

recoveries for necessities, is that the husband is held liable only for the reasonable value of the services, not for the contract price.)¹²

Prior to the instant case, the New York decisions have not considered the question when the suit in which the legal services were rendered was one for absolute divorce; but when the suits were for limited divorce or judicial separation two lines of reasoning, a mixture of minority rules already mentioned, have appeared. When the wife instituted the original suit, the general principle has been adopted of permitting recovery in a separate action for counsel fees, where the suit was on reasonable grounds.¹³ But where the wife has defended, the court has held that her counsel may recover from the husband without proving any justification for defending the suit, public policy and the effort of the wife to preserve the marriage being sufficient reasons.¹⁴

In the instant case the original proceeding between the husband and wife was one for absolute divorce.¹⁵ It is said in the opinion that the rule would be otherwise where the wife began the divorce suit, no distinction being made as to whether it was reasonably justified or not. The decision extends the rule laid down in the separation cases to cases where the wife was defendant in an action for absolute divorce, but intimates that it would not be followed where she was plaintiff. Thus in New York there is a tendency toward adopting the rule and distinctions recognized in Iowa at the present time.¹⁶

V. C. B. '37.

LANDLORD AND TENANT—INNKEEPER—LIABILITY OF PROPRIETOR FOR INJURY TO OCCUPANT.—The plaintiff sued to recover for personal injuries sustained by a fall in her apartment kitchenette. The plaintiff was standing on her tiptoes attempting to turn on the kitchen light, balancing against a drainboard with her left hand, when the drainboard suddenly collapsed, precipitating plaintiff to the floor whereby she sustained a fracture of her right arm. The evidence showed that plaintiff's apartment was one of many located in the "Hotel Claremont," operated under a hotel keeper's license; that the plaintiff with her two daughters occupied the apartment under an oral contract for a monthly rental, payable weekly; that the defendant controlled the entire building, fixtures and equipment, furnished the light, heat, water, telephone and janitor service; that the defendant con-

¹² *Sprayberry v. Merk* (1860) 30 Ga. 81, 76 Am. Dec. 637; *Bord v. Stubbs* (1899) 22 Tex. Civ. App. 242, 54 S. W. 633.

¹³ *Naumer v. Gray* (1898) 28 App. Div. 529, 51 N. Y. Supp. 222.

¹⁴ *Hays v. Ledman* (1899) 28 Misc. Rep. 575, 59 N. Y. Supp. 687.

¹⁵ Though no point is made of it, this decision necessarily involved holding that the statute allowing suit money to be granted by the court in the divorce action was not an exclusive method of obtaining it. This again is contra to the weight of authority, *Hamilton v. Salisbury* (1908) 133 Mo. App. 718, 114 S. W. 563; *Zent v. Sullivan*, supra., note 6, but it had already been decided that the New York statute was not an exclusive remedy for the attorney in separation suits. *Naumer v. Grey*, supra., note 13.

¹⁶ See *Sherwin v. Maben* (1899) 78 Ia. 467, 43 N. W. 292; *Gordon & Belsheim v. Brackey et al.* (1909) 143 Ia. 102, 120 N. W. 83.

sidered himself obligated to keep the buildings and apartments in habitable condition; that the defendant retained a duplicate key to the apartment; that transient guests were received in the single-room apartments; that bills were presented upon which plaintiff's indebtedness was described as "room rent." The court submitted the case to the jury upon the theory that if the plaintiff was occupying the apartment as a lodger as distinguished from a tenant, and the jury so found, a verdict for plaintiff would be proper. The jury found for plaintiff. On appeal: Affirmed. There was sufficient evidence in the record to sustain the finding of the jury that the plaintiff was a lodger and not a tenant. *Marden v. Radford* (Mo. Sup. 1935) 84 S. W. (2d) 947.

It may be necessary in the determination of a landlord's liability to ascertain the relationship of the parties.¹ The functions and purposes of hotels change with the period, and ancient definitions must therefore be accepted with reservations.² The distinction in law between a tenant and a lodger is a substantive one. The tenant may maintain ejectment and trespass, the lodger may not. Upon the goods of a lodger his landlord has a lien for unpaid rent; upon those of a tenant he has no lien. In the case of the tenant, the landlord has divested himself of the possession of the premises and the tenant acquires an interest in the real estate, giving him the right to maintain ejectment or trespass against his landlord. The lodger has merely the use of the room or rooms, the landlord retaining general control.³ The very fact that the arrangement did not contemplate accommodating the plaintiff alone, but allowed her to bring in her daughters, whether as lodgers or as sharers of expenses, is enough of itself to show that there was no such agreement as is commonly made between a guest and an innkeeper.⁴ It is a matter of general knowledge, of which the courts will take judicial notice, that innkeepers charge according to persons as well as according to rooms.⁵ Our modern apartment houses, often styled hotels, whose rooms, suites, or flats are let furnished or unfurnished, even though transient people occasionally lodge there, cannot be reckoned as inns.⁶

The issue, however, was for the jury and its finding was conclusive.⁷ For this reason the decision is on sound ground.⁸

¹ *Wolk v. Pittsburgh Hotel Co.* (1925) 284 Pa. St. 545, 131 Atl. 537.

