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Negligence--Theatres--Faulty Construction--Safe Use Negatives Negligence Claimed Therefrom (De Salvo v. Stanley-Mark-Strand Corp., 281 N.Y. 333 (1939))

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and mortgage in which the company holds a large share at the time of liquidation, preferred over holders of certificates in other bonds and mortgages in which the company held a smaller share or none at all.[12] Since the purchasers of all guaranteed mortgage certificates relied on the credit standing of the company,[13] and since a substantial part of the company's assets consisted of retained shares,[14] all certificate holders should have equal rights of satisfaction of their deficiency claims.

F. D. M.

NEGLIGENCE—THEATRES—FAULTY CONSTRUCTION—SAFE USE NEGATIVES NEGLIGENCE CLAIMED THEREFROM.—The defendant-appellant maintains the Strand Theatre on Broadway in the city of New York. The plans of this theatre were drawn by a competent architect and were approved by the Building Department. Thereafter, the theatre was inspected annually and its conditions were approved by the said department. On the mezzanine floor, above the rear section of the orchestra, there was an oval opening surrounded by a railing thirty-two inches high and five and one-half inches wide. Two patrons, walking on the mezzanine, were jostled by an unnamed person and fell over the balustrade onto persons beneath. Three actions ensued against the defendant, by a person who fell [1] and two occupants of the orchestra seats who were struck,[2] for the injuries sustained. From the date of construction to this event, an interval of about twenty-three years, numerous patrons had passed by the opening and railing without being injured. Several other theatres similarly built had been safely used by the public for a period of time. The theory of the complaints was that the balustrade was insufficient and that the defendant should have reasonably foreseen the danger. The Appellate Division affirmed the judgment for the plaintiff on each action with a modification in the amount of damages recoverable in one.[3] On appeal, *held,* reversed, complaints dismissed. The mere occurrence of the avoidable accident was inadequate to hold the owner liable for faulty construction, and the constant safe use of the prem-

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[12] N. Y. INSURANCE LAW § 173 as amended by N. Y. Laws 1933, c. 318; see ALGER, *op. cit. supra* note 7, at 18, 131.

[13] ALGER, *op. cit. supra* note 7, at 94, 103, 110.

[14] *Id.* at 15; (1938) 47 YALE L. J. 480.

[1] Duckowitz v. Stanley-Mark-Strand Corp., 257 App. Div. 941, 13 N. Y. S. (2d) 281 (1st Dept. 1939).

[2] De Salvo v. Stanley-Mark-Strand Corp., 257 App. Div. 941, 13 N. Y. S. (2d) 102 (1st Dept. 1939); Zussman v. Stanley-Mark-Strand Corp., 257 App. Div. 941, 13 N. Y. S. (2d) 104 (1st Dept. 1939).

[3] De Salvo v. Stanley-Mark-Strand Corp., 257 App. Div. 941, 13 N. Y. S. (2d) 102 (1st Dept. 1939).

ises, and its kindred, for such a long period of time, negatived the charge of negligence arising out of the alleged balustrade's insufficiency. *De Salvo* v. *Stanley-Mark-Strand Corp.*, 281 N. Y. 333, 23 N. E. (2d) 457 (1939).

The owner of a theatre, or other place of public amusement, owes its patrons the duty to maintain the premises in a reasonably safe and appropriate condition, and he is liable to them for injuries received because of the breach of this duty,[4] whether caused by an affirmative act or omission.[5] However, the proprietor can be held responsible only for injuries resulting from acts or omissions from which harm as a *probable* consequence, in the exercise of *reasonable* care, is foreseeable.[6] Thus, the occurrence of a mishap, even though the *locus* is dangerous, does not fix liability for faulty construction on the owner merely because it could have been prevented.[7]

Moreover, "when an appliance or machine or structure, not obviously dangerous, has been in daily use for years, and has uniformly proved adequate, safe and convenient, its use may be continued without the imputation of culpable imprudence or carelessness." [8] The weight of authority is overwhelmingly in accord with this general rule.[9] In a leading case, the judgment for the plaintiff against a ferry company was set aside, for there was no actionable negligence, when the sole basis of the claim was the alleged insufficient guardrail through a space of which the plaintiff's intestate, a child six years old, fell into the water while leaving the boat and was drowned, and when it was proved that millions of persons had passed annually for several years over similar bridges at other ferries with-

[4] Lusk v. Peck, 132 App. Div. 426, 116 N. Y. Supp. 1051 (4th Dept. 1909), *aff'd*, 199 N. Y. 546, 93 N. E. 377 (1910); Reinzi v. Tilyou, 252 N. Y. 97, 169 N. E. 101 (1929); Gerhardt v. Manhattan Beach Park, 237 App. Div. 832, 261 N. Y. Supp. 185 (2d Dept. 1932), *aff'd*, 262 N. Y. 698, 188 N. E. 126 (1933); Tapley v. Ross Theater Corp., 275 N. Y. 144, 9 N. E. (2d) 812 (1937).

