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NOTES

DEATH BY WRONGFUL ACT—STATUTORY CON- STRUCTION—BREACH OF CONTRACT RESULTING IN DEATH.

An important question of no little interest to those of the legal profession and of momentous significance to landlords and tenants, is the liability of a landlord to a tenant for the breach of his contract to keep the leased premises heated, which breach becomes the proximate cause of injury or death to the tenant or one in privity with him. From time immemorial no notice has been taken by the courts of any duties of a landlord existing in favor of his tenants excepting such duties as are established between the parties by contract, and then only such damages have been allowed for the breach of the covenant as were in the con-

temptation of the parties at the time of the letting. But this attitude has not prevailed against third parties who suffered by reason of the landlord's breach of the contract with the tenant, and they have been allowed to recover against the landlord in an action *ex delicto* for a breach of duty imposed by law on a landlord to make and keep the premises safe for those that are rightfully on such premises. *Glidden v. Goodfellow*, 124 Minn. 101; *Roddy v. Mo. Pac. Ry. Co.*, 104 Mo. 234; *contra*, *Tuttle v. Gilbert Manf. Co.*, 145 Mass. 169. This stringent duty toward a third party still exists and in the recently adjudicated case of *Keiper v. Anderson*, 138 Minn. 392, the old doctrine of non-liability of a landlord to a tenant for personal injuries sustained by reason of a landlord's breach of no more than a contract duty was repudiated and the widow of the deceased was allowed to recover full damages for the non-performance of the defendant's contract to keep the premises heated to a comfortable degree during specified months of the year.

Anderson, a landlord and the defendant in the case above cited, as a part of his contract with the plaintiff's intestate, agreed to keep the premises heated to a comfortable and proper temperature each year, from October to April, inclusive. He failed to do so and the tenant, deceased, contracted a severe cold which later resulted in his death. 1913 Minn. G. S. No. 8175 allows "an action for the benefit of the next of kin of a deceased person, whose death was caused by the wrongful acts or omissions of another," and it is under this statute that the widow of the deceased brings this action, alleging repeatedly the negligence and carelessness of the defendant resulting in the death of her husband.

After the passage and adoption of the Lord Campbell Act in England in 1846 the majority of our American States enacted into their statutes a similar act conferring a right of action upon the widow or next of kin of the deceased whose death was the direct result of the wrongful act or omissions of another. Under this statute a widow can no doubt recover in damages but, the degree of recovery is dependent upon the construction of it in the particular state. Some jurisdictions have construed this to be a "death statute," giving to the widow of the deceased two causes of action; the first, *ex contractu*, for the breach of the contract on which the deceased might have sued had he lived, and the second, *ex delicto*, for the death of the deceased. Other jurisdictions, and among them the Supreme Court of Minnesota, have construed such statutes to be "survival statute," giving to the widow or next

of kin the right of action the deceased would have had, had he lived, plus the added element of his death. The two constructions of these statutes are squarely in conflict with one another, but the weight of authority is to allow two recoveries. *Bowers v. City of Boston*, 155 Mass. 344; *Needhorn v. Grand Trunk Ry. Co.*, 38 Vt. 294.

Under the "death statute" construction the widow would have no trouble in securing a final judgment in an action *ex delicto*, for, her cause of action would be based on the right of a third party to recover in damages for the breach of the landlord's duty resulting in loss or injury to the third party. *Supra*. 124 Minn. 101. In the states which construe the statute to be a "survival statute" the action is brought *ex contractu*, but the Minnesota court in *Keiper v. Anderson*, held that it was immaterial that the action is called *ex contractu* or *ex delicto*, since the non-performance of such a contract duty is such an omission as will under the statute render one liable in damages for all the consequences arising from the failure to act. And they cite a great many cases in point where a landlord for the non-performance of no more than a duty imposed by contract has been held liable in tort. In the Kentucky case of *Dice, Adm'r., v. Barbour, Adm'r.*, 161 Ky. 646, the opinion of the court was "that where a legal duty arises out of a contract, a breach of such duty resulting in death will ground an action in tort for the wrongful death." In *Heizer v. Kingsland & Douglass Manf. Co.*, 110 Mo., pp. 611, the court was of the opinion that a tort action may often arise from the breach of duty created by contract, but that to hold the defendant there must be a privity between the person injured and the defendant. *Roddy v. Mo. Pac. Ry.*, 104 Mo. 234, also supports this doctrine. Again in *Fowler Cycle Works v. Fraser & Chalmers*, 110 Ill. App. 126, the court held that "as between a landlord and tenant there is always a general duty to so use one's own as not to injure another, and that when such a general duty having been established by contract is breached by a negligent performance or a non-performance of duty, the landlord is liable in an action *ex delicto*." Quoting from *Shearm & Redfield on Negligence*, Book Three, 6th Ed., Sec. 708a, "a covenant by a landlord to keep the premises in a safe and tenable condition, will in the absence of contributory negligence on the part of the tenant, lay the landlord liable in an action of tort." For this liability of a landlord in tort for the breach of a contract duty we have a Missouri case in point; *Thompson v.*

Clemens, 96 Mo. 196, deciding that "the negligent failure of a landlord, having agreed to repair the premises, which failure results in an injury to the tenant, will render him liable in tort, and the fact that such a duty had as its foundation a contract does not preclude the plaintiff from suing in tort."

