Notre Dame Law Review

Volume 11 | Issue 2 Article 4

1-1-1936

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NOTES

ADJOINING LANDOWNERS—LATERAL SUPPORT.—One of the most perplexing doctrines in the law of real property is that which pertains to the lateral support of land. The general rule in regard to lateral support is that an owner of land is entitled to have his land remain in its natural condition, in respect to lateral support from the land of the adjoining owners. The basic principle which underlies this rule is one of the cardinal rules of real property. The maxim from which the doctrine of lateral support emanates is *Sic utere tuo ut alienum non laedas.*[1] "That the rights of one should be so used, as not to impair the rights of another, is a principle of morals, which from the very remote ages has been recognized as a maxim of law." [2] The right of lateral support is a right which is natural to and inherent in the land itself.

Cases involving the precise question of lateral support of the land itself are very few but those cases which have been adjudicated in that respect are worthy of consideration. In the Kentucky case of *Chesapeake & O. Ry. Co. v. May* [3] it appears that the defendant's predecessor in title had obtained a right of way from the plaintiff's testator. The land which the plaintiff received was situated adjacent to the right of way of the defendant. In order to obtain some dirt for the construction

1 See ADJOINING LANDOWNERS, 1 C. J. 1212.
2 Rhodes v. City of Cleveland, 10 Ohio 160, 161, 36 Am. Dec. 82, 83 (1840).
3 157 Ky. 708, 163 S. W. 1112 (1914).

of an embankment, the defendant excavated on its right of way. As a result of such excavation the land of the plaintiff was deprived of its lateral support. The plaintiff thereupon brought an action for damages and the court ruled in favor of the plaintiff, laying down the proposition that one of two adjoining landowners has no right to excavate on his land and in so doing remove the lateral support to which the neighboring land is entitled. And in the event that the land subsides, the one excavating is liable for the resulting damage regardless of whether he was guilty of *negligence* or intentional or *malicious wrongdoing*. The rule laid down in the *May* case is adhered to in the New York case of *Village of Haverstraw v. Eckerson*,[4] in which the plaintiff village obtained an injunction restraining the defendant, an owner of land which abutted a highway in the village, from excavating sand and clay so near the highway that the lateral support of the highway was impaired. The court therein asserted: (1) That an adjoining landowner has no right to excavate his premises so as to destroy the lateral support of the street; and (2) That the law of lateral support operates in favor of a city in regard to its streets and highways.

These cases show that the right of a landowner to have his land remain in its natural state, with respect to lateral support from the land of the adjoining landowner, is an *absolute* right at the common law. This right may be protected by an *action for damages* or by an *injunction* preventing the removal of the lateral support. However, there is sound authority contra to this principle. In the Missouri case of *Gates v. Fulkerson* [5] the plaintiff owned land in the city of St. Joseph adjacent to the property owned by the defendant. As a consequence of divers excavations by the defendant on this land, the land of the plaintiff slipped from its natural position, and he brought an action for damages. The court ruled for the defendant, stating that an owner making an excavation on his own land is not liable for injury to the adjacent land unless the excavation is negligently done and if it is done with proper care the owner of the adjacent land must protect it from damage. The court was influenced by the contention of the defendant that a frozen water pipe under the plaintiff's land really caused the land to collapse.

No doubt the most widely debated phase of the doctrine of lateral support is whether or not the principles of lateral support should be applicable to land upon which there are artificial improvements so as to require lateral support to be given to these improvements. The general rule, in regard to artificial structures and improvements on the land, is that the natural right to lateral support does not extend to

[4] 192 N. Y. 54, 84 N. E. 578 (1908).
[5] 129 Mo. App. 620, 107 S. W. 1032 (1908).

buildings or artificial structures which may be erected on the land.[6] This rule is by no means a recent development in the law of lateral support, but, on the contrary, it is a very ancient principle. The English case of *Wilde v. Minsterly*,[7] decided in 1639, offers credence to the aforementioned proposition. In regard to that case it is said: "One reason given for the nonexistence of the right of lateral support in such cases is that where the complaining party has himself erected buildings on the margin of his own land he himself is in fault and therefore is not entitled to recover on the familiar doctrine that he who complains of the use which another makes of his property must be himself free from fault." [8]

In discussing the question of lateral support of land upon which there are artificial improvements it would be advisable to briefly state the possible factual situations. First, there is the situation in which an adjoining landowner excavated in a careful and proper manner, on his land and in so doing caused a building on his neighbor's land to slip. Secondly, we have the question of the liability of a landowner who excavates on his hand in such a negligent manner that the building and improvements on his neighbor's land collapse and are damaged. Then there is the situation in which the excavation is done with due care but the land subsides from its own pressure, and the weight of the structures on it in no way contributes to the subsidence of the soil. Finally, there is the case in which the excavation is performed with malicious and improper motives.

