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LIABILITY OF A LANDLORD TO THIRD PERSONS FOR INJURIES OCCURRING OUTSIDE THE RENTED PROPERTY

It is not unusual that courts are faced with the question of the extent of the liability of a landlord to third persons for injuries received outside the rented property and caused by a nuisance or dangerous condition existing on the rented property. It has been uniformly said that as the tenant is in possession and has an opportunity to correct the defect before injury that *prima facie* the tenant and not the landlord is liable.¹ However, there are certain situations in which the landlord is also liable. Should such a situation exist, the burden should be on the injured party to show the existence of such an exception and its applicability to his injury before the landlord will be responsible. Even here the tenant is not absolved of liability but remains liable with the landlord as a joint tortfeasor.²

The term "nuisance" as used herein includes not only a continual interference with the enjoyment of one's land or of a public right, but also instantaneous interferences—such as the collapse of a wall. While, for technical accuracy this latter is not a nuisance, it has been so uniformly considered by the courts as a nuisance and is so governed by the same rules that it is more practical to consider it as such. Thus, for our purpose here it will suffice to define a nuisance as including anything that endangers life or health or gives offense to the senses or which violates the laws of decency or obstructs reasonable and comfortable use of realty or public ways arising from the wrongful use of land.³

It has been thought advisable to divide this discussion into the following three general categories:

- 1) When, at the time the lease was executed there existed on the premises a condition amounting to a nuisance;
- 2) When, at the time possession was taken under the lease there existed on the premises no nuisance either active or quiescent but later during the term a nuisance came into being thereon;
- 3) When, at the time the lease was executed there existed on the property a potential nuisance which in the normal course of events developed into a nuisance.

If at the time the lease is executed a nuisance exists on the premises and the lessor knows or should know of its existence, he is said to be liable for any injury caused thereby. However, if at the time he was not and could not by the exercise of reasonable dili-

¹ Knight v. Foster, 163 N.C. 329, 79 S.E. 614 (1913), Ahern v Steele, 115 N.Y. 203, 22 N.E. 193 (1889)

Gordon v Peltzer, 56 Mo. App. 599 (1893), Brogan v Hanan, 55 App. Div. 92, 66 N.Y.S. 1066 (2d Dept. 1900) reversed on other grounds, 93 App. Div. 580, 87 N.Y.S. 930 (2d Dept. 1904).

² Hall v Putney, 291 Ill. App. 508, — 10 N.E. 2d 204, 207 (1937).

gence have been aware of the existence of the nuisance, the courts with few exceptions hold the landlord blameless.⁴ Normally, the courts reach this first result by inferring from the landlord's act of leasing the property with an existing nuisance, an authorization to the tenant to continue the wrong.⁵ Should the court find this inference is rebutted by a condition in the lease that the tenant shall remedy the defect, it may as some have done, find that every landlord has a duty to abate every nuisance of which he is aware and over which he has control, and his failure to do so is an actionable tort from which anyone injured by the continuing nuisance may recover.⁶ Still other courts faced with such a covenant in the lease have said that the fact that the tenant has covenanted to repair will not shield the landlord from liability for an obligor may not transfer his liability to another without the consent of the obligee.⁷

It is normally said that if at the time possession was taken under the lease there existed on the premises no nuisance either active or quiescent, the landlord is not liable for a condition that later develops,⁸ since a lease is considered as a conveyance of land⁶ for a term and during that term the landlord usually has no right to enter and abate the nuisance. However, since the lease is created by contract, the effect and operation of the lease may be altered by covenants therein. Thus, it would be well to consider the effect of a covenant in the lease requiring the tenant to perform a particular act on the premises during the term, or of a covenant requiring the landlord to repair.

The relation of master and servant is not to be implied in a lease and usually the doctrine of *respondet superior* has no appli-

⁴ *Swift & Co. v Peoples Coal & Oil Co.*, 121 Conn. 579, 186 Atl. 629 (1936) *Wiffin v De Tweede Northwestern & Pacific Hypotheek Bank*, 52 Idaho 165, 12 P. 2d 271 (1932) *East End Improvement Co. v. Sipp*, 14 Ky. Law Rep. 924 (1893) *Benton v. Kerman*, 127 N.J. Eq. 434, 13 A. 2d 825 (1940) *Junkermann v Tilyou Realty Co.*, 213 N.Y. 404, 108 N.E. 190 (1915) *Timlin v. Standard Oil Co. of N.Y.*, 126 N.Y. 514, 27 N.E. 786, 22 Am. St. Rep. 845 (1891) *City of Los Angelo v. Sitas*, 143 Tex. 154, 183 S.W. 2d 417 (1944), with at least one court requiring notice and request to abate before liability would arise if a nuisance existed on the land at time of purchase and was at that time subject to an existing lease which was renewed by the purchaser, *Webber v Wright*, 124 Me. 190, 126 Atl. 737 (1924)

