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Recent Cases

MALPRACTICE—WHEN STATUTE OF LIMITATIONS COMMENCES IN MALPRACTICE ACTIONS

*Thatcher v. DeTar*¹

The defendant negligently permitted a surgical needle to remain in plaintiff's body following the removal of the appendix in August, 1937, but defendant continued to treat the plaintiff until October, 1939, when plaintiff obtained the services

1. 173 S.W. (2d) 760 (Mo. 1943).

of other physicians who performed another operation in September, 1940, at which time the plaintiff learned for the first time that his pain and disability following the operation by the defendant were due to and caused by the presence of the needle. The specifications of negligence were in negligently performing the operation and in permitting a surgical needle to remain in the wound; in negligently treating plaintiff until October, 1939; in negligently failing to discover the presence of the needle during the period from the operation to October, 1939; in negligently failing to X-ray the plaintiff during this period although the defendant knew that such X-ray was advisable and in failing to exercise the care and skill commonly exercised by physicians and surgeons in Joplin and in the State of Missouri in the performance of the appendectomy and in the post-operative treatment. The trial court sustained the defendant's demurrer to the petition on the defendant's theory that the cause of action was barred by the Statute of Limitations because the only actionable negligence was in permitting the needle to remain in the operative incision on August 25, 1937. On appeal the court held the negligence complained of was not only the leaving of the needle in plaintiff's body but also the subsequent negligence in failing to discover it, and that the Statute of Limitations did not begin to run until the treatment by the defendant ceased under the Missouri Revised Statutes (1939) Section 1016, which provides that causes of action for malpractice "shall be brought within two years from the date of the act of neglect complained of."

The mere fact that the plaintiff was not aware of the existence or extent of his injuries or of his cause of action for malpractice in the absence of concealment does not postpone the running of the period of limitations. The cause of action runs from the commission of the doctor's wrongful act or omission rather than from the time the patient first learns of it.²

But where there is concealment of the fact by the person liable for malpractice so that the injured party is prevented from learning thereof the period of limitations does not start to run until the cause of action is discovered or could have been discovered through reasonable diligence. The confidential relationship between physician and patient imposes a duty to inform the patient of the nature

2. *Becker v. Porter*, 119 Kan. 626, 240 Pac. 584 (1925) (portion of drill left in root of tooth by dentist); *Graham v. Updegraph*, 144 Kan. 45, 58 P. (2d) 475 (1936) (radium beads left in patient's uterus); *Carter v. Harlan Hospital Ass'n*, 265 Ky. 452, 97 S.W. (2d) 9 (1936) (action by husband for loss of wife's services resulting from surgical forceps having been left in abdomen). An exception has been made by the California courts where the negligence consists in failing to remove from a human body a foreign substance which defendant has placed there, the statute commencing to run from the date the plaintiff discovered, or from the use of reasonable diligence should have discovered, that the foreign substance had not been removed. *Ehlen v. Burrows*, 51 Cal. App. (2d) 141, 124 P. (2d) 82 (1942) (pieces of broken roots of teeth left in jaw after removal of teeth); *Pellett v. Sonotone Corp.*, 55 Cal. App. (2d) 196, 130 P. (2d) 181 (1942) (plaster paris left in ear after making a plaster cast). Other cases are collected in 74 A. L. R. 1317 (1931); 144 A. L. R. 209 (1943).

and character of any operation which he has performed on the patient,³ and disclose any injury inflicted by his negligence in the performance thereof.^{3a}

These cases differ from the instant case in that there was actual concealment with knowledge on the part of the surgeon in a relationship of trust and confidence, thereby inducing the patient to refrain from making further inquiries as to his condition. Failure to exercise care in the performance of an operation does not constitute fraud or impute fraudulent concealment.⁴

Where there has been a negligent diagnosis followed by a course of treatment the negligence may be said to be a continuing one, constituting a single cause of action,⁵ and the statute does not begin to run until the last date of the continuous negligent treatment. But where there has been an affirmative act, such as the operation, which has been followed by treatment made necessary by the original act, the subsequent treatment is not the wrong complained of and hence has been held not to postpone the concealment of the limitation period. Thus, negligent X-ray treatments causing serious burns may have made necessary subsequent treatment extending over a period of time, yet the cause of action has been held not to be suspended by the fact that the patient continued under the professional care of the