A study of the cases, involving injury to buildings on land which was caused as a result of an excavation on the adjoining land when the excavation was done with due care, will enable us to observe the respective rights and liabilities in such cases. In the ensuing cases the artificial improvements on the land were of such character that they greatly increased the pressure on the land so as to be the sole cause for subsidence of the land. In the case of *Gilmore v. Driscoll* [9] the plaintiff owned land upon which there were certain buildings, a fence, and a few currant bushes. Contiguous to the land of the plaintiff was the land of the defendant. In excavating on his land, the defendant, though acting with due and proper care, caused the land of the plaintiff to subside resulting in the collapse of and injury to the structures and improvements. Although the court allowed the plaintiff small dam-

6 Moody v. McClelland, 39 Ala. 45, 84 Am. Dec. 770 (1863); White v. Nassau Trust Co., 168 N. Y. 149, 61 N. E. 169 (1901); Matulys v. Philadelphia & Reading Coal & Iron Co., 201 Pa. St. 70, 50 Atl. 823 (1901); Hemsworth v. Cushing, 115 Mich. 92, 72 N. W. 1108 (1897).

7 2 Rolle, Abr. 564 (1639).

8 1 THOMPSON ON REAL PROPERTY 659.

9 122 Mass. 199, 23 Am. Rep. 312 (1877).

ages for the injury to his land, it refused to allow him a recovery for the injury done to the artificial improvements on the land. In so refusing, the court asserted that the right of lateral support is restricted to the protection of the land in its natural state but such right does not extend to buildings or other improvements on the land. Proceeding further, the court stated: "For an injury to buildings, which is unavoidably incident to the depression or slide of the soil on which they stand, caused by the excavation of a pit on the adjoining land, an action can only be maintained when a want of due care or skill, or positive negligence, has contributed to produce it." In accord with the principle just laid down is the decision in the case of *Moellering v. Evans*.[10] There the plaintiff and defendant were the owners of adjacent tracts of land. On the plaintiff's property were divers artificial improvements. The defendant, desirous of building on his land, commenced to excavate but as a result of his excavation the land of the plaintiff dropped from its natural position thereby causing the improvements to likewise collapse. Thereupon the plaintiff brought an action for the injury done to the improvements. The court denied recovery, laying down the rule that the right to lateral support of land extends to the land in its natural state, and, in the absence of negligence, an owner of land, who excavates on his land and in so doing causes the buildings on the adjacent land to collapse, is not liable for such damage to the buildings or other artificial improvements. A further consideration of the problem of whether the right of lateral support extends to artificial improvements leads us to an analysis of the case of *Bicah v. Runde*.[11] In that case the plaintiff and the defendant were owners of contiguous tracts of land. Each party had erected a house on his respective piece of land and there was a party wall between the houses. The defendant severed her house from the party wall but reenforced the wall and annexed her building to the new party wall. In performing this work the defendant caused bricks to fall through and injure the interior structure of the plaintiff's house and the defendant's operation also caused the plaintiff's building to begin sagging. As a result of such injury the plaintiff brought an action for damages. The trial court had ruled in favor of the plaintiff but on appeal the judgment was reversed. The basis for the reversal was that the defendant had employed due care and that the right of lateral support does not extend to the support of any artificial improvements on the land. In order for the plaintiff to recover for the damage caused to the building by the subsidence of the land he would have to show negligence on the part of the defendant in excavating, or show that there had been malicious conduct on the part of the defendant.

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10 121 Ind. 195, 22 N. E. 989, 6 L. R. A. 449 (1889).

11 138 N. Y. S. 413, 78 Misc. 358 (1912).

The cases just considered establish the rule that where one of two adjoining landowners excavates on his property and in so doing removes the lateral support of the adjacent property he is not liable at the common law for the injuries done to the improvements or buildings due to the subsidence of the contiguous property provided the excavation was performed with due care.

