

Realism in Statutory Interpretation and Elsewhere

NOTHING is more disconcerting to a writer of an article in a law review¹ than to be overruled by the Supreme Court of the United States. It seems, however, upon careful examination of the problem, that the Court acts within its constitutional powers when it does so.

This reflection is induced by the case of *Manhattan Properties v. Irving Trust Company*,² in which it was decided that under two types of leases, the landlord could not prove in bankruptcy for the difference between the rents reserved in the lease for the proportion of the term subsequent to the bankruptcy, and the rental value of that proportion at the time of the bankruptcy. The moment of bankruptcy is, I suppose, taken to be the date of the petition, provided the petition is followed by adjudication.

The decision will undoubtedly be cited as authority for the statement that "future rents are not provable under our present bankruptcy statute." Of course, it does not decide that at all, but confines itself, quite properly and judicially, to the question before it, which lays emphasis on the particular kind of lease in the cases presented.

One of these two leases provided that on bankruptcy the lessor might, if he chose, determine the lease and retake possession, in which event, the tenant agreed "to pay each month to the landlord the deficit accruing from the difference between the amount to be paid as rent as herein reserved and the amount of rent which shall be collected." The other lease provided that "upon entry, this lease shall determine, and the lessee covenants that in case of such termination it will indemnify the lessor against all loss of rent which the lessor may incur by reason of such termination. . . ."

The Court takes the common character of these two leases,—which is to furnish the generalized type,—to be the fact that "in both cases the lessor has the choice whether he will terminate the lease. . . ."³ If, therefore, there is a "rule" to be derived from the case, that is to say, if we attempt to find one of the limits beyond which we are not entitled to generalize, we may say that all cases in which the lessor at his option may or may not terminate a lease, are within this decision and that in all such cases, the lessor may not prove for the rent which accrued after the bankruptcy.

¹ The article is Radin, *Claims for Unaccrued Rent in Bankruptcy* (1933) 21 CALIF. L. REV. 561, (1933) 22 *ibid.* 1.

² (1934) 291 U. S. 320.

³ *Ibid.* at 338.

It ought not to be necessary to say that the limit of generalization thus reached is not exclusive in both directions. It does not follow that future rent may be proved in all leases which do not have this option. We may properly say in those cases the Supreme Court has not yet decided, and the vexed question is to that extent still open.

At the same time, the Court does put a rather weighty emphasis on the fact that the leases in these cases could be terminated only by reëntry. One wonders whether Mr. Justice Roberts means us to drag out the slightly shopworn rule of *expressio unius*. That rule, to be sure, is usually applied to statutes, but as far as it has any validity at all, it is a rule of logic and common sense. And such validity depends precisely on the degree of emphasis attached to the thing expressed. If it is so emphatic that reasonable people could imply a negative, then the expression of one thing, *i. e.*, the creation of one category, is in fact, and not in theory, the exclusion of anything not in this category.

Suppose that a lease is so drawn up as to provide specifically that bankruptcy avoids or terminates the lease, and that reëntry is merely one of the several ways in which the lessor may safeguard his property. Does this decision apply? Or again, suppose the lease provides that bankruptcy, or some other circumstance that just preceded bankruptcy, terminates the lease, at the lessor's option without reëntry. Must the option be exercised by an overt act before the petition in bankruptcy or may it be exercised afterwards with retroactive effect? So much is made of actual entry by Mr. Justice Roberts that we are left uncertain.

We are the more uncertain because in some at least of the cases cited⁴ the lease did in fact provide that not the reëntry but bankruptcy itself, or a default in rent, terminated the lease. I may mention *Trust Company of Georgia v. Whitehall Holding Company*,⁵ *In re Metropolitan Chain Stores*,⁶ *In re Mullings Clothing Company*,⁷ and *Orr v. Neilly*.⁸ And in one of the earlier cases cited, *Bray v. Cobb*,⁹ the court reaches its conclusion on the premise that the contractual relations created by the lease were terminated, although most of the other cases, and this one in the Supreme Court, base their reasoning on the theory that these relations had not terminated.

