TORTS—LANDLORD AND TENANT—LIABILITY FOR NEGLIGENCE OF AN INDEPENDENT CONTRACTOR.—The recent cases of *Bloecher v. Duerbeck*[1] and *Vitale v. Duerbeck*[2] arose from the explosion of a hot water heating plant installed by an independent contractor in the rented premises of the defendant landlord. In each case, the plaintiff sought to recover damages for personal injuries caused by the defective manner in which the heater was installed. The court affirming its prior judgment for plaintiffs;[3] *Held*, that the lessor was not relieved of liability for the negligent or defective performance of the work by reason of having intrusted it to an independent contractor.

The problem as to the liability of a landlord for the negligence of an independent contractor whom he has employed to repair premises is one which has become increasingly important, and which raises some difficult and uncertain questions.[4] The early English cases on this problem were to the effect that if the tort-feasor was an independent contractor, the landlord was not liable for his negligence.[5] To this general rule, however, some exceptions existed, and others were developed,[6] which exceptions may be classified as follows: (1) When the work intrusted to the contractor is of such a nature that it is inherently dangerous, or calculated to produce a nuisance,[7] (2) When the lessor has covenanted with the lessee to maintain the premises in reasonably safe condition (In such cases, the covenant is considered to be personal, and therefore, its performance cannot be delegated with immunity),[8] (3) If the injuries occur in parts of the premises over which the lessor has retained exclusive control, as common stairways, hallways, etc.,[9] (4) Where the repairs are made without the consent of the lessee, the lessor, having procured the commission of a trepass, is liable as a joint wrongdoer,[10] and (5) in those cases where there is a statutory duty to act.[11]

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[1] (1935) 92 S. W. (2d) 681.

[2] (1935) 92 S. W. (2d) 691.

[3] Bloecher v. Duerbeck (1933) 333 Mo. 359, 62 S. W. (2d) 553, 90 A. L. R. 41. Vitale v. Duerbeck (1933) 332 Mo. 1184, 62 S. W. (2d) 559.

[4] See for problem in general, 1 Tiffinany, *Landlord & Tenant*, (1912) 610; McCleary, Liability of an Employer for the Negligence of an Independent Contractor in Missouri (1933) 18 ST. LOUIS LAW REV. 289; U. of Mo. Law Bull. 50 Law Series, 62; (1933) 90 A. L. R. 50; (1913) 23 A. L. R. 1009.

[5] Rapson v. Cubitt (1842) 9 M. & W. 301, 152 Eng. Rep. 301; Quarman v. Burnett (1840) 6 Mees. & W. 509, 151 Eng. Rep. 509.

[6] See for historical development (1921) 18 A. L. R. 802.

[7] Bower v. Peate (1876) 1 Q. B. Div. 321; 16 Am. & Eng. Enc. 201; Loth v. Columbia Theatre Co. (1905) 197 Mo. 328, 94 S. W. 847; Privitt v. Jewett (Mo. App. 1920) 225 S. W. 127.

[8] Prescott v. Le Conte (1904) 178 N. Y. 585, 70 N. E. 1108; Restatement, *Torts*, sec. 289; Warton, *On Agency*, (1876) sec. 485.

[9] Hussey v. Long Dock R. Co. (1924) 100 N. J. L. 380, 126 Atl. 314; Blake v. Fox (1892) 43 N. Y. Supp. 527; Wilber v. Wollansbee (1897) 97 Wis. 577, 72 N. W. 741.

[10] Northern Trust Co. v. Palmer (1898) 171 Ill. 383, 49 N. E. 553; Nahn v. Register Newspaper Co. (1905) 27 Ky. Law Rep. 887, 87 S. W. 296.

[11] McGolderich v. Wabash Ry. Co. (1918) 200 Mo. App. 436, 200 S. W.