The next phase of the doctrine of lateral support is that which deals with the situation in which an adjoining landowner excavates on his land in such a negligent manner that the adjoining land falls from its own weight and the collapse is not due to the weight of the artificial improvements on the land. In the Michigan case of *Gildersleve v. Hammond* [12] the plaintiff owned a piece of land with a building thereon and the land was very sandy and possessed very little power of adhesion. The defendant owned the lot which was adjacent to that of the plaintiff, and being desirous of erecting a building on his property, commenced excavating. Although he was well cognizant of the nonadhesive power and sandy quality of the plaintiff's land and aware that it would probably subside in the event of a deep excavation on the adjoining lands, the defendant nevertheless excavated to a depth of eight feet. As a result of such excavation the land together with the appurtenances thereon were removed from their natural position and were considerably damaged. The plaintiff thereupon brought a suit for the injury to the building and land. In holding for the plaintiff, the court laid down the rule that a landowner has the right to excavate on his land, and in the event the excavation causes injury to the buildings and land of the adjoining landowner the excavator is liable for both if the excavation was done in a careless and negligent manner.

Adhering to the principles just laid down is the case of *Larson v. Metropolitan Street R. Co.*,[13] in which the plaintiff owned a piece of property with a two-story building on it and the defendant company was the owner of the adjacent piece of land. The defendant, desirous of erecting an engine house on their property, commenced to excavate. Since the Missouri land was very sandy and nonadhesive, it was an established custom among engineers and excavators when excavating near buildings to do so in sections sixteen feet long and then substitute a new foundation in each section before opening up another. The defendants, however, ignored the well-known procedure and excavated in one entire section thereby causing the land of the plaintiff to slip and the house to likewise subside. In ruling in favor of the plaintiff, the court was of the opinion and the evidence sustained the opinion, that the defendant was guilty of negligence in failing to proceed with

12 109 Mich. 431, 67 N. W. 519 (1896).
13 110 Mo. 234, 19 S. W. 416, 16 L. R. A. 330 (1892).

its work in accordance with the established practice. Proceeding further, the court held that an owner of land who excavates on his own premises near the premise of his neighbor in a careless and negligent manner, is liable in damages for any injuries to the building of the adjoining landowner which were the consequences of his negligent excavation. The foregoing cases just discussed establish the principle that where a landowner excavates on his land and causes the soil of an adjacent landowner to *fall from its own pressure* and no reasonable precautions have been taken to protect the neighbor's soil and preserve it in its natural condition, the person doing the excavating is liable for the injury to the land and also for the injury to any improvements on the land. While the subsidence in this class of cases is not due in any material degree to the improvements on the land of the adjoining owner, yet the person doing the excavating is held liable for any resulting injury to the artificial structures on the adjoining land that subsides. If the subsidence is solely due to the weight of the soil itself and there is no negligence on the part of the person whose excavation caused the subsidence, some courts have held that there is no liability for an injury to the artificial improvements on the land that subsides. In the case of *Cooper v. Altoona Concrete Construction and Supply Co.*[14] the plaintiff owned land which was situated adjacent to the land of the defendant. In excavating, the defendant caused the plaintiff's land and also a building on the land to collapse. The court ruled in favor of the defendant and laid down the rule that an owner of land making an excavation on his land is not liable for damage to a building when the building itself did not increase the lateral pressure and there was no negligence on the part of the excavator.

On the other hand a number of courts have taken the view that a landowner, by building on his land, has not thereby lost his right to have his soil supported; and if an excavation on the adjoining land causes his land to sink and, also, produces an injury to artificial improvements on his land he is entitled to damages for such improvements when such subsidence cannot be ascribed to the weight and pressure of the artificial structure. This might be termed the *English rule.* This rule is based upon the theory that while a landowner is under no legal duty to furnish lateral support for the artificial improvements on the adjoining owner's land, yet if the subsidence is due to no pressure from the artificial improvements and the excavation is carefully done an actionable wrong has been committed with respect to the subsidence of the soil itself and, under the general rule that a wrongdoer must make compensation in damages for all direct consequences of his wrongdoing, there is liability, also, for any injury to the artificial structures on the land. In the Rhode Island case of *Prete v. Gray*[15] the plaintiff

