RECENT CASES

CONFLICT OF LAWS — ENFORCEMENT OF FOREIGN REVENUE CLAIMS—New York State brought suit in New York against a New Jersey corporation for the collection of a franchise tax. Jurisdiction was obtained and judgment rendered for the State. Subsequently, suit was brought on the judgment in New Jersey. *Held,* that since the tax was not penal in its nature, recovery was permitted. *People of New York State v. Coe Mfg. Co.,* 112 N. J. L. 536, 172 Atl. 198 (E. & A. 1934).

For comment see NOTE *supra,* page 199.

CONTRACTS—REALITY OF CONSENT AND CONSIDERATION—THE PRESIDENT'S REEMPLOYMENT AGREEMENT—The defendant by signing a reemployment agreement with the President of the United States agreed that he would not require of any employee or of anyone seeking employment as a condition of employment that he join any company union or refrain from joining, organizing, or assisting a labor organization of his own choosing. Employees of the defendant who had gone on strike prayed that the defendant be restrained from breaching his agreement by refusing to reemploy them unless they became members of a rival union. *Held,* that the agreement is supported by a sufficient consideration and that the complainants, being the beneficiaries of the contract, are entitled to an injunction. *Fryns et al. v. Fair Lawn Fur Dressing Company,* 114 N. J. Eq. 462, 168 Atl. 862 (Ch. 1933).

Contractual principles have been applied to the President's Reemployment Agreement by several jurisdictions, in each of which the employer was enjoined from breaching it. *Wisconsin State Federation of Labor v. Simplex Shoe Manufacturing Co.,* Circ. Ct., Milwaukee County (Wisc., Oct. 13, 1933); *Beaton v. Avondale,* Colo. Dist. Ct., 2d Jud. Dist. (Colo., Oct. 26, 1933); *Hoffman v. Zerwos,* 1st Mun. Ct., Bronx County, N. Y., New York Herald-Tribune, Nov. 2, 1933, at page 6. It is essential to every contract that it be entered into voluntarily by both parties to it. *Ballantine v. Stadler,* 99 N. J. Eq. 404, 132 Atl. 664 (E. & A. 1926). Because of the great weight of governmental pressure and of aroused public enthusiasm that have been brought to bear on the signers of this agreement, it is difficult to classify their action in signing as voluntary. The courts, however, have always hesitated to find duress in any influence exerted by the government. *United States v. McMurty,* 48 Fed. (2d) 258 (1930); *American Smelting Co. v. United States,* 259 U. S. 75, 66 L. ed 833 (1922); *Lajoie v. Milliken,* 242 Mass. 508, 136 N.E. 419 (1922). During the war, to prevent profiteering, the government required all

dealers in wool to be licensed. The applicant agreed as a condition precedent to the issuing of the license that he would conduct his business in accordance with governmental regulations. In the case of *United States v. McMurty, supra,* the court held that the action of the government did not amount to duress or undue influence. The court in the instant case found consideration for the employers' promise in the right to use the blue eagle emblem and with it the benefit of the pledge of all other members of N.R.A. to patronize their fellow members. While the ultimate motives of the parties to a contract are immaterial, it is necessary that the consideration be actually bargained for as the exchange for the promise. RESTATEMENT, CONTRACTS (Am. L. Inst. 1933) Vol. I, p. 81. Presupposing, as the court does, that a contract was voluntarily entered into, it seems probable that the promise was given in exchange for the use of the blue eagle emblem. The benefit accruing to the employer from his membership in N.R.A. is sufficient consideration for his promise. The courts will sustain a contract in which the public has an interest on a consideration which in a purely business contract might be regarded as questionable. *New Jersey Orthopedic Hospital and Dispensary v. Wright,* 95 N. J. L. 462, 113 Atl. 144 (E. & A. 1920); *Barnes v. Perine,* 12 N. Y. 18 (1854); and see cases collected in 38 A. L. R. at page 868. Moreover, a court of equity will not refuse to grant specific performance of a contract on the ground of inadequacy of consideration alone. *Traphagen v. Voorhees,* 44 N. J. Eq. 21, 12 Atl. 895 (Ch. 1888); *Campbell v. Smullen,* 96 N. J. Eq. 724, 125 Atl. 569 (E. & A. 1924). It might also be contended that a consideration for this contract appears not only in the mutual promises to patronize each other, but also in the signatories' mutual self-limitation as to the conduct of their enterprises. Both charitable subscription contracts and creditors' composition agreements have been sustained on similar theory. *Daniels v. Hatch,* 21 N. J. L. 391 (Sup. Ct. 1848); *Edinboro Academy v. Robinson,* 37 Pa. 210, 78 Am. Dec. 421 (1860); *Underwood v. Waldron,* 12 Mich. 73 (1863); and see cases collected in 38 A. L. R. at page 906. However, the doctrine that the mutual promises of the promisors constitute consideration for their respective agreements with the common promisee must be regarded as exceptional.

