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Torts--Nuisance--Liability of Lessor and Sub-Lessee for Wrongful Act of Independent Contractor (Rohlfs v. L. Weil, Strauss & Co., and the Gotham Silk Hosiery Co., Inc., 271 N.Y. 444 (1936))

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the deed of "one dollar and other valuable consideration" is not sufficient to put him in this position.[7] Thus the prior grantee by establishing that the junior grantee is not protected by the Recording Act, compels the subsequent grantee to produce further evidence of consideration to bring himself within the meaning of "a purchaser for a valuable consideration" under the statute.

Likewise, the burden of producing evidence is upon the holder of the unrecorded deed, when the subsequent deed, first recorded, *acknowledges receipt of consideration sufficient to satisfy the Recording Act.*[8] In this instance, as in the preceding one, the prior grantee must show, *if he asserts it,* that the subsequent grantee took with notice. Although the subsequent grantee meets the requirements of the Recording Act, if the prior purchaser shows that a fraud has been perpetrated upon him by the grantor, the burden of producing evidence then shifts to the subsequent purchaser who must prove that he had no knowledge of the fraud and that he purchased for a valuable consideration.[9] In this instance (where a fraud has been perpetrated by the grantor), the proof of a substantial payment by the subsequent grantee, is held to be more than evidence of a valuable consideration—it is construed as an inference of a purchase without notice.[10] The burden of adducing evidence to offset this inference then shifts to the prior purchaser.

E. O. C.

TORTS—NUISANCE—LIABILITY OF LESSOR AND SUB-LESSEE FOR WRONGFUL ACT OF INDEPENDENT CONTRACTOR.—Defendant Gotham Silk Hosiery Co. was lessee of an entire building at 34th Street and Broadway, New York City. Five large signboards were affixed to the sides and on the roof of the building. Two of these signs were leased to defendant Strauss & Co., which was engaged in the sign advertising business. Plaintiff was seriously injured when one end of a scaffold, which was insecurely suspended from said building, gave

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vance is not, within the meaning of the Recording Act, a purchaser for valuable consideration and his deed, although recorded, conveys no title as against a prior unrecorded conveyance of the same property. The consideration must not only be good, but valuable, in the sense that a fair equivalent is given for the property granted, in order to constitute the grantee a purchaser for value.).

[7] Lehrenkrauss v. Bonnell, 199 N. Y. 240, 92 N. E. 637 (1910).

[8] Wood v. Chopin, 13 N. Y. 509 (1856); Page v. Waring, 76 N. Y. 63 (1882).

[9] Brody v. Pecoraro, 250 N. Y. 56, 164 N. E. 741 (1928) (Where the proof shows a fraud has been perpetrated, by the grantor, the burden of evidence is shifted upon one who claims to be an innocent purchaser to show that he acquired the property *without any knowledge or notice* that would put him upon inquiry and for a *full and adequate consideration.*).

[10] Brown v. Volkening, 64 N. Y. 76 (1876); Constant v. University of Rochester, 111 N. Y. 604, 19 N. E. 631 (1889).

way, and a painter at work on the scaffold fell, and his body struck the plaintiff. No barricades or danger signals were posted to warn pedestrians of the scaffold suspended overhead. The painter was employed by defendant Weil, who had a contract with Strauss & Co. for painting advertisements on some of these signboards. At Trial Term the jury found for the plaintiff as against defendant Weil, and he has not appealed. The complaint was dismissed as against Strauss & Co. and The Gotham Co., but this judgment was reversed, and a new trial ordered by the Appellate Division. On appeal to the Court of Appeals, *held,* affirmed, and judgment absolute for plaintiff as against both appellants. The erection of a scaffold over a public highway is a nuisance in fact, and appellants who suffered such erection are liable as joint tort feasors. *Rohlfs* v. *L. Weil, Strauss & Co., and The Gotham Silk Hosiery Co., Inc.,* 271 N. Y. 444, 3 N. E. (2d) 588 (1936).

As a general rule an independent contractor is solely liable for injuries caused by his negligence, or that of his employees.[1] The owner may be held liable, however, when the thing contracted to be done is unlawful, or creates a nuisance.[2] If the work is inherently dangerous, and the injury occurs from an act of the contractor, doing the work entirely within the limits of his contract, then the employer is liable, and his duty to guard against injury cannot be delegated;[3] but if the injury is the result of an act of the contractor outside of, or in violation of his contract, then the employer is freed of liability.[4] When the work to be done jeopardizes the safety of the public,[5] in the use of a public place, such as excavating in the street,[6] or cleaning windows of a building abutting on the highway,[7] or negligently leaving the highway in disrepair,[8] or blasting on land adjoining a highway,[9] then the courts will invoke the doctrine of *respondeat superior*,[10] and

[1] RESTATEMENT, TORTS (1934) § 384; Deyo v. Kingston Cons. R. R., 94 App. Div. 578, 88 N. Y. Supp. 487 (3d Dept. 1904); Heidenway v. Philadelphia, 168 Pa. St. 72, 31 Atl. 1063 (1895).

