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NEGLIGENT INTERFERENCE WITH CONTRACTUAL RELATIONS

Whenever a third person through some act, such as harming or destroying persons or property, makes performance of a contract more burdensome, or impossible, or renders performance of less or no value to the person entitled to it, a cause of action in tort arises for the interference with the contractual relations.¹ When the invasion is caused by a negligent act, the courts are faced with a problem which has caused much confusion and led to unsatisfactory results. Let it be said here that this discussion will be devoted only to the problem of negligent interference with a present contractual relation and not the one encountered when there is an invasion of one's interest in entering into a contract.

It is no longer disputed that both parties to a contract have such an interest therein which the law will protect as against third persons. Damages are recoverable at law,² and in some instances, the threatened invasion may be enjoined in equity.³ The interest of a promisee as respects the promisor is to have performance of the contract. He also has an interest as respects third persons in having that contract free from invasions by third persons which may either prevent, retard, or lessen the value of its performance. The promisor, too, has an interest as respects third persons in having his performance free from invasions which make performance more difficult or impossible. Plaintiff's right in contract is not unqualified; it does not protect him from all or any invasions.⁴

There is virtually no doubt any longer that the principle of *Lumley v. Gye*⁵ is the law in all states today. The requirements of the prima facie tort and the circumstances of defendant's justification and privilege are well defined by the cases and adopted by the American Law Institute Restatement of the Law of Torts.⁶ But few cases have considered and few authorities have discussed the more troublesome problem of negligent interference. A legal system which gives a remedy for negligent invasions of other, more tangible interests certainly should not deny a remedy for the negligent invasion of contractual interests particularly when there is a remedy provided for the intentional invasion of both.

¹Carpenter, *Interference with Contract Relations*, (1928) 41 HARV. L. REV. 728.

²*Id.* at 764, app. A; *Caskie v. Phila. Rapid Transit Co.*, 321 Pa. 157, 184 Atl. 17 (1936); *Klauder v. Cregar*, 327 Pa. 1, 192 Atl. 667 (1937).

³*Supra*, note 1 at 764, app. A; *Phila. Dairy Products v. Quaker City Ice Cream Co.*, 306 Pa. 164, 159 Atl. 3 (1931), where an injunction was denied for reason that defendant's act was justified, but the case is authority that such remedy will lie; *Darrington v. Manning*, 135 Pa. Super. 144, 4 A. (2d) 886 (1939).

⁴*Supra*, note 1 at 732; see also, *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 763, 53 Atl. 230, 234 (1902). It was stated there "that the interest of an employer or an employee in a contract for services is property is conceded. Where defendants . . . undertake to interfere with . . . contract relations between employer and employee, it is plain that a property right is directly invaded."

⁵2 E. & B. 216 (1853).

⁶§ 766 *et seq.*

Were a court to start from scratch having a case of first impression, we would expect that it would approach the question somewhat in this fashion: basically, the question is one of negligence, and therefore the principles of negligence should be applied unless there is a good reason for not so doing. First, we should expect the court to determine whether there was some duty owing the plaintiff in his contractual relations. Second, there must be a breach of that duty. And third, the breach must be the proximate cause of the injury.⁷ Then, to ascertain defendant's duty, the court would apply the principle of *Heaven v. Pender*⁸ and decide whether the circumstances were such that an ordinary prudent man would have foreseen harm to the plaintiff in his contractual relations unless he used care with respect thereto. Having determined a duty existed, the court would have little difficulty with the question of breach and could pass on to the more vexed question of proximate cause. This analysis would dispose of the entire matter but unfortunately it is not followed in these cases as it is for negligent invasions of more tangible interests.

The opponents of the remedy find comfort in some cases which are cited⁹ for the proposition that no liability exists for a defendant who has caused injury to the plaintiff in his contractual relations through defendant's negligent act. Most of the cases so cited are distinguishable on the facts. In *Conn. Mutual Life Insurance Co. v. New York and New Haven R. R. Co.*,¹⁰ plaintiff insurance company was required to pay out money on decedent's insurance policy due to defendant's negligence. There were no facts to show that defendant knew or should have known of plaintiff's interest in decedent. The court broadly declared that a plaintiff cannot successfully claim a legal injury to himself from another because the latter has injured a third person in such a manner that plaintiff's contractual liabilities are affected thereby. It is submitted that the true basis for this decision is lack of defendant's knowledge of plaintiff's interest and thereby he could foresee no harm and owed no duty to plaintiff. All the other language in this decision is purely dicta and of no more weight than that in being cited for the proposition above stated. And again, in *Brink v. Wabash R. R.*,¹¹ plaintiffs, who were the parents of the decedent who was killed through defendant's negligence, sought to recover damages for injury to them under a contract which decedent had made to support them. While the court here disposed of the case on the theory that no common

⁷REBSE, *Negligence and Proximate Cause*, 7 CORN. L. Q. 95 (1921).