CONTRACTS—VALIDITY OF AGREEMENT TO PAY EXPERT WITNESS AN AMOUNT IN EXCESS OF THE STATUTORY WITNESS FEE—The plaintiff in this action, a doctor, was subpoenaed to testify as an expert at a trial in which the present defendant and his wife were parties. The doctor had previously treated the defendant's wife and his expert opinion as to the nature and cause of her injury was desired. The defendant promised to compensate him for his time. *Held,* that an expert can be compelled to testify to the actual facts of a litigation

but cannot be required to give testimony involving professional knowledge and skill acquired by study and practise in his profession; where such professional testimony is desired, it is the right of such person to contract for and receive compensation thereof. *Stanton v. Rushmore,* 112 N. J. L. 115 (E. & A. 1933).

Where a person, whether he be professional or lay, has knowledge of the actual facts of a litigation, the authorities are uniform in holding that he may be compelled to testify to such facts. The courts are, likewise, uniform in holding that an expert cannot be compelled to give testimony of a nature which requires special preparation, investigation, or labor of any kind which is not required of the ordinary witness. *Gordon v. Conley,* 107 Me. 286, 78 Atl. 365, 33 L. R. A. (N.S.) 336 (1910); *Tiffany v. Kellog Iron Works,* 59 Misc. 113, 109 N. Y. S. 754 (1905). The decisions, however, are not uniform on the question of whether or not an expert is compellable to testify to matter of professional opinion when no special preparation is required. The more general view is that an expert can be compelled to give such testimony. This view seems to be based on sounder legal reasoning, namely, that every witness is compellable to testify as to facts within his knowledge, regardless how that knowledge was acquired. *Ex Parte Dement,* 53 Ala. 389, 25 Amer. Rep. 611 (1876); *Dixon v. People,* 168 Ill. 179, 48 N.E. 108, 39 L. R. A. 116 (1897); *Burnett v. Freeman,* 125 Mo. App. 683, 103 S. W. 121 (1907); *Philler v. Waukesha County,* 139 Wis. 211, 120 N. W. 829, 25 L. R. A. (N.S.) 1040 (1909); 4 WIGMORE, EVIDENCE (2d Ed.) Sec. 2203. See 40 Cyc. 2186, 27 L. R. A. 669, 39 L. R. A. 120, 25 L. R. A. (N.S.) 1040 and 2 A. L. R. 1576 where cases are collected for and against this proposition. Where a witness can be compelled to testify, a promise to compensate him in excess of the statutory fee is unenforceable for want of consideration, the performance of a legal duty being insuffcient consideration to support a promise. *Keon & McEvoy v. Verlin,* 253 Mass. 344, 149 N. E. 115, 41 A. L. R. 1319 (1925). The above rule applies to a promise to compensate an expert witness who can be compelled to testify. *Burnett v. Freeman, supra.* See also 2 PAGE, THE LAW OF CONTRACTS, 1640, Sec. 926. Where, however, testimony is sought which requires special preparation, a promise to compensate for such testimony is supported by a valid consideration, the preparation not being required by law. *Gordon v. Conley, supra.* Many authorities have questioned the policy of compensating an expert witness under any circumstances on the ground that where compensation is given the expert becomes biased and will often give exaggerated testimony. There is no doubt that the practice of compensating expert witnesses leads, in many instances, to the procurement of unreliable testimony. As a result, many states have adopted statutes either limiting the fees or giving the court power to appoint disinterested experts to testify at the trial of an action and power to fix the compensation. A bill of the latter type has been proposed to the legislature