[14] 231 Pa. St. 557, 80 Atl. 1047 (1911).
[15] 41 R. I. 209, 141 Atl. 609 (1928).

owned land with a building thereon in the city of Providence. The city, pursuant to the repairing of a sewer in front of the plaintiff's house, excavated but in so doing removed the lateral support of the plaintiff's land thereby causing considerable damage to the building. The plaintiff brought an action to recover for the injury to the building and the land. In ruling in favor of the plaintiff, the court concluded that there was no negligence on the part of the municipality in excavating but held that the removal of the lateral support of the land was the cause of the subsidence and that the weight of the building in no way contributed to bring about the collapse of the soil. Proceeding further, the court said that when the right of lateral support is infringed upon by the adjoining landowner and the land of his neighbor subsides, the injured party is entitled to compensation for the direct results of such a violation of duty including any injury to buildings upon his land when such injury is due to an interference with the lateral support and cannot be attributed to the pressure and weight of the building on the land. In accord with the decision just reviewed is the case of *Riley v. Continuous Rail Joint Co. of America.*[16] In this case the plaintiff had sold the defendant company a strip of her land which the defendant needed for the laying of tracks. On the plaintiff's land, which was adjacent to the property of the defendant, were two frame houses and a few sheds. The defendant then commenced excavating on its property, and, as a result, caused the land and improvements of the plaintiff to subside thereby causing considerable damage to the plaintiff. In defense of the action, which the plaintiff brought, the defendant contended that the artificial improvements on the plaintiff's land increased the lateral pressure to such an extent that they were really the cause of the subsidence. The court dismissed the defendant's contention and, in holding for the plaintiff, laid down the principle that where a landowner removes the lateral support of the adjoining owner's land and as a result the land and the buildings subside and are damaged, such landowner is liable for the injuries to both the land and the buildings when the land would have subsided of its own accord. A much quoted case and one which is in accord with the aforementioned rules is that of *Stearns v. City of Richmond,*[17] in which the city, in excavating to lay a street, caused the plaintiff's land and a building thereon to collapse. The court rendered a decision in favor of the plaintiff, in an action brought for the injury, and established the principle that where land, upon which there are artificial improvements or buildings, subsides by reason of excavation on the adjoining land, and the artificial improvements or buildings in no way contributed to

16 97 N. Y. S. 283, 110 App. Div. 787 (1906).
17 88 Va. 992, 14 S. E. 847 (1892).

the subsidence, then the injury done to the buildings or artificial improvements may be taken into consideration in awarding damages.

There is a qualification of the general rule that the right of lateral support does not extend to the artificial improvements on the land, and that is where the injury to the buildings or structures is the consequence of an excavation made maliciously on the adjoining land. A landowner who excavates on his land, and his excavation is performed with malicious and improper motives, should be liable for the injury to the adjoining land and the artificial improvements thereon. Apparently there are no decisions involving the question of malice in excavating, but in a few cases there has been obiter [18] to the effect that a landowner who removes the lateral support of the adjoining land merely to satisfy his ill feeling toward the adjoining landowner, is liable for the damage done to the land and any artificial improvements thereon.

Howard F. Jeffers.

CONTRACTS—"REQUIREMENTS" CONTRACTS—MUTUALITY OF OBLIGATION.—A not uncommon type of contracts is that wherein one party agrees to furnish all of a certain commodity needed by the other party to the contract in his business at a certain price and for a given period of time. The question of the validity of an accepted offer to furnish such material as one may *need,* or *require,* in one's business is one that has occasioned much difficulty in the cases. Perhaps the leading case in support of the validity of such a contract is *Wells v. Alexandre.*[1] In this case the defendants agreed to buy from the plaintiff all of the coal required for the use of certain steamships, at a given price and for a stated period of time. The defendants were engaged in the business of operating a steamship line, that is to say, they were engaged in an *established business.* In an action to recover damages for the breach of this contract, the court held the plaintiff was entitled to recover. It appeared that the defendants had sold the steamers during the time specified in the contract. The court said this did not terminate the contract; that according to the provisions of the contract, a discontinuance of the business did not terminate the defendant's obligation.

Two principles are illustrated by this case: (1) An agreement to buy or sell the *requirements* of an established business for a definite period

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[18] McGuire v. Grant, 25 N. J. L. 356, 67 Am. Dec. 49 (1856).

