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NOTES AND COMMENT

Editor—JOSEPH A. SCHIAVONE

LANDLORD'S LIABILITY FOR DEFECTIVE PREMISES AFTER PASSAGE OF TITLE.

It is only the common ways of leased premises that a landlord must keep in repair for the protection of his tenants.¹ But even as to those so retained as common passageways a purchaser of real property is under no duty to inspect before taking possession;² nor is the vendor under any obligation to examine after he has transferred.³ "One's liability in negligence for the condition of land ceases when the premises pass out of one's control before injury results."⁴

That such is the rule in this state may be implied from a study of the decisions of the courts of New York involving the liability of the landlord after the title has been transferred.⁵

It has been stated by way of dictum merely, that the vendee is not responsible for the dangerous condition of the premises until he has had notice thereof and a reasonable time within which to repair.⁶

Thus there is a period after the transfer when the tenant of the vendor is without remedy for injuries resulting from defective conditions of the demised premises. This is due to the termination of the relationship of landlord and tenant between the vendor and the tenant, and the immunity of the vendee from liability for a reasonable period of time after notice of the defective condition of the premises plus a reasonable time within which to repair.

¹ *Dollard v. Roberts*, 130 N. Y. 269, 29 N. E. 104 (1891); *Peil v. Reinhart*, 127 N. Y. 381, 27 N. E. 1077 (1891).

² *Kilmer v. White*, 254 N. Y. 64, 171 N. E. 908 (1930); *Ahern v. Steele*, 115 N. Y. 203, 22 N. E. 193 (1889).

³ *Trustees of Canandaigua v. Foster*, 156 N. Y. 354, 359, 50 N. E. 971, 973 (1898); *Wilks v. N. Y. Tel. Co.*, 243 N. Y. 351, 359, 153 N. E. 444, 446 (1926).

But see *Jaffe v. Harteau*, 56 N. Y. 398 (1874); *Grobner v. Norton*, 183 N. Y. Supp. 731 (4th Dept. 1920); *Thompson, Real Property* (1924) Sec. 1387.

See also American Law Institute, "Restatement of Torts," Tentative Draft, No. 4, Sec. 222: "Except as stated in Sec. 223, a vendor is not subject to liability for bodily harm caused to his vendee or others upon the land after the vendee has taken possession, by any dangerous condition * * * which existed at the time vendee took possession."

⁴ *Kilmer v. White*, *supra* note 2 at 69, 171 N. E. at 909.

⁵ *Supra* notes 2 and 3.

⁶ *Supra* note 2.

In June, 1930, the Court of Appeals reviewed the case of *Kilmer v. White*,⁷ where the rule enunciated was squarely presented. The defendant (White) had leased to the plaintiff (Kilmer) the upper apartment of a three-story apartment house on April 20, 1926. A porch in the rear adjoined the leasehold. It was not used by the tenants in common but the landlord and workmen used it in connection with a scuttle in the ceiling of the piazza as a means of access to the roof of the building. On October 28, 1927, the defendant transferred the premises to one Rubin, by deed recorded the following day, and at which time Rubin, unknown to the plaintiff, entered into possession. On October 31, 1927, plaintiff, while cleaning out the woodbox, leaned his arm against the railing of the porch. The upper rail gave way, and, losing his balance, he fell to the ground below, sustaining severe injuries. The evidence showed that defendant had notice of the defective condition but that neither plaintiff nor Rubin had discovered it.

The trial Justice dismissed the action as against Rubin, and submitted to the jury the question as to the reservation of the piazza by the landlord. The jury was instructed that, if the landlord had reserved it, he was bound to exercise due diligence in keeping the railing in repair, and, so far as the tenants were concerned, notice of change in possession and ownership was necessary to change the nature of the tenancy. The jury returned a verdict in favor of the plaintiff, which the Appellate Division (Third Department) unanimously affirmed.⁸ On appeal, held: The vendor is not liable for dangerous conditions existing at the time of the transfer, unless, by concealing them, he prevents the purchaser from learning of the defects. "The transfer of the reversion, whether with the consent of the tenant or without it, is a transfer of the lease and of its rights and obligations."⁹

A landlord who neglects to keep premises in repair according to his covenant, allowing such to become a *nuisance*, and later transfers while in that condition, is guilty of misfeasance and responsible for the damage caused after title has passed.¹⁰ Likewise one who leases premises to be used as a public amusement is under a duty to repair on the theory that those who enter are there at the invitation of the lessee who maintains and the lessor who leased it for that purpose. Liability is predicated not upon contract but upon tort; the lessor having failed to make safe premises under his control.¹¹ While these cases are not decisive of the present one, they

⁷ *Supra* note 2.

⁸ 227 App. Div. 830, 238 N. Y. Supp. 862 (3rd Dept. 1930).

⁹ Matter of O'Donnell, 240 N. Y. 99, 105, 147 N. E. 541, 543 (1925).

¹⁰ *Klepper v. Seymour House Corp.*, 246 N. Y. 85, 158 N. E. 29 (1927); *McFarlane v. City of Niagara Falls*, 247 N. Y. 340, 160 N. E. 391 (1928).

¹¹ *Edwards v. N. Y. & H. R. R.*, 98 N. Y. 245 (1885) in which Earle, J. at p. 248 stated: "If any responsibility in this case attaches to the defendant,

indicate the scope of the rule. Apparently the courts are loathe to extend it.