The cases cited in this decision have somewhat the air of being thrown together, but there they are. Shall the fact that they are duly and properly cited in this connection be taken to modify the crucial im-

⁴ *Ibid.* at 335.

⁵ (C. C. A. 5th, 1931) 53 F. (2d) 635.

⁶ (C. C. A. 2d, 1933) 66 F. (2d) 482, 483.

⁷ (C. C. A. 2d, 1916) 238 Fed. 58, 61.

⁸ (C. C. A. 5th, 1933) 67 F. (2d) 423.

⁹ (E. D. N. C. 1900) 100 Fed. 270.

portance of the landlord's entry, which must necessarily, for our purposes, be a day, or at least a few minutes, after the filing of the petition? It is difficult to say.

Justice Roberts has not cracked his whip over those venerable but spavined nags, "Contingency" or "Absolutely Owing" or "Lord Coke" or the "Differences between Realty and Personality."¹⁰ He has contented himself with the statement that while a logical basis might be found for the contradictory view, the weight of authority is for the decision he renders. I think he is quite right. The term "weight of authority" has a discoverable meaning—a realistic meaning. If ordinary experience is a guide, I should say that the great majority of experienced and successful lawyers who have ever thought of the question, have been of the opinion that rent claims accruing after bankruptcy are in general not provable. Indeed, these same lawyers would not wish offhand to cite a situation in which such rent claims were provable. This is certainly authority and weighty enough, and it is evidenced to the Court by many cases, some of which are cited. That these cases can be distinguished, reclassified and regenereralized so as to leave many situations in which "future" rent would be provable cannot detract from the fact that in all these cases the deciding judges were extremely reluctant to permit this proof, and obviously entertained a firm conviction that on the whole claims for unaccrued rent should not be proved. These decisions are, therefore, quite properly evidence that authority is with Justice Roberts, even though the decisions themselves are not always neatly logical nor historically sound.

Now, why should lawyers in general on or off the bench have this conviction? We cannot put it quite on previous authority because when the authority is examined historically, it melts very rapidly.¹¹ It is quite unlikely that there is any unconscious economic prejudice at work or that lawyers, on the whole, belong to a class whose interests would be adversely affected by a different decision. Normally, a weighty lawyer means a landlord's lawyer and landlords are the very persons whose claims are rejected. To be sure, a weighty lawyer is also as a rule a creditor's lawyer, and the claims of creditors are here maintained. But it cannot be said that the interests of the latter group are so predominant in the conscious or unconscious minds of lawyers as to control their determinations.

¹⁰ On pages 332 and 333, he refers to these terms in passing, but chiefly by way of historical review. Perhaps I may refer to the article above cited (*supra* note 1) in which I sought to show that claims for future rent are no more and no less "contingent" than executory contracts in general, and no less and no more "absolutely owing" than any other obligation of which the performance is accelerated by anticipatory breach.

¹¹ Coke, in spite of his frequent invocation in this connection, was not speaking of these claims at all when he made the unimpeachable statement that interests in realty were different from interests in personalty.

I think it is a technical prejudice, the result of a more or less uniform training in a particularly technical craft. A dogmatic tradition in regard to rent has for several generations been transmitted so vigorously that the immediate reaction of any craftsman in the law—however inadequately trained in other respects—is to state that rent and right of occupation are indissolubly associated. Legal apprentices do not learn about rent at the same time they learn about contracts in general and they attach a wholly different group of associations to these two kinds of obligations. What comes into the mind of most lawyers when rent is mentioned is not a single abstract relationship, but a whole complex of type situations which he cannot without an effort tear into pieces.

Authority is, therefore, on the side of the decision, if authority is all a decision needs.¹² Justice Roberts does not quite think so because he works out for his decision a fine logical scheme which involves rules of statutory interpretation and a distinction between one obligation and another, which is not without its ingenuity.