[1] 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218 (1891).

of time is a sufficient consideration to support a contract; [2] and (2) An agreement to purchase the *requirements* of an established business cannot be evaded by a sale of the business, unless the provisions of the contract admit of such a construction. That is, a termination of the *needs* of the business does not terminate the contract.[3] The effect of this decision is that the defendants are not entitled to terminate their obligation by going out of business, or by transferring the business, and thus terminating their *requirements* as a matter of fact.

In *Wells v. Alexandre* the obligation of the defendants was measured by the *requirements* of certain named steamers, X., Y., and Z.,—not by the *requirements* of the defendants (buyers) in general in a business. The result of the holding is that there was an implied promise on the part of the defendants to continue to purchase the coal normally *required* by these steamers during the contract period, even though the defendants sold the steamers. This promise was regarded as sufficiently definite to be enforceable and to constitute a valid consideration. The general rule, applicable in the class of cases, is that an accepted offer to furnish or deliver such articles of personal property as shall be required by the established business of the acceptor during a definite period of time is binding. It contains an implied agreement of the acceptor to purchase all the articles that shall be required in conducting his business during this time from the party who makes the offer.

Since the requirements of the buyer may decrease or increase as business conditions fluctuate and be met by the inherent elasticity of a "requirements" contract, provided the conduct of the buyer is *bona fide,* there can be no *rational distinction between decreases* stopping short of total extinction and those which do not.[4] A very liberal and equitable interpretation was given in a recent case,[5] where, under a contract to purchase all requirements from seller, the buyer was left free to deal with his business as he deemed best, provided his conduct was *bona fide.* The contract required the buyer to purchase from seller all ice cream "required" for buyer's stores. It was held that the contract was not breached where buyer ceased making purchases because it had become disabled by bankruptcy from further performance under the contract and its good faith was unquestioned.

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2 Southwest Kansas Oil & Gas Co. v. Argus Pipe Line Co., 141 Kan. 287, 39 Pac. (2d) 906 (1935); Jenkins v. City Ice & Fuel Co., 160 So. 215 (Fla. 1935); Cantrell v. Knight, 72 S. W. (2d) 196 (Mo. App. 1934); Hladik v. Noe, 243 N. W. 180 (Iowa, 1932).

3 Wells v. Alexandre, *op. cit. supra* note 1; Hickey v. O'Brien, 123 Mich. 611, 82 N. W. 241, 49 L. R. A. 594 (1900); Diamond Alkali Co. v. P. C. Tomson & Co. 35 Fed. (2d) 117 (C. C. A. 3rd, 1929).

4 Helena Light & Ry. Co. v. Northern Pacific Ry. Co., 57 Mont. 93, 186 Pac. 702 (1919).

5 In re United Cigar Stores Co., 72 Fed. (2d) 673 (C. C. A. 2nd, 1924).

Another distinct type of "requirements" contract, which is almost universally held to be invalid, is one in which the terms of the contract are so stated as not to obligate either party to do the acts contemplated. The defect lies in the lack of mutuality of the contract. A "requirements" contract is said to be mutual where it contains an agreement to sell on the one side and an agreement to purchase on the other. But it is not mutual where there is an obligation to purchase but no obligation to sell, or an obligation to sell, but no obligation to purchase. Such a contract is void for want of mutuality if the quantity to be delivered is conditional entirely on the will or want of the buyer,[6] but is valid if the quantity is ascertainable otherwise than by the will of the buyer with reasonable certainty. For example, an accepted offer to furnish such goods as shall be required or consumed by an established business may be enforced.[7]

The quantity of goods is sometimes fixed in the contract wholly without reference to a numerical standard.[8] The buyer may agree to take all the seller manufactures, or, more commonly, the seller may agree to sell such quantity as the buyer requires. If it is wholly optional with one party to a bilateral agreement whether he shall perform or not there is no legal contract.[9] A promise to buy such a quantity of goods as the buyer may thereafter order,[10] or to take goods in such quantities as the buyer "may want," is not sufficient consideration since the buyer may refrain from buying at his option and without incurring legal detriment himself or benefitting the other party.[11] Whether the

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6 *Contra*: Golden Cycle Mining Co. v. Rapson Coal Mining Co., 188 Fed. 179 (C. C. A. 8th, 1911) (An agreement by one party to furnish and by the other party to purchase all the coal of a stated kind which the second party "may use" in the operation of a mine during a limited time is valid.).