3. *Tabor v. Clifton*, 63 Ga. App. 768, 12 S.E. (2d) 137 (1940) (during appendectomy surgeon removed without the knowledge of the patient not only her appendix but also the right tube and right ovary, the surgeon withholding this information and the patient not learning of this fact until some nine years after the operation when a second operation by another surgeon was performed); *Colvin v. Warren*, 44 Ga. App. 825, 163 S.E. 268 (1932) (injury to patient's bladder in the course of an operation coupled with assurances the trouble was only temporary); and see *Hudson v. Shoulders*, 164 Tenn. 70, 45 S.W. (2d) 1072 (1932) (representations that inflammation of the skin resulting from X-ray burns would result in no ill effects or injurious results).

3a. There is some authority that the concealment of the fact of negligence or injury does not postpone the running of the limitation period: *Graham v. Updegraph*, 144 Kan. 45, 58 P. (2d) 475 (1936); *McCoy v. Stevens*, 182 Wash. 55, 44 P. (2d) 797 (1935). See collection of cases in 74 A. L. R. 1317 (1931); 144 A. L. R. 209 (1943). *Burton v. Tribble*, 189 Ark. 58, S.W. (2d) 503 (1934) (leaving gauze in patient's abdominal cavity and failure to apprise the patient of that fact was both fraudulent concealment and negligence).

4. *Carrell v. Denton*,—Tex.—, 157 S.W. (2d) 878 (1942); *Carter v. Harlan Hospital Ass'n*, 265 Ky. 452, 97 S.W. (2d) 9 (1936); *Hudson v. Moore*, 239 Ala. 130, 194 So. 147 (1940); *Brown v. Grinstead*, 212 Mo. App. 533, 252 S.W. 973 (1923). (Illinois statute involved); *but see* *Burton v. Tribble*, 189 Ark. 58, 70 S.W. (2d) 503 (1934) (negligently leaving gauze in abdominal cavity and failure to disclose this fact constituted fraudulent concealment as well as negligence). See note (1931) 74 A. L. R. 1317; 144 A. L. R. 209 (1943).

5. *Hotelling v. Walther*, Ore., 130 P. (2d) 944 (1942); *Shives v. Chamberlain*, Ore. 126 P. (2d) 28 (1942); *Williams v. Elias*, 140 Neb. the patient was suffering from fractured vertebra and an injury to the left sacroiliac joint, followed by treatment for four months for lumbago). In the last case the Nebraska court said: "The diagnosis referred to was a continuing bi-weekly one, and each time an incorrect diagnosis was made and an incorrect treatment applied, plaintiff's injuries were extended."

physician.⁶ While a distinction exists between the operation cases in which there was negligence followed by further negligence in the post operation treatment and where the negligence was in diagnosis followed by continuing negligence of the same nature, it enables a surgeon to cover up his original negligence by continuing to treat the patient at the expense of the innocent patient who has placed trust and confidence in him.⁷ For it is the normal step to continue treatment from the professional expert who performed the operation. The only way the patient may adequately protect himself against the period of limitations running on the negligent act would be to change doctors at once following the operation. This imposes an undue burden upon the patient at a time when he needs the advice of the surgeon best acquainted with the medical facts in the case. Even here a desire to protect those within the profession may prevent the patient from learning of the real cause of his condition.

Where, as in the instant case, the surgeon leaves a foreign substance in a patient's body and thereafter continues to treat and care for the patient but fails to discover or remove the substance, the cause of action may be predicated upon the original leaving of the substance in the body, or upon the failure to remove the harmful substance, or the negligence may be considered as a continuing one so that the period of limitations would not begin to run until the patient-physician relationship ceased or until the patient learned or should have learned of the presence of the foreign substance.⁸ No question of fraudulent concealment is involved in this theory of liability. Neither should the plaintiff be obliged to split his cause of action, at least for the purpose of the Statute of Limitations. The negligent operation required a course of treatment to follow and the two should not necessarily be treated as distinct isolated causes of action if the plaintiff desires to consider

6. *McCoy v. Stevens*, 182 Wash. 55, 44 P. (2d) 797 (1935); *Becker v. Floersch*, 153 Kan. 374, 110 P. (2d) 752 (1941). *Contra*: *Petrucci v. Heidenreich*, 43 Cal. App. (2d) 561, 111 P. (2d) 421 (1941) (operation followed by treatments).

