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LANDLORD AND TENANT THE CONDITION OF THE PREMISES

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FEW fields of law are of more interest to the average practitioner and few have been more neglected in recent legal publications than that dealing with the duty of the landlord and the tenant to repair the demised premises and the lessor's property adjacent to the demised premises. It is the purpose of this paper to treat this field with special emphasis on the law of Illinois. However, it is believed that the principles enunciated are of general significance and are applicable to the common law of all states where that system prevails, except where it is indicated that Illinois law is peculiar in some respect. Some emphasis will be placed upon the effect of the lease contract with respect to the duty to repair, in view of the fact that leases frequently contain provisions relating thereto. For the purposes of this paper, unless otherwise indicated, any duty with respect to the physical condition of the premises—for example an obligation to mend defects, to erect improvements, or to heat—will be regarded as a duty to "repair," inasmuch as it is believed that similar principles are applicable to any such obligation.

The landlord owes a duty to keep in a reasonably safe condition the portions of the premises in his possession and control. This duty does not arise as a result of his status as landlord but from the fact that he, as any person, must so control his property as not to unreasonably endanger oth-

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ers.¹ Thus, if his title is limited so that he has no right to control the premises, there is no duty.² And again, if he transfers his possession, he is no longer charged with the responsibility of maintaining the property in good condition,³ although he may, under certain circumstances, become liable for a dangerous condition which accrued during the time of his possession.⁴

Passageways provided for the common use of the various tenants of a building are under the control of the landlord, in the absence of some evidence that this was not intended by the parties to the lease.⁵ In order that such passageway be a common one it is necessary that more than one tenant have access to it;⁶ however, a way, common at its inception, since it leads to the premises of several of the tenants, is under the control of the landlord as to its entire length, unless some evidence can be produced to show that the parties intended otherwise, despite the fact that a portion of the passage leads only to the premises of one tenant.⁷ Thus common stairways,⁸ porches,⁹ sidewalks,¹⁰ and elevators¹¹

¹ *Bodden v. Thomas*, 192 Ill. App. 348 (Abst., 1915); *Payne v. Irvin*, 144 Ill. 482, 33 N.E. 756 (1893); *Revel v. Butler*, 322 Ill. 337, 153 N.E. 682 (1926); *Rogowski v. Picha*, 182 Ill. App. 378 (Abst., 1913). See also *Baird v. Shipman*, 132 Ill. 16, 23 N.E. 384, 22 Am. St. Rep. 504, 7 L. R. A. 128 (1890).

² *Brazowski v. Chicago Title and Trust Co.*, 280 Ill. App. 293 (1935), noted in 13 CHICAGO-KENT REVIEW 383. See also *Bodden v. Thomas*, 192 Ill. App. 348 (Abst., 1915).

³ *Hull v. Sherrod*, 97 Ill. App. 298 (1901); *Wheeler v. Pullman Palace Car Co.*, 131 Ill. App. 262 (1907); *Revel v. Butler*, 322 Ill. 337, 153 N.E. 682 (1926); *Blake v. Ranous*, 25 Ill. App. 486 (1888); *Park v. Penn.*, 203 Ill. App. 188 (Abst., 1916); *Johnson v. Perkins*, 167 Ill. App. 611 (1912); *Gathemann v. Rosenfeld*, 190 Ill. App. 110 (Abst., 1914).

⁴ See notes 135-141 *infra*.

⁵ *Wells v. Wise*, 298 Ill. App. 252, 18 N.E. (2d) 750 (1939), where the court discusses the evidence in order to show that the parties intended a stairway to be a common one.

⁶ *Platt v. Farney*, 16 Ill. App. 216 (1885); *May v. DiCenso*, 277 Ill. App. 248 (1934); *Pamler v. Byrd*, 131 Ill. App. 495 (1907).

⁷ *Wells v. Wise*, 298 Ill. App. 252, 18 N.E. (2d) 750 (1939). But see, *contra*, *Henry v. Breyer*, 151 Ill. App. 566 (1909) with a strong dissent.

⁸ *Rosseau v. Goodridge*, 185 Ill. App. 164 (Abst., 1914); *Miller v. Spreyne*, 189 Ill. App. 384 (1914); *B. Shoninger Co. v. Mann*, 219 Ill. 242, 76 N.E. 354, 3 L.R.A. (N.S.) 1097 (1905).

⁹ *Bayofski v. Rosenberg*, 194 Ill. App. 609 (Abst., 1915); *Petterson v. Gnatek*, 205 Ill. App. 309 (1917).

¹⁰ *Udwin v. Spirkel*, 136 Ill. App. 155 (1907); *Christiansen v. Navigato*, 185 Ill. App. 318 (1914); *Sprengel v. Schroeder*, 203 Ill. App. 213 (Abst., 1917).

¹¹ *Hill v. Western Union Cold Storage Co.*, 80 Ill. App. 423 (1899); *Mueller v. Phelps*, 252 Ill. 630, 97 N.E. 228 (1911); *Haymarket Theater Co. v. Rosenberg*, 77 Ill. App. 183 (1898).

must be safely maintained. And the rule is not altered by the fact that the disrepair was created by the act of an intermeddler, provided that the landlord had notice of its existence.¹² The landlord has also been held liable, under this doctrine, for his failure to repair a defective roof, on the theory that it remained under his control where he leased only a portion of the building¹³ or where he leased parts of the building to separate tenants.¹⁴ And it has also been held that he is liable for dangerous conditions in the boiler room of the building, where the leased premises do not include the boiler room.¹⁵ Likewise, it would seem that a fire sprinkler system installed by, and under the control of, the landlord must be maintained by him in a reasonably safe condition, even in regard to portions of the system on the premises of the tenant.¹⁶

The scope of the duty is to exercise reasonable care,¹⁷ and notice to the landlord of the dangerous condition must be proved in order to establish his failure to exercise that care.¹⁸ The doctrine of *res ipsa loquitur* does not apply.¹⁹ Notice may be proved by evidence that the landlord has made an attempt to fix the condition²⁰ or that it has been called to his attention, since such facts establish actual knowledge.²¹ Notice may also be shown by proof of knowledge on the part of an agent employed in the maintenance of the premises.²² And the proof of facts from which a reasonable, ordinary, and prudent man would have deduced the presence of a defect has been held to constitute sufficient

¹² *Gorney v. Szykiewicz*, 174 Ill. App. 265 (1912).

¹³ See *Johns v. Eichelberger*, 109 Ill. App. 35 (1903).

¹⁴ *Trower v. Wehner*, 75 Ill. App. 655 (1898); *Rehbach v. Bogt*, 126 Ill. App. 613 (1906).

¹⁵ *Sherman v. Partridge*, 177 Ill. App. 304 (1913); *Kennedy v. Heisen*, 182 Ill. App. 200 (1913).

¹⁶ *Squire, Vandervoort & Co. v. Ryerson*, 150 Ill. App. 255 (1909).

¹⁷ *Merchants Loan & Trust Co. v. Boucher*, 115 Ill. App. 101 (1904); *Smith v. Morrow*, 230 Ill. App. 382 (1923).

¹⁸ *Boske v. Collopy*, 86 Ill. App. 268 (1899); *Nelson v. Tunick*, 250 Ill. App. 462 (1928); *Burke v. Hulett*, 216 Ill. 545, 75 N.E. 240 (1905).

¹⁹ *Hopkins v. Sobra*, 152 Ill. App. 273 (1908). But the doctrine of *res ipsa loquitur* does apply to the negligent operation of an elevator. See *Springer v. Ford*, 189 Ill. 430, 59 N.E. 953, 52 L.R.A. 930, 82 Am. St. Rep. 464 (1901).

²⁰ *Miller v. Spreyne*, 189 Ill. App. 384 (1914).

²¹ *Schwandt v. Metzger Linseed Oil Co.*, 93 Ill. App. 365 (1901).