7 Conley Camera Co. v. Multiscope & Film Co., 216 Fed. 892 (C. C. A. 8th, 1914). Accord: Golden Cycle Mining Co. v. Rapson Coal Mining Co., *op. cit. supra* note 6; Lima Locomotive & M. Co. v. National Steel C. Co., 155 Fed. 77; 11 L. R. A. (N. S.) 713 (C. C. A. 6th, 1907); National Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427 (1884); Warden Coal Washing Co. v. Meyer, 98 Ill. App. 640 (1901); Dailey Co. v. Clark Can Co., 128 Mich. 591, 87 N. W. 761 (1901); Grand Prairie Gravel Co. v. Joe B. Wills Co., 188 S. W. 680 (Tex. Civ. App. 1916).

8 2 WILLISTON ON SALES 464.

9 Missouri, K. & T. Ry. Co. v. Bagley, 60 Kan. 424, 759 (1899); McCaw Mfg. Co. v. Felder, 115 Ga. 408, 41 S. E. 664 (1902); Wagner v. J. & G. Meakin, 92 Fed. 76 (C. C. A. 5th, 1899); Morrow v. Southern Exp. Co., 101 Ga. 810, 28 S. E. 998 (1897).

10 Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co., 114 Fed. 77, 57 L. R. A. 696 (C. C. A. 8th, 1902). See, also, Buick Motor Co. v. Thompson, 138 Ga. 282, 75 S. E. 354 (1912).

11 Other illustrations may be found in the following cases: Harvester King Co. v. Mitchell, Lewis & Staver Co., 89 Fed. 173 (C. C. D. Ore. 1898); Wagner v. J. & G. Meakin, *op. cit. supra* note 9; Ellis v. Dodge Bros., 237 Fed. 860 (D. C., N. D. Ga. 1916); Schalk Chemical Co. v. R. W. Pridham Co., 48 Cal. App.

buyer agrees to buy all that he requires, or the seller agrees to sell all that he produces, the weight of authority is clearly that such contracts are binding.[12]

These distinctions may be more clearly seen in *Brawley v. United States*,[13] in which Justice Bradley stated the following general rules governing these cases: "Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of 'about,' or 'more or less,' or words of like import, the contract applies to the specific lot; and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it. . . . But when no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material and governs the contract. words of like import, the contract applies to the specific lot; and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure or weight.[14] If, however, the qualifying words are supplemented by other stipulations or conditions which give them a broader scope, or a more extensive significancy, then the contract is to be governed by such added stipulations or conditions. As,

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650, 192 Pac. 195 (1920); C. & A. R. R. Co. v. Jones, 53 Ill. App. 431 (1894); Missouri, K. & T. Ry. Co. v. Bagley, *op. cit. supra* note 9; Atlantic Pebble Co. v. Lehigh Valley R. Co., 89 N. J. Law 336, 98 Atl. 410 (1916).

12 Klipstein & Co. v. Allen, 123 Fed. 992 (C. C. N. D. Ga. 1903); American Trading Co. v. National Fibre & Insulation Co., 1 W. W. Harr. 258, 111 Atl. 290 (1920); Nat'l Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427 (1884); Minnesota Lumber Co. v. Whitebreast Coal Co., 160 Ill. 85, 43 N. E. 774 (1895); S. B. Smith & Co. v. R. Morse & Co., 20 La. Ann. 220 (1868); Parks v. Griffith & Boyd Co., 123 Md. 233, 91 Atl. 581 (1914); Ziehm v. Frank Steil Brewing Co., 131 Md. 582, 102 Atl. 1005 (1917); Burgess Sulphite Fibre Co. v. Broomfield, 180 Mass. 283, 62 N. E. 367 (1902); Cooper v. Lansing Wheel Co., 94 Mich. 272, 54 N. W. 39 (1892); Hickey v. O'Brien, *op. cit. supra* note 3; Ames-Brooks Co. v. Aetna Ins. Co., 83 Minn. 346, 86 N. W. 344 (1901); Miller v. Leo, 35 App. Div. 589, 55 N. Y. S. 165 (1898), *affirmed*, 165 N. Y. 619, 59 N. E. 1126 (1900); Robertson v. Garvan, 270 Fed. 643 (D. C., S. D. N. Y. 1920); Walker v. Mason, 272 Pa. 315, 116 Atl. 305 (1922).