7. *Petrucci v. Heidenreich*, 43 Cal. App. (2d) 561, 111 P. (2d) 421 (1941) (physician charged with negligently performing a cervical cauterization of the uterus and continuing to treat the patient for two years).

8. *Huysman v. Kirsch*, 6 Cal. (2d) 302, 57 P.(2d) 908 (1936) (negligently failing to remove a rubber drainage tube after it has served its purpose, the patient continuing under the care of the same physician), overruling *Gum v. Allen*, 119 Cal. App. 293, 6 P. (2d) 311 (1931) (gauze pack left in operation cavity). *Trombley v. Kolts*, 29 Cal. App. (2d) 699, 85 P. (2d) 541 (1938) (negligently leaving a skin clip in the body after the purpose for which it had been placed there had been fully accomplished); *Hotelling v. Walther*, Ore. 130 P. (2d) 944 (1942) (two parts of the root from a tooth extracted by the defendant negligently left in the area surrounding the tooth socket, the dentist continuing to treat the patient for more than a year, during which time the patient became progressively worse, but never at any time taking a radiograph of the region of the infected tooth); *Perrin Rodriguez*, 153 So. 555 (La. App. 1934); and see *Burton v. Tribble*, 189 Ark. 58, 70 S.W. (2d) 503 (1934) (leaving gauze in patient's abdominal cavity and failure to apprise the patient of the fact was both negligence and fraudulent concealment).

the whole course of conduct as one tort.⁹ This is what the courts have in mind when they speak of the tort being a continuing one.¹⁰ Any other result would give undue protection to the surgeon.¹¹ The same result has been supported on the theory that the operation is not complete until the wound has been closed and all appliances used in the operation have been removed.¹²

The conclusion reached in the instant case is further supported by the express language found in the Missouri statutes of limitation. As the court points out, in addition to the Section providing that actions for malpractice shall be brought within two years "from the date of the act of neglect complained of,"¹³ the first Section in the article of the statutes governing limitations of actions expressly applies to the following Sections in that article of which the malpractice Section is one. There it is provided "that for the purpose of this article, the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained."¹⁴

G. A. M.

9. Instalment contract cases are not an analogy because a party to an instalment contract knows when each instalment comes due. There are no special considerations to postpone the setting in of the period of limitations such as exist in the instant situation.

10. *Contra* to the principal case on identical facts: *Silvertooth v. Shallenberger*, 49 Ga. App. 133, 174 S.E. 365 (1934) (action barred as to that part predicated upon negligence in leaving a surgical needle in the wound following an operation but not as to that part predicated for the negligence in failing to discover the needle during the subsequent treatment).

11. In Ohio the same result is reached on the rule that the Statute of Limitations does not start to run against a malpractice action until the relationship of physician and patient has terminated. *Meyers v. Clarkin*, 33 Ohio App. 165, 168 N.E. 771 (1929).

12. See *Huysman v. Kirsch*, 6 Cal. (2d) 302, 57 P. (2d) 908 (1936).

13. MO. REV. STAT. (1939) § 1016 WHAT WITHIN TWO YEARS. Within two years: An action for libel, slander, assault, battery, false imprisonment or criminal conversation. All actions against physicians, surgeons, dentists, roentgenologists, nurses, hospitals and sanitariums for damages for malpractice, error, or mistake shall be brought within two years from the date of the act of neglect complained of.

14. MO. REV. STAT. (1939) § 1012. PERIOD OF LIMITATIONS PRESCRIBED.—Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued: *Provided*, that for the purposes of this article, the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained.

PROPERTY—ALIENABILITY AND THE NECESSITY FOR SURVIVORSHIP
IN CONTINGENT REMAINDERS

*Byrd v. Allen*¹

Testator devised land to *B*, his daughter, for life and then to the heirs of her body; but if *B* die without issue, to *C*. There was a residuary clause leaving the residue of his estate to *B*, *C*, and others.

In order to bar the entailment *C* conveyed to *B*, and the residuary devisees (including *C*) joined in a conveyance to *B*. *C* died leaving children who are the present plaintiffs. Then *B* died without issue, devising the land to the defendants. In an action to quiet and determine title, and set aside the deeds above, *held* for the defendants.