So far from quarrelling with the result of the decision, I may say that it is quite defensible, not only on authority, but also on the realities of the situation involved. What we have here is a contest between two groups of creditors. Of these two, in *Manhattan Properties v. Irving Trust Company*, the lessor will get his property back if the claim is allowed, and will also prove for twenty-five thousand dollars. On this, of course, he will receive a dividend, not the full sum. If the dividend averages those which are paid in cases in which there is an estate to distribute, it may amount to six or seven thousand dollars.¹³ And the lessor will also get the chance that the rental value of his property will considerably appreciate and so closely approach the rental value of the lease that in fact the landlord may lose nothing at all. The remaining creditors, on the other hand, will get no such chance of recoupment.

Again, the loss of twenty-five thousand dollars is determined by subtracting the present rental value of the balance of the term, thirty-three thousand dollars, from the rental value as set forth in the lease, fifty-eight thousand dollars. But the least experience in these matters must make evident that the determination by any appraiser of this value must contain a great many quite conjectural elements, and that the rental value of thirty-three thousand dollars was not likely to have been put

¹² "Authority" is not at all the same thing as a binding precedent. Where precedents are binding and to the extent that they can be binding, the following of a precedent is the enforcement of a rule of law. Evidently these cases in lower federal courts are not binding precedents on the Supreme Court.

¹³ Gamer, *On Comparing "Friendly Adjustment" with Bankruptcy* (1931) 16 CORN. L. Q. 35 *et seq.* Cf. further (1931) 6 JOUR. OF NAT. ASSOC. OF REFEREES IN BANKRUPTCY 78-79.

too high. We must remember that the date at which this value, for a lease which had still five and a half years to run, was determined, was March 18, 1932, in the very lowest trough of a depression. There was, accordingly, a real likelihood that within five and a half years there would be an appreciable rise in rental values.

Since the struggle was between these two groups, the equities would seem to be against the lessor and for the trustee. It is true that, if, besides the lessor, there had been another creditor claiming on a breach by anticipation, the comparison would need revision. We do not know that there was such a creditor, but if he had been present, he would, like the lessor, still possess whatever goods he had not yet furnished and need no longer furnish. It is not likely, however, that he would have the same chance at later recoupment by a rise in value, since few commodities are as permanent even as improved realty.

The lease had been made in a peak year, *i.e.*, on February 1, 1928, and, therefore, at what must be assumed to have been a specially high rental. It is safe to assume that most of the other obligations had been entered into between 1929 and 1932, in a period of rapidly falling prices. That certainly increases the balance of equity against the lessor and in favor of the other creditors.

Whether such considerations can be adequately evaluated in every specific case is doubtful. Since rules must have categories, the realistic approach would be to find whether in the majority of cases this superior economic position of the lessor is maintained. For that we should need far more actual data than we possess, but such a study as that undertaken by the Yale and Columbia Law Schools demonstrates that the data could be got if we set about it.¹⁴

The balances of interests are hard to set. When for good reason we postpone the landlord to other creditors, we find that under our system we must at the same time put the debtor at a disadvantage. If the landlord cannot prove, he keeps his claim against the debtor. Now, since a consideration for the real facts compels us to consider the landlord, the creditor and the debtor as three persons who, each in his own way, invested money in a particular enterprise, it would seem reasonable that when that enterprise is over, all the parties are in some equitable fashion discharged and a line drawn under this unsuccessful business attempt. Evidently that is not the case if the lease is allowed to survive and to create a monthly debt for years to come or a substantial debt at once.

To be sure, when, as in one of these cases, the tenant-debtor is a

¹⁴ Douglas and Marshall, *Factual Study of Bankruptcy Administration* (1932) 32 *COL. L. REV.* 25.

chain-store which may have sought bankruptcy as a means of getting rid of a lease and which in any case almost certainly means to go on in the same business very near, if not at, the previous site, the balance of equity is not much changed. And where the business failure means the end of the independent business career of the bankrupt, the surviving liability is in practice an illusory asset for the landlord. It is in the intermediate situations that there is a real burden which might need relief. Whether in the majority of cases it overcomes the balance of equity in favor of the general creditors depends upon facts which are not as yet within our knowledge.