13 96 U. S. 168 (1877).

14 Norrington v. Wright, 115 U. S. 188 (1885). See, also: Glecker v. Slavens, 5 S. D. 364, 59 N. W. 323 (1894); Weinmann v. Fellman, 162 N. Y. S. 131 (1916); Pierce v. Miller, 107 Neb. 851, 187 N. W. 105 (1923); City of Chicago v. Galpin, 183 Ill. 399, 55 N. E. 731 (1899); Hills v. Edmund Peycke Co., 14 Cal App. 32, 110 Pac. 1088 (1910); United States v. Republic Bag & Paper Co., 250 Fed. 79 (C. C. A. 2nd, 1918).

if it be agreed to furnish so many bushels of wheat, more or less, according to what the party receiving it shall require for the use of his mill, then the contract is not governed by the quantity named, nor by that quantity with slight and unimportant variations, but what the receiving party shall require for the use of his mill; and the variation from the quantity named will depend upon his discretion and requirements, so long as he acts in good faith." [15]

How strongly the matter of good faith determines the decisions is strikingly presented in the case of *Diamond Alkali Co. v. P. C. Tomson Co.*,[16] where the defendant was to purchase its entire requirements of the plaintiff for a period of five years. All the negotiations between the parties were based upon the proposed "continuance" of the contract for the term of five years. The fulfillment of their undertakings necessarily implied such a continuance. The parties in good faith contemplated performance of the covenants requiring the defendant to purchase all its specified supplies from the plaintiff for five years. Implicit in these negotiations and stipulations was the *bona fide* operations by the defendant of its manufacturing plant for that period. The defendant did not intend to do otherwise until an unexpected opportunity to make an advantageous sale presented itself. The contact was held valid and binding.[17]

In *Crane v. Crane & Co.*[18] the court distinguishes between a contract to furnish another with such supplies as may be needed during a specified period of time, or with such commodities as the purchaser has ready to furnish to others, the quantity in such cases being capable of at least the approximate estimation when the contract is made, and an agreement by a wholesale dealer to supply a retailer during a certain time, at stated prices with so much of a commodity as the purchaser may require for his trade. The former, in the opinion of the court, is good; but the latter is not, for the reason that it leaves it practically optional with the purchaser to increase or diminish his orders with the rise or fall of prices, as may be most to his advantage and the corresponding disadvantages of the seller. Hence, in the opinion of the court, there is no mutuality.[19] The line of demarcation between valid and invalid contracts runs between the requirements of machinery or

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15 See, also, Louisville Soap Co. v. Taylor, 279 Fed. 470 (C. C. A. 6th, 1922).

16 35 Fed. (2d) 117 (C. C. A. 3rd, 1929).

17 Accord: New Eng. Iron Co. v. Gilbert Elev. R. R. Co., 91 N. Y. 153 (1883); Booth v. Cleveland Rolling Mill Co., 74 N. Y. 15 (1878). See, also: Holtz v. Schmidt, 59 N. Y. 253 (1874); East v. Cayuga Lake Ice Line, 21 N. Y. S. 887 (1893).

18 105 Fed. 869 (C. C. A. 7th, 1901).

19 See, also, Tarbox v. Gotzian, 20 Minn. 139 (1873) (The court reasoned that as the acceptor might go out of business when he pleased, there was no engagement on his part to "want" any of the goods offered.).

of an established business, and the wants, desires or requirements of the tenative vendee; and that because the former are reasonably certain or may be made so by evidence, while the latter are conditioned by the will of the tentative vendee alone, and are both uncertain and capable of much variation.[20]