⁸(1883) L. R. 11 Q. B. D. 503. The doctrine recited therein is: ". . . whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

⁹*supra*, note 1; Note (1918) 31 HARV. L. REV. 1017.

¹⁰25 Conn. 265 (1856). See also, *Cattle v. Stockson*, L. R. 10 Q. B. 453 (1875); *La Societe Anonyme de Remorquage a Helice v. Bennetts*, (1911) 1 K. B. 243.

¹¹160 Mo. 87, 60 S. W. 1058 (1901).

law action could be maintained for decedent's death, recovery here being in effect permitting such recovery since the tort was said here to spring from the defendant's negligence toward decedent, it could have pointed out that under the facts no knowledge or notice was shown on the part of defendant and hence, no duty could arise toward plaintiff in his contractual relations. This principle is better illustrated in *Robins Dry Dock & Repair Co. v. Flint*¹² where the United States Supreme Court was called upon to decide a case involving an injury incurred by libellant through his contract by the negligence of respondent. There, libellant had a contract of charter of a vessel which he had agreed to place in dry dock every six months. In accordance with this contract, libellant placed the vessel in respondent's dry dock where its return to service was somewhat delayed through respondent's servants negligently injuring the propeller which then had to be replaced. The owner of the vessel had made the contract with the respondent. Libellant sued for the loss due to delay in returning to service. Mr. Justice Holmes in denying liability said:¹³ "The question is whether the respondents have an interest protected by the law against the unintended injuries inflicted upon a vessel by third persons who *know* nothing of the charter." (*Italics added*). While there can be no quarrel with the court's statement of the law, it is curious to observe that this case is cited frequently¹⁴ for the proposition that there is no liability for negligent interference with contract. These words of Mr. Justice Holmes merely add up to the thought that there can be no duty imposed upon a defendant who knows nothing of the interest to be protected. This is a fundamental rule of negligence.

There is another group of cases which refuses to hold defendant liable. Though these imply that a duty is owed, they state that the injury is too remote from the cause. *Anthony v. Slaid*¹⁵ is one of this group. There, plaintiff had a contract to support town paupers, one of whom was injured through defendant's negligence, the plaintiff thereby being forced to extra expense under his contract. The court denied liability upon the theory that no duty was owed to plaintiff and

¹²275 U. S. 303 (1927).

¹³*Id.* at 309. See also, *Kelly v. Central Hanover Bank & Trust Co.*, 11 F. Supp. 497 (S. D. N. Y. 1935), where equity jurisdiction to grant mandatory injunction to restore a pledge made in violation of restrictive covenants was denied where it was not shown that defendant knew of the restrictive covenant.

¹⁴Mr. Justice Holmes continued with an expression which is often cited for no liability for negligent interference with contract: ". . . no authority need be cited to show that, as a general rule, at least, a tort to the person or the property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with the other, unknown to the doer of the wrong. The law does not spread its protection so far." See, *Sidney Blumenthal & Co. v. United States*, 30 F. (2d) 249 (C. C. A. 2nd. 1929); *New York Trust Co. v. Island Oil & Transport Corp.*, 34 F. (2d) 649 (C. C. A. 2nd. 1929); *Lampport v. 4175 Broadway, Inc.*, 6 F. Supp. 923 (S. D. N. Y. 1934).