of New Jersey by the Judicial Council. SECOND REPORT OF THE JUDICIAL COUNCIL OF NEW JERSEY Appendix M. Page 79 (1931). Its adoption would seem highly desirable. From the opinion in the instant case it does not appear that the doctor was required to give testimony of a nature which required labor in addition to that required by the ordinary witness, and it is, therefore, submitted that the decision is contrary to the weight of authority.

EQUITY—STATUTE OF LIMITATIONS—HUSBAND AND WIFE—The complainant filed a bill against her husband's executor seeking to recover for services rendered by her as housekeeper for her husband for six years prior to their marriage. She had been employed by him at five dollars per week for some fourteen years before the marriage in 1930 but had received no wages after 1921. The defendant pleaded the statute of limitations as a bar to all claims accruing more than six years before the action was brought. The complainant contended that the statute was tolled by her marriage and hence that she could recover for a full six years preceding that event. *Held,* that the statute of limitations did not run during the continuance of the marital state, even though the claim arose before coverture. *Morris v. Pennsgrove Bank,* 115 N. J. Eq. 219, 170 Atl. 16 (Ch. 1934).

The universal rule of the courts of law is that the statute of limitations, having once begun to run its course, will not be tolled by a subsequent disability. Nothing will impede the "giant force" of the statute. *Clark v. Richards,* 15 N. J. L. 347, (Sup. Ct. 1836); *Pinckney v. Burrage,* 31 N. J. L. 21 (Sup. Ct. 1864); *Freeman v. Conover,* 95 N. J. L. 89, 112 Atl. 324 (E. & A. 1920). This is subject to two exceptions, expressly enacted in the statute. The death of the defendant or his absence from the jurisdiction will toll its course, though they occur after the cause of action accrues. 3 COMP. STAT. 3166, sec. 8;) COMP. STAT. 3167, sec. 9. The policy of equity is to discourage suits between husband and wife. *Gray v. Gray,* 39 N. J. Eq. 511 (E. & A. 1895). The Vice-Chancellor decided in the instant case that the disability would prevent the statute from running despite the fact that the cause of action arose before the marriage, for, to penalize the complainant for refraining from the prosecution of the suit during her husband's life would be inequitable. The novelty of the case will be appreciated when it is stated that there is no decided case supporting the learned Vice-Chancellor's position, while the contrary view has been uniformly upheld. *Cawood v. Middleton,* 202 Ky. 745, 261 S.W. 242 (1924); *Appeal of Amole's Administrators,* 115 Pa. 356, 8 Atl. 614 (1887); *Enwright v. Griffith,* 169 Wis. 284, 172 N.W. 156 (1919); *Bliler v. Boswell,* 9 Wyo. 57, 59 Pac. 798 (1900). It must be remembered, however, that the statute of limitations has no binding effect, as such, on courts of equity. By its