²² *Cwiklik v. Hrejsa*, 167 Ill. App. 268 (1912); *Fowler v. Crilly*, 187 Ill. App. 399 (1914); *Fenno v. Cullen*, 162 Ill. App. 283 (1911).

evidence of notice,²³ as, for example, a showing that the dangerous condition could have been ascertained by a reasonable, visual inspection of a stairway²⁴ or by some slight application of force to a railing which otherwise appeared to be sound.²⁵

The leased premises, being in the exclusive possession of the tenant, are not under the control of the landlord, and he is not responsible for their maintenance, in the absence of a contractual undertaking.²⁶ The one exception to this rule is the situation where a lease is made for a very short period of time, perhaps for a day or two, where the leasing is for a specified purpose, and where the injury occurs in the course of the contemplated use of the premises.²⁷ And this does not seem to be a true exception, since the basis of liability in such case seems to be the intention of the parties to the lease that the landlord be responsible for the condition of the premises, in view of the nature of the holding.²⁸

The landlord may, however, contractually assume the duty to repair or to keep safe the portions of the property included in the lease.²⁹ There must be consideration for the promise. If it is made at the time of the creation of the tenancy, the mutual agreements in the lease will support it,³⁰ but if the promise is made at a later time, a new consideration must be furnished.³¹ In this connection it has been held that, since a month to month tenancy is a continuous one, an agreement to repair which is made after the commencement of such a periodic tenancy cannot be supported on the theory that the promise was made in consideration of a new tenancy which began the first of the next month following the prom-

²³ *Bodden v. Thomas*, 192 Ill. App. 348 (Abst., 1915).

²⁴ See *Fenno v. Cullen*, 162 Ill. App. 283 (1911).

²⁵ *Smith v. Morrow*, 230 Ill. App. 382 (1923).

²⁶ See note 3 *supra*.

²⁷ *Koehler v. La Salle Turn Verein*, 187 Ill. App. 340 (1914), where the duration of the lease was one night and where the plaintiff, an officer of the tenant club, fell through a trap door while he was engaged in the performance of his duties. The premises were leased and used for a dance hall and bar room.

²⁸ See also notes 79-91 *infra* for liability for conditions existing at time of lease.

²⁹ *Sontag v. O'Hare*, 73 Ill. App. 432 (1898); *Coyne v. Laubenheimer*, 225 Ill. App. 50 (1922); *Wells v. Wise*, 298 Ill. App. 252, 18 N.E. (2d) 750 (1939).

³⁰ See note 31 *infra*.

³¹ *Borggard v. Gale*, 107 Ill. App. 128 (1903); *Strong v. Soodvoisky*, 141 Ill. App. 183 (1908); *Margolen v. de Haan*, 226 Ill. App. 110 (1922); *Dawson v. Kitch*, 156 Ill. App. 185 (1910).

ise.³² It cannot, however, be doubted that, if the parties so intended, the tenant's agreement not to terminate a periodic tenancy would be good consideration for the landlord's promise to repair.³³ And it would seem that in many cases involving a periodic tenancy it would be possible to establish an express or an implied promise by the tenant not to terminate the tenancy at the end of the next period, and thus the promise by the landlord could be sustained, despite the above mentioned doctrine.

The scope of the duty which is imposed by the promise to repair is dependent upon the intention of the parties as expressed in the terms of the lease contract. The general rules of interpretation and construction, such as the doctrine of *expressio unius est exclusio alterius*³⁴ and the principle that all of the terms of the contract must be interpreted together,³⁵ are applicable. Certain problems in this connection are of particular interest because of the frequency with which they arise.

Where the premises would be useless for the purpose for which they were leased unless the landlord fits them for that purpose, the lease is construed to place that duty upon him. This result, it should be noticed, is not attained by a process of interpreting the language of the parties to the lease. The process is one of construction. The parties by failing to make a provision in this regard have indicated that they did not consider the matter.³⁶ Thus the court reads into the contract a provision which it thinks the parties would have included had the problem come to their attention. Examples of this technique are numerous. If the leased premises are an apartment in an apartment building, the landlord is bound to fur-

³² Strong v. Soodvoisky, 141 Ill. App. 183 (1908).

³³ See Williston, Contracts (Rev. ed., 1936), § 102A.

³⁴ The specification of particular repairs to be made by the landlord impliedly relieves him from the duty of making any other repairs. Rubens v. Hill, 213 Ill. 523, 72 N.E. 1127 (1904); Carpenter v. Stone, 112 Ill. App. 155 (1904); Quinn v. Crowe, 88 Ill. App. 191 (1900).

³⁵ Soucy v. Louis Obert Brewing Co., 180 Ill. App. 69 (1913); Loop Office Bldg. Corp. v. Hogan, 253 Ill. App. 574 (1929); First Trust & Savings Bank v. Raklios, 247 Ill. App. 183 (1928); Miland v. Meiswinkel, 82 Ill. App. 522 (1899).

³⁶ They may have considered the problem, but their intention may not be admissible in evidence because of some policy of the law, as the rule against admissibility of parole evidence in the case of written contracts and the rule against evidence of subjective intention in all contract cases.

nish heat³⁷ and water.³⁸ And again, where premises were leased for a dance hall for a day or two, it was held that the landlord was bound to repair a trap door in the floor.³⁹ The latter example illustrates the importance of the length of the term of the lease in the application of this rule. If the lease is for a very short period of time, it seems that the court will impose a duty upon the landlord which it would not impose were the term of longer duration.

Another important question of construction which has arisen, involves the time within which the duty must be performed. Ordinarily, the courts have seen fit to stipulate that repairs must be made within a "reasonable time."⁴⁰ However, where the alterations are essential to the use of the premises contemplated by the parties, they must be completed before the commencement of the term, unless they are of such a nature as to render such completion impossible.⁴¹

Where it is provided that the landlord shall make repairs "in case the premises shall be rendered untenable by fire or other casualty," the duty does not arise until the condition to the obligation has arisen.⁴² In this connection it has been held that a "casualty" is any occurrence which takes place without fault on the part of the tenant and that an "act of God," is not a requisite.⁴³ This is a problem of interpreting the language used. In another type of situation, a condition precedent to the duty has been construed into the agreement. Thus, the duty has been held not to arise until the landlord is notified of the need for repair,⁴⁴ unless he has an obligation to inspect the premises when the duty arises from the existence of such facts as would inform a reasonable man of the necessity for repair.⁴⁵

³⁷ *Giddings v. Williams*, 336 Ill. 482, 168 N.E. 514 (1929); *O'Donnell v. Rosenthal*, 110 Ill. App. 225 (1903).

³⁸ *Risser v. O'Connell*, 172 Ill. App. 64 (1912).

³⁹ *Koehler v. La Salle Turn Verein*, 187 Ill. App. 340 (1914).

⁴⁰ *Lunn v. Gage*, 37 Ill. 19, 87 Am. Dec. 233 (1865).

⁴¹ *Lunn v. Gage*, 37 Ill. 19, 87 Am. Dec. 233 (1865); *Gibbons v. Hoefeld*, 299 Ill. 455, 132 N.E. 425 (1921). Cf. *Kesner v. Truax*, 195 Ill. App. 285 (1915).

⁴² *John Morris Co. v. Southworth*, 154 Ill. 118, 39 N.E. 1099 (1894); *First Trust & Savings Bank v. Raklios*, 247 Ill. App. 183 (1928); *Miland v. Meiswinkel*, 82 Ill. App. 522 (1899).

⁴³ *John Morris Co. v. Southworth*, 154 Ill. 118, 39 N.E. 1099 (1894).

⁴⁴ *Breazeale v. Chicago Title & Trust Co.*, 293 Ill. App. 269, 12 N.E. (2d) 217 (1938).

⁴⁵ See *Cromwell v. Allen*, 151 Ill. App. 404 (1909). See also *Fowler v. Crilly*, 187 Ill. App. 399 (1914); *Fenno v. Cullen*, 162 Ill. App. 283 (1911).

The landlord cannot defend his breach of an agreement to repair on the grounds that it entails an un contemplated expense, even where performance by him is thereby rendered impossible.⁴⁶ However impossibility of an objective nature⁴⁷ or impossibility caused by the fault of the tenant or his subtenant will excuse the landlord from performance.⁴⁸ These matters are of no special significance in this field and will not be emphasized.

