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# Recent Decisions

David A. Gelber

Francis A. Dunn

James R. Burke

view can be said to be erroneous: one, recognizing a man's right to make a will and wishing to protect devisees and legatees under a will, places the burden of proof on the contestant; the other, recognizing the interests of the heirs, and wishing to make positive the fact that the testator really made a will in accordance with the statutory requirements, places the burden upon the proponent. Both are correct.

In regard to those courts which have confused the idea of "burden of proof," a note in the *Michigan Law Review* offers a sage suggestion:[17] "If for reasons of policy or expediency the courts think it desirable to protect wills by placing the burden of proof on the contestant throughout they should express these reasons instead of bolstering up their opinions with doubtful arguments as to the shifting of the burden of proof during the trial, or giving probative force to presumptions of testamentary capacity."

*William J. Fish* and *Francis P. Kelly.*

## RECENT DECISIONS

INNKEEPERS—INJURY TO PROPERTY OF GUEST—CARE REQUIRED OF INNKEEPER. —Action of tort for damages sustained by the plaintiff whose fur coat was burned when a toy balloon exploded in the defendant's restaurant. The balloon, filled with gas, unknown to the plaintiff, exploded when it was touched with a lighted cigar by another patron. The defendant was held liable for the damage sustained by the plaintiff. The court said that "since the presence of the plaintiff in the restaurant of the defendant was a benefit to each, the defendant was under the obligation to use reasonable care to see to it that portions of the premises where the plaintiff was specially or impliedly invited to go were reasonably safe for her use. . . . The defendant was also obligated not, without warning, to expose the plaintiff to a danger existent on the premises which was known or ought to have been known by the defendant but was not known or was not of such a character that it should have been known to the plaintiff." *Robinson v. Weber Duck Inn Co.*, 1 N. E. (2d) 27 (Mass. 1936).

In *Del Rosso v. F. W. Woolworth Co.*, 200 N. E. 277 (Mass. 1936), the plaintiff, a patron in a basement restaurant owned and operated by the defendant, was injured by jumping and falling when a rat came from the kitchen and ran under the table where she was eating her lunch. The court held that she could not recover, as she did not show that the defendant had not attempted to keep its premises free from rats and as she did not show whether the presence of rats on the premises was known to the defendant.

An innkeeper or hotel keeper is under a duty to provide reasonably safe premises for his guests, which they may be expected to use in the ordinary way and in the ordinary manner. This duty is imposed by law and is not contractual. *Dye-Washburn Hotel Co. v. Aldridge*, 93 So. 512 (Ala. 1922); INNKEEPERS, 14 R. C. L. 508. The innkeeper or hotel keeper is not an insurer of the safety of his guest; his responsibility is limited to the exercise of ordinary care. *Burgauer v. McClellan*, 265 S. W. 439, 440 (Ky. 1924). Liability is limited to those con-

17 *Op. cit. supra* note 7.

sequences which can reasonably be forseen or anticipated by a person of ordinary prudence. *Cumberland Hotel Operating Co. v. Hartman,* 94 S. W. (2d) 637, 641 (Ky. 1936).

As a general rule, in the law of negligence, the defendant is under a duty to protect the plaintiff against the reasonably expectable conduct of third persons, if the defendant ought reasonably not to expose the plaintiff to such conduct. This rule has been applied in many jurisdictions. In an Iowa case a motorman left a street car unguarded on a grade and a passenger released the brake; the court held that the jury might properly find that some such happening was forseeable and so was a risk that made the motorman's conduct negligent. *Kliebenstein v. Iowa R. & Light Co.,* 193 Iowa 892, 188 N. W. 129 (1922). In a New Jersey case a passenger, in attempting to have her baggage checked, was knocked down and injured in a railroad depot by cabmen who were engaged, in sport, in scuffling; the court held that evidence of similar occurrences was admissible to show the danger to passengers existing there and to show that the defendant had knowledge of them and so was bound to use reasonable care to protect passengers from such dangers. *Exton v. Central R. Co. of New Jersey,* 62 N. J. Law 7, 42 Atl. 486, 56 L. R. A. 508, BOHLEN, CASES ON TORTS (3rd ed.) 179 (1899). In an Irish Free State case the defendants failed to provide a platform and handrail for travelers, as an ordinance required while their premises were undergoing repairs; the plaintiff, a traveler on the premises, was run over by motor lorry carelessly driven by a third person; the jury found that the failure to have the platform and handrail directly conduced to the plaintiff's injury, and the Court of Appeals affirmed a verdict and judgment for the plaintiff. *McKenna v. Stephens* [1923] I. R. 2 K. B. 112. Extreme examples of this doctrine are to be found in those cases holding that criminal acts of third persons, induced by the defendant's conduct, may be forseeable. An English case held that one who had negligently recommended a stock broker was liable for the money of the customer embezzled by the broker. *De La Bere v. Bearson* [1907] L. R. 1 K. B. 483. A South Carolina case held that a railroad company which caused its employees to work in its yards at night, with knowledge that its yards were a customary resort for criminals who gathered there to rob the cars, was liable to an employee who was shot by a robber with whom he came in contact in the course of his employment. *Green v. Atlantic & Charlotte Air Line R. Co.,* 131 S. C. 124, 126 S. E. 441, 38 A. L. R. 1448 (1925).