If the decision is supportable on authority and also, it may be, on the realities of the situation, the only unresolved doubt is that which concerns the need for the particular type of technique employed.

Bankruptcy depends on statute and, specifically, the United States Bankruptcy Act of 1898 as seven times amended by Congress.¹⁵ The provability of the landlord's claim must, therefore, on established principles somehow depend upon the statute, and, by approved doctrine, this means that it depends on the "intention of the legislature" as expressed in the statute. Unfortunately, nothing at all is said in the statute about the claim of a landlord for unaccrued rent. We must, therefore, conjecture the intent from what the legislature said about something else, or from what it failed to say about this matter. As the intent is a fiction and the legislature in this connection an imaginary person inhabiting an imaginary space and time, it will be seen that the derivation of this purely formal intent entertained by a non-existent being about a situation which he did not mention, is something of a problem, involving both constructive fantasy and a high degree of skill in casuistry.¹⁶

¹⁵ *Manhattan Properties v. Irving Trust Co.*, *supra* note 2. The dates are 1903, 1906, 1910, 1917, 1922, 1926, and 1932. 32 STAT. (1903) 797, 34 STAT. (1906) 267, 36 STAT. (1910) 838, 39 STAT. (1917) 999, 42 STAT. (1922) 354, 44 STAT. (1926) 662, 47 STAT. (1932) 47; see 11 U. S. C. (1926) §1 *et seq.*

¹⁶ I have elsewhere set forth my beliefs on the subject of legislative intent and the machinery for discovering it. Radin, *Statutory Interpretation* (1930) 43 HARV. L. REV. 863. In the same number Professor Landis has subjected my contention to an acute and thorough criticism. Landis, *A Note on "Statutory Interpretation"* (1930) 43 HARV. L. REV. 885. If I none the less find his objections inconclusive, that must doubtless be set down to the besotted fondness of an older man for his own notions.

I understand Professor Landis' view to be that the proponent, or some proponents, of statutes in Congress or in committee may be taken as the spokesman of those who passed the bill and that his explanations or declarations give the meaning of the bill. I should have no objection to a system in which such an authoritative spokesman is created by law or custom. In such a case, the intent would be real because the person who entertained the intent was a flesh and blood human being capable of intending. But it would be his intent, not that of Congress. It would be tantamount

The argument in the main is that Congress had many chances of making such claims provable, and did not do so. It is, therefore, a reasonable inference that "Congress" did not "intend" that they should be. To put the argument so is a little unfair, since there is the further point made that the existence of the question must have been known to Congress. But the principal argument is after all that since under the Acts of 1800, 1841 and 1867 claims for future rent were not specifically made provable, and since, under every one of these acts, some case on this question had arisen in the lower courts, it must be supposed that the failure to say anything about it in the Act of 1898 showed an intent to keep these claims unprovable.

The situation in England is cited by way of contrast. Under the Act of George I, such claims were not allowed. But they were specifically allowed in the English Act of 1869. If Congress had wished to follow the example of England, why had it not done so explicitly?

It is idle to deny that we may infer intent from silence as well as expression. But this inference in our daily lives and practice depends for its force on the fact that a real occasion to speak had been deliberately omitted. Is that so here? When the Act of 1898 was adopted, there was—to quote the decision—"much agitation by trade associations and commercial bodies." Congress passed the act "after prolonged consideration," "extended consideration and discussion."¹⁷ But in all this discussion and consideration, the Court apparently finds no suggestion that this particular important situation was discussed at all. That it was an important situation is the basis of the entire argument that it must have been present to the mind of the legislature.

In that case, why does not the protracted and extended discussion show that it was present? Can we not work the *argumentum ex silentio* both ways and declare that the fact that this situation was not mentioned¹⁸ proves that it was not considered and that, therefore, the failure to add this class to the provable claims cannot possibly show that it was intended to exclude them?