Plaintiffs base their claim on a construction of the first will, claiming (a) that instrument created contingent remainders in the alternative (to the heirs of the body of *B* or to *C*), (b) that the contingent remainder in *C* (as well as that to the heirs of the body of *B*) was in fee tail, (c) that section 3498², which abolishes fee tails, converted this into a life estate in *C* with remainder in fee to the heirs of her body; (d) that therefore *C* could convey no more than her life estate and the heirs of *C* take by purchase under the will.

Defendants contend³ that on the death of *C* precedent to the death of *B*, *C*'s estate lapsed, and became a part of the residuum which the deed from all the residuary devisees conveyed to *B*.

The court's decision is based solely on the consideration of the plaintiff's construction of the will and the application of the fee tail statute.⁴ Since plaintiffs do not take as they contend under (b) *supra*, they have no standing in court. The decision admittedly is confined to this point. A cursory examination of the statute and the will corroborates the court's conclusion as to the application of the statute in this situation. The alternative devise to *C* was expressed, "In the event that said grantee die without issue, then the above mentioned property to descend: 1/3 to *C* . . ." The statute applies only to a situation where at common law a fee tail would have been created. Obviously this was not such a limitation. The mere fact that the first alternative attempted to create a fee tail in *B* and the heirs of her body has no bearing on the construction of the limitation to *C*. *C* had either a fee simple,

1. 171 S.W. (2d) 691 (Mo. 1943).

2. MO. REV. STAT. (1939) § 3498: "In cases where, by the common or statute law of England, any person might become seized in fee tail of any lands, by virtue of any devise, gift, grant or other conveyance, or by any other means whatever, such person, instead of being seized thereof in fee tail, shall be deemed and adjudged to be, and shall become, seized thereof for his natural life only; and the remainder shall pass in fee simple absolute to the person to whom the estate tail would, on the death of the first grantee, devisee or donee in tail, first pass according to the course of the common law, by virtue of such devise, gift, grant or conveyance."

3. 171 S.W. (2d) 691, 694 (Mo. 1943).

4. *Ibid.*

so that the expectancy of her heirs was barred by her deed to *B*, or a life estate, the undisposed of remainder being part of the residue conveyed by the deed of the residuary devisees.

The case, however, potentially presents two aspects of a contingent remainder: (1) transferability, (2) the necessity of the remainderman surviving the happening of the event upon which the interest is to become vested (the basis of defendant's argument).

The history of contingent remainders is that of gradual recognition of the interest as an estate in land, not as a mere chose in action. At common law the doctrine of the non-assignability of choses in action prohibited the alienability of contingent remainders, and a conveyance *inter vivos* of the interest was unknown. It was, however, descendible if the survivorship of the party was not an express condition precedent to the vesting of the remainder.⁵ The question of the devisability of the interest did not arise at common law,⁶ because lands were not devisable. After the Statute of Wills was enacted, there was some question as to whether contingent remainders were within the scope of the legislation. At first the tendency was to construe the statute against the devisability of contingent interests, but more modern decisions uphold the power to devise contingent estates.⁷

In 1845 the Real Property Amendment Act⁸ changed the rule in England as to the alienability by conveyance *inter vivos*. Today many states⁹ have statutes expressly providing for alienability, but the same result in Missouri has been reached by judicial decision.¹⁰ In *Godman v. Simmons*¹¹ the court construed the statute of 1865¹² providing for conveyance of lands, "or any estate or interest therein," to include a contingent remainder which, they said, was "not an estate in lands, since it is merely the chance of having, but it is an interest in land" intended to be in-

5. KALES, ESTATES AND FUTURE INTERESTS (2d ed. 1920) § 324; SIMES, LAW OF FUTURE INTERESTS (1936) § 723; FEARNE, CONTINGENT REMAINDERS (10th ed. 1844) 364.

6. TIFFANY, REAL PROPERTY (3rd ed. 1939) § 341; FEARNE, *op. cit.* 367; *Bishop v. Fountaine, Bradshaw & Todd*, 3 Lev. 427 (1695).

7. SIMES, *op. cit.* §§ 730, 731; TIFFANY, *op. cit.* § 341; KALES, *op. cit.* § 325; RESTATEMENT, PROPERTY (1936) § 164.

8. (1845) 8 & 9 Vict. c. 106. See CHALLIS, REAL PROPERTY (3rd ed. 1911) 177.

