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Landlord and Tenant--Duty to Repair--Gratuitous Promise by Landlord

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months after the insured's death; this would mean no waiver. Nor did the insurer retain the unearned premium under such circumstances as to involve a waiver, since it would hardly have been possible to return the unearned premium earlier because of the tardy appointment of a legal representative to whom it could have been paid. On either view the result appears a proper one.

H. P. S.

LANDLORD AND TENANT — DUTY TO REPAIR — GRATUITOUS PROMISE BY LANDLORD. — P brought trespass on the case, against D, for the alleged wrongful death of P's decedent. D owned a two-family dwelling, one part of which he leased to P. A double chimney, located between the respective parts of the house, had two or more flues which were maintained for the joint and common use of both family units. By reason of defects in the chimney and flue the part of the dwelling leased by P caught fire, and P's decedent perished in the fire. D, through his agent, had promised to inspect and repair the flue, and had repaired the half of the chimney and flue in the unit occupied by the other tenant. P relied for recovery upon the "common use rule" and upon D's failure to carry out his gratuitous promise to repair. The trial court sustained D's demurrer to both counts of the petition. Affirmed. Redden v. James T. McCreevy Co., Inc. 2

This case presents for the first time in West Virginia the problem of the liability of a lessor who has gratuitously promised to repair, when, due to his nonperformance, the tenant is injured. The law seems well established that absent an agreement to the contrary there is no duty upon the lessor to repair leased premises during the continuance of the lease. In three situations, however, courts have recognized the liability of the landlord for injury caused by failure to repair. First, a doctrine uniformly adopted by the courts is the "common use rule" which imposes a duty upon the land-

11 Cf. Goorberg v. West Assurance Co., 150 Cal. 510, 89 Pac. 130 (1907); Benanti v. Delaware Ins. Co., 86 Conn. 15, 84 Atl. 109 (1912), (more retention of premiums after loss, where liability is steadfastly denied, does not constitute a waiver of defense nor an estoppel.

1 For a discussion of this rule see Commonwealth v. Bond, 214 Pa. 307, 63 Atl. 741 (1906).

2 15 S. E. (2d) 150 (W. Va. 1941).

3 The issue was discussed but not decided in a recent Virginia case. Newman v. Early, 176 Va. 263, 16 S. E. (2d) 885 (1940).


5 HARPER, TORTS (1933) §§ 106, 238.
lord to keep those parts of the premises which are maintained for the common use of his tenants and over which he retains control in a reasonably safe condition.\(^6\) The rule has been applied in cases involving stairways,\(^7\) stairway landings,\(^8\) halls,\(^9\) walks,\(^10\) heating and ventilation systems,\(^11\) elevators,\(^12\) porches,\(^13\) balconies,\(^14\) roofs,\(^15\) carpets in halls,\(^16\) steps,\(^17\) railings on banisters,\(^18\) automatic door closers,\(^19\) water pipes,\(^20\) and bathrooms.\(^21\) The second situation in which the courts hold the lessor liable is when he undertakes to repair and because of his negligence in connection with the repairs, injury is sustained.\(^22\) The third situation in which a recovery in tort is sometimes allowed is when the landlord covenants in the lease or otherwise to repair and because of nonperformance of the covenant, the tenant is injured.\(^23\) The earlier view, that in such cases there is no liability for personal injuries growing out of a breach of such covenant\(^24\) because the "damages are too remote and not within the contemplation of the parties",\(^25\) has been superseded in a number of jurisdictions by the view that, in addition to liability for breach of a contract, the law imposes a tort liability for harm due to the landlord's failure to perform his contract.\(^26\) The Amer-

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\(^7\) Sawyer v. McGillicuddy, 81 Me. 318, 17 Atl. 124 (1889).


\(^11\) Tallman v. Murphy, 130 N. Y. 345, 24 N. E. 716 (1890).

\(^12\) Lander v. Hornbeck, 74 Okla. 239, 179 Pac. 21 (1918).

\(^13\) Reynolds v. Land Mortgage & Title Co., 114 Conn. 447, 159 Atl. 282 (1932).

\(^14\) Robinson v. Leighton, 122 Me. 309, 119 Atl. 809 (1923).


\(^17\) Brandt v. Rakauskas, 112 Conn. 69, 151 Atl. 315 (1934).

\(^18\) Viola v. Conway, 10 La. App. 85, 122 So. 90 (1929).


\(^21\) March v. Riley, 118 W. Va. 52, 188 S. E. 748 (1936).


\(^25\) 1 Tiffany, Landlord & Tenant (1910) 593.


\(^27\) Prosser, Torts (1941) 659, 661. This has been in various theories, e.g., (n) "control theory", Barron v. Liedloff, 95 Minn. 474, 104 N. W. 289 (1905); Stillwell v. South Louisvile Land Co., 58 S. W. 696 (Ky. 1900); cf. Flood v. Pabst Brewing Co., 158 Wis. 626, 149 N. W. 459 (1914); Robinson v. Heil, 138 Md. 645, 98 Atl. 195 (1916); Ashmun v. Nichols, 92 Ore. 223, 178 Pac. 234
ican Law Institute has adopted this modern rule. The instant case does not come within the first of the three situations because of failure to allege a retention of control in the landlord nor within the second for there was no undertaking as to the part of the chimney in P's part of the house; nor is it within the third for there was no consideration alleged. The court does not indicate what it would do if consideration were alleged; its action in refusing to recognize a duty growing out of the gratuitous promise finds respectable support elsewhere.

P. W. H.

**TAXATION — OCCUPATIONAL TAX — LIEN FOR UNPAID TAX UPON “PROPERTY USED IN BUSINESS”**. — Under a contract for the construction of a jail, a county court retained a stipulated minimum of the contract price pending completion. The contractor, already in default in payment of a privilege tax upon those engaged “in the business of contracting”; failed to complete its undertaking, and the work was taken over and completed by the surety. An issue arose over the disposition of the fund in the hands of the county court. Held, that a contract for the construction of a building under which the contractor is to receive money is property used in the business of contracting within the meaning of the statute imposing a lien, in favor of the state for the gross sales tax, on property used in the business or occupation on which such tax

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1 W. Va. Code (Michie, 1937) c. 11, art. 13, § 2c.

2 In defining “property” in the principal case, Judge Fox said: “... the all-inclusive term ‘property’ was, we think, intended to cover not only the physical and tangible property of a taxpayer used in his business, but all other property, of whatever character, which was a part of his assets and which are used or relied upon to carry on his activities as a contractor.” Italics supplied. Fidelity & Deposit Co. of Md. v. County Court of Lewis County, 15 S. E. (2d) 302, 303 (W. Va. 1941).

3 Rationalizing that the contract and the income are used in the business, the court said, at 303-304: “In most instances the contract is the one thing that enables the taxpayer to carry on his activities, and to say that accruals of earnings thereunder are not property and subject to the tax imposed on the gross income of the business is not, in our opinion, a reasonable construction of the statute under consideration.”