² *Friedman v. Shindlers Prairie House* (1928) 230 N. Y. Supp. 45, 224 App. Div. 232; *Dixon v. Robbins* (1927) 246 N. Y. 169, 158 N. E. 63, 53 A. L. R. 986.

³ *Carroll v. Cooney* (1933) 116 Conn. 112, 163 Atl. 599; *Mathews v. Livingston* (1912) 86 Conn. 263, 85 Atl. 529; *Dewar v. Minneapolis Lodge* (1923) 155 Minn. 93, 192 N. W. 358, 32 A. L. R. 1012; *Bradley v. Bayles* (1881) 8 Q. B. 195. See also, Tiffany, *Landlord and Tenant*, Vol. 1 p. 94.

⁴ *Roberts v. Case Hotel Co.* (1919) 175 N. Y. Supp. 123, 106 Misc. Rep. 481; *Schouler, Bailments*, 3rd Ed. 278.

⁵ *Ibid.* See cases supra, note 4.

⁶ *Ibid.*

⁷ *Carroll v. Cooney* (1933) 116 Conn. 112, 163 Atl. 599. *Mathews v. Livingston* (1912) 86 Conn. 263, 85 Atl. 529; *Roberts v. Case Hotel Co.* (1919) 175 N. Y. Supp. 123, 106 Misc. Rep. 481; *Fox v. Windmere Hotel Co.* (1916) 30 Col. App. 162, 157 Pac. 820; *Masserly v. Mercer* (1891) 45

There is another angle to the problem. The parties under the contract considered the defendant obligated to make repairs.⁹ That a contract may be construed according to the interpretation put upon it by the parties is a well-established principle.¹⁰ Whether a covenant to repair imposes upon the lessor a liability in tort for personal injuries resulting from the breach thereof, at the suit of the lessee, is a matter of divided judicial opinion. Missouri joins with the majority view in denying recovery.¹¹ The minority doctrine has won a notable adherent in the American Law Institute.¹² The lessee can only recover the cost of the repairs.¹³ Liability in tort is an incident to occupation or control,¹⁴ and by preponderant opinion, occupation

Mo. App 327; *Shearman v. Iroquois Hotel Co.* (1903) 85 N. Y. Supp. 365, 43 Misc. Rep. 217; *Cedar Rapids Inv. Co. v. Commodore Hotel Co.* (1928) 205 Iowa 736, 218 N. W. 510, 56 A. L. R. 1098.

⁹ *Kincaid v. Birt* (Mo. 1930) 29 S. W. (2d) 97; *Lackey v. Wilder* (Mo. 1931) 33 S. W. (2d) 1011; *Cook v. Sears Roebuck Co.* (Mo. 1934) 71 S. W. (2d) 73; *Goldman v. Indemnity Co.* (Mo. 1934) 72 S. W. (2d) 866; *Greaves v. Kansas City Orpheum Co.* (Mo. 1935) 80 S. W. (2d) 228.

⁹ *Marden v. Radford*, (Mo. Sup. 1935) 84 S. W. (2d) 947 l. c. 958 and 959.

¹⁰ *Clayton v. Wells* (1930) 324 Mo. 1176, 26 S. W. (2d) 969; *Diehl v. A. P. Green Fire Brick Co.* (1923) 299 Mo. 641, 253 S. W. 984; *Summer v. Sheysor* (1933) 273 Ill. App. 588; *Biltmore Land Co. v. Monroe's Estate* (1935) 271 Mich. 125, 260 N. W. 135; *Scotten v. Metropolitan Life Ins. Co.* (Mo. 1935) 81 S. W. (2d) 313; *Thomsen v. Riedel* (1935) 114 N. J. Law 379, 176 Atl. 701; *Claborne-Reno Co. v. E. I. Dupont de Nemours Co.* (1935) 77 F. (2d) 565; *Belk x. George Washington Ins. Co.* (1935) 208 N. C. 267, 180 S. E. 63; *Thelin v. Marwitz* (1934) 277 Ill. App. 535; *Orlando Orange Grove Co. v. Hale*, (Fla. 1935) 161 So. 284.