9. RESTATEMENT, PROPERTY (1936) § 162, special note p. 588.

10. *Godman v. Simmons*, 113 Mo. 122, 20 S.W. 972 (1892); *Sikemeier v. Galvin*, 124 Mo. 346, 27 S.W. 551 (1894); *Brown v. Fulkerson*, 125 Mo. 400, 28 S.W. 632 (1894); *Allison v. Wabash Ry.*, 219 Mo. App. 271, 275 S.W. 965 (1925). Also see RESTATEMENT, PROPERTY (1936) § 162. But alienability may be restricted by the instrument of grant, *Gordon v. Tate*, 314 Mo. 508, 284 S.W. 497 (1926).

11. 113 Mo. 122, 20 S.W. 972 (1892).

12. Revised Statutes 1865, c. 109 § 1 (Mo. REV. STAT. (1939) § 3401): "Conveyances of lands, or of any estate or interest therein, may be made by deed executed by any person having authority to convey the same, or by his agent or attorney, and acknowledged and recorded as herein directed, without any other act or ceremony whatever."

cluded in the statute. The court expressed the view that any other result would have been against the spirit and policy of our laws which favor free alienation.

Determination that this interest is alienable does not, however, decide whether the grantee takes anything under the conveyance in case the grantor die before the happening of the event on which the interest is to become vested. In some instances survivorship is obviously required. In a devise "to *B* if *B* survive the devisor," clearly *B* does not have a descendible or devisable interest because the death of *B* precludes the vesting of any estate at all. Under the Missouri decisions *B* has an alienable interest, but if *B* sells his remainder to *D*, and *B* later dies before the devisor, *D* would receive nothing.

But where survivorship is not expressly made a part of the contingency, is it necessary? In the case of personal property there is implied a condition precedent¹³ that the remainderman must survive the life tenant. But that is not authority in cases of realty. *Kales*¹⁴ discusses this point and cites an example analogous to the principal case: if there is a contingent remainder to the life tenant's surviving children and then a remainder is limited to a class upon the life tenant's dying without leaving children, is the second remainder to the class also contingent on the remaindermen surviving the life tenant? *Kales* answers in the negative, saying this does not differ materially from the case where the remainder is limited to the life tenant's surviving children and in case any die leaving children, to such children. There the first generation must survive to take, but the grandchildren need not. There is no expressed condition precedent in either, and the rule against the implication of such contingencies forbids it. If the contingency of survivorship is added to the first contingency the chance of intestacy is greatly increased. *Tiffany*¹⁵ concurs in the proposition that where the contingent remainder is limited in favor of an ascertained person—as in the principal case—the remainder is freely alienable and devisable unless the survivorship is a part of the contingency. He states the rule as different where the remainder is limited to unascertained persons, since it is hard to conceive of a case where no one could be ascertained as a remainderman after his death.¹⁶

In the instant case the survivorship of *C* until after the death of *B* without children was not an express condition precedent. The question is whether such a condition should be implied, so that had *C* not conveyed all her interest or had *C* held but a life estate with remainder in her heirs, the heirs could not take.

The Missouri cases on the point are few. In *Eckle v. Ryland*,¹⁷ *A* devised to *B* in trust for *C* for life, then one-third to *D* or his heirs if *D* be dead. *D* died be-

13. *KALES, ESTATES AND FUTURE INTERESTS* (2d ed. 1920) § 356.

14. *KALES, op. cit.* §§ 351-2; 2 *SIMES, LAW OF FUTURE INTERESTS* (1936) § 362.

15. *TIFFANY, REAL PROPERTY* (3rd ed. 1939) § 341; Hudson, *Transfer and Partition of Remainders in Missouri* (1917) 14 *LAW SERIES, MO. BULL.* 3, 7.

16. See Hudson, *Transfer of Remainders* (1916) 26 *YALE L. JOUR.* 24, 28 for a possible case.

17. 256 *Mo.* 424, 165 *S.W.* 1035 (1914).

fore *C* and in his will left out a son who later claimed by "purchase" under the will of *A*. The court held for the son, construing the devise to *D*, or his heirs if *D* be dead, as an express condition precedent that *D* be alive and if he was not, to his children. *Eckle v. Ryland*, however, is distinguishable from the instant case since the primary question there was whether *D*'s interest was contingent at all, and by the court's construction, the express condition of survivorship was the contingency upon which the remainder could vest in *D*. No such expression can be found in the principal case.