The effects of a breach of the contractual obligation to repair are manifold. Ordinarily the agreement of the tenant to pay rent is independent of the agreement of the landlord to repair, and a breach of the latter obligation is no excuse for the nonperformance of the former.⁴⁹ The tenant must go on paying his rent and sue the landlord to recover his damages. The courts frequently state that the tenant may recoup his damages in an action by the landlord for rent, thus implying that the tenant may safely refuse to pay rent as long as his damages resulting from the breach of the agreement to repair are equal to or in excess of the rent due.⁵⁰ This is a false notion. The landlord may elect to terminate the lease. And it would be no defense to an action of forcible detainer after forfeiture of the lease that the tenant has suffered damages from the landlord's nonperformance of the independent covenant to repair.⁵¹

Sometimes, the tenant's agreement to pay rent is expressly conditioned upon the making of repairs, but this is rather unusual. More frequently, the agreement to pay rent is construed to be dependent because of the circumstances under which the lease was made. As explained above, the agreement to repair must be performed before the commencement of the term where performance is essential to the utility of the premises as contemplated.⁵² In this case, as well

⁴⁶ *Gibbons v. Hoefeld*, 299 Ill. 455, 132 N.E. 425 (1921); *Sweeting v. Reining*, 235 Ill. App. 572 (1924).

⁴⁷ See *Risser v. O'Connell*, 172 Ill. App. 64 (1912), where it is intimated that the landlord's failure to supply water to the tenant because of failure of municipal water supply during a hot season would not be cause for the tenant to abandon the premises on a theory of constructive eviction. See also *Morgan v. Cook*, 213 Ill. App. 172 (1919).

⁴⁸ See *First Trust & Savings Bank v. Raklios*, 247 Ill. App. 183 (1928).

⁴⁹ *Clark v. Ford*, 41 Ill. App. 199 (1891); *Cote v. Landau*, 240 Ill. App. 292 (1926).

⁵⁰ See e.g. *The Globe Ass'n v. Brega*, 190 Ill. App. 60 (Abst., 1914).

⁵¹ *Tiffany, Landlord and Tenant*, II, 1372, § 194.

⁵² See note 41 supra.

as when the parties expressly agree that repairs shall be made before the commencement of the term, the courts have construed the performance of the agreement as a condition precedent to the duty of the tenant to enter into possession and pay rent.⁵³ If the repairs are not made, the tenant may refuse to take possession under the lease and he may rescind the entire transaction.⁵⁴ But if the tenant takes possession, he waives the condition precedent, the agreement to repair becomes independent, and the tenant has only a right to recover damages from the landlord⁵⁵ or, if the performance does not result within a reasonable time, to abandon the premises on a theory of constructive eviction.⁵⁶

Constructive eviction is the right of the tenant to abandon the premises, thereby terminating the lease and all obligations thereunder, and this is one of the most important remedies available to the tenant in the event of the nonperformance of the contract to repair. A qualification upon this right is that the injury from nonperformance must be substantial.⁵⁷ A trivial breach, such as the failure to install a tooth brush rack would seem insufficient to make this remedy available to the tenant. The breach of duty, it should be noticed, need not be intentional or willful or malicious. There is much language in the cases which would lead one to believe that there is a requisite of intention,⁵⁸ but the courts have not enforced such a doctrine.⁵⁹ This is especially important with regard to breach of an agreement to repair, because it frequently occurs that the landlord becomes unable to perform his duty because of some circumstance beyond his control. The case of *Gibbons v. Hoefeld*⁶⁰ is a perfect example. The landlord agreed to repair the walls of the store

⁵³ *Kesner v. Truax*, 195 Ill. App. 285 (1915); *Rubens v. Hill*, 213 Ill. 523, 72 N.E. 1127 (1904).

⁵⁴ *Ibid.*

⁵⁵ *Lunn v. Gage*, 37 Ill. 19, 87 Am. Dec. 233 (1865).

⁵⁶ *Ibid.* See also *Petersen v. Slauf Mfg. Co.*, 251 Ill. App. 202 (1929).

⁵⁷ See *Saunders v. Fox*, 178 Ill. App. 309 (1913), where the statement is made that the act of the landlord must be of a grave and permanent character. The statement is dicta in this case, it should be noted, inasmuch as there was a failure of the tenant to abandon the premises after the alleged wrong of the landlord. See also *Keating v. Springer*, 146 Ill. 481, 34 N.E. 805, 22 L.R.A. 544, 37 Am. St. Rep. 175 (1893).

⁵⁸ See, e.g. *Morgan v. Cook*, 213 Ill. App. 172 (1919).

⁵⁹ See *Harmony Co. v. Rauch*, 64 Ill. App. 386 (1896); *Sweeting v. Reining*, 235 Ill. App. 572 (1924); *Thomssen v. Meinersmann*, 207 Ill. App. 110 (Abst., 1917).

⁶⁰ 299 Ill. 455, 132 N.E. 425 (1921).

which he leased to the defendant tenant before the latter took possession. The tenant moved into the store, thus waiving the condition precedent to his liability for rent that the premises be fitted for store purposes⁶¹ in consideration of the landlord's agreement to remedy the damp condition of the premises by repairing the walls. The landlord did everything in his power to prevent seepage, but it appeared that he was unable to do so except by resort to the prohibitively expensive procedure of building a new wall. The tenant abandoned the premises, and the court held that there was a constructive eviction. The final requisite of the remedy is that the tenant abandon the premises.⁶² He cannot remain in possession and refuse to pay rent. The breach of an agreement to repair is a continuous wrong until the repairs are made, and the tenant may abandon the premises up to that time.⁶³ But as long as he remains in possession, he must pay rent, and if the landlord makes the repairs before abandonment then the tenant has waived his right to treat nonperformance as a constructive eviction.⁶⁴

An action for damages may be brought against the landlord for breach of his obligation, and the measure of recovery will be governed by the agreement of the parties, if agreement there be in this regard.⁶⁵ Ordinarily, however, the parties contemplate that performance, not breach, will result, and they fail to make any provision as to damages. In this event, the court determines the recoverable damages, and it frequently does so by means of the device of "construing" into the lease contract an intention which never existed.⁶⁶ By this technique, a number of Illinois Appellate Court decisions have established a doctrine that, while a promise to keep the premises in a safe condition indicates an intention that the landlord will be liable for personal injuries suffered as a result of nonperformance, a promise to repair does not.⁶⁷ Under this rule the diminution in the value

⁶¹ See note 55 *supra*.

⁶² See *Rubens v. Hill*, 213 Ill. 523, 72 N.E. 1127 (1904). The possession of one cotenant is the possession of both for this purpose, *Kesner v. Truax*, 195 Ill. App. 285 (1915).

⁶³ See *Lunn v. Gage*, 37 Ill. 19, 87 Am. Dec. 233 (1865).

⁶⁴ *Ibid.*

⁶⁵ See note 67, *infra*.

⁶⁶ See note 67, *infra*.

⁶⁷ *Cromwell v. Allen*, 151 Ill. App. 404 (1909); *Mikusz v. Kahn*, 207 Ill. App. 258 (1917); *Margolen v. de Haan*, 226 Ill. App. 110 (1922); *Breazeale v. Chicago Title*

of the premises is the only damage which can be recovered for breach of an agreement to repair.⁶⁸ The doctrine seems unsound, and it has been severely criticized in the latest judicial discussion of the matter.⁶⁹ It is true that a promise to keep the premises in safe condition does seem to contemplate the risk of personal injury which would result from breach, and fairness does seem to require that the injured person be permitted to recover. It is equally true, however, that an agreement to repair does not indicate that this type of damage should not be recoverable. Since the actual intention of the parties was never expressed in this regard, it is submitted that all damages should be recoverable which are the ordinary and natural result of nonperformance. Thus, for example, if the landlord agrees to keep the premises in repair and fails, so that the tenant in the exercise of due care is tripped and injured by defective flooring which has been called to the attention of the landlord, the latter should be liable for the personal harm done to the tenant and not merely for the diminution in the value of the premises because of the defective floor. In a number of cases which did not discuss the matter, recovery has been permitted for personal injuries and other proximate harm,⁷⁰ and it is hoped that the Supreme Court of Illinois will approve these decisions if and when it is called upon to decide this question.

Either the tenant or a third party may recover for injury proximately caused by the landlord's breach of his contractual duty to repair.⁷¹ The tenant, of course, is entitled to recovery on a contractual theory. The ground of the third party's right is not so clear, but it is submitted that the sound basis is the prevention of circuity of action. Clearly, the ten-

and Trust Co., 293 Ill. App. 269, 12 N.E. (2d) 217 (1938); *Farmer v. Alton Bldg. & Loan Ass'n*, 294 Ill. App. 206, 13 N.E. (2d) 652 (1938).