⁵ *Decker v Pacific Coast Steam Ship Co.*, 3 Alaska 230 (1906) *Fleischner v Citizens Real Estate & Investment Co.*, 25 Ore. 119, 35 Pac. 174 (1893) *see Lufkin v Zane*, 159 Mass. 117, — 31 N.E. 757, 758, 34 Am. St. Rep. 262, — (1892) *Britton v Donwin Realty Corp.*, 123 N.J.L. 540, — 10 A. 2d 262, 263 (1940).

⁶ *See Equitable Life Assur. Soc. of United States v. McClellan*, 286 Ky 17, 22, 149 S.W. 2d 730, 733 (1941).

⁷ *Baily v Dunaway*, 8 Ga. App. 713, 70 S.E. 141 (1911) *Kelly v. LaCede Real Estate & Investment Co.*, 155 S.W. 2d 90 (Mo. 1941) *Junkermann v Tilyou Realty Co.*, 213 N.Y. 404, 108 N.E. 190 (1915)

⁸ 1 *TIFFANY, LANDLORD AND TENANT* Sec. 101 (1910) *see Miller v Fisher*, 111 Md. 91, — 73 Atl. 891, 892 (1909)

cation to the acts of the tenant.⁹ However, this does not prevent the parties from expressly providing in the lease that the tenant shall be the servant of the landlord, as where the tenant agrees to construct certain buildings during the term. In such a situation it has been held that under the usual rules of agency the landlord is liable for any resulting injury not only if the act would necessarily result in a nuisance, but if it does so result due to the misfeasance or non-feasance of the tenant if done within the scope of the employment as set forth in the lease.¹⁰

Frequently, a lease provides that during the term the landlord will maintain the premises in repair. Under this state of facts, the lessor becomes liable if a third person suffers from a nuisance caused thereon by the disrepair of the premises.¹¹ Most courts have predicated liability on the reasoning that the lessor has contracted to repair, and as the tenant would be liable to any third person injured by the failure to repair, he would then have an action over against the lessor for damages he was forced to pay. Then, to avoid circuity of action, they have allowed an action by the injured person against the landlord in the first instance.¹² Some courts have recognized the fallacy of such a theory both from the standpoint of the normal measures of contract damages and from a procedural point of view and have developed a more substantial ground of liability. These courts have said that the usual duty of a landlord to keep his land free from nuisances passes from him when he surrenders possession to his tenant. But where the landlord covenants to repair, he reserves to himself a conditional possession and prevents this duty from passing from him in its entirety and thus retains the same duty as though no lease had been given.¹³

Between these two situations, there lies a third field which is one of greater uncertainty. It is within the power of every landlord *at the time he executes the lease* to control the subsequent use of the premises by the tenant. Since the landlord by leasing is making a use of his land, he must not authorize a use by the tenant which he knows will encroach on the protected rights of others.¹⁴ Thus, if one leases a parcel of land with a quiescent or potential nuisance there-

⁹ See *Midland Oil Co. v Thigpen*, 4 F 2d 85, 91 (C.C.A. 8th 1924) writ of error dismissed in 273 U.S. 658, 71 L.Ed. 826, 47 Sup. Ct. 343 (1927)

¹⁰ *Byne v. Mayor, etc. of City of Americus*, 6 Ga. App. 48, 64 S.E. 285 (1909)

¹¹ *Lebensburger v Scofield*, 155 Fed. 85 (C.C.A. 6th 1907) *Appel v. Muller*, 262 N.Y. 278, 186 N.E. 785 (1933), see *Klepper v Seymour House Corp. of Ogdensburg*, 246 N.Y. 85, — 158 N.E. 29, 32 (1927)

¹² *Lebensburger v Scofield*, 155 Fed. 85 (C.C.A. 6th 1907) *City of Lowell v Spaulding*, 4 Cush. 277, 50 Am. Dec. 775, (Mass. 1849).