*Tevis v. Tevis*¹⁸ brought a similar question before the court. *T* devised to *P* an undivided one-half in certain property, the other half to *A*, but at *A*'s death, *P* was to have the option to buy the land at a specified price. The land, or the money if the option were exercised, was to vest in the children of *A*, but if he left none, to the heirs of *T*. *A* died leaving no children. One of *T*'s heirs had died before *A*, devising her interest to her husband. The court held the deceased heir had to survive in order to take anything, and therefore her husband was entitled to nothing—basing its opinion on the proposition that the persons could not be ascertained until the death of *A* without children. If that was right the case is justifiable, but it cannot stand for the proposition that an identified contingent remainder must survive in order to take.

In view of these cases Hudson said of the problem: ". . . it is open to the Missouri court to hold that whenever the person to take is ascertained, contingent remainders are devisable unless the death of the testator is an event which precludes the vesting of the interest."¹⁹

There seems not to have been a case since that time where it was necessary for the court to enter the door held by Professor Hudson. The instant case could have discussed the question, but it was not necessary to the decision, even on the merits of the case. Because of the alienability of contingent remainders under our law, a decision for the defendants is inescapable. Even had the court accepted the proposition that one need not survive the happening of the contingency, *C* had conveyed her interest to *B*.

EDITH DAILEY

TORTS—LIABILITY FOR DISREPAIR IN PUBLIC PURPOSE LEASES

*Brown v. Reorganization Investment Co.*¹

A building was leased for one night by the lessee for the purpose of conducting a wrestling show. The lessor was to receive a percentage of the proceeds, with a guaranteed minimum amount. The plaintiff, a paying spectator, was injured by tripping over a projecting leg of a movable wooden fence which was used to form

18. 259 Mo. 19, 167 S.W. 1003 (1914).

19. Hudson, *Transfer and Partition of Remainders in Missouri* (1917) 14 LAW SERIES, MO. BULL. at 14.

1. 166 S.W. (2d) 476 (Mo. 1942).

an aisle for people entering the door of the arena from the lobby. The fence was provided and placed in the lobby by the lessor as part of the equipment of the building, but was arranged in its final location by employees of the lessee. It was found by the jury that the fence was of insecure and unsubstantial construction, and that the portion causing the injury had been negligently left in such a position as to form a dangerous obstruction. It was used in the exact spot and manner intended by the lessor. In an action for personal injuries against the lessor and lessee it was held for the plaintiff on the ground that one leasing land to another for a purpose which involves the admission of many persons thereto as the lessee's patrons is liable for injuries to them caused by artificial conditions existing thereon when the lessee took possession, if the lessor knew or should have known of the danger to such patrons and had reason to expect that the lessee would admit patrons before the premises were put in a reasonably safe condition. This liability of the lessor, however, does not release the lessee from his negligence, which is based upon a breach of duty as possessor of the land.²

In this case the Missouri Supreme Court has been called upon for the first time³ to apply this exception to the general rule of non-liability of the lessor of realty for injuries sustained thereon during the term of the lease. This exception to the maxim *caveat emptor* applies to situations in which the premises are leased for a "public purpose."⁴ Although the existence of the exception is well recognized, the scope of "public purpose" is not settled.⁵ It is generally conceded that a mere leasing of premises for a commercial purpose is not sufficient to impose this added liability upon the landlord.⁶ The purpose must be such that the admittance of

2. RESTATEMENT, TORTS, (1934) § 359; and notes (1923) 22 A. L. R. 624; (1924) 29 A. L. R. 31; (1926) 44 A. L. R. 205; (1928) 53 A. L. R. 858; (1929) 61 A. L. R. 1293; (1935) 98 A. L. R. 562.

3. The court cites the following cases in support of its decision, but in the opinion of the writer, they are clearly distinguishable, since in each case, the defendant had retained a measure of control or had an active interest in the premises at the time of the injury. *Douglas v. Lang*, 124 S.W. (2d) 642 (Mo. App. 1939) (suit against the manager of a carnival for injury in sideshow); *Murphy (Roark) v. Electric Park Amusement Co. and Brainerd*, 209 Mo. App. 638, 241 S.W. 651 (1922) (suit against operator of the park for injury occurring on chute managed by sub-lessee); *Hollis v. Kansas City, Missouri, Retail Merchants' Ass'n*, 205 Mo. 508, 103 S.W. 32, 14 L. R. A., (N. S.) 284 (1907) (amusement device at a street fair being presented by Merchants' Ass'n); *Young v. Waters-Pierce Oil Co.*, 185 Mo. 634, 84 S.W. 929 (1904) (licensee held liable for death caused on right of way of licensor to an employee of the licensor).