Whenever a case falls within the scope of these exceptions, it presents little difficulty, but where the plaintiff relies solely upon the negligence of the independent contractor, we find that the authorities are in conflict.[12] Most courts will hold that if the injury is the result of a collateral or incidental act of negligence which occurs during the course of the work, as distinguished from the negligent or defective performance of the work itself, the lessor is not liable.[13] In those situations, however, where the work is performed negligently, and the premises are left in a defective condition, the majority rule is that the duty of the lessor is non-delegable, and that so long as the relation of landlord and tenant exists, there is an absolute duty not to do, or cause to be done, anything which would render the premises dangerous and unsafe for the lessee.[14] This view manifests another step in the gradual trend to impose liability in those instances where the injury is caused by the negligence of an independent contractor.[15] Other jurisdictions have reached an opposite result, and have limited the duty of the lessor to that of employing a reasonably competent contractor.[16] Still others have held that the lessor is not liable in those cases where the work is done gratuitously at the request of the tenant, as distinguished from those instances where the lessor makes the improvements for the purpose of increasing the rent.[17]

In the instant case we find that the Supreme Court adopted the prevailing view. Other Missouri decisions on this same issue, however, have followed the exceptions, such as, where the work was of an inherently dangerous nature;[18] the repairs made without the consent of the tenant, the landlord being held liable as a joint tort-feasor;[19] or, the express covenant to maintain the premises in constant repair was regarded as personal.[20] The only other Missouri decision which directly followed the majority ruling was the case of *Vollrath v. Stevens*,[21] which decided that the lessor had an absolute duty to see that the premises were not left in a dangerous or defec-

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74 (Ry. Co. required by statute to keep down the undergrowth along its right of way held liable for negligence of independent contractor).

[12] Supra, note 1.

[13] O'Hara v. Laclede Gas Light Co. (1912) 244 Mo. 395, 148 S. W. 884; Schatzky v. Harber (1917) 164 N. Y. Supp. 610; Vitale v. Duerbeck, supra, note 3, l. c. 560.

[14] Peerless Mfg. Co. v. Bagler (1901) 126 Mich. 225, 85 N. W. 568, 53 L. R. A. 285; Doyle v. Franek (1908) 82 Neb. 606, 118 N. W. 468; Wertheimer v. Saunders (1897) 95 Wis. 573, 70 N. W. 824, 37 L. R. A. 146.

[15] See McCleary's article, supra, note 4; supra, note 6.

[16] Bains v. Dank (1917) 199 Ala. 250, 74 S. W. 341; Jefferson v. Jameson & Morse Co. (1896) 165 Ill. 138, 46 N. E. 272; Blake v. Woolf (1898) 2 Q. B. 426.

[17] Eblin v. Miller's Ex'r. (1880) 78 Ky. 371; Lasker Real Estate Assn. v. Hatcher (1894 Tex. Civ. App.) 28 S. W. 404.

[18] Dillon v. Hunt (1891) 195 Mo. 154, 16 S. W. 516 l. c. 518.

[19] Golber v. Grossberg (1930) 324 Mo. 742, 25 S. W. (2d) 96.

[20] Eberson v. Investment Co. (1906) 118 Mo. App. 67, 93 S. W. 297.

[21] (1918) 199 Mo. App. 5, 202 S. W. 283.

tive condition. These exceptions and others[22] illustrate that the *Duerbeck* and *Vollrath* cases have overruled the Missouri law on this subject, for, if we had followed the non-delegable theory, our former decisions would have been based on that factor, and the existence or non-existence of an exception would not have determined the final result. This is further illustrated by other Missouri cases which have passed directly on this issue, and which have held that the lessor was not liable.[23] How far these encroachments upon the doctrine of non-liability will be carried remains to be seen, but in view of these more recent decisions, it seems safe to predict that in Missouri, the immunity of the landlord will continue to be more and more abridged.

M. J. G. '38.

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[22] Long v. Moon (1891) 107 Mo. 334, 17 S. W. 810; Welsh v. City of St. Louis (1880) 73 Mo. 71; Russell v. Town of Columbia (1881) 74 Mo. 480.

[23] Wiese v. Remme (1897) 140 Mo. 289, 41 S. W. 797; Noggle Wholesale Co. v. Sellers (1916) 183 S. W. 659; Burns v. McDonald (1894) 57 Mo. App. 599.