As regards these heating cases the Minnesota courts have been consistent in allowing a tenant to recover for injury to health or person resulting from the breach of a landlord's contract to heat. An action will always lie for the misfeasance of a contract, but not generally for nothing more than a non-feasance, but the courts have held that non-feasance in cases of this description result in such consequence that it is an omission such as will ground an action against the landlord for death or injuries of the tenant. In *Whittaker v. Collins*, 34 Minn. 299, all the allegations of negligence and wrong done came to but one point; the failure of the landlord to heat the premises as he had agreed to, and the gist of the action was based on the contract.

If one maintains any doubt as to where the Missouri Supreme Court stands on this matter they have only to read a few of the leading cases decided by this tribunal within the last few years to find that a landlord is liable on his breach of contract with his tenant for only such damages as were in the contemplation of the parties, and that for a non-feasance of no more than a contract duty, an action in tort for injury will not lie, though there might be cases where a misfeasance of such a contract would lay the landlord liable for personal injuries arising from the breach of the contract. The leading Missouri case on this question of a landlord's liability to his tenant for a breach of covenant is *Glenn v. Hill*, reported in 210 Mo. 291. The action was brought in tort by the widow of the deceased to recover for the death of her husband alleged to have been caused by the defendant's breach of contract to repair the premises, whereby the plaintiff's husband died from exposure. The plaintiff attempted to convert the breach of contract into a tort and to maintain an action to recover in damages for the death of her husband under Secs. 5245-5246, R. S. Mo. 1909, but the court did not allow this and decided that "the gravman of the plaintiff's action was for the failure to perform the contract and that no actual negligence such as would be necessary on which to ground a tort action was shown." At this point the court generalized a bit and stated their opinion to be "that where the only relation between the parties is contractual, the liability of

one to another in tort for the negligence must be based upon some positive duty which the law imposes because of the relationship, or because of the negligent manner in which some act which the contract provided for was done. The mere violation of a contract duty where there is no general duty will not ground an action in tort." Cases in support of this rule of law are: *Davis v. Smith*, 26 R. I. 129; *Schik v. Fleischauer*, 26 App. Div. (N. Y.) 210, and *Tuttle v. Gilbert Manf. Co.*, 145 Mass. 169, where the court held "that as the relation between the parties was purely contractual, a violation of the contract by the landlord did not create any liability in tort." Bishop on Non-Contract Law, Sec. 76, confirming this.

An early Missouri case on this subject is that of *Graft v. Brewing Co.*, 130 Mo. App. 623, in the decision of which Judge Johnson of the Kansas City Court of Appeals quoted a rule announced in *Quay v. Lucas*, 25 Mo. App. 4, "that where a covenant creates a duty, the neglect to perform that duty is ground for an action in tort." In square conflict with this decision is *Murphy v. Dee*, 190 Mo. App. 83, which decision is sustained by *Kohnle v. Paxton*, 268 Mo. 463, the latest authority on this subject. The latter case was an action brought in tort to recover in damages for injuries sustained by reason of the defendant's failure to perform on his covenant to keep the premises in repair. In brief the decision of the court was "that an agreement to repair does not contemplate a destruction of life or an injury to the person which may result from an omission to fulfill the terms of the agreement, and an action in tort will not lie for injuries resulting from the breach."

From the bearing of these authoritative Missouri cases it readily appears that the Missouri courts are not in harmony with the decision of *Keiper v. Anderson* but are following the common law principles as regards a landlord's liability to his tenant on an express covenant to repair. Sec. 5438, R. S. Mo. 1909, does not prevent the widow from recovering on any cause of action her husband would have had, had he lived, but the measure of damages and the defendant's liability is no more than if such death had not occurred. Under the Missouri decisions the widow cannot maintain an action *ex delicto* for the death of her husband resulting from the non-performance of a covenant to keep the premises heated and Sec. 5438, R. S. Mo. 1909, will preclude her from recovering any more than her husband could have recovered had he

lived, so that, unless by some recent Municipal Law creating a duty upon a landlord to perform his contract to heat the premises, and fixing a liability for the non-performance of the contract, one contracting a serious and permanent disease, or one sustaining a substantial loss by the death of the husband, wife or other members of the family, is substantially injured without a legal remedy to recover damages suffered. It appears to the writer that the legal maxim "Non injuria sine damno" has been completely ignored and that appropriate legislation under the Police powers of the state should be enacted imposing a liability upon landlords to heat their premises as agreed by contract.

Note—Since completing this article it has come to the writer's knowledge that the Legislature of New York State has recently passed an act imposing a liability upon a landlord who fails to heat his tenement as prescribed by the statute.

KARL P. SPENCER, '22.



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