⁶⁸ See note 67 *supra*.

⁶⁹ *Fonyo v. Chicago Title & Trust Co.*, 296 Ill. App. 227, 16 N.E. (2d) 192 (1938). The court refused to pass on the question since the plaintiff was held to have been guilty of contributory negligence.

⁷⁰ *Sontag v. O'Hare*, 73 Ill. App. 432 (1898); *Jacobson v. Ramey*, 200 Ill. App. 96 (Abst., 1915); *Coyne v. Laubheimer*, 225 Ill. App. 50 (1922).

⁷¹ See *Coyne v. Laubheimer*, 225 Ill. App. 50 (1922); *Boyce v. Tallerman*, 183 Ill. 115 (1899); *Reichenbacher v. Pahlmeyer*, 8 Ill. App. 217 (1881). In the *Boyce* case, the landlord negligently erected a smokestack, which caused the injury, and in the *Reichenbacher* case, the landlord fraudulently concealed a dangerous condition from the tenant. Thus the statement is dictum in each case, since liability was not predicated on failure to perform a promise to repair.

ant in control of the property is not relieved from his duty to exercise reasonable care in that control, despite his contractual agreement with the landlord that the latter will perform the tenant's duty.⁷² Therefore, the injured third party has a cause of action against the tenant for the former's injury, and since the tenant, if he were required to pay damages to the third party, would be entitled to recovery thereof from the landlord as damages for the latter's breach of contract, the third party's recovery from the landlord prevents this circuitry of action. It has been suggested that this is an unsound basis for permitting recovery, since the agreement to repair, in the absence of some indication to the contrary, does not show an intention that the landlord should be liable, in the event of default, for the tenant's liability to a third party, inasmuch as recovery for the diminution in the value of the premises is the only recovery contemplated by the parties to the lease.⁷³ As has been indicated above, this contention is unsound, and it is submitted that the cases permitting the injured third party to recover from the landlord are authority against such an argument, since they can only be supported on the theory of avoidance of circuitry of action. Two other bases for the landlord's liability to a third person are possible, one being that the landlord regains control of the premises to the extent of his agreement to repair and hence is chargeable in tort and the other being that the third party has a contractual right as beneficiary of the contract between the landlord and the tenant. The latter theory is clearly faulty in that no direct benefit is usually intended to accrue to the third party, either as an individual or as the member of a class.⁷⁴ And obviously the landlord does not regain control of the premises because of his duty to repair⁷⁵—indeed he would be a trespasser if he entered thereon against the wishes of the tenant. It is therefore submitted that prevention of circuitry of action is the only sound basis

⁷² *Cochran v. Kankakee Stone & Lime Co.*, 179 Ill. App. 437 (1913).

⁷³ *Tiffany, Landlord and Tenant*, § 107. If this is the true basis for the landlord's liability, it should be noted that the cases permitting recovery are opposed in theory to those limiting liability for breach of covenant to repair to the amount of the diminution in the value of the premises. See note 41 *supra*.

⁷⁴ *Pitts v. Kelly*, 234 Ill. App. 403 (1924).

⁷⁵ See *Northern Trust Co. v. Palmer*, 171 Ill. 383, 49 N.E. 553 (1898). But see *Coyne v. Laubenheimer*, 225 Ill. App. 50 (1922), in which the court seems to assume that the duty is owed by the landlord to the third party and not to the tenant.

for permitting recovery by a third party, and thus it is to be expected, although no cases in point have been found, that circumstances insulating the tenant from liability will prevent recovery by the third party from the landlord.

Where the landlord has no duty to keep the premises safe, nevertheless if he does undertake the task, he is liable for a failure to exercise reasonable care.⁷⁶ But the gratuitous execution of one or more repairs imposes no duty upon him to continue to perform, unless his failure would leave a project commenced by him in a dangerously uncompleted condition.⁷⁷ In this connection, it has been held that where the landlord bolstered a porch for the purpose of rendering it safe for the moving of a piano, he was not liable for any injury occurring after the piano had been moved, since his assumption of duty was limited to the use of the porch on the one occasion.⁷⁸

Ordinarily the landlord is not liable for injuries which occur after the commencement of the tenancy, where the defective condition exists at the time of the making of the lease. The tenant cannot recover, since he, as purchaser of an interest in land, must be on his guard against the seller and cannot be heard to complain if the property which he purchased was in bad condition.⁷⁹ Third parties cannot recover, for the landlord is not responsible for the condition of property which is not under his control.⁸⁰ To the general rule, however, an exception has been made. Where a latent defect⁸¹ known to the landlord⁸² and existing at the time of

⁷⁶ *Glassman v. Abromovich*, 163 Ill. App. 388 (1911). See also *Anderson v. Moore*, 108 Ill. App. 106 (1903); *O'Donnell v. Rosenthal*, 110 Ill. App. 225 (1903).

⁷⁷ *Quinn v. Crowe*, 88 Ill. App. 191 (1900).

⁷⁸ *Miskell v. Boydston*, 152 Ill. App. 66 (1909). The case is weakened by the fact that the plaintiff admitted that she saw the removal of the props used to bolster the porch, although the landlord insisted, and the evidence seemed to show, that the props were not removed. The plaintiff by her admission brings the element of contributory negligence into consideration.

⁷⁹ *Shields v. J. H. Dole Co.*, 186 Ill. App. 250 (1914); *Gathemann v. Rosenfeld*, 190 Ill. App. 110 (Abst., 1914).

⁸⁰ See notes 2 and 3 *supra*.

⁸¹ *Borggard v. Gale*, 107 Ill. App. 128 (1903); *Lazarus & Cohen v. Parmly*, 113 Ill. App. 624 (1904); *Mikusz v. Kahn*, 207 Ill. App. 258 (1917). See also *Long v. Joseph Schlitz Brewing Co.*, 214 Ill. App. 517 (1919); *Fowler Cycle Works v. Fraser & Chalmers*, 110 Ill. App. 126 (1903); *Shields v. J. H. Dole Co.*, 186 Ill. App. 250 (1914).

⁸² *Sunasack v. Morey*, 196 Ill. 569, 63 N.E. 1039 (1902); *Lovas v. Independent Breweries Co.*, 199 Ill. App. 60 (Abst., 1916). See also *McCoull v. Herzberg*, 33 Ill. App. 542 (1889); *Long v. Joseph Schlitz Brewing Co.*, 214 Ill. App. 517 (1919).

the lease⁸³ is not disclosed to the tenant,⁸⁴ the landlord is liable for resultant injuries to the tenant and third parties.⁸⁵ In the case of a periodic tenancy, the dangerous condition must be in existence at the beginning of the tenancy, or this doctrine may not be invoked. Such a holding is a continuous one and not a series of tenancies beginning each month or each year, as the case may be. Thus where the premises were safe when leased and where they became unsafe after several months of a month to month tenancy, the plaintiff was denied recovery.⁸⁶

The ground of liability, under this doctrine is not entirely clear. The courts speak of fraud upon the tenant by the non-disclosure of known defects,⁸⁷ but such a theory would not support an action by third parties, since they would have no right to rely on the implied representations to the tenant.⁸⁸ And it is clear that third parties may recover.⁸⁹ It is submitted that the sound basis for the landlord's responsibility in this situation is that he has so acted as to cause an unreasonable risk of danger to others, in view of all the factors present at the time of the making of the lease. It is unnecessary to apply a label, such as negligence or fraud, to the wrong.

Another exception to the general rule that the landlord is not responsible for injuries resulting from defects which were in existence at the time of the commencement of the tenancy is the situation where a lease is made for a very short period of time, where the premises are leased and are apparently suitable for a specified purpose, and where the injury occurs in the course of the contemplated use.⁹⁰ In this case, the knowledge of the defect by the landlord is not material; he is responsible for failure to exercise ordinary care

⁸³ See note 86 *infra*.

⁸⁴ *Reichenbacher v. Pahlmeyer*, 8 Ill. App. 217 (1881); *Sunasack v. Morey*, 196 Ill. 569, 63 N.E. 1039 (1902).

⁸⁵ See notes 82 and 84 *supra*.

⁸⁶ *Dawson v. Kitch*, 156 Ill. App. 185 (1910). But see *Borman v. Sandgren*, 37 Ill. App. 160 (1890). See also *Hull v. Sherrod*, 97 Ill. App. 298 (1901).