To this the Court adds the following statement:

"What of the activities of the Congress while this body of decisions interpreting §63a was growing? From 1898 to 1932 the Bankruptcy Act was amended seven times without alteration of the section. This is persuasive

to giving his intention statutory force. There is, however, some doubt in my mind whether anything quite so limited and concrete is part of Professor Landis' contention.

¹⁷ *Manhattan Properties v. Irving Trust Co.*, *supra* note 2, at 334-335.

¹⁸ A rent provision was embodied in section 60 as part of a bill proposed in 1880. (1883) 14 CONG. REC. 43-48. The entire bill failed to pass. There is, of course, nothing to indicate that this section was specially discussed.

that the construction adopted by the courts has been acceptable to the legislative arm of the government. *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 372.^{18a}

Unfortunately there is a difficulty. The decisions have been "well-nigh," not quite, unanimous. There has been a noticeable dissent. And when the decisions are examined, it will be seen that most of them are based upon the particular type of lease, or upon the special situation involved. It would have been difficult to be certain what the decisions were well-nigh unanimous about.

Again, it is only the cases since *Central Trust Company v. Chicago Auditorium*,¹⁹ that are really in point. Before that case, it was not certain that anticipatory breaches of contracts gave rise to provable claims, and it could not have been very forcibly urged that anticipatory breaches of rent covenants did. The opportunities to amend this section in the sense discussed must be dated from 1915, not 1898.

But, finally, the chief objection to this form of argument is that all the cases cited on the question up to the present ones had been cases in lower federal courts. Who knows, since we are imputing knowledge, but that the Congress was aware of that fact and wished the Supreme Court to decide the question independently? It is demonstrable that when the *Auditorium* case was decided, the then Supreme Court did not know whether it would ultimately allow such rent claims or not. It says so.²⁰ Why should we, therefore, assume that Congress knew that the Court would not allow them and, being of the same opinion, decided that it was not worth legislating about the matter?

As a warranty of this type of interpretation, Mr. Justice Roberts cites *Baltimore & Ohio Railroad Company v. Baugh*.²¹ Here also it is declared that if the courts have for a long time interpreted a statute in a certain way and Congress did not change the statute, this may be taken as proof that Congress accepted the interpretation of the Court. But the Court in this case is the Supreme Court and the two cases are *Swift v. Tyson*²² and *Burgess v. Seligman*.²³ *Swift v. Tyson* is a case so well known to lawyers that we may assume that in a legislature which, like Congress, has nearly always had a majority of lawyers among its members,²⁴ a majority or nearly a majority of the members were in fact

^{18a} *Manhattan Properties v. Irving Trust Co.*, *supra* note 2, at 336.

¹⁹ (1916) 240 U. S. 581.

²⁰ *Ibid.* at 590.

²¹ (1893) 149 U. S. 368; *cf.* Note (1927) 40 HARV. L. REV. 469-472.

²² (1842) 16 Pet. (41 U. S.) 1.

²³ (1882) 107 U. S. 20.

²⁴ In the last Congress, seventy per cent of the Senators and fifty-eight per cent of the Representatives were lawyers. Mason, *A Study of the Legal Education and Training of the Lawyers in the 73d Congress* (1934) 6 ROCKY MOUNT. L. REV. 155,

acquainted with it. We certainly cannot make that assumption about the cases on rent-claims collected in *Manhattan Properties v. Irving Trust Company*. Only a very small proportion of lawyers in practice know even the leading cases in bankruptcy, much less a miscellaneous group of cases in district and circuit courts. Bankruptcy is almost as confined a specialty as admiralty. It is certainly different with a case like *Swift v. Tyson*. The assumption that the lawyer members of Congress knew this case is not a formal assumption but a probability in fact.

If we must use the argument from silence, it will be necessary to go into the matter more fully. Was a proposal to add these claims made in committee or in Congress and was this proposal rejected? That would show something, even if it would not necessarily be conclusive. But apparently research does not uncover such a proposal.