language it has application only to particular legal remedies. Nevertheless, where a legal right becomes cognizable in equity, so that the jurisdiction of the two courts is concurrent, equity acts in obedience to the statute. *Colton v. Depew,* 60 N. J. Eq. 454, 46 Atl. 728 (E. & A. 1900). The court of chancery has considered itself bound in such cases by the principle of the statute and has acted in conformity with it. In controversies of a purely equitable nature, however, equity need not follow the law and the statute of limitations is of no concern. The question of neglect and lapse of time then becomes controlling, and is determined according to discretion and the peculiar circumstances of each case, without any regard to any fixed period of limitation. This is familiarly known as the doctrine of laches. *Colton v. Depew, supra; Blue v. Everett,* 56 N. J. Eq. 455, 39 Atl. 765 (E. & A. 1897); *Alling v. Alling,* 52 N. J. Eq. 92, 27 Atl. 655 (Ch. 1893). Equity has exclusive jurisdiction over suits between husband and wife and their legal representatives. *Wood v. Chetwood,* 44 N. J. Eq. 64, 14 Atl. 21 (Ch. 1888); *Rusling v. Rusling's Executors,* 47 N. J. L. 1 (Sup. Ct. 1885). The statute of limitations then, need not have been controlling in the instant case and the decision is not so startling when we realize that it involved nothing more than a question of laches.

LANDLORD AND TENANT—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—The plaintiff sustained injuries while walking on a defective boardwalk on the roof of the apartment house in which he was a tenant. The plaintiff had previously notified the landlord-defendant of the defect and the latter had promised to make repairs but failed to do so. *Held,* the plaintiff, in knowingly using defective premises, does not assume the risk and is not chargeable with contributory negligence as a matter of law. *Sidway v. Greater Atlantic Finance & Mortgage Co.,* 12 N. J. Misc. 83, 169 Atl. 532 (Sup. Ct. 1933).

As a general rule, a tenant knowingly occupying defective premises of which the landlord has no notice, may be considered as having assumed the risk and be guilty of contributory negligence. This rule is enunciated in the principal case and followed in many jurisdictions. *Vorrath v. Burke,* 63 N. J. L. 188, 42 Atl. 838 (Sup. Ct. 1899); *Saunders v. Smith Realty Co.,* 84 N. J. L. 276, 86 Atl. 404 (E. & A. 1913); *Frank v. Suthan,* 159 Fed. 174, (1908); *Shackford v. Coffin,* 95 Me. 69, 49 Atl. 57 (1901); *Quinn v. Perham,* 151 Mass. 162, 23 N. E. 735 (1890); *Loucks v. Dolan,* 211 N. Y. 237, 105 N. E. 311 (1914); *Davis v. Smith,* 26 R. I. 129, 58 Atl. 630, 67 L. R. A. 478 (1904). However, a landlord is chargeable with notice of defects in those portions of his property not demised to the tenant but retained in the control of the landlord for the common use of the tenants. *Gillvon v. Reilly,* 50 N. J. L. 26, 11 Atl. 481 (Sup. Ct. 1887); *Gleason v.*