⁸⁷ See *Blake v. Ranous*, 25 Ill. App. 486 (1888); *McCoull v. Herzberg*, 33 Ill. App. 542 (1889).

⁸⁸ See *Tiffany, Landlord and Tenant*, § 96, p. 653, 654.

⁸⁹ See notes 82 and 84 *supra*.

⁹⁰ See note 27 *supra*.

in detecting the condition.⁹¹ This exception can be justified on the grounds that the landlord and the tenant, in such case, do not generally contemplate that the tenant will have to repair the premises before he can use them for the stipulated purpose. The duty of the landlord, since it arises from the intention of the parties to the lease, should logically be regarded as one arising from the contract and thus one that can be negated by express terms. Recovery by a third party may be justified on the ground that it prevents circuitry of action.

Not everyone who is injured as a result of the landlord's failure to put or keep the premises in a safe condition may recover, since a duty is owed only to certain persons. Parties who, as against the landlord, have a right to be in the place where the injury occurs are protected. Thus a tenant who suffers an injury to himself or his property as a result of his use of the leased premises or a common passageway may recover.⁹² A sublessee may also recover,⁹³ and it has been indicated that this rule applies even where the terms of the lease forbid a sublease.⁹⁴ Persons who are in the unsafe place for the mutual benefit of the landlord and themselves or for a use of the premises contemplated by the lease are commonly designated invitees, and a duty is owed to them.⁹⁵ This class includes the tenant's or the sublessee's⁹⁶ fam-

⁹¹ *Ibid.*

⁹² *Sherman v. Pardridge*, 177 Ill. App. 304 (1913); *Smith v. Morrow*, 230 Ill. App. 382 (1923); *Squire, Vandervoort & Co. v. Ryerson*, 150 Ill. App. 255 (1909).

⁹³ See *Dawson v. Kitch*, 156 Ill. App. 185 (1910).

⁹⁴ *Told v. Madison Building Co.*, 216 Ill. App. 29 (1919). The negligence in this case was the careless operation of an elevator in which the plaintiff was riding. Since the landlord and his agents owe a duty to refrain from active negligence even to known trespassers, the issue was not raised in this case, but the court indicated that a duty to keep the premises in a safe condition would be owed to the plaintiff-sublessee. This seems sound, since the effect of the tenant's breach of a covenant not to sublease is to render him subject to an action on the part of the landlord for damages or possibly specific performance. But the sublease is still effective to convey an interest in the property to the sublessee, until the landlord takes action for specific performance.

⁹⁵ See notes 96-100 *infra*.

⁹⁶ It would seem to be uncontrovertable that the sublessee's family, social guests, etc. have the same rights as the tenant's. There are no cases in point, but see *Dawson v. Kitch*, 156 Ill. App. 185 (1910); *Squire, Vandervoort & Co. v. Ryerson*, 150 Ill. App. 255 (1909).

ily,⁹⁷ employees,⁹⁸ social guests,⁹⁹ and business guests¹⁰⁰ who use the leased premises or the common passageways. And it has been held that a municipal inspector who, at the tenant's request, entered a boiler room which was under control of the landlord was an invitee, where an ordinance made an inspection a prerequisite to the installation of a meter which was required to be installed by the terms of the lease.¹⁰¹

There is no duty owed to persons, generally designated as licensees, whose only right to be in the unsafe place is the permission of the landlord, and this rule applies to tenants and their families.¹⁰² For example, a tenant's wife who used, by permission of the landlord, a storeroom in the basement of the building could not recover for an injury caused by exposed wires on a light switch in the storeroom.¹⁰³

Neither is a duty owed to trespassers,¹⁰⁴ except in the situation where the injured party is a child who is drawn to the premises by a dangerous and attractive condition.¹⁰⁵ Recovery under this doctrine requires that the landlord have notice of the condition as well as notice of its attractiveness.¹⁰⁶

The breach of duty must not only be a cause¹⁰⁷ of the injury to the person to whom the duty is owed, but it must be

⁹⁷ *Bodden v. Thomas*, 192 Ill. App. 348 (Abst., 1915); *Schwandt v. Metzger Linseed Oil Co.*, 93 Ill. App. 365 (1901), injury to wife of tenant; *Miller v. Spreyne*, 189 Ill. App. 384 (1914), also injury to wife of tenant; *Sontag v. O'Hare*, 73 Ill. App. 432 (1898), child of tenant; *Jacobsen v. Ramey*, 200 Ill. App. 96 (1915), child; *Wells v. Wise*, 298 Ill. App. 252, 18 N.E. (2d) 750 (1939), also involving injury to a child of the tenant.

⁹⁸ *Reichenbacher v. Pahnmeier*, 8 Ill. App. 217 (1881); *Coyne v. Laubenheimer*, 225 Ill. App. 50 (1922); *Soibel v. Oconto Co.*, 299 Ill. App. 518, 20 N.E. (2d) 309 (1939), where it was held, following the *Shields* case, that the duty to the tenant's employee is no greater than that owed to the tenant.

⁹⁹ *Borman v. Sandgren*, 37 Ill. App. 160 (1890); *Fisher v. Jansen*, 30 Ill. App. 91 (1889), aff'd, 128 Ill. 549, 21 N.E. 598 (1889).

¹⁰⁰ See *Burke v. Hulett*, 216 Ill. 545, 75 N.E. 240 (1905).

¹⁰¹ *Kennedy v. Heisen*, 182 Ill. App. 200 (1913).

¹⁰² See *Jacobs v. Michel*, 137 Ill. App. 221 (1907); *Culver v. Kingsley*, 78 Ill. App. 540 (1898); *Saffer v. Molter*, 124 Ill. App. 21 (1905); *Cameron v. Feely*, 208 Ill. App. 521 (1917).

¹⁰³ *Hansen v. Gromoll*, 232 Ill. App. 485 (1924).

¹⁰⁴ See *Jacobs v. Michel*, 137 Ill. App. 221 (1907).

¹⁰⁵ *Cochran v. Kankakee Stone & Lime Co.*, 179 Ill. App. 437 (1913).

¹⁰⁶ *Farmer v. Alton Bldg. & Loan Ass'n*, 294 Ill. App. 206, 13 N.E. (2d) 652 (1938).

¹⁰⁷ *Devine v. Ficklin*, 192 Ill. App. 593 (Abst., 1915); *Burke v. Hulett*, 216 Ill. 545, 75 N.E. 240 (1905); *Winn v. Keep*, 205 Ill. App. 618 (1917); *O'Donnell v. Rosenthal*, 110 Ill. App. 225 (1903).

the proximate cause, that is, it must bring about the injury through a natural sequence of events.¹⁰⁸ The question is one for the jury, if the facts are in dispute or if reasonable men might differ as to whether or not the sequence of events leading to the injury is a natural one.¹⁰⁹ The landlord is not liable if the injury is occasioned by the negligent use of the defective premises by a tenant¹¹⁰ or a member of his household¹¹¹ even where that use is made of the premises because any other mode of utilization would be inconvenient because of the defective condition. For example, the landlord has been held not liable for an injury to a child of the tenant caused by the negligence of the latter's wife in allowing a trap door to stand open because it stuck when closed and because it was the only convenient way to the cellar which was frequently used by her.¹¹²

The defense of contributory negligence is based on the theory that proximate cause is lacking, since the plaintiff's careless act intervenes to break the sequence of events started by the defendant's fault.¹¹³ Contributory negligence is a failure by the plaintiff to exercise that degree of care which a reasonable, ordinary and prudent man would have exercised under similar circumstances.¹¹⁴ The question is one for the jury where the facts are in dispute or where reasonable men might differ as to the carelessness of the plaintiff's conduct.¹¹⁵ The doctrine is frequently stated by the courts in the form of a rule that the landlord is not liable for an un contemplated use of the premises,¹¹⁶ but recovery has been denied only in cases where the injured party was negligent.

¹⁰⁸ Mendel v. Fink, 3 Ill. App. 378 (1881); McGinnis v. Berven, 16 Ill. App. 354 (1885).

¹⁰⁹ See Burke v. Hulett, 216 Ill. 545, 75 N.E. 240 (1905); Christiansen v. Navigato, 185 Ill. App. 318 (1914).