All these imputations of knowledge and inferences from silence are accordingly not based on what really did take place, but are abstract arguments resting upon general assumptions. As arguments, they are not more unreal, perhaps, than the entire technique of discovering the legislative intent, but they are equally so. In sober fact, it would seem more sensible to say that, when we have no evidence that a subject was considered by Congress, the failure of Congress to act proves only that it failed to act, and that on this point there was no legislative intent because there was nothing to pin the legislative intent on.

The second illustration of judicial technique is concerned with the indemnity covenants in the lease. The Court notes first that they "do not provide for liquidation of damages, nor indeed for any right to damages for breach of the covenant to pay rent."²⁵ Later, however, the Court says that "there is some color for the claim that bankruptcy is an anticipatory breach of the lease contract, entailing a damage claim against the estate."²⁶

But, the Court goes on, what we have here is a new claim, arising from the breach of the covenant of indemnity, created under the lease by the act of the landlord in reëntering.

The formal distinction between a covenant to pay damages for breach of a lease covenant which could be breached by anticipation and a covenant to indemnify the landlord for his loss of rents which could not be breached until he had put the covenant into operation by reëntry, is one that it is quite easy to make in words and diagrams. Whether the difference is substantial is another question.

(1934) 3 THE BAR EXAMINER 254-260. This may be a little larger proportion than is usual, but it seems very probable that, as is popularly assumed, every Congress since the beginning of our national history contained a majority of lawyers.

²⁵ 291 U. S. at 337.

²⁶ *Ibid.* at 338.

One thing is clear. The damages that would have been recovered if there had been a formal provision for liquidation or for a right to damages for breach of the covenant to pay rent, and the damages recoverable for a breach of the indemnity covenant are precisely the same. They are calculated in the same way and would attain the same total. Of course, there would be a difference if the landlord did not reënter until a considerable time after bankruptcy, but in that case, it is not likely that he would seek to prove for the rents.

It is unfortunate that mere wording of a lease should be given such weight. If landlords really wish to prove for unaccrued rent in bankruptcy within the decision, it will, it seems, be necessary for them merely to add a provision to their leases that on bankruptcy all the covenants to pay future rent are at once and summarily breached, the property reverts to the lessor and the tenant agrees to pay all the damages caused by the breach, unless the landlord promptly relieves him from such a liability by some appropriate act, and reestablishes the lease.

That will put the burden of acting on the landlord and he has as a rule sought to avoid that burden. Landlords may not wish to phrase their covenants this way because it is possible that they will be interpreted in such a way as to compel the landlord to prove for the unaccrued rent whether he wishes to or not. Landlords, as Justice Learned Hand points out, would very much like to have it both ways. But they may safely forego the doubtful advantage of holding the tenant. As the law stands now, if the lease does not automatically determine on bankruptcy the landlord might find the trustee choosing to take the lease from him in the interests of the estate.

It would probably be better to conform leases to the inferences which may be drawn—unfortunately, one cannot be sure of them—from the case before us. Bankruptcy should be declared to terminate the lease with a provision for a claim for liquidated damages arising *eo instanti* and perhaps with an option to reinstate the lease and waive the damages. If, however, landlords continue to blow hot and cold, they cannot complain if no particular effort is made by the Court to improve their position in bankruptcy.

As has been said, all this logical scheme involving distinctions that have little or no relevance to substance, and based on a type of statutory interpretation which is suspended in a legal empyrean at several removes from the realities of statute-making, all this might well be set aside for what, I venture to believe, is the real foundation for this and similar decisions. Authority, that is, the generally accepted and repeated

dogma of a technically trained craft, is a real thing; and may properly in some cases justify a decision, and authority is on the side of Mr. Justice Roberts. And if it should turn out that the landlord's economic position at such crises is on the whole better than that of the other creditors, he cannot complain if he is somewhat less favored when an adjustment is made. It is curious that when courts might tread the firm ground of fact, they prefer the more dexterous, but also more perilous, technique of the flying trapeze.

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