Bockin, 50 N. J. L. 475, 34 Atl. 886, 32 L. R. A. 645 (Sup. Ct. 1896); *Siggins v. McGill,* 72 N. J. L. 263, 62 Atl. 411, 36 L. R. A. (N.S.) 316, 11 Am. St. Rep. 666, (E. & A. 1905). Our courts have continually confused the doctrine of assumption of risk with the principle of contributory negligence. *Mullen v. Rainear,* 45 N. J. L. 520 (Sup. Ct. 1883); *Vorrath v. Burke, supra; Saunders v. Smith Realty Co., supra; Ionin v. E. D. & M. Corp.,* 107 N. J. L. 145, 151 Atl. 640 (E. & A. 1930); *Bland v. Gross,* 110 N. J. L. 26, 159 Atl. 392 (Sup. Ct. 1932) *aff.* 163 Atl. 891 (E. & A. 1933); although it is generally recognized that there is a distinction. Note, 18 Ann. Cas. 960. Assumption of risk depends on the voluntary act of a party in exposing himself to a known and appreciated danger and is wholly incompatible with an act of negligence or carelessness. Actual knowledge and action in spite of that knowledge is essential. *Indiana Natural Gas Co. v. O'Brien,* 160 Ind. 266, 65 N. E. 918 (1903); *Pittsburgh, etc., R. Co. v. Hoffman,* 57 Ind. A. 431, 107 N. E. 315 (1914); *Drown v. New England Tel., etc., Co.,* 80 Vt. 1, 66 Atl. 874 (1922). On the other hand, contributory negligence is merely the failure to exercise that degree of care commensurate with the circumstances, which failure contributes as a proximate cause to the injury. *Murray v. Cohen,* 132 Atl. 221 (N. J. Sup. Ct. 1926); *Klauber v. Jackson,* 124 Misc. 738, 209 N. Y. S. 209 (1925). With this distinction in mind, it is apparent that where, as in the case *sub judice,* the tenant deliberately uses defective premises, the doctrine of contributory negligence is of no moment. The issue should be as to assumption of risk. *Rooney v. Silatti,* 96 N. J. L. 312, 115 Atl. 664 (Sup. Ct. 1921); *Nutter v. Colyer,* 180 Mich. 107, 146 N. W. 643 (1914); *Pencus v. Schlechter,* 167 App. Div. 361, 153 N. Y. S. 67 (1915); *Stoops v. Carlisle-Pennell Lumber Co.,* 219 Pac. 876 (Wash. 1923). Where the landlord has notice of the defective condition, either actual or constructive, to permit him to escape liability on the ground that the tenant assumed the risk as a matter of law, would practically preclude tenants from the use of necessary premises. *Perry v. Levy,* 87 N. J. L. 670, 94 Atl. 569 (E. & A. 1915). Where the defective premises are the only means of ingress and egress, this would be manifestly unjust. *Bailey v. Fortugno,* 8 N. J. Misc. 739, 151 Atl. 484 (Sup. Ct. 1930); *Roman v. King,* 289 Mo. 641, 655, 233 S. W. 161, 25 A. L. R. 1263 (1921); but *cf. Fabel v. Boehmer Realty* Co., 227 S. W. 858 (Mo. 1921) holding that when a tenant was aware of the dangerous condition of a stairway and there was another stairway which could have been used which was safe, the tenant was considered as having assumed the risk as a matter of law. It would seem that the better rule to follow, as enunciated in the principal case, is that even though it is the tenant's duty to protect the landlord from loss by subjecting himself to a round-about way, he will not be deemed to have assumed the risk as a matter of law in either event; but that he has a right to consider, to some extent at least, his own

convenience secured by the rental, even to the degree of encountering a danger which might react upon the landlord who violates his duty.

LANDLORD AND TENANT—NOTICE TO TERMINATE AN UNCERTAIN TENANCY—On February 20th, 1928, plaintiff in writing leased to the defendant certain premises for a period of one year and eight months, beginning March 1st, 1928, and ending October 31st, 1929, at a specified annual rental, payable in monthly installments. Defendant entered the premises on March 1st, 1928, and vacated them in June, 1931, and paid rent up to and including October 31st, 1931. Suit was started against the defendant for rent for seven months ending May 31st, 1932, on the theory that he was a hold-over tenant. A motion was made to strike the answer filed by the defendant as sham and frivolous, and for final judgment. The trial court granted the motions, and defendant appealed. *Held,* the defendant, by reason of his holding over and paying the rent, became a tenant from year to year of the demised premises, and in order to terminate such tenancy, the defendant would have had to serve upon the plaintiff a six month's notice of his intention to terminate the tenancy. Judgment affirmed. *Heckel v. Griese,* 12 N. J. Misc. 211, 171 Atl. 148 (Sup. Ct. 1934).

For comment see NOTE, *supra,* at page 226.

NEGLIGENCE—TRESPASSER—DEGREE OF CARE OWING BY PERSONS OTHER THAN THE LANDOWNER—The plaintiff was a painter engaged in painting a house adjoining that owned by Mrs. Katz, the wife and mother of the two defendants respectively. He placed the base of his ladder on the driveway of the Katz property, and the son, in backing his father's car out of the garage, knocked down the ladder on which the plaintiff was standing. The complaint was drawn in ordinary negligence form, charging failure to use reasonable care. *Held,* that the son and father, though not the owners of the land, were lawful occupants and owed the plaintiff a licensee at most, only the duty to refrain from wilful and wanton injury. *Sohn v. Katz,* 112 N. J. L. 106, 169 Atl. 838 (E. & A. 1934).