¹¹⁰ McGinnis v. Berven, 16 Ill. App. 354 (1885); Nelson v. Tunick, 250 Ill. App. 462 (1928); Weston v. Hicks, 203 Ill. App. 491 (1916); Hull v. Sherrrod, 97 Ill. App. 298 (1901); Greene v. Hague, 10 Ill. App. 598 (1882); Mendel v. Fink, 8 Ill. App. 378 (1881); Taylor v. Bailey, 74 Ill. 178 (1874).

¹¹¹ Richason v. Chicago & Western Indiana R.R. Co., 150 Ill. App. 38 (1909).

¹¹² Ibid.

¹¹³ See Arling v. Zeitz, 269 Ill. App. 562 (1933).

¹¹⁴ See note 90 *infra*.

¹¹⁵ Christiansen v. Navigato, 185 Ill. App. 318 (1914); Mueller v. Phelps, 252 Ill. 630, 97 N.E. 228 (1911); Green v. Y.M.C.A., 65 Ill. App. 459 (1896).

¹¹⁶ Pamler v. Byrd, 131 Ill. App. 495 (1907); Fenno v. Cullen, 162 Ill. App. 283 (1911); Pozdal v. Heisen, 184 Ill. App. 441 (1913); Powrozek v. Pollan, 209 Ill. App. 576 (Abst., 1918).

Thus, the plaintiff was permitted to recover where she unwittingly placed her weight against a defective railing in order to assist herself in stepping from an adjoining roof to a common passageway, although this use of the railing was apparently quite un contemplated by the landlord and the tenant at the time of the lease.¹¹⁷ On the other hand, recovery was denied to a plaintiff who, in order to call to a fellow worker on the floor below, put his head in an elevator shaft and was struck by a descending elevator.¹¹⁸ In this case the unusual use of the premises involved lack of due care. It seems that a person who continues to use the premises after knowledge that they have been in a defective condition is contributorily negligent,¹¹⁹ unless he has reason to believe that they have been repaired.¹²⁰ However, it has been held that the plaintiff is not negligent by failing to anticipate the landlord's careless conduct in leaving open and unguarded a trap door in a common sidewalk.¹²¹ And this rule should apply to any actively negligent conduct of the landlord.

Whether or not a young child can be contributorily negligent is an unsettled matter. Some decisions state that he can,¹²² and some that he cannot,¹²³ be barred from recovery by reason of his careless conduct, but all of the cases in the latter class involve dangerous conditions of an attractive nature of which the landlord had notice.¹²⁴ This would seem to establish the rule that a child can be negligent so as to bar his recovery, unless the presence of an attractive condition of which the landlord has notice creates a situation in which the child's negligence is one of the natural, since foreseeable, factors leading to the injury. This is sound, since the question

¹¹⁷ *Powrozek v. Pollan*, 209 Ill. App. 576 (Abst., 1918).

¹¹⁸ *Pozdal v. Heisen*, 184 Ill. App. 441 (1913).

¹¹⁹ *Martin v. Surman*, 116 Ill. App. 282 (1904); *Pamler v. Byrd*, 131 Ill. App. 495 (1907); *Panteles v. Arsht*, 227 Ill. App. 488 (1923); *Day v. Talcott*, 361 Ill. 437, 198 N.E. 339 (1935); *Fonyo v. Chicago Title & Trust Co.*, 296 Ill. App. 227, 16 N.E. (2d) 192 (1938).

¹²⁰ *Udwin v. Spirkel*, 136 Ill. App. 155 (1907).

¹²¹ *Sprengel v. Schroeder*, 203 Ill. App. 213 (Abst., 1917).

¹²² *Rayfield v. Sans Souci Park*, 147 Ill. App. 493 (1909); *Young v. Williams*, 167 Ill. App. 8 (1912).

¹²³ *Fowler v. Crilly*, 187 Ill. App. 399 (1914); *Whitney v. Derby*, 210 Ill. App. 107 (Abst., 1918).

¹²⁴ See *Cochran v. Kankakee Stone & Lime Co.*, 179 Ill. App. 437 (1913) and note 123 *supra*. In *Farmer v. Alton Bldg. & Loan Ass'n*, 294 Ill. App. 206, 13 N.E. (2d) 652 (1938), recovery was denied for want of notice of the dangerous condition.

is not one of the capacity of the child to be guilty of negligence, as the courts frequently state it,¹²⁵ but whether or not the injury flows naturally, hence proximately, from the negligent conduct of the defendant.

Closely connected with the doctrine of contributory negligence is that of assumption of the risk of injury. There are but few decisions which discuss the point, and some of them state that the rule, being founded in the employment relationship, has no application to the landlord's liability for the defective condition of the premises.¹²⁶ It is submitted that this is unsound since it is obvious that a person could expressly assume the risk. It is probable that what is meant by these statements is that the doctrine enunciated in the employment cases, that mere knowledge of the defect on the part of the injured person will constitute an assumption of the risk of harm from that defect, will not be applied to the liability of the landlord in this situation.¹²⁷

The landlord and the tenant may contractually agree that the former will not be liable for injuries resulting from the condition of the premises and such agreements have been held not to be illegal.¹²⁸ The scope of such exculpatory provisions depends, of course, upon the intention of the parties to the lease.¹²⁹ As a general rule, the landlord is held not to be relieved from the consequences of his affirmative, negligent conduct¹³⁰ or his failure to repair after he has actual

¹²⁵ *Fowler v. Crilly*, 187 Ill. App. 399 at 404 (1914).

¹²⁶ *B. Shoninger Co. v. Mann*, 219 Ill. 242, 76 N.E. 354, 3 L.R.A. (N.S.) 1097 (1905); *Mueller v. Phelps*, 252 Ill. 630, 97 N.E. 228 (1911).

¹²⁷ *Fenno v. Cullen*, 162 Ill. App. 283 (1911). See also *Helbig v. Slaughter*, 95 Ill. App. 623 (1901); *Pamler v. Byrd*, 131 Ill. App. 495 (1907), where the doctrine of assumption of the risk is stated in an extreme way to deny recovery to a plaintiff who was obviously contributorily negligent.

¹²⁸ *Hopkins v. Sobra*, 152 Ill. App. 273 (1908), where the statement that such an agreement was not illegal was dicta, since it was established that the plaintiff was a licensee, and there was no proof of negligence. See also *Arling v. Zeitz*, 269 Ill. App. 562 (1933), where it was held to be error for the trial court to exclude exculpatory clauses from the evidence. See also *Taylor v. Bailey*, 74 Ill. 178 (1874).

¹²⁹ *Dickey v. Wells*, 203 Ill. App. 305 (1917); *Green v. Y.M.C.A.*, 65 Ill. App. 459 (1896).

¹³⁰ *Chapman & Smith Co. v. Crown Novelty Co.*, 175 Ill. App. 397 (1912), where there is an inference that exculpation from leakage from water closets, pipes, etc. would not have relieved the landlord from liability for his affirmative, negligent conduct, since the court expressly stated that there was no evidence of such conduct. See also *Dickey v. Wells*, 203 Ill. App. 305 (1917); *Green v. Y.M.C.A.*, 65 Ill. App. 459 (1896).

knowledge of the dangerous condition.¹³¹ The same reasoning would deny him exculpation where he leases the premises with known, but latent, defects which he fails to disclose to the tenant.¹³² Furthermore, such an agreement only relieves the landlord from liability to the tenant and not from responsibility to third persons who are injured by his negligence, since they are not bound by the tenant's contract.¹³³

It should be noted that if the provision does indicate an intention that the landlord shall be relieved from his or his agents' active negligence the provision is effective, and it is not invalid as against public policy, inasmuch as the public has no interest in this type of contract.¹³⁴

Where harm occurs as the result of a dangerous condition existing on the premises or on a portion of the public way adjoining the premises, the landlord may be liable to a person who is injured while on his own property or on the public way.¹³⁵ For example, where the landlord built a coal cellar beneath a public sidewalk and placed a defective cover on an opening in the sidewalk, he was held responsible for resulting injuries to a pedestrian although the harm occurred after the commencement of the tenancy.¹³⁶

If the landlord is in control of the part of the premises to which the dangerous condition is appurtenant, he is liable for his negligent management.¹³⁷ If, however, he is no longer in possession, inasmuch as he has leased the property, he is responsible for the injury, if he created the defective condition¹³⁸ or if it occurred prior to the lease.¹³⁹ And this rule is

¹³¹ *Arling v. Zeitz*, 269 Ill. App. 562 (1933).