¹⁵2 Mass. 290 (1846). Mr. Chief Justice Shaw speaking for the court said: "It is not by means of any material or legal relation between the plaintiff and the party injured that the plaintiff sustains any loss by the act of the defendant's wife but by means of the special contract by which he has undertaken to support the town paupers. The damage is too remote and indirect."

if there was, the injury was too remote from the cause. In *Conn. Mutual Life Insurance Co. v. New York and New Haven R. R. Co.*,¹⁶ previously discussed, there is language to the same effect citing *Anthony v. Slaid*¹⁷ with approval. The theory of these cases seems to be founded on a public policy which seeks to protect wrongdoing defendants at the expense of innocent plaintiffs. It is highly doubtful whether such is the policy of the law. It is fortunate that these cases can be explained on other grounds, i. e., that no duty arose because of lack of knowledge, otherwise these cases would seem clearly to be wrong. An interesting course of reasoning was taken by a federal court in *The Federal No. 2*,¹⁸ where libellant sought to recover for hospital and medical expenses caused by respondent's negligence causing injury to libellant's employee for which expenses libellant had obligated himself through his contract of employment. The court in holding that respondent was not liable said that libellant was attempting to hold respondent upon "the producing of the contingency which makes libellant liable under his contract"¹⁹ and further that the contract "was the proximate cause of the libellant's damage."²⁰ The logic of the court leaves something to be desired as the libellant here is claiming injury to himself in his contractual relations and not a personal injury apart from the contract. How then can the contract be said to be an efficient intervening cause between respondent's wrong and the libellant's injury? On closer analysis, the court appears to be saying this: that although a duty exists to libellant in his contractual relations recovery should always be denied because the proximate cause of the injury is libellant's contract which must always be present to give rise to the duty. Hence *reductio ad absurdum!*

Some cases deny liability for reason of public policy. Such is the case of *Byrd v. English*.²¹ There plaintiff was a user of electric power gotten under a contract with the public utility. Defendant in doing some excavating caused injury to the utility's cables which caused a failure of power and loss to plaintiff. The court in sustaining defendant's demurrer said that were it to concede liability to plaintiff then, on the same basis, plaintiff's customers would be entitled to recover for their losses growing out of the same wrong from defendant *ad infinitum*. This reasoning is not peculiar to this situation. The same criticism of limiting liability of a defendant where the courts have applied the natural and probable consequence rule for proximate cause could be directed at this argument. As between a wrongdoer and an innocent plaintiff, the one who sets the wrong in motion should be charge-

¹⁶*supra*, note 10.

¹⁷*supra*, note 15.

¹⁸14 F. (2d) 530 (E. D. N. Y. 1926).

¹⁹*id.* at 531.

²⁰*ibid.*

²¹117 Ga. 191, 43 S. E. 419 (1903).

able for all injuries which flow from the wrong without the intervention of a more efficient cause.²²

Turning now to the cases which have allowed plaintiff to recover for negligent interference with contract, we find three classes of cases. Whether the groups are all-inclusive is a matter which cannot now be determined but on principle they should not be. First, there are those cases which have imposed liability for injury to an employee of the plaintiff. In *Bradford v. Webster*,²³ defendant's servants negligently injured a policeman employed by plaintiff municipality. It was held that plaintiff could recover damages for loss of service and for extra compensation it had paid as a special pension. There seems nothing inherently peculiar about employment contracts which should allow recovery here and deny it as to other contracts.

Second, there are cases which have arisen in the field of admiralty law where recovery has been allowed. Why this is true in admiralty and not under tort law generally is difficult to understand. Latest of these cases is *Aktieselskabet v. The Sucarseco*.²⁴ There, the Toluma, a vessel carrying a cargo, collided with the Sucarseco through the admitted negligence of both vessels. Under the cargo contract of the Toluma, the usual clause requiring the owners of the cargo to contribute a general average apportionment of expenses and losses incurred through accident to the vessel forced the libellant to pay a certain sum for which they then sued to recover from the respondent. On the basis of the *Robins Dry Dock Case*, *supra*, respondent argued that no recovery could be had. Mr. Chief Justice Hughes speaking for the court pointed out²⁵ the distinguishing fact of lack of knowledge of respondent there, whereas here respondent was charged with knowledge of the usual and customary clauses of cargo contracts. Respondent was therefore held liable. The decision is the stronger because the court points out that libellant's right to recover is not derived from that of the owner of the vessel but is based upon the direct tort to libellant. This can only be in his contractual relations. If there was any doubt of the liability of a defendant for negligent interference with contract, this decision would seem to lay its ghost.