The rule that the owner or the occupant of realty is liable to a trespasser or licensee only for wanton acts is well established. *Railroad Company v. Reich,* 61 N. J. L. 635, 40 Atl. 682 (E. & A. 1898); *Phillips v. Library Company,* 55 N. J. L. 307, 27 Atl. 478 (E. & A. 1893); *Matthews v. Bensel,* 51 N. J. L. 30, 16 Atl. 195 (Sup. Ct. 1888). There is no duty on the owner to keep his premises safe and in repair for those who come upon them by sufferance. Many foreign jurisdictions make him liable for acts of misfeasance while exempting him from responsibility for hazardous conditions on the land. *Pom-*

ponio v. Railroad Company, 66 Conn. 528, 34 Atl. 491 (1896); *Morrison v. Carpenter,* 179 Mich. 207, 146 N. W. 106 (1914); *Batts v. Telegraph Company,* 186 N. C. 120, 118 S. E. 893 (1923); *Union News Company v. Freeborn,* 111 Ohio 105, 144 N. E. 595 (1924). This distinction between active and passive negligence has never been adopted in New Jersey. *Sullivan v. Railroad Company,* 105 N. J. L. 450, 144 Atl. 580 (E. & A. 1929). Heretofore our New Jersey cases have applied the wilful and wanton negligence measure of liability only to persons having legal title or the legal right to possession, that is, to actual owners and tenants. In other jurisdictions this standard has been extended to include persons in possession under any right superior to that of the trespasser or licensee. Thus, an independant contractor in possession of the land doing work for the owner has been held to stand in the shoes of the owner, and was not liable to a licensee for ordinary negligence. *Lindholm v. Railroad Company,* 248 Pac. 1033 (Cal. 1926); *Murphy v. Railroad Company,* 248 Mass. 78, 142 N. E. 782 (1924); *McLaughlin v. Bardsen,* 50 Mont. 177, 145 Pac. 954 (1915); *Downes v. Elmira Bridge Company,* 179 N. Y. 136, 71 N. E. 743 (1904). So with an invitee of the owner when sued by a trespasser. *Louisville Trust Company v. Horn,* 209 Ky. 27, 273 S. W. 549 (1925). The theory of these cases is that one on the land at the invitation or request of the owner is an occupant with respect to a trespasser or licensee. It seems unsound to permit the owner, at his whim, to invest another with a status that will exempt the other from the consequences of his negligence. The privileges growing out of the ownership and possession of land should not be extended to casual invitees of the owner. But the granting of those exemptions and privileges to the owner's immediate family does no violence to our conception of occupancy. The family occupies the premises as an entity and each of its members should be entitled to the same benefits though legal title may be vested in but one. The principal case is carefully decided and its language is not likely to lead to further, and less wise, extensions of the doctrine.

TRUSTS—DEVIATION FROM TERMS—LIABILITY OF TRUSTEE FOR FAILURE TO DEVIATE—The testator by his will left certain common stocks to his brother and a trust company in trust as co-trustees. By the express terms of the will, the securities could be sold only with the brother's consent. The testator died in January, 1929. From that date until well after the crash, to wit, until April, 1930, the securities could have been sold with but little loss. From the latter date until the present there was a steady decline. Although repeatedly asked by the company, the brother at all times refused to consent to a sale. *Held,* the trust company is liable for the loss sustained. *In re Cross,* 115 N. J. Eq. 611 (Prerog. 1934).