The decision in the instant case propounds a rigid application of this rule. If the plaintiff's injuries were sustained three months after the transfer of the reversion there would be no thought of holding the defendant liable.¹² If the premises were leased for a public use,¹³ or through negligence had become a nuisance,¹⁴ the defendant's liability would continue after the transfer. But where injuries are sustained within a few days or a few hours after the sale, the courts must grope in the shadowy realm of conflicting rights. It is admitted that in the instant case the decision was the result of the logical application of the rule; but would the conclusion of the Court have been the same had a wall of the building collapsed, seriously injuring twenty of the tenants, which wall upon inspection by the vendee before the transfer had shown no evidence of the defect?¹⁵ Or, since inspection by the vendee before the transfer is not necessary, presume he made no attempt to determine the condition of the premises.

Logical application of the rule would require a decision adverse to the tenants.

Under present economic conditions large properties are being transferred daily without the knowledge of the tenants, or sufficient inspection by the vendee. The recurrence of the present problem is inevitable. Should the vendor's liability be extended beyond its present limits and continue during the reasonable time in which the vendee is allowed to discover the defect and make the necessary repairs? Or should the vendee upon taking possession be charged,

it cannot be based upon any contract obligation but must rest entirely in *delictum*."

And in *Junkermann v. Tilyou Realty Corp.*, 213 N. Y. 404, 108 N. E. 109 (1915), Cardozo, *J.* at p. 410, 108 N. E. at 110, declared: "In this situation, if there existed when he made his lease a dangerous condition that was known to him, or by reason of inspection, might have been known, the law charges him with liability."

¹² *Ugla v. Brokaw*, 117 App. Div. 596, 102 N. Y. Supp. 857 (1st Dept. 1907).

¹³ *Junkermann v. Tilyou Realty Corp.*, *supra* note 11.

¹⁴ *Supra* note 10. For cases of continuing liability after transfer due to collateral covenants see *Jones v. Parker*, 163 Mass. 564, 40 N. E. 1044 (1895); *Neal v. Jefferson*, 212 Mass. 517, 99 N. E. 334 (1912); *Ganz v. Clark*, 252 N. Y. 92, 169 N. E. 100 (1929); *Mauro v. Alvino*, 90 Misc. 328, 152 N. Y. Supp. 963 (1st Dept. 1915); *Stuart v. Jay*, 1 K. B. 362 (1904).

¹⁵ See (1926) 5 Tenn. L. Rev. 362, regarding the case of *Smith v. Tucker*, 151 Tenn. 347, 270 S. W. 66 (1925), wherein a few weeks after conveyance defendant vendor assured the plaintiff that a cracked wall was not defective, and promised to send a mason "right over," to repair the crack. The mason did not come, and within a few days, the wall fell burying plaintiff's infant son in the debris, and inflicting injuries from which he died, *Held*; in the absence of fraud of the vendor who relinquished the premises tort liability may not be imposed, since the defendant had no knowledge of the defect when he transferred the premises.

if not with actual knowledge, at least with presumptive notice of the dangerous condition and the risk involved?

The problem is a social one. The increasing number of individuals affected demands a remedy. Undoubtedly the vendee's liability will be extended until assumption of title will "ipso facto" charge him with presumptive notice of the condition of the premises. While it has been suggested that the liability of the vendor should continue until discovery and repair by the vendee¹⁶ it is submitted that the former rule would be more easily applied, since the uncertain element of "reasonable time to repair" would not be included. The line would be sharply drawn if determined by the "time of transfer," and responsibility would be definitely fixed.

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THE GENERATIVE FORCE OF CUSTOM AND USAGE IN LAW.

There is an ancient rule of evidence of wide application that parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a valid written instrument.¹ It is but a corollary of the rule, that where there is no imperfection or ambiguity in the language of a contract, it will be deemed to express the entire and exact meaning of the parties.² *Ergo*, on the same principle, all conversations and parol agreements prior to or contemporaneous with the written agreement are so merged therein, that they cannot be given in evidence for the purpose of changing the contract or showing an intention or understanding different from that expressed in the written agreement.³

The rigidity of the rule above adverted to has been relaxed to allow for numerous exceptions,⁴ the analysis and treatment of which

¹⁶ Kilmer v. White, *supra* note 2.

¹ A written contract cannot be altered to show that an indorsement on a note in blank was agreed to be without recourse, *Martin v. Cole*, 104 U. S. 30, 26 L. ed. 647 (1881); that the acceptor of a draft should not be called on to pay, *Davis v. Randall*, 115 Mass. 547, 15 Am. Rep. 146 (1874); that the date of payment be changed, *Wells v. Baldwin*, 18 Johns. 45 (N. Y. 1820); *Wright v. Taylor*, 9 Wend. 538 (N. Y., 1832); that goods might be delivered in parcels where the agreement was to deliver a gross amount, *Baker v. Higgins*, 21 N. Y. 397 (1860); that a certificate of deposit should bear interest, *Reed v. Bank of Attica*, 124 N. Y. 671, 27 N. E. 250 (1891).

² *Miles v. Schreve*, 179 Mich. 671, 146 N. W. 374 (1914); *Reed v. Van Ostrand*, 1 Wend. 424 (N. Y. 1828); *Washington Trust Co. v. Keyes*, 79 Wash. 61, 139 Pac. 638 (1914).

³ *De Witt v. Berry*, 134 U. S. 306, 10 Sup. Ct. 536 (1890); *Beall v. Fisher*, 95 Cal. 568, 30 Pac. 773 (1892); *Ennis v. Wright*, 217 Mass. 40, 104 N. E. 430 (1914); *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. 961 (1891); *Traders National Bank v. Laskin*, 207 App. Div. 18, 201 N. Y. Supp. 728 (4th Dept. 1923); see editorial, *N. Y. L. J.*, May 4, 1928.

⁴ *Richardson*, *Evidence* (1928), Sec. 425.