²²*Cf.* *Ryan v. New York Central R. R. Co.*, 35 N. Y. 210 (1866). In New York, the courts have arbitrarily set a limit on the extent of injuries for which a defendant can be charged for negligent start or maintenance of fire which spreads to other buildings. Damages are recoverable only for the first building to which the fire has spread even though further spread was reasonably foreseeable. The rule is based upon public policy for otherwise a defendant may be faced with financial ruin. For a criticism, see REESE, *Negligence and Proximate Cause*, 7 CORN. L. Q. 95 at 108, 109 (1921). See also, Note (1918) 31 HARV. L. REV. 1017 at 1019.

²³(1920) 2 K. B. 135. See also, *Jones v. Brown*, 1 Esp. 217 (1794); *Martinez v. Gerber*, 3 Man. & G. 88 (1841). *Cf.* *The Federal No. 2*, *supra*, note 18.

²⁴294 U. S. 394 (1934). See also, *The Argentino*, 14 A. C. 519 (1889). *Cf.* *Robins Dry Dock & Repair Co. v. Flint*, *supra*, note 12; *La Societe Anonyme de Remorquage a Helice v. Bennetts*, *supra*, note 10.

²⁵294 U. S. at 404.

The third class of cases involves a duty imposed by a contract incidental to the main contract. In *Glanzer v. Shepard*,²⁶ defendant weigher was engaged by X to weigh and furnish to plaintiff the correct weight of beans which X was to supply plaintiff. Through defendant's negligence in weighing, plaintiff overpaid X and sought to recover the amount overpaid as damages caused him by defendant. It was held that defendant was liable for his negligence in consequence of which plaintiff was injured in his contractual relations.

In the case of *Cue v. Breeland*,²⁷ the Mississippi court went the whole way in imposing liability for negligent invasion of contractual interest under circumstances when it might well be questioned whether there was any foreseeability of harm to plaintiff. It did not appear in the case that defendant knew or should have known of plaintiff's interest.

While the American Law Institute has given elaborate treatment to the subject of inducing breach of contract in the Restatement of the Law of Torts,²⁸ it is entirely silent on the question we have been discussing. No doubt this omission will be regarded as persuasive by those courts which would deny the remedy in any event.

In addition to the reasons above stated for refusing liability for negligent interference with contract, it has been stated that granting such a remedy would be opening the door to much litigation.²⁹ It has also been urged that such action would cause too much difficulty in apportioning damages.³⁰ However, neither of these arguments is peculiar to invasion of contractual interests. Nor is the latter argument weighty in view of the fact that the same problem arises in cases involving intentional invasions where courts have almost universally made the necessary apportionment. The sum and substance of most of the arguments is that courts are reluctant to take a forward step.

As to the position of Pennsylvania on this question, it can only be said definitely that there is no case in the books on this specific problem. However, in *Tredway v. Ingram*,³¹ the Superior Court decided a closely analogous question. There plaintiff having agreed to lend money on a mortgage on a new home required a release of liens to be signed by the contractor and sub-contractors on that job. Defendant sub-contractor signed a release purporting to be the one for this

²⁶233 N. Y. 236, 135 N. E. 275 (1922).

²⁷78 Miss. 864, 29 So. 850 (1901).

²⁸*supra*, note 6.

²⁹*Anthony v. Slaid*, *supra*, note 15; *Conn. Mutual Life Insurance Co. v. New York and New Haven R. R. Co.*, *supra*, note 10; *Ryan v. New York Central R. R. Co.*, *supra*, note 22; *Savings Bank v. Ward*, 100 U. S. 195 (1879).

³⁰Note (1918) 31 HARV. L. REV. 1017 at 1019-1021.

³¹102 Pa. Super. at 459, 157 Atl. 4 (1931).

home though he had furnished no materials for this home but had for others in the vicinity. Plaintiff took the mortgage and then to save its priority had to purchase some liens placed against the home by some materialmen who had actually furnished the materials. Defendant had no knowledge of plaintiff's mortgage. The court held that defendant was not liable since he owed no duty to plaintiff, hence his act could not be negligent as to her or her mortgage. The court admits that the decisive factor here was defendant's lack of knowledge. This seems to return us to the fundamental problem of finding a duty. Similarly, in *Peabody Bldg. & Loan Ass'n. v. Houseman*,³² plaintiff loaned money upon mortgages to be secured by X's real estate. The title had been searched by defendant recorder of deeds who had been engaged to do this by X. Defendant knew that plaintiff was going to loan money upon the faith of these searches. The evidence showed that defendant knew of some existing mortgages and relied upon X's assurance that these were to be paid off out of the money to be received from plaintiff. The Supreme Court held that plaintiff could recover his loss due to defendant's negligence. In short, both these cases seem to require a duty owing by defendant to plaintiff, and in both cases, knowledge is the controlling factor.³³ In the former case, there was no knowledge and consequently no liability on the part of defendant, whereas in the latter, defendant had actual knowledge of the purpose of the search and held liable. Between these two extremes, there can be varying degrees of knowledge before a duty will be imposed, and for that reason, we cannot now determine what the rule may be. While these cases are prospective, looking toward a contractual relation to be formed, it should be safe to say that if Pennsylvania imposes a duty upon one to use care toward others about to enter into contractual relations, an interest less highly regarded by the law than the interest one has in an existing contract,³⁴ it should protect the more favored interest with an equal or stricter rule.