In some cases a distinction has been drawn between contracts in which the use of the commodity puchased is but an incident to the carrying on of the business itself, and those in which the purchase and use of the commodity is the main business of the purchaser, holding that in the latter case an agreement to purchase such an amount as will be required is invalid.[21] *T. W. Jenkins & Co. v. Anaheim Sugar Co.*[22] gives an excellent discussion of the distinction: "The books are full of cases . . . to the effect that a contract binding one party to sell, and the other to buy, all of the 'requirements' of the latter's *established business* as to a given commodity, will be enforced, and this because of the fact that the ascertainment of such requirement is possible with sufficient definiteness and certainty; the subject-matter of the contract being thus rendered certain, in the face of the positive reciprocal obligations complete mutuality is secured, and a breach of either party can be the basis of relief to him who tenders or has given full performance. As a necessary element of this wholesome conclusion, however, the courts have been forced to indulge in the presumption that the parties intended that the established business of the purchaser was to be carried on, substantially as of the time of contract, and that the purchase and *use* therein of the commodity forming the subject-matter of the contract would be but an *incidental* feature of the carrying on of such established business. . . . It will be observed that the principle involved, and which is reflected in all the cases [with a few exceptions] . . . has to do with a purchase by, and a sale for the use of, an established business, in which, presumably . . . the use of the commodity purchased is but an *incident* to the carrying on of the business itself, and because of which fact, therefore, the presumption can be indulged in that the business will be carried on and the incidental use of the commodity will continue, substantially as intended by the parties, entirely irrespective of any rise or fall in the price of the commodity itself."

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20 Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co., *op. cit. supra* note 10. See, also, Laclede Construction Co. v. Tudor Iron Works, 169 Mo. 137, 69 S. W. 384 (1902).

21 T. W. Jenkins & Co. v. Anaheim Sugar Co., 237 Fed. 278 (D. C., S. D. Col. 1916). Contra: Minnesota Lumber Co. v. Whitebreast Coal Co., *op. cit. supra* note 12 (A contract for the purchase and sale of the "requirements" of a coal company engaged in the purchase, use and sale of coal in its business is valid.). See, also, Hickey v. O'Brien, *op. cit. supra* note 3.

22 237 Fed. 278, 279, 280 (D. C., S. D. Cal. 1916).

The obviously harsh rulings in such cases as *Wells v. Alexandre*[23] (which is often cited to sustain the proposition that the buyer must take all the goods that his business, if maintained under substantially the same conditions as existed at the time the bargain was made would require), *Du Point De Nemours Power Co. v. Schlottman*[24] (where it was held that the fact that the contract did not in express terms say that the defendant would continue in business for five years did not relieve it from performing their mutual intention as indicated by the express covenants, and in order to do so, it had to continue in business), and *National Furnace Co. v. Keystone Mfg. Co.*[25] (where it was held that a contract to furnish a manufacturing company all the iron it needed in its business for the ensuing year at a certain price is binding on the purchaser for what is reasonably required and necessary for a year's supply in such business), have today been mellowed to the point where, in most jurisdictions, the courts have made "good faith" in the terminating of requirements contracts the criterion of their judgments.[26]

As to the validity and mutuality of obligation on both parties to the requirements contract, practically all the jurisdictions agree that such contracts are valid and binding.[27] Such decisions, however, depend largely on the language of the contract. In almost no instance has it been held that a contract is valid where the quantity "required" is conditional entirely on the will or want of the buyer.[28]

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23 *Op. cit. supra* note 1.

24 218 Fed. 353 (C. C. A. 2nd, 1914).

25 *Op. cit. supra* note 7.

26 See In re United Cigar Stores Co., *op. cit. supra* note 5.

27 Southwest Kansas Oil & Gas Co. v. Argus Pipe Line Co., 141 Kan. 287, 39 Pac. (2d) 906 (1935); Jenkins v. City Ice & Fuel Co., 160 So. 215 (Fla. 1935); Cantrell v. Knight, 72 S. W. (2d) 196 (Mo. App. 1934); Ferenczi v. National Sulphur Co., 11 N. J. Misc. 262, 166 Atl. 477 (1933); Nassau Supply Co. v. Ice Service Co., 234 N. Y. S. 656, 226 App. Div. 368 (1929); Imperial Refining Co. v. Kanotex Refining Co., 29 Fed. (2d) 193 (C. C. A. 8th, 1928); Southwest Dairy Products Co. v. Coffee & Moore, 62 Fed. (2d) 174 (C. C. A. 5th, 1932); Hladik v. Noe, *op. cit. supra* note 2; Banner Creamery Co. v. Judy, 47 S. W. (2d) 129 (Mo. App. 1932).

28 See: Cosby-Hodges Milling Co. v. Riley, 149 So. 612 (Ala. 1936); Miller v. Thomason, 156 So. 773 (Ala. 1924). *Contra*: Golden Cycle Mining Co. v. Rapson Coal Mining Co., *op. cit. supra* note 6.