4. *Harkrider, Tort Liability of a Landlord* (1927) 26 MICH. L. REV. 260, 285; HARPER, TORTS (1933) 235; RESTATEMENT, TORTS (1934) § 359, cited *supra* note 2. For study in the general development of the exception, see Eldredge, *Landlord's Tort Liability for Disrepair* (1936) 84 U. OF PA. L. REV. 467, 477; 32 AM. JUR. 533 § 667.

5. See note (1941) 130 A. L. R. 1275.

6. *Harkrider, Tort Liability of a Landlord* (1927) 26 MICH. L. REV. 260, 288, cited *supra* note 4.

large numbers of the general public is contemplated.⁷ Some courts indicate that this "public purpose" must form the basis for the landlord's compensation.⁸ The exception originally developed with regard to piers,⁹ but was early extended to amusement halls,¹⁰ parks,¹¹ skating rinks,¹² and other places of public entertainment.¹³ It has been enlarged, however, until some courts have applied it to public garages,¹⁴ stores,¹⁵ boarding houses,¹⁶ hotels,¹⁷ and in one instance, to an office building.¹⁸

The lessor is under a duty to remedy, not only the known dangerous conditions, but also those which he could discover by a reasonable inspection.¹⁹ This duty is not fulfilled merely by giving notice of the defect to the lessee. Even a contract by the lessee to make repairs does not relieve the landlord,²⁰ although an agreement to the effect that the lessee will put the premises in a safe condition before the admission of the public might be sufficient. It would at least tend to negative the expectation of non-repair by the lessee. The duty is especially clear in cases where the lease is for public use, with a provision that the lessee shall make no alterations.²¹ It is to be clearly distinguished, however, from the case in which the landlord is negligent in making repairs.²²

7. RESTATEMENT, TORTS (1934) § 359; *Torts—Negligence—Liability of Landlord* (1934) 8 TEMPLE L. Q. 284; *Oxford v. Leathe*, 165 Mass. 254, 43 N.E. 92 (1896).

8. *Oxford v. Leathe*, 165 Mass. 254, 43 N.E. 92 (1896); *Fox v. Buffalo Park*, 21 App. Div. 321, 47 N. Y. Supp. 788 (4th Dep't 1897), *aff'd*, 163 N. Y. 559, 57 N.E. 1109 (1900); HARPER, TORTS (1933) 235. However, see RESTATEMENT, TORTS (1934) § 359, *comment* (d), which indicates that even though it were a gratuitous lease to a charitable organization, the landlord would not be relieved of liability.

9. *Swords, Administratrix, etc. v. Edgar*, 59 N. Y. 28 (1874); *Albert v. State of Maryland*, use of Ryan, 66 Md. 325, 7 Atl. 697 (1886).

10. *Oxford v. Leathe*, 165 Mass. 254, 43 N.E. 92 (1896).

11. *Fox v. Buffalo Park*, 21 App. Div. 321, 47 N. Y. Supp. 788 (4th Dep't 1897), *aff'd*, 163 N. Y. 559, 57 N.E. 1109 (1900).

12. *Regenhardt v. Prudential Ins. Co. of America*, 258 App. Div. 856, 15 N. Y. Supp. (2d) 1007 (4th Dep't 1939).

13. *Larson v. Calder's Park Co.*, 54 Utah 325, 180 Pac. 599 (1919) (shooting gallery); *Miller v. Johnson*, 184 Ark. 1071, 45 S.W. (2d) 41 (1931) (motordrome). But see *De Motte v. Arkell*, 77 Cal. App. 610, 247 Pac. 254 (1926) (lodge hall).

14. *Warner v. Lucey*, 207 App. Div. 241, 201 N. Y. Supp. 658 (3d Dep't 1923), *aff'd*, 238 N. Y. 638, 144 N.E. 924 (1924).

15. *Turner v. Kent, Fehrenback and Hedrick*, 134 Kan. 574, 7 P.(2d) 513 (1932); *Senner v. Danewolf*, 139 Ore. 93, 293 Pac. 599, 6 P.(2d) 240 (1932). *Contra: Bender v. Weber*, 250 Mo. 551, 157 S.W. 570 (1913).