*David A. Gelber.*

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LANDLORD AND TENANT—INJURIES DUE TO FAILURE TO REPAIR.—The plaintiff, as tenant, brought a tort action to recover for personal injuries sustained as the result of the alleged negligence of the defendant, who was the landlord of the dwelling house. The rights of the parties arose from the relationship of landlord and tenant. The defendant obtained the house through a foreclosure sale, and at that time it was in need of repairs. Part of the house consisted of front and back piazzas; to reach both the downstairs and the upstairs tenements, an ascent of stairs was necessary. The plaintiffs agreed to rent the house from the defendant bank, and the agreement was that plaintiff was to repair the place, the bank furnishing the materials, and also making an allowance on the rent, and giving the plaintiff a small payment each month for his services. This contract was terminated sometime later, and the bank by its officers agreed to finish the repairs, and did make some repairs. Sometime afterwards, the plaintiffs, on leaving their dwelling place, were walking on the back piazza; here the wife stepped on a board that was decayed and fell forward down the stairs and was injured. The

defective part of the piazza was a part of the building that the defendants had intended to repair. *Held,* that the defendant, in failing to make repairs on the piazza, where the plaintiff was injured, was not liable for the injuries received by her. *Andrews v. Leominster Savings Bank,* 5 N. E. (2d) 50 (Mass. 1936).

There is no implied warranty in the letting of premises that they are reasonably fit for use. In the absence of an express warranty or deceit the lessee assumes the risk of the quality of the premises he leases. *Tuttle v. George H. Gilbert Manufacturing Co.,* 145 Mass. 169, 13 N. E. 465 (1887). The ordinary relation of lessor and lessee gives rise to no obligation on the part of the lessor to keep the premises in repair or in the same condition they were in when let to the tenant. *Walsh v. Schmidt,* 206 Mass. 405, 92 N. E. 496, 34 L. R. A. (N. S.) 798 (1910).

It is the duty of the lessor to inform the lessee of concealed defects in the premises, which a careful examination by the tenant would not reveal and which are known to the lessor, in order that the lessee may guard against them. *Sunasack v. Morey,* 196 Ill. 569, 63 N. E. 1039 (1902); *Miner v. McNamara,* 81 Conn. 690, 72 Atl. 138, 21 L. R. A. (N. S.) 477 (1908). *Contra: Land v. Fitzgerald,* 52 Atl. 229 (N. J. 1902), holding that since the lease contained no express or implied promise that the premises were safe, the tenant could not recover for a personal injury due to the unsafe condition of the premises that was known to the landlord and not known or discoverable by ordinary care by the tenant.

Where the landlord warrants the safe condition of the demised premises, he is subject to liability to the tenant for a personal injury due to a defect in the premises, if the defect amounts to a breach of the warranty. *Ousley v. Hampe,* 128 Iowa 675, 105 N. W. 122 (1905).

As a general rule, under the ordinary contract of the landlord to repair premises let to a tenant, there is no liability in tort to the tenant for personal injuries resulting from the want of repair. Such injuries are generally regarded as too remote to be recovered for on breach of the contract. The ordinary duties arising from the relation of landlord and tenant are not increased by such a contract with respect to the obligation of the landlord to provide for the personal safety of the tenant. So it makes no difference whether the form of the action be *ex delicto* or *ex contractu,* as the gravamen of the action in either case would be breach of a contract. If, however, the contract to repair amounts to a covenant to keep the premises reasonably safe, or if the contract was made under circumstances reasonably indicating that damages for personal injuries were contemplated by the parties at the time of the making of the contract, or if there is some duty resting on the landlord to make the repairs (the want of which produced the injury) not arising from a contract, then there is liability for the personal injuries sustained from a failure to make the repairs that brought about the personal injury sustained. See discussion in *Cromwell v. Allen,* 151 Ill. App. 404, 407, 408 (1909).