It has often been said that the trust instrument is the trustee's charter and all its terms must be strictly observed. 3 POMEROY, EQUITY JURISPRUDENCE (4th ed.) § 1062. This, like most generalities, is not strictly accurate. Had the brother been the sole trustee in the principal case, he would not have been justified in retaining the securities after they had become highly speculative. *Smith v. Pettigrew,* 34 N. J. Eq. 216 (Prerog. 1881). Such retention would have been an abuse of his discretion. Even if there is an express direction not to sell, the court of equity will sometimes permit a sale. *Price v. Long,* 87 N. J. Eq. 578, 101 Atl. 195 (Ch. 1917). In fact a trustee may be under a positive duty to deviate from the terms of a trust. SCOTT, DEVIATION FROM THE TERMS OF A TRUST (1931) 44 HARVARD L. REV. 1025. Thus, in *Johns v. Herbert,* 2 App. D. C. 485 (1894), a sale was not authorized by the terms of the trust; the shares subsequently fell in value and it was probable that they would ultimately become worthless. It was held that the trustee was liable for the loss sustained due to his failure to sell. Even if he did not have power to sell without the permission of the court, he was guilty of a breach of trust in not applying to the court for such permission. We are concerned, in this discussion, however, with the liability of the trust company, not that of the brother. For a discussion of the liabilities of one trustee for the default of his co-trustee see I PERRY, TRUSTS AND TRUSTEES (7th ed.) § 415 *et seq.* According to the terms of the trust the trust company could not sell without the brother's consent. That consent was refused. As a general rule the trustee should comply with the terms of the trust. LORING, A TRUSTEE'S HANDBOOK (4th ed. 1928) 2. And a trustee who, within the scope of his powers, acts in good faith, prudently discharging the obligations of his trust, is not responsible for errors of judgment. *Harris v. Guarantee Trust Co.,* 115 N. J. Eq. 602 (Ch. 1934). But the fact that he so complies is not a justification if he acts as a prudent man would not act under the circumstances. *Smith v. Pettigrew, supra; Matter of Quinby,* 134 Misc. 296, 235 N. Y. S. 308 (1929); 1 PERRY, TRUSTS AND TRUSTEES, *supra* § 465. In the principal case, the court found that the trust company did not act with reasonable prudence. This finding was justified by the fact that a trust company is held to a high degree of care. *In re Chamberlain,* 9 N. J. Misc. 809, 156 Atl. 42 (Prerog. 1931). Moreover, that a retention of the securities was not advisable was admitted by the company. *In re Cross, supra* at p. 615. But *cf. People's Nat. Bank, etc., Pemberton v. Bichler,* 115 N. J. Eq. 617 (E. & A. 1934) where under strikingly similar circumstances a trust company was held to have used reasonable diligence. Having determined that a retention of the securities was imprudent, the result of the principal case is clearly sound. Under such circumstances the trustee owes a duty to the beneficiary to apply to the court for permission to deviate; failure to apply is a breach of his trust, for which he should be liable.

TORTS—LIABILITY OF A CHARITABLE INSTITUTION FOR TORTS OF ITS AGENTS—Suit was brought to recover for injuries sustained in a collision between the automobile in which the plaintiff was riding and a truck owned by the defendant, the Methodist Episcopal Church, a charitable institution. The accident occurred on a public highway as a result of the negligent operation of the truck by the church's servant and driver. The injured person was a complete stranger having no beneficial relation to the institution. *Held,* that a charitable institution is liable for its agent's negligent acts, when such negligence caused injuries to a person who was in no way a recipient of the charity's beneficence. *Simmons v. Wiley Methodist Episcopal Church,* 112 N. J. L. 129 (E. & A. 1934).

For comment see NOTE, *supra,* page 206.

TORTS—NUISANCE—LIABILITY OF AN EMPLOYER FOR THE NEGLIGENCE OF AN INDEPENDENT CONTRACTOR—Defendants employed X for the digging and replacement of the sidewalk on their premises in the process of installing an oilburner. After the oilburner was installed, X refilled the sidewalk with cinders but did nothing further for a period of three weeks. The result was that the sidewalk became uneven and holes were formed. Plaintiff was injured by a fall on the sidewalk in this condition. *Held,* that defendants were not liable for the failure to abate a nuisance created by an independent contractor. *Savarese v. Fleckenstein,* 111 N. J. L. 574, 168 Atl. 850 (Sup. Ct. 1933).

