Martin v. Organ arose in the Federal Court of Texas. For an interpretation of the Texas statute see Marsalis v. Pitman, 68 Tex. Rep. 624, 5 S. W. 404. In re Pittsburgh Drug Co. and Martin v. Organ are further distinguishable upon the ground that the petition in bankruptcy was not the only breach, but the lessee was in arrears and thus in default. The distinction that we are attempting to make here is plainly shown by the Organ case where the recovery was limited to one year's rent as set out in the state statute, whereas the lease itself was to extend for more than three years. See also Lontos v. Coppard, 246 Fed. 803, another Texas case. See also 7 C. J. 295. The property passed to the trustee burdened with a valid lien, York Mfg. Co. v. Cassell, 201 U. S. 344, 25 Sup. Ct. 481.

DRUGGISTS—SALE OF POISONS—PROXIMATE CAUSE—The deceased sent his 8-year-old son to the drug store of the appellant with the instructions to obtain for him a bottle of carbolic acid in which he said he wished to wash his feet. The child obtained the acid from a clerk of the appellant and delivered it to the deceased who drank it and died. The appellee is the administratrix of the deceased and sues to recover for his death on the ground that the appellant was negligent in selling the acid to the son. She bases her claim on the assumption that the druggist was negligent in the sale to the child and that the death proximately resulted from such negligence. The lower court gave judgment for her for $5000 and the appellant appealed. Held: Reversed. The sale of the carbolic acid to the child was not the proximate cause of the death of the deceased and hence no cause of action lies against the appellant. Riesbeck Drug Co. v. Wray, Appellate Court of Indiana, April 2, 1930, 170 N. E. 862.

The law imposes upon a druggist the duty to conduct his business in a manner so as to avoid acts in their nature dangerous to the lives of others and druggists who perform this duty in such a manner as to cause injury to others must respond in damages. Knowful v. Atkins, 40 Ind. App. 428, 81 N. E. 600. The legislature may regulate the sale of poisons, and failure to comply with such statutes constitutes negligence per se. Goodwin v. Rowe, 67 Ore. 1. Some states have by statute prohibited the sale of poisons to minors. See Nebraska Criminal Code, sec. 42. Indiana has no statute prohibiting the sale of carbolic acid to minors. Even though there be no statute prohibiting the sale of poisons to minors yet there is a general rule of law which demands that a druggist shall exercise in every case that degree of care which the circumstances of the case demand and for a failure to use such care he may be held liable under a general negligence test, for any injury proximately resulting. There is then some duty on a druggist dealing in dangerous drugs, irrespective of statute.

There being a duty to use reasonable care in such sales it was for the jury to decide whether or not there had been a breach of that duty. The jury in the instant case might easily have found that such a sale to an eight-year-old child constituted a breach of this duty. Even admitting,