¹¹ *Collins v. Goetz* (1931) 256 N. Y. 287, 176 N. E. 397; *Turner v. Ragan* (Mo. App. 1921) 229 S. W. 809; *Glenn v. Hill* (1908) 210 Mo. 291, 109 S. W. 27, 16 L. R. A. (N. S.) 699; *Kohule v. Paxton* (1916) 268 Mo. 463, 188 S. W. 155; *Mathews v. Galbraith* (Mo. App 1922) 238 S. W. 554; *Hunkins v. Amoskeag Mfg. Co.* (1933) 169 Atl. 3; *Chambers v. Lowe* (1933) 169 Atl. 912; *Minneker v. Gardiner* (1933) 47 Ohio App. 203, 191 N. E. 793; *Tuttle v. Gilbert Mfg. Co.* (1887) 145 Mass. 169, 13 N. E. 465; *Miles v. Janvrin* (1907) 196 Mass. 431, 82 N. E. 708, 13 L. R. A. (N. S.) 378; *Davis v. Smith* (1904) 26 R. I. 129, 58 Atl. 630, 66 L. A. R. 478; *Cavalier v. Pope* (1905) 2 K. B. 757; *Cavalier v. Pope* (1906) A. C. 428; *Cameron v. Young* (1908) A. C. 176; *Carrol v. Club of Boston* (1923) 243 Mass. 380, 137 N. E. 656; *Dustin v. Curtis* (1907) 74 N. H. 266, 67 Atl. 220, 11 L. R. A. (N. S.) 504; *Brady v. Klein* (1903) 133 Mich. 422, 95 N. W. 557, 62 L. R. A. 909. See also, cases in 8 A. L. R. 766, and 68 A. L. R. 1194. There are decisions to the contrary but they speak the voice of a minority: *Napier v. Pool* (1929) 39 Ga. App. 187, 146 S. E. 783; *Ross v. Haner* (1922) 244 S. W. 231; *Barren v. Liedloff* (1905) 95 Minn. 474, 104 N. W. 289; *Flood v. Pabst Brewing Co.* (1914) 158 Wis. 626, 149 N. W. 489, L. R. A. 1916 F. 1101. See also cases in 8 A. L. R. 766 and 68 A. L. R. 1194.

¹² American Law Institute, *Restatement of Torts*, Sec. 357.

¹³ *Goodal v. Deters* (1929) 121 Ohio State 432, 169 N. E. 443; *Priver v. Young* (1923) 62 Cal. App. 405, 216 Pac. 966; *Block v. Balden Realty Co.* (1927) 223 N. Y. Supp. 518, 129 Misc. Rep. 906; *Rowan v. Amoskeag Mfg. Co.* (1920) 79 N. H. 409; *Marks v. Citron* (1923) 243 Mass. 454, 137 N. E. 647; *Karsch v. Laeffle* (1912) 168 Mo. App. 414, 151 S. W. 790.

¹⁴ See cases *supra*, note 13.

and control are not reserved through an agreement that the lessor will repair.¹⁵ The power of control necessary to raise the duty implies something more than the right or liability to repair the premises; it implies the power to admit people to the premises and the power to exclude people from them.¹⁶ The question as to when and to what extent a recovery for negligence may be based upon the breach of a contract obligation is one of the moot questions in the law.¹⁷ It has been said with much force that the ground of liability upon the part of the lessor when he demises dangerous property has nothing to do with the relation of landlord and tenant; it is the ordinary case of liability for the breach of a duty, which runs through all the relations of individuals to each other.¹⁸ The instance afforded by the breach by the lessor of a covenant to repair is but one phase of it, and cannot be considered otherwise than as a part of the larger problem.¹⁹ The modern tendency is to make the fundamental nature of the obligation the test as to whether the action is founded upon either contract or tort.²⁰ In other words, the particular facts which bring two persons into a relationship to each other are not necessarily controlling, but the true test is, speaking generally, being in that relationship, are the circumstances such that one, in the performance of some act within the scope of that relationship, unless he uses proper care, is likely to do injury to the person, property, or the rights of the other.²¹ Brett, M. R. states the principle thus:²² "Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." It is in this sense that negligence grows out of contracts, as nuisance may grow out of negligence.²³

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¹⁵ *Collins v. Goetz* (1931) 256 N. Y. 287, 176 N. E. 397; *Cavalier v. Pope* (1906) A. C. 428; Pollock, *Torts* (13th Ed.) 532; Salmond, *Torts* (7th Ed.) 477.

¹⁶ See cases *supra*, note 15.

¹⁷ *Dean v. Hershowitz* (Conn. 1935) 177 Atl. 262.

¹⁸ *Wilcox v. Hines* (1898) 100 Tenn. 538, 46 S. W. 297, 41 L. R. A. 278; *Kilmer v. White* (1930) 254 N. Y. 64, 117 N. E. 908.

¹⁹ See *supra*, note 18.

²⁰ Bohlen, *Studies in the Law of Torts*, 86 and 87.

²¹ Maltby, C. J., in *Dean v. Hershowitz* (Conn. 1935) 177 Atl. 262. Pollock, *Torts* 554.

²² *Heaven v. Pender* (1883) L. R. 11 Q. B. D. 503.

²³ *Hoffman v. Bristol* (1931) 113 Conn. 386, 155 Atl. 499, 75 A. L. R. 1191.