16. *Stenberg v. Willcox*, 96 Tenn. 163, 33 S.W. 917 (1896).

17. *Copley v. Balle*, 9 Kan. App. 465, 60 Pac. 656 (1900); *Colorado Mtg. & Inv. Co. v. Giacomini*, 55 Colo. 540, 136 Pac. 1039 (1913).

18. *Gilligan v. Blakesley*, 93 Colo. 370, 26 P.(2d) 808 (1933).

19. *Lusk v. Peck*, 132 App. Div. 426, 116 N. Y. Supp. 1051 (4th Dep't 1909), *aff'd*, 199 N. Y. 546, 93 N.E. 377 (1916).

20. *Junkermann v. Tilyou Realty Co.*, 213 N. Y. 404, 108 N.E. 190, L. R. A., 1915F, 700 (1915).

21. *Barrett v. Lake Ontario Beach Improvement Co.*, 174 N. Y. 310, 66 N.E. 968 (1903).

22. *Nilsson v. Abruzzo*, 107 N. J. L. 327, 153 Atl. 486 (1931).

This liability is based upon an affirmative duty imposed by law, and not upon a contract relationship.²³ The landlord is held to anticipate injuries when the premises are leased for this "public purpose."²⁴ He is sometimes said to extend, by implication, an invitation to the public by making such a lease, and to hold out the premises as safe.²⁵ Some courts have also based the liability upon the theory that the lessor, by allowing the dangerous condition to remain, is maintaining a nuisance.²⁶

Contrary to the ordinary lease, these "public purpose" leases are very often for short periods of time.²⁷ Since, in such instances, it can be foreseen that the lessee will not only be unwilling, but also often unable to put the premises in a safe condition before admitting the public, the affirmative duty falls upon the landlord. The known character and responsibility of the lessee is often such that the lessor can foresee that no steps will be taken to render the premises safe.²⁸ In case of several short term leases, it is the landlord's duty to put the premises in condition prior to each occupancy.²⁹

This duty, however, extends only to those persons on the premises for the purpose for which the lease was made, *i.e.* "patrons" of the lessee. It does not apply to general business visitors of the lessor, to social callers, or to persons in any other capacity.³⁰ Furthermore, there is no duty upon the landlord to repair unsafe conditions which arise during the term. It extends only to the condition of the premises at the time the lessee takes possession.³¹

The Missouri court in the principal case distinguished leases of business buildings³² and dwellings³³ from the lease under consideration, and indicated by the distinction that the lessor's liability in Missouri is confined to premises which are leased for public exhibitions or entertainment. This expression is further strengthened by the case of *Clark v. Chase Hotel Co.*,³⁴ in which the court of appeals expressly rejected application of the exception to a lease of a turkish bath, stating that such "could not be classified as a place of amusement."

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23. *Barrett v. Lake Ontario Beach Improvement Co.*, 174 N. Y. 310, 66 N.E. 968 (1903).

24. HARPER, LAW OF TORTS (1933) § 103.

25. *Tulsa Entertainment Co. v. Greenlees*, 85 Okla. 113, 205 Pac. 179 (1922).

26. *Kane v. Lauer*, 52 Pa. Super. 467 (1913); *Larson v. Calder's Park Co.*, 54 Utah 325, 180 Pac. 599 (1919); *Turner v. Kent*, 134 Kan. 574, 7 P. (2d) 513 (1932). But see criticism of this doctrine in 32 Am. Jur. 533, § 667.

27. *Oxford v. Leathe*, 165 Mass. 254, 43 N.E. 92 (1896).

28. *Eldredge, Landlord's Tort Liability for Disrepair* (1936) 84 U. OF PA. L. REV. 467, 488.

29. *Lusk v. Peck*, 132 App. Div. 426, 116 N. Y. Supp. 1051 (4th Dep't 1909), *aff'd*, 199 N. Y. 546, 93 N.E. 377 (1916).

30. RESTATEMENT, TORTS (1934) § 359, *comment* (b).

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

32. *Bender v. Weber*, 250 Mo. 551, 157 S.W. 570, 46 L. R. A. (N. S.), 121.

33. *Mahnken v. Gillespie*, 329 Mo. 51, 43 S.W. (2d) 797 (1931).

34. *Clark v. Chase Hotel Co.*, 230 Mo. App. 739, 74 S.W. (2d) 498 (1934).