¹³² See *McIntyre, Ltd. v. Chanler Holding Co.*, 16 N.Y.S. (2d) 642 (1939), discussed in 18 CHICAGO-KENT LAW REVIEW 318.

¹³³ *Springer v. Ford*, 189 Ill. 430, 59 N.E. 953, 52 L.R.A. 930, 82 Am. St. Rep. 464 (1901); *Helbig v. Slaughter*, 95 Ill. App. 623 (1901).

¹³⁴ *World's Columbian Exposition Co. v. Republic of France*, 96 F. 687 (1899); *Checkley v. Illinois Central R.R. Co.*, 257 Ill. 491, 100 N.E. 942, 44 L.R.A. (N.S.) 1127, Ann. Cas. 1914A, 1202 (1913); *Weirick v. Hamm Realty Co.*, 179 Minn. 25, 228 N.W. 175 (1929).

¹³⁵ *City of Canton v. Torrance*, 151 Ill. App. 129 (1909).

¹³⁶ *Ibid.*

¹³⁷ *Helbig v. Slaughter*, 95 Ill. App. 623 (1901); *Payne v. Irvin*, 144 Ill. 482, 33 N.E. 756 (1893).

¹³⁸ *Tomle v. Hampton*, 129 Ill. 379, 21 N.E. 800 (1889); *Stephani v. Brown*, 40 Ill. 428 (1866); *Boyce v. Tallerman*, 183 Ill. 115, 55 N.E. 703 (1899); *Boyce v. Snow*, 187 Ill. 181 58 N.E. 403 (1900).

¹³⁹ *Gronlund v. Forsman*, 124 Ill. App. 362 (1906); *Everett v. Foley*, 132 Ill. App. 438 (1907); *Foley v. Everett*, 142 Ill. App. 250 (1908); *Hanrahan v. F. Salter & Co.*, 182 Ill. App. 161 (1913).

not changed by the fact that the tenant expressly contracts to be responsible for the safe condition of the premises,¹⁴⁰ since the landlord's liability in this situation is based upon his previous, negligent erection or maintenance of a dangerous condition, generally termed a nuisance.¹⁴¹

While the landlord is ordinarily not liable if the premises were in a safe condition when he leased them,¹⁴² he is responsible if the defective condition is a result of his failure to perform a contractual duty to repair.¹⁴³ The basis of this liability is the avoidance of circuity of action, since the tenant in control is liable to the third party¹⁴⁴ despite the landlord's contractual duty to repair, and the tenant then has a remedy against the landlord for breach of his agreement.¹⁴⁵

Where liability is predicated on the creation or previous maintenance of a nuisance, the plaintiff must have suffered the injury as a member of the public¹⁴⁶ or as the occupant of adjoining premises.¹⁴⁷ The lease has the effect of terminating the duty to the tenant or the subtenant or their invitees.¹⁴⁸ In this regard, it has been held that a landlord who constructs his property in such a manner as to make part of it seem to be a portion of the public way, he is liable to persons who are injured on the apparently public property.¹⁴⁹ Thus a plaintiff was allowed to recover where, at the time of the injury, he was on a portion of the defendant's premises between a fence and a public alley, inasmuch as all of the property in front of the fence seemed to be part of the alley.¹⁵⁰ In another case recovery was permitted where the

¹⁴⁰ *Everett v. Foley*, 132 Ill. App. 438 (1907); *Foley v. Everett*, 142 Ill. App. 250 (1908); *Helbig v. Slaughter*, 95 Ill. App. 623 (1901). It seems clear that the agreement does not add to the tenant's responsibility, since he, being the party in possession, would have a duty to keep the premises reasonably safe, even in the absence of contract.

¹⁴¹ See *Stephani v. Brown*, 40 Ill. 428 (1866).

¹⁴² *Union Brass Mfg. Co. v. Lindsay*, 10 Ill. App. 583 (1882); *West Chicago Masonic Ass'n v. Cohn*, 192 Ill. 210, 61 N.E. 439, 55 L.R.A. 235, 85 Am. St. Rep. 327 (1901).

¹⁴³ See *Gridley v. City of Bloomington*, 68 Ill. 47 (1873); *West Chicago Masonic Ass'n v. Cohn*, 192 Ill. 210, 61 N.E. 439, 55 L.R.A. 235, 85 Am. St. Rep. 327 (1901).

¹⁴⁴ See *Gridley v. City of Bloomington*, 68 Ill. 47 (1873).

¹⁴⁵ See *Stephani v. Brown*, 40 Ill. 428 (1866).

¹⁴⁶ See notes 135 and 136 *supra*.

¹⁴⁷ See notes 135 and 136 *supra*.

¹⁴⁸ See note 3 *supra*.

¹⁴⁹ *Tomle v. Hampton*, 129 Ill. 379, 21 N.E. 800 (1889); *Everett v. Foley*, 132 Ill. App. 438 (1907); *Foley v. Everett*, 142 Ill. App. 250 (1908).

¹⁵⁰ *Everett v. Foley*, 132 Ill. App. 438 (1907).

injury occurred on an extension of a public sidewalk leading to a show window in the front of the premises.¹⁵¹ The doctrine seems sound. It is reasonable that the same duty be owed to a person on the defendant's property which he has caused to appear as part of the public way as is owed to one actually on the way. A person should not be required to carry a plat and a ruler when he goes for a walk.

Ordinarily, the fundamental basis of the landlord's liability in this situation is his lack of due care. He is not an insurer of the safety of persons or property off the premises, and if he has acted reasonably, he is not liable, even if the premises are actually in a dangerous condition at the time he leases them.¹⁵² The courts state that the ground of responsibility is the creation or the maintenance of a nuisance,¹⁵³ but a nuisance requires wrongful conduct, and in order to prove a wrong in this situation, lack of reasonable care must be shown.¹⁵⁴ There is an exception to the requirement of negligence, where the landlord's wrong is committed by interference with the public easement, and in this case he is liable for injury proximately caused no matter how carefully he acted in creating the condition which caused the harm.¹⁵⁵ For example, where a landlord, without a required municipal license, builds a coal cellar beneath a public sidewalk through which he constructs an opening to the cellar below, he is liable for an injury to a member of the public regardless of the question of due care.¹⁵⁶

As in the preceding instances of liability, the wrong of the landlord must operate in an ordinary, natural fashion¹⁵⁷ to

¹⁵¹ *Tomle v. Hampton*, 129 Ill. 379, 21 N.E. 800 (1889).

¹⁵² See *Payne v. Irvin*, 144 Ill. 482, 33 N.E. 756 (1893); *Stephani v. Brown*, 40 Ill. 428 (1866). In these cases the courts assume that liability is based on negligence.

¹⁵³ See c.g. *Tomle v. Hampton*, 129 Ill. 379, 21 N.E. 800 (1889).

¹⁵⁴ *Tiffany, Landlord and Tenant*, I, 680, § 102. See also *Throckmorton's Cooley on Torts* (1930), § 284.

¹⁵⁵ See note 143 *supra*.

¹⁵⁶ See *Stephani v. Brown*, 40 Ill. 428 (1866), where the court assumed that there was liability without negligence, but where the approved instruction required careless conduct. Since the jury found for the plaintiff, the court was not obliged to criticize the instruction on this ground. The effect of the doctrine that negligence is not required is mitigated by such cases as *Gridley v. City of Bloomington*, 68 Ill. 47 (1873), where it was assumed that the municipal license had been given, since the vault in question had been in existence for many years without objection by the city authorities.

¹⁵⁷ *Helbig v. Slaughter*, 95 Ill. App. 623 (1901). See also *Stephani v. Brown*, 40 Ill. 428 (1866); *City of Canton v. Torrance*, 151 Ill. App. 129 (1909).

cause the injury to the plaintiff, and the latter's careless conduct, as an intervening factor, will have the effect of relieving the defendant from responsibility.¹⁵⁸

There are very few cases dealing with the tenant's common law¹⁵⁹ liability for injuries resulting from the defective condition of the premises. Those decisions that have been made follow very closely the pattern of the cases dealing with the landlord's responsibility.