Ordinarily, an employer is not liable for injuries resulting from the negligence of an independent contractor unless the employer is in default in employing an unskillful or improper person. *Cuff v. Newark & N. Y. R. Co.,* 35 N. J. L. 17 (Sup. Ct. 1870); *Reisman v. Public Service Corp.,* 82 N. J. L. 464, 81 Atl. 838 (E. & A. 1911); *Mann v. Max,* 93 N. J. L. 191, 107 Atl. 417 (E. & A. 1919); *Bush v. Margolis,* 102 N. J. L. 179, 130 Atl. 525 (E. & A. 1925); *Salliotte v. King Bridge Co.,* 122 Fed. 378, 58 C.C.A. 466 (1903); *Pittsburgh Foundry v. Gallagher,* 32 Fed. (2d) 436 (1929); *Boomer v. Wilbur,* 176 Mass. 482, 57 N.E. 1004 (1900); *Rogers v. Boyers,* 170 S.E. 905 (W. Va. 1933). This rule, however, does not apply where the injury, instead of being collateral and flowing from the negligent act of the independent contractor alone, arises out of work which is a nuisance in itself. *Scutte v. United Electric Co.,* 68 N. J. L. 435, 53 Atl. 204 (Sup. Ct. 1902); *Chicago v. Robbins,* 4 Wall. 657, 18 L. ed. 432 (1867); *St. Paul Water Co. v. Ware,* 16 Wall. 566, 21 L. ed. 485 (1873); *Railroad Co. v. Morey,* 47 Oh. St. 207, 24 N.E. 269 (1890); and cases *supra.* Generally excavations in a public way of any kind, including sidewalks, are nuisances which render an abutting owner liable *per se,* but as a matter of convenience the law permits

them to be made on condition that proper safeguards be provided for the safety of the public. *Houston v. Traphagen,* 47 N. J. L. 23 (Sup. Ct. 1885); *Schneider v. Winkler,* 74 N. J. L. 71, 70 Atl. 731 (Sup. Ct. 1906); *N. Y. Life Ins. Co. v. Savage,* 58 Fed. 338, 7 C.C.A. 260 (1893); *Spence v. Schultz,* 103 Cal. 208, 37 Pac. 220 (1894); *Wiggin v. St. Louis,* 135 Mo. 558, 37 S.W. 528 (1896); *Calloway v. Newman Mercantile Co.,* 12 S.W. (2d) 491 (Mo. 1928); *Murphy v. Perlstein,* 76 N. Y. S. 657, 73 App. Div. 256 (1902); *Lubelsky v. Silverman,* 96 N. Y. S. 1056, 49 Misc. 133 (1905); *Kampmann v. Rothwell,* 109 S.W. 1089, 17 L.R.A. (NS) 758 (Tex. 1908); see also 13 R.C.L. 321, 402, 438. In the case under discussion, the replacement of the sidewalk was an essential part of the excavation work, and therefore the defendants' duty to provide proper safeguards for the public continued until that was done. This duty could not be avoided by employing an independent contractor. *Wight v. H. G. Christman Co.,* 244 Mich. 208, 221 N.W. 314 (1928); and see cases cited in 13 R.C.L. 332. There is an additional ground upon which defendants should have been held liable in the principal case. This is based upon the general proposition that where an owner knowingly maintains a defect in the sidewalk on his premises which constitutes a nuisance or where a nuisance has existed for a sufficient time to have charged him with knowledge, he is liable for injuries sustained even though the defect was created by a prior owner or stranger, *Braelow v. Klein,* 100 N. J. L. 156, 125 Atl. 103 (E. & A. 1924); *Openhym v. Foeller,* 6 N. J. Misc. 639 (Sup. Ct. 1928); *Glass v. American Stores Co.,* 110 N. J. L. 152, 164 Atl. 305 (E. & A. 1932); *Waterhouse v. Schlitz,* 12 S.D. 397, 81 N.W. 725 (1900); or by an independent contractor. *Frassie v. McDonald,* 122 Cal. 400, 55 Pac. 139 (1898).