It is entirely clear that Pennsylvania recognizes the tort of interference with contractual relations when the invasion is accomplished by an intentional act. Certainly the court should allow recovery when the invasion is accomplished by a negligent act. It would seem that consistency and public policy should favor the same remedy for each.

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³²89 Pa. 261 (1879). Cf. *Watson v. Muirhead*, 57 Pa. 161 (1868), where it is implied that a duty exists to purchasers by defendant abstractors of titles engaged by vendor to use "ordinary knowledge and skill (and) . . . due caution," but under the facts, the defendant had exercised such care and skill and loss devolved upon plaintiff notwithstanding defendant's discharge of his duty.

³³See, 34 A. L. R. 67; 68 A. L. R. 375.

³⁴*supra*, note 1 at 741.

DUTY OF A LIFE TENANT OF REAL ESTATE TO PAY TAXES AND MAKE REPAIRS

The life tenant of real estate owes a duty to the owner of the future interest to pay the taxes accruing during his tenancy and to keep the premises in as good repair as when the tenancy began.¹ His liability, however, in Pennsylvania and many other jurisdictions, has been limited to the amount of income received, or where the property is occupied by the life tenant, to the rental value thereof.² It should be noted that the duty is imposed only in the absence of a contrary agreement or when the creator expresses no intent to the contrary.³ For example, in *Daly's Estate*⁴ there was a direction by the testator that the life tenant should be permitted to hold the property "rent free" and that she should not be required to pay the taxes, interest on charges, or make repairs. The court held in such a case the life tenant was relieved and the remainderman had to assume the duties.

It is to the tenant's obligations in the ordinary estate for life, where there is no direction or agreement, that we wish to confine this note. As a general rule, in regard to the payment of taxes, the tenant has a duty to pay all those which accrue during his tenancy to the extent of the income derived.⁵ In a case where there is but one instrument creating a life estate in property composed of separate lots the courts are confronted with the problem of applying the rule stated in the preceding sentence. According to the holding in *McDannel v. Weddige*,⁶ however, the liability exists for the whole of the estate even though the property is in part unproductive. It was decided in that case, though the unproductive portion did not yield a sufficient income to pay the taxes on that portion, the income of the productive part must be applied. The words of Judge Gawthrop were:

"If the defendant would continue to enjoy all the benefits accruing to him as a life tenant, he must assume all the burdens imposed upon him by law. As the rental value of the *entire* estate was ample to pay *all* the taxes, we think the Act of 1887 imposed on him the obligation to take part of the rental from the income producing land and pay the taxes on the unimproved lots. Any other interpretation of

¹*Farber's Estate*, 70 Pa. Super. 81 (1918); *McDonald v. Heylin*, 4 Phila. 73 (1860); *Estate of Wilson Jewell*, 11 Phila. 73 (1875).

²*McDannel v. Weddige*, 79 Pa. Super. 494 (1922), 101 A. L. R. 681; *Deprisco v. Rykaczewski*, 18 Del. Ch. 252, 158 Atl. 145 (1932); *Woolsten v. Pullen*, 88 N. J. Eq. 35, 102 Atl. 461 (1917). See *In re Stout's Estate*, 151 Ore. 411, 50 Pac. (2d) 768, 773 (1935). The Oregon court said the life tenant was not excused merely because the annual income was reduced during her occupancy. It was the total income from the entire period of the life tenant's occupancy which was considered.

³See *Sheffield v. Cooke*, 39 R. I. 217, 98 Atl. 161, 171 (1916), 35 L. R. A. 790.