[5] Brister v. Flatbush Leasing Corp., 202 App. Div. 294, 195 N. Y. Supp. 424 (2d Dept. 1922) (theater patrons are invitees).

[6] Barrett v. Lake Ontario Beach Improvement Co., 174 N. Y. 310, 66 N. E. 968 (1903); Rich v. Madison Square Garden Corp., 241 App. Div. 722, 270 N. Y. Supp. 915 (1st Dept. 1934); Ingersoll v. Onondaga Hockey Club, 245 App. Div. 137, 281 N. Y. Supp. 505 (3d Dept. 1935); Nabson v. Mordell Realty Corp., 257 App. Div. 659, 15 N. Y. S. (2d) 38 (1st Dept. 1939); Dunning v. Jacobs, 15 Misc. 85, 36 N. Y. Supp. 453 (1895).

[7] Instant case; Dunning v. Jacobs, 15 Misc. 85, 36 N. Y. Supp. 453 (1895).

[8] Lafflin v. Buffalo and Southwestern R. R., 106 N. Y. 136, 141, 12 N. E. 599, 601, 602 (1887).

[9] Dougan v. Champlain Transportation Co., 56 N. Y. 1 (1873); Crocheron v. North Shore Staten Island Ferry Co., 56 N. Y. 656 (1874); Cleveland v. New Jersey Steamboat Co., 68 N. Y. 306 (1877); Loftus v. Union Ferry Co., 84 N. Y. 455 (1881); McGrell v. Buffalo Office Building Co., 153 N. Y. 265, 47 N. E. 305 (1897); O'Connor v. Webber, 239 N. Y. 191, 146 N. E. 200 (1924); Tryon v. Chalmers, 205 App. Div. 816, 200 N. Y. Supp. 362 (3d Dept. 1923), *appeal dismissed*, 240 N. Y. 580, 148 N. E. 713 (1925); Reilly v. Board of Education of City of New Rochelle, 205 App. Div. 431, 200 N. Y. Supp. 50 (2d Dept. 1923); Dunning v. Jacobs, 15 Misc. 85, 36 N. Y. Supp. 453 (1895); Haleem v. Gold, 167 N. Y. Supp. 907 (1917).

out the occurrence of a similar accident.[10] There was no evidence of negligence in the construction of the theatre in an action by a patron to recover for personal injuries suffered when, having slipped or stumbled, he fell from the gallery, the floor of which inclined about fifty-five degrees, over the parapet, which, with the balustrade, was over three feet high and that in the many years that the theatre was used no such accident had ever taken place.[11]

For the application of the rule, an analysis of the cases reveals, it is essential that the structure, machine or appliance had been (1) safely used in the past and that the use was (2) continuous (3) for a long period of time.[12] However, the latter prerequisite may vary in each case. In a proper one, it is satisfied even though the use is only for several days.[13]

A. G.

WILLS—FUTURE INTERESTS—VESTING OF ESTATES.—Testator died leaving a will providing for a trust fund of his residuary estate, the income of which was to be payable to his widow for life. Upon the death of his widow, the trust was to terminate and the trustees were to sell and dispose of the corpus. From the proceeds, two legacies of $1,000 each were to be paid to his grandchildren, and the remainder was to be divided equally among his three sons, Harry, Robert and John, or their survivors. In the event that either grandchild should die before him, the amount of his legacy was to go to his issue, if any, otherwise it was to lapse and was to be added to the portion to be received by the sons. One of the sons, Harry, survived the testator, but predeceased the widow. The surrogate excluded his estate from participation in the proceeds of the trust fund. On appeal, *held,* two judges dissenting, reversed. The requirements of survivorship of the remainderman imposed by the testator referred to the *death of the testator,* and not to the death of the life tenant. *In re Montgomery Estate,* 258 App. Div. 64, 15 N. Y. S. (2d) 729 (2nd Dept. 1939).

It is a cardinal rule of construction that the law favors the vest-

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[10] Loftus v. Union Ferry Co., 84 N. Y. 455 (1881).
In another action to recover for the fatal injuries sustained by the plaintiff's intestate, which could have been avoided if the elevator in which she was a passenger had been more adequately enclosed, it was held that the defendant was not negligent, for no evidence was offered that any similar accident had happened before and there was proof that elevators similarly constructed had been safely used for years. McGrell v. Office Building Co., 153 N. Y. 265, 47 N. E. 305 (1897).

[11] Dunning v. Jacobs, 15 Misc. 85, 36 N. Y. Supp. 453 (1895).

[12] See note 9, *supra.*

[13] O'Connor v. Webber, 239 N. Y. 191, 146 N. E. 200 (1924).