The tenant has a duty to keep in a reasonably safe condition the portions of the property in his possession.¹⁶⁰ And this duty is not alleviated, as to third persons, by the landlord's contractual agreement to keep the premises in repair.¹⁶¹

In regard to property not included in the lease, the tenant ordinarily has no obligation.¹⁶² However, he may contractually assume the landlord's duty to keep such property in repair, and in the event of failure to perform, he must compensate the landlord for the latter's liability to third persons.¹⁶³ On the theory that circuitry of action would be avoided, it seems that the third party should be able to recover directly from the tenant,¹⁶⁴ in this situation, but there are no cases in point. The scope of the contractual duty is determined by the intention of the parties to the lease, and all of the provisions must be read together. Thus, a provision to the effect that the tenant was only responsible for repairs necessitated by fire in the event of his negligence was not given the construction that the tenant was liable for all other repairs, regardless of negligence, where another clause stated that in case "said premises shall be rendered untenable by fire or other casualty, the lessor may, at his option

¹⁵⁸ See note 157 *supra*.

¹⁵⁹ For the tenant's statutory liability see notes 172-183 *infra*.

¹⁶⁰ *Thomas v. Vannucci*, 185 Ill. App. 414 (1914); *Cleveland Co-operative Stove Co. v. Wheeler*, 14 Ill. App. 112 (1883); *Chicago Telephone Co. v. Commercial Union Assur. Co.*, 131 Ill. App. 248 (1907).

¹⁶¹ *Cochran v. Kankakee Stone & Lime Co.*, 179 Ill. App. 437 (1913); *Johanson v. The William Johnston Printing Co.*, 263 Ill. 236, 104 N.E. 1046 (1914), holding that the tenant was not liable where the landlord had contractually assumed the duty of control, can be distinguished on the ground that the injury occurred not by reason of a defect in the premises but because of the negligence of one of the tenant's agents acting outside of the scope of his authority.

¹⁶² *Haisler v. Hayden*, 124 Ill. App. 264 (1906). See also notes 5-15 *supra*.

¹⁶³ *Trego v. Rubovits*, 228 Ill. App. 559 (1923).

¹⁶⁴ See notes 72-75 *supra*.

terminate this lease or repair the premises within thirty days, and failing so to do, or upon the destruction of the premises by fire, the term hereby created shall cease and determine." It was held by the court that a boiler explosion was a "casualty" within the meaning of the lease and that the tenant was not responsible for the harm, inasmuch as there had been no proof of his negligence.¹⁶⁵

Where no duty exists by virtue of control or contractual obligation, the tenant is nevertheless charged with responsibility for the exercise of due care in the making of gratuitous repairs.¹⁶⁶

The duty in each of the situations discussed above is owed only to invitees; there is no responsibility to licensees or trespassers,¹⁶⁷ except in the case of an "attractive nuisance."¹⁶⁸

The scope of the obligation, in the absence of contractual provision, is to exercise reasonable care under all of the facts and circumstances.¹⁶⁹ In this regard, all the rules relating to the extent of the landlord's duty should apply.¹⁷⁰

And, as in every case, there must be a natural, causal connection between the tenant's breach of duty and the resulting injury to the plaintiff.¹⁷¹

The landlord and the tenant must comply with legislative enactments which regulate their control of the premises, and if the legislative body intends, by the act, to impose a duty to persons who may suffer injury as a result of noncompliance, a party who is in fact injured may predicate an action upon the violation of the enactment,¹⁷² despite the fact that no criminal prosecution has been commenced.¹⁷³ The class of

¹⁶⁵ *John Morris Co. v. Southworth*, 154 Ill. 118 (1894).

¹⁶⁶ *Pisko v. United Breweries Co.*, 181 Ill. App. 542 (1913). This case illustrates the fact that gratuitous repairs must be carefully made, no matter who makes them. In this case, the defendant was a tenant who had subleased the premises, and the court in deciding in favor of the plaintiff placed no stress upon the defendant's status as tenant.

¹⁶⁷ See notes 92-104 *supra*. The question has not been raised in any of the cases involving liability of a tenant, but the principles involved are the same as in the decisions involving the liability of the landlord.

¹⁶⁸ See notes 105 and 106 *supra*.

¹⁶⁹ *Haisler v. Hayden*, 124 Ill. App. 264 (1906); *Chicago Telephone Co. v. Commercial Union Assur. Co.*, 131 Ill. App. 248 (1907).

¹⁷⁰ See notes 17-25 *supra*.

¹⁷¹ See notes 107-127 *supra*.

¹⁷² *Cowen v. Story & Clark Piano Co.*, 170 Ill. App. 92 (1912).

¹⁷³ *Arms v. Ayer*, 192 Ill. 601, 61 N.E. 851 (1901).

persons to whom the duty is owed is determined by the intention of the legislature,¹⁷⁴ and it would seem that ordinarily a licensee or a trespasser is not protected.¹⁷⁵ It has been held, for example, that a member of a fire insurance patrol who was injured by a defective condition during the extinguishment of a fire was not entitled to recover, since the ordinance upon which the suit was predicated was designed to protect employees.¹⁷⁶ The legislative intent also determines the person upon whom the duty is imposed. It has been decided that an act placing a duty upon the "owner, trustee, lessee, or occupant" of a building to erect and maintain certain safety devices places liability upon the landlord where he has leased separate parts of the premises to various persons,¹⁷⁷ upon the tenant where the lease included the entire building and was made prior to the enactment,¹⁷⁸ upon the tenant where subsequent to the act the entire premises were leased with the required devices,¹⁷⁹ and upon both the landlord and the tenant where the lease was made after the act and while the premises were without the required apparatus.¹⁸⁰ It has also been held that there is no civil liability for breach of an enactment where the injury occurs after the defendant, violator of an act, has conveyed the property.¹⁸¹ However, where the duty is imposed upon a party who constructs something, he will be liable by reason of the violation, despite the fact that he is a landlord who has created a structure upon the premises in the possession of the tenant upon whom the lease placed the duty of repair.¹⁸² This liability does not arise from the maintenance and control of the premises but from the erection of the structure in

¹⁷⁴ *Gibson v. Leonard*, 143 Ill. 182, 32 N.E. 182, 17 L.R.A. 588, 36 Am. St. Rep. 376 (1892).

¹⁷⁵ *Ibid.*; *Marcovitz v. Hergenrether*, 302 Ill. 162, 134 N.E. 85 (1922).

¹⁷⁶ *Gibson v. Leonard*, note 174 *supra*.

¹⁷⁷ *Landgraf v. Kuh*, 188 Ill. 484, 59 N.E. 501 (1900).

¹⁷⁸ *Arms v. Ayer*, 192 Ill. 601, 61 N.E. 351 (1901).

¹⁷⁹ *Marcovitz v. Hergenrether*, 302 Ill. 162, 134 N.E. 85 (1922).

¹⁸⁰ *Cowen v. Story & Clark Piano Co.*, 170 Ill. App. 92 (1912).

¹⁸¹ *Mercer v. Meinel*, 290 Ill. 395, 125 N.E. 288, 8 A.L.R. 351 (1919). The case seems to be opposed in theory to *Cowen v. Story & Clark Piano Co.*, note 180 *supra*, where the court held the landlord liable for his breach of ordinance, although he had leased the entire premises prior to the injury. It would seem more reasonable to hold that, after the landlord has parted with control of the premises, the future maintenance of the property in compliance with the act is imposed upon the tenant or the grantee, unless a public nuisance was created.

¹⁸² *Klonowski v. Crescent Paper Box Mfg. Co.*, 217 Ill. App. 150 (1920).

violation of the act. None of these situations involve the problem of nuisance which was discussed above,¹⁸³ inasmuch as the duty here discussed is that owed to persons on the premises.

Thus, in summary it should be noted that the landlord's responsibility for disrepair may arise from his control of the premises, from a contractual obligation with regard thereto, from his conduct in concealing the state of disrepair, from his assumption of the duty to repair, from his creation or maintenance of a nuisance, or by reason of a legislative enactment. It should also be noted that where harm results to a tenant from the landlord's breach of duty, there is no effect upon the tenant's obligation to pay rent, unless a condition precedent to that obligation can be established or unless a constructive eviction can be proved. And either the tenant or a third party should, in accordance with sound theory, be permitted to recover for all harm proximately caused by the landlord's breach of duty. Similar principles govern the liability of the tenant.

¹⁸³ See notes 135-158 *supra*.