For a breach of the ordinary contract of a landlord to make repairs, the following remedies are open to the tenant: (1) The tenant may abandon the premises, if they become untenantable by reason of the want of repair; (2) The tenant may make the repairs himself and deduct the cost from the rent; (3) The tenant may occupy the premises without repair and recoupe his damages in an action for rent; and (4) The tenant may sue for damages for breach of covenant to repair, and the damage recoverable is usually the difference between the value of the premises in repair and the value of the premises out of repair. See discussion in *Cromwell v. Allen,* 151 Ill. App. 404, 408, 409 (1909).

The mere fact that the landlord states that he will repair the premises is not sufficient to create liability for an injury due to disrepair of the premises, be-

cause such a promise is gratuitous. However, where performance of a gratuitous promise to repair is entered upon by the defendant, then he is bound to use due care in performance and the tenant, if he relies on such repairs, may have a cause of action. *Gill v. Middleton,* 105 Mass. 477 (1870). The landlord is at liberty to repudiate his gratuitous promise or to perform it, but if he does undertake to perform it he is obligated to use due care as to the manner of its performance. In the absence of contractual obligation, the landlord is liable to his tenant only for acts of misfeasance—not for nonfeasance (*Ward v. Fagin,* 101 Mo. 669 (1890)); and recovery, if any may be had against him, must be founded on the law of negligence, and does not rest upon the theory of an implied contract. *Russell v. Little,* 22 Idaho 429 (1912); LANDLORD AND TENANT, 16 R. C. L. § 555.

However, there is a distinction to be drawn where the parts of the premises that have been leased involve a common entrance, or stairway, or something of that nature, which is to be used by all tenants In such cases the duty to repair, at the common law, is not upon the tenants but upon the landlord; this appears to be the general rule. *Sawyer v. McGullicuddy,* 17 Atl. 124 (Me. 1889).

*Francis A. Dunn.*

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WILLS—EFFECT OF CONVEYANCE OF REAL ESTATE DEVISED AND ITS REACQUISITION BY TESTATOR.—In 1919 the testator devised all of his real estate and personal property to *D.* This was a general devise. In 1921 the testator conveyed his real estate to the devisee (*D.*), who later reconveyed it to the testator. In 1933 the testator died owning this real estate and without republishing his will. *Held,* that the real estate passed to *D.* under the will. *Strang v. Day,* 362 Ill. 110, 199 N. E. 263, 103 A. L. R 1215 (1935).

Prior to the *Statute of Wills* of 1540 in England the power to devise real property (except by some particular custom) did not exist, because the feudal system required livery of seisin to effect a conveyance and wills were regarded as conveyances. The *Statute of Wills* provided that "every person and persons, having manors, lands, tenements or heriditaments," should have the power to devise the same. But it was held that where a testator devised lands of which he was not seised at the time, they did not pass under his will. *Brinker v. Cook,* 11 Mod. 121, 88 Eng. Rep. 940 (1707). There the court pointed out that to hold otherwise would be contrary to reason and against the known rules of the common law of England, and that the *Statute of Wills,* which gave the power to devise lands, enabled only persons having lands at the time a will was made to devise them.

Under the *Statute of Wills* a conveyance of land, after it had been specifically devised by the grantor, constituted an implied revocation of the devise. Two reasons were given for this rule. (1) The will could not affect land acquired after its execution, as a will was regarded in the nature of a conveyance of the land devised, that is, as a title document. It could operate only upon the land in which the testator had an interest at the time of the execution of his will devising the same. It was necessary that the testator should be seised of the land at the time he made his will and that he should continue so seised without interruption until his decease. *Marey v. Sohier,* 63 N. H. 507, 3 Atl. 636, 56 Am. Rep. 538 (1885). (2) The conveyance of land which was the subject of a specific devise indicated the testator's intention to revoke that part of the will. If, however, the testator republished the will with language properly including the reacquired property that he had devised, then the will operated to pass it to the devisee.