⁴*Daly's Estate*, 11 W. N. C. 514 (Pa. 1882).

⁵*McDannel v. Weddige*, 79 Pa. Super. 494 (1922), 101 A. L. R. 681.

⁶*id.*

the act would not only practically nullify it, but would lead to results absurd and unjust."⁷

Since the Act of 1887,⁸ referred to by Judge Gawthrop, merely gives the remainderman additional protection by providing for the appointment of a sequestrator to meet the obligations when the life tenant refuses or neglects to pay the taxes, this case would have been decided in the same way on common law principles. In *Taheny's Estate*⁹ the court went a step further by holding that when the unproductive real estate is sold, the life tenant cannot demand that the amount of the taxes paid out of the estate generally be repaid to him from the proceeds of such sale. The following sentence is quoted from the opinion of the court: "If the remaindermen are unwilling to allow the life tenant the amount of depletion of his income, the court is without authority to compel payment."

For the purpose of comparison may we point out that the rule of *McDannel v. Weddige*, *supra*, is not in accord with the one adopted by the New York court in *Marshall's Estate*.¹⁰ In this case, it was held that the income of the productive portion should be used to pay the taxes on the unproductive part, but the court said the proportion of the unproductive to the productive property must be taken into consideration in determining whether the life tenant should pay the taxes. Thus, in New York a life tenant has a duty to pay the taxes on the unproductive property when the income is large and the tax is relatively small. The *Restatement of Property*¹¹ represents a third view in regard to this problem. It states that since a life tenant is liable only to the extent of the income it must naturally follow that he is liable only to the extent of the income received from the unproductive property.

Since the Pennsylvania courts have stated on several occasions that the owner of a life estate is bound to keep the property in the same state of repair as when the tenancy began,¹² no construction would exempt him from liability to repair conditions resulting from his own willful or negligent acts.¹³ It is well settled in the case of an estate for years that the tenant is not required to repair a condition resulting from an act of God or public enemy, and this is true even though there is an express covenant to return in the same condition.¹⁴ Although a strict interpre-

⁷Italics added.

⁸Act of May 24, 1887, P. L. 168 § 1, 68 PS 231.

⁹*Taheny's Estate*, 12 Pa. D. & C. 243 (1927).

¹⁰*Marshall's Estate*, 238 N. Y. Supp. 763 (1930).

¹¹REST., PROPERTY (1936) § 130, comment g.

¹²*Farber's Estate*, 70 Pa. Super. 81 (1918).

¹³*Brinton v. School District of Shenango Township*, 81 Pa. Super. 450 (1923). Although this case involved an estate for years, there was a covenant to return the premises in the same condition as they were at the inception of the lease. REST., PROPERTY § 146, comment c.

¹⁴*Pollard v. Shaafer*, 1 Dall. 210 (Pa. 1787). The court said such repairs were not within the contemplation of the parties at the time the lease was executed.

tation of the rule stating the life tenant's duty to repair would require him to repair a condition brought about by either of the above mentioned forces, it is predicted that the courts will draw an analogy to the duty imposed upon a tenant for years; especially since the tenant for years in *Pollard v. Shaffer*¹⁵ was bound by a contract stating the precise legal duty of a life tenant. In regard to ordinary wear and tear a reasonable construction of the rule would impress upon the holder of a life estate the duty to repair such conditions and it has been so interpreted.¹⁶

The *Restatement of Property* adopted a doctrine which negatives any duty to repair conditions resulting from an act of God or public enemy¹⁷ by requiring the tenant to make only ordinary repairs.¹⁸ In a jurisdiction which follows the *Restatement* view the life tenant's obligation to repair ordinary wear and tear is stated as follows:

"A repair necessary to make good ordinary wear and tear is not within the duty unless such repair is necessary to prevent a progressive deterioration of the land or structures or whenever the condition existing as a result of the failure to make such repair will amount to substantial deterioration of the land or structures from the condition in which such land and structures were at the time of the commencement of the estate for life."¹⁹

