

Landlord and Tenant

BREACH OF COVENANT TO REPAIR — LANDLORD'S TORT LIABILITY TO INVITEE OF TENANT

In a recent case, *Berkowitz v. Winston*, 128 Ohio St. 611, 193 N.E. 343 1 Ohio Op. 270 (1934), the court followed the traditional rule that a landlord who breached his covenant to repair is not liable in tort for injuries to persons entering on the premises at the invitation of the tenant. In this case, after the tenant went into possession of the premises, the landlord promised to make certain repairs. An invitee of the tenant was injured while on the premises due to the landlord's failure to make the promised repairs. The court held that the landlord was not liable for the personal injuries of the tenant's invitee either in an action *ex delicto* or in an action *ex contractu*; that liability in tort is an incident to occupation and control; and, further, that occupation and control are not reserved by an agreement to make repairs.

The court relies upon the rule laid down in the case of *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767 (1875). In this case the court held that the injured party, on the premises at the invitation of the lessee, not being in privity with the landlord, can have no action against the landlord but must seek his remedy against the lessee. Since the decision in *Burdick v. Cheadle*, the rule has been reaffirmed in *Shindelbeck v. Moon*, 32 Ohio St. 264, 30 Am. Rep. 584 (1877); *Shinkle, Wilson and Co. v. Birney*, 68 Ohio St. 328, 67 N.E. 1096 (1903); *Stackhouse v. Close*, 83 Ohio St. 339, 94 N.E. 746 (1911); *Marqua v. Martin*, 109 Ohio St. 56, 141 N.E. 654 (1923); *Minneker v. Gardiner*, 47 Ohio App. 203, 191 N.E. 793 (1933).

In the last mentioned case, the rule is stated that a landlord who has breached his covenant to repair, his breach offering the occasion of the plaintiff's injury, is not liable even to his tenant in an action *ex delicto*. The court says ". . . in such case the landlord remains liable for the breach of a valid contract to make repairs, but it does not follow that the measure of liability would include damages for personal injuries to the tenant, or a member of the tenant's family, or an employee of the tenant." Accord: *Marlow v. Shipman*, 18 O.L.R. 209; 9 O.N.P. 533 (1911); *Grace v. Williams*, 36 Ohio App. 569, 173 N.E. 448 (1930).

Thus, in short, the landlord's liability arises from the breach of his covenant to repair. The tenant's recovery is limited to the cost of making the repairs of the defective premises. Third parties, standing outside

the area of the contractual relationship, are restrained from suing the landlord by lack of privity with him. (See 8 A.L.R. 765, 779, 68 A.L.R. 1194, 1204 which states the basis of this view). The Ohio rule is in accord with the majority view of the United States. See "Restatement of the Law of Torts," sec. 226; 68 A.L.R. 1194, 1195.

It is submitted that this majority rule of the United States which the State of Ohio follows, is too narrow; that it is unjust and not in keeping with the temper of the times which is tending toward a more humane interpretation of the law. Justice Cardozo, in a recent case, while following the majority view of the United States, recognized the patent harshness of the majority view. In *Cullings v. Goetz* 256 N.Y. 287, 176 N.E. 397 (1931) Justice Cardozo said: "The doctrine, wise or unwise in its origin, has worked itself by common acquiescence into the tissues of our law. . . . Hardly a day goes by in our great centers of population but it is applied by judges and juries in cases great and small. Countless tenants, suing for personal injuries and proving nothing more than the breach of an agreement, have been dismissed without a remedy. . . . Countless visitors of tenants and members of a tenant's family have encountered a like fate. If there is no remedy for the tenant, there is none for visitors or relatives present in the tenant's right."

A strong minority in our land has, however, risen to the exigency of liberalizing the too deeply imbedded traditional view and holds the landlord liable for injuries to a third party who is on the premises as an invitee of the tenant. See 8 A.L.R. 765, 772, 68 A.L.R. 1194, 1201, under subsection entitled "Minority View" for collection of cases. See also the "Restatement of the Law of Torts," Sec. 227.

The tone of the Wisconsin court's decision in *Flood v. Pabst Brewing Co.*, 158 Wis. 626, 149 N.W. 489 (1914) is refreshingly welcome. The court says that better reason supports the doctrine that a landlord is liable to the tenant for a breach of contract to repair; that he is also liable to the invitee of the tenant in tort for his breach of duty. In the same case, Justice Winslow maintains that if the landlord covenants with the tenant to keep the premises in repair, he does not surrender the duty of care which rests on an owner and occupant and is therefore liable for a breach of that duty as if no lease had been made.

In accord with this view of the Supreme Court of Wisconsin, and even broader in its application, is the decision of the Supreme Court of Georgia in *Birdsey v. Green*, 176 Ga. App. 688, 170 S.E. 681 (1933) which held the landlord liable in tort for injuries to an invitee of the tenant, notwithstanding the fact that the lease released the landlord

from the obligation to make repairs and the tenant knew of the defective condition of the premises which caused the injuries. Accord: *Goldberg v. Wunderlich*, 248 Ky. 798, 59 S.W. (2d) 1018 (1933) where the court held that a clause in the lease exempting the landlord from liability for failure to repair does not relieve him from liability to third persons.

In consonance with this view is that of the court in *Barron v. Liedloff*, 95 Minn. 474, 104 N.W. 289 (1905) which placed the landlord's liability not on his contractual obligation to repair, but on his negligence. The contract to repair is a mere matter of inducement from which arises the landlord's duty to exercise care as to the condition of the leased premises.

Collison v. Curtner, 141 Ark. 122, 216 S.W. 1059 (1919) held that the landlord was liable for injuries to third persons, invited on the premises by the tenant. And in *Robinson v. Heil*, 128 Md. 645, 98 Atl. 195 (1916), the court held that the landlord's liability for injuries to a member of the tenant's family is practically the same as to the tenant himself.

In the cases quoted in this comment, the Ohio courts have made no effort to deal with the challenge of the minority view. The trends of the day are to place the burdens of responsibility upon the backs of the strong; not on the weak. Where the great traditions of the Law afford a logical and reasonable departure from the harsh interpretations of its principles, without doing violence to its logic and rules, it would seem that the courts are dutibound to do so. The minority view seems more in harmony with modern economic and social changes.

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Master and Servant

WORKMAN'S COMPENSATION — LEGAL TRAUMA — RECOVERY FOR INJURIES NOT COMPENSABLE UNDER THE ACT — OCCUPATIONAL DISEASE

The plaintiff was a saleslady in a dress goods department of the Elder and Johnson Co. of Dayton, Ohio. The plaintiff's duties were to handle ready made dresses, some of which were dyed completely, and others partially. The plaintiff had been working for seven years, and the court assumed for the purpose of discussion that during this period particles of dye had come in contact with her eye at various times, finally causing chemical conjunctivitis. Compensation was refused because the disease sustained was not one listed under the Occupational Disease List