¹³ See *Appel v Muller*, 262 N.Y. 278, — 186 N.E. 785, 786 (1933), *Burdick v Cheadle*, 26 Ohio St. 393, 396, 20 Am. Rep. 767, — (1875)

¹⁴ *Fish v. Dodge*, 4 Demo 311, 47 Am. Dec. 254 (N.Y. 1847).

on, he has enabled the lessee to injure others, and may be held liable, not for maintaining a nuisance, but for participating in the creation of one if injury results in the normal course of events.¹⁵ The ordinary effects of nature acting without the interference of a human agency may properly be considered as the normal course of events. Should a landlord dig an excavation on his land so that it catches and holds surface water, and after the transfer of possession, it percolates through the ground to the injury of his neighbor, he would be liable for that injury;¹⁶ or if the potential nuisance which later comes to life without human intervention be a deteriorated condition at the time possession is surrendered, he is likewise held at fault.¹⁷ However, even though a defective condition existed at the time of leasing, the landlord is not always liable. The question of his liability has been said to rest on a distinction between defects remediable by repair and those requiring rebuilding. It is only in this latter situation that liability attaches to the landlord.¹⁸

The phrase, "normal course of events," is not restricted to acts of nature but extends to acts of the tenant consistent with the use intended by the parties at the time the lease was executed. If, at that time, the parties contemplated a use which acted on a quiescent nuisance and caused it to injure a third person, the lessor is liable for the damage done.¹⁹ Nor can he escape liability by saying that no injury would have been done had the premises not been so used if he impliedly authorized such a use by leasing when he knew it would be so used.²⁰ However, once again, the courts have been loath to place liability where there is no fault. They have said, that in order for the lessor to be liable, the tenant must have pursued the safest course.²¹ Hence, if the premises could be used in the contemplated manner without becoming a nuisance, the lessor is not liable for the act or neglect of the tenant which creates the nu-

¹⁵ *Simmons v. Kennedy*, 74 Fla. 411, 76 So. 739 (1918) *Peacock Distilling Co. v Commonwealth*, 25 Ky Law Rep. 1778, 78 S.W. 893 (1904), *Fow v Roberts*, 108 Pa. St. 489 (1885) *Knauss v Brua*, 107 Pa. St. 85 (1884), *Larson v. Calder's Park Co.*, 54 Utah 325, 180 Pac. 599 (1919).

¹⁶ *Canon City & C.C.R.R. Co. v. Oxtoby*, 45 Colo. 214, 100 Pac. 1127 (1908).

¹⁷ *Updegraff v City of Ottumwa*, 210 Iowa 382, 226 N.W. 928 (1929).

¹⁸ See *Knauss v Brua*, 107 Pa. St. 85 (1884)

¹⁹ *Peacock Distilling Co. v Commonwealth*, 25 Ky L. Rep. 1778, 78 S.W. 893 (1904), *Miller v. Fisher*, 111 Md. 91, 73 Atl. 891 (1909) *Jackman v. Arlington Mill*, 137 Mass. 277 (1884), *Fow v Roberts*, 108 Pa. St. 489 (1885) *Knauss v Brua*, 107 Pa. St. 85 (1884) *Larson v. Calder's Park Co.*, 54 Utah 325, 180 Pac. 599 (1919).

²⁰ *Peacock Distilling Co. v Commonwealth*, 25 Ky L. Rep. 1778, 78 S.W. 893 (1904) *Fow v Roberts*, 108 Pa. St. 489 (1885) *Knauss v Brua*, 107 Pa. St. 85 (1884).

²¹ *Meloy v. City of Santa Monica*, 124 Cal. App. 622, 12 P. 2d 1072 (1932), *Kennedy v. Garrard*, 156 S.W. 570 (Tex. 1913).

sance.²² But if it is not to be avoided by the tenant's exercise of due care, the lessor is liable for the injury so caused.²³

In conclusion it may be said that the landlord is liable in the following situations for a nuisance existing on his rented property, subject of course to the exceptions to be mentioned. If at the time of the demise there exists on the premises a nuisance of which the landlord knows or should have known he is liable for any injury caused thereby to persons off the rented property regardless of any covenants in the lease requiring the tenant to remedy the defects. Although it may be said as a general rule that if at the time possession is surrendered to the tenant the property did not constitute a nuisance the landlord is not liable for damages caused by a nuisance subsequently created on the premises. There are two exceptions in which even here he is liable, that is where the lease constitutes the tenant the agent of the landlord to make alterations on the premises and he creates a nuisance thereon, or when the landlord provides in the lease that he will repair. Then, finally the landlord may be liable for a nuisance subsequently created on the premises if the contemplated acts of the tenant caused a quiescent nuisance, which existed at the time possession was transferred, to come into existence and injure a third person off the premises.

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²² *Meloy v City of Santa Monica*, 124 Cal. App. 622, 12 P 2d 1072 (1932) *Lufkin v Zane*, 157 Mass. 117, 31 N.E. 757, 34 Am. St. Rep. 262 (1892)

²³ *Wasilewski v McGuire Art Shop*, 117 N.J.L. 264, 187 Atl. 530 (1936)