In the case where a transferee of a life estate is in possession, the courts of different jurisdictions have emerged with conflicting doctrines in regard to the extent of the life tenant's liability to pay taxes and make repairs. In *Murch v. J. O. Smith Manufacturing Co.*²⁰ the New Jersey court disposed of the problem in the following manner. In this case Murch had been in possession of the property in question for eight years as tenant by curtesy, and then the property was sold under a judgment to the defendant corporation. The life tenant, Murch, had failed to pay certain taxes on the property and also had permitted the house to go out of repair. The purchaser under the judgment was sued by the holder of the remainder interest for failure to pay the taxes which should have been paid by the former holder of the life estate. The defendant advanced the argument that he could not be held responsible for the default of the former tenant, but the court held that a transferee stands in the shoes of the former life tenant and takes the liabilities with the benefits. The court went on to say that the subsequent holder of a life estate is bound not only to keep down the charges and make repairs from the profits

¹⁵*id.*

¹⁶In the Matter of Steele, 19 N. J. Eq. 120 (1868).

¹⁷REST., PROPERTY § 146.

¹⁸*id.*, § 139.

¹⁹*id.*, § 139, comment c.

²⁰*Murch v. J. O. Smith Mfg. Co.*, 47 N. J. Eq. 193, 20 Atl. 213 (1880).

received by him while he is in possession, but the profits of the entire estate are applicable to the discharge of such liability.

The authorities are not in accord as to whether a transferee should be held liable for the failure of a transferor to apply the income to the payment of taxes. Though there is a basis for requiring the purchaser at a sale, under a judgment, to devote the rents and profits to the payment of taxes owed by the former holder of the estate,²¹ it seems inequitable to extend the liability beyond the income of the estate while the subsequent holder was in possession. The *Restatement of Property*²² adopts the more equitable view by saying:

"The rule stated in Clause (b) (*i. e.*, the extent of the Life Tenant's liability) has particular importance when the estate for life is transferred. The duty of each successive owner of the same estate for life is limited to the proper and full application by him of the sums derived *by him* from the estate for life."^{22a}

The problem presented by the *Murch* case has not confronted our courts, but it has been held in *Crump's Estate*,²³ where the life tenant died during the tax year, the taxes for that year will be apportioned between the tenant and the remainderman. This is true even though the taxes were payable on a certain day each year and it made no difference that the tenant for life had received enough profit to pay the year's taxes.

Germane to a study of the duties and extent of liability of a life tenant is a discussion of the remedies which the law affords the remainder when the tenant does not perform these duties. If the life tenant fails to apply the income derived from the estate to the payment of the taxes which accrue during the tenancy and fails to keep the premises in the same state of repair as at the origin of the tenancy, the remainderman is provided with alternative remedies. Since there is a personal liability imposed by law the remainderman can, upon default of the tenant, pay the taxes or make the repairs and recover the amount from the life tenant.²⁴ Under the provisions of the Act of May 24, 1887,²⁵ entitled "An Act for the Protection of the Owners of Freehold Estates in Remainder or Reversion," if the life tenant fails to make the repairs which he is legally bound to make or to pay the taxes, a sequestrator will be appointed to meet these obligations. According to the words of the court in *Rowe v. Thompson's Executors*,²⁶ this act does not change the prior

²¹17 A. L. R. 1397.

²²REST., PROPERTY § 130, comment *d*.

^{22a}Italics added.

²³*Crump's Estate*, 13 C. C. 286 (Pa. 1893).

²⁴*McDannel v. Weddige*, 79 Pa. Super. 81 (1918).

²⁵Act of May 24, 1887, P. L. 168 § 1, 68 PS 231.

²⁶See *Rowe v. Thompson*, 8 Luzerne Legal Reports 449, 452, 453 (1897).

remedy available to the remainderman, but simply gives him an additional one. The following dictum expresses the effect of the act very distinctly:

"The very nature of the remedy, in the case of a tenancy for life, makes it applicable only during his life. The act does not in express terms provide that the failure of the remainderman to avail himself of the remedy thereby given during the time when it may be applied, shall work a forfeiture of all claims against the estate of the life tenant, nor is such its spirit or purpose as shown by its title and its terms. Its object was security to the remainderman against an irresponsible tenant for life or for years who might otherwise absorb all the rents and leave nothing out of which those interested in the estate after his death might obtain relief. The remainderman may waive this security without loss of his right to prosecute the estate of the tenant."

Whether the remainderman or reversioner proceeds under the Act of 1887 or seeks reimbursement from a defaulting tenant, it is significant to note that the plaintiff has the burden of proving that the income is sufficient.²⁷

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²⁷Clark v. Middlesworth, 82 Ind. 240 (1882).