[2] RESTATEMENT, TORTS (1934) § 416; Storrs v. City of Utica, 17 N. Y. 104 (1858); Deming v. Terminal R. R., 169 N. Y. 1, 61 N. E. 983 (1901); Boylhart v. Di Marco & Reimann, 270 N. Y. 217, 200 N. E. 793 (1936). In the case of Water Co. v. Ware, 16 Wall. 566 (U. S. 1872), Clifford, J., says: "When a person is engaged in a work, in the ordinary doing of which a nuisance occurs, the person is liable for any injuries that may result to third persons from carelessness or negligence, though the work be done by a contractor."

[3] 2 COOLEY, TORTS (3d ed. 1906) 1090; Blake v. Ferris, 5 N. Y. 48 (1851); Brusso v. City of Buffalo, 90 N. Y. 679 (1882); Deming v. Terminal R. R., 169 N. Y. 1, 61 N. E. 983 (1901).

[4] COOLEY, TORTS (3d ed. 1906) 1091; Pack v. Mayor, *etc.,* of N. Y., 8 N. Y. 222 (1853); Kelly v. Mayor, *etc.,* of N. Y., 11 N. Y. 432 (1854); McCafferty v. Spuyten Duyvil & P. M. R. R., 61 N. Y. 178 (1874).

[5] Pettingill v. City of Yonkers, 116 N. Y. 558, 22 N. E. 1095 (1889).

[6] Boylhart v. Di Marco & Reimann, 270 N. Y. 217, 200 N. E. 793 (1936).

[7] Doll & Sons v. Ribetti, 203 Fed. 593 (C. C. A. 3d, 1913).

[8] Trustees, *etc.* v. Foster, 156 N. Y. 354, 50 N. E. 971 (1898).

[9] Berg v. Parsons, 156 N. Y. 109, 50 N. E. 957 (1898).

[10] In Blake v. Ferris, 5 N. Y. 48 (1851), the court gives an exhaustive discussion of the doctrine of *respondeat superior,* which is generally accepted to

forbid the delegation of the employer's duty to protect the public from the dangers inherent in such work,[11] Hence, in the instant case, Strauss & Co. breached its non-delegable duty of affording protection to the public by failing to provide the proper barriers or danger signals while the work was in progress.[12]

As to the appellant Gotham Co., its liability is predicated upon entirely different grounds.[13] As lessee of the entire premises, this appellant stands in the position of an owner in possession.[14] The landlord is ordinarily liable for injuries to strangers resulting from a condition on the premises at the time of the demise,[15] or of a particular use made thereof by the tenant, if this use can be regarded as having been intended or contemplated by the lessor.[16] In leasing the signboards to Strauss & Co., the appellant clearly intended that they be used for advertising purposes.[17] The erection of the scaffold was an essential incident to such use, and a jury could reasonably infer that the Gotham Co. gave its permission and consent to the erection of this dangerous obstruction to street travel.[18] The mere fact that the premises are *susceptible* of a use which may cause injury to others is not sufficient to place liability on the lessor, because such use is not necessarily contemplated or intended by him.[19] But if the premises are used as they apparently had been intended for use, and the injury occurs, then the landlord is liable for granting his implied permission for such use without guarding against the injury with special precautions.[20]

The courts in this state,[21] and in other jurisdictions,[22] have made extremely narrow distinctions in deciding cases involving this prin-

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this day, although the decision in this case is open to criticism. See Deming v. Terminal R. R., 169 N. Y. 1, 61 N. E. 983 (1901).

[11] Hexamer v. Webb, 101 N. Y. 377, 4 N. E. 755 (1886); Babbage v. Powers, 130 N. Y. 281, 29 N. E. 132 (1891).

[12] Instant case, at p. 448; Jager v. Adams, 123 Mass. 26; Pettingill v. City, 116 N. Y. 558, 22 N. E. 1095 (1889).

[13] 1 TIFFANY, LANDLORD AND TENANT (1910) § 102; Kalis v. Shattuck, 69 Cal. 593, 11 Pac. 346 (1886). *But cf.* Swords v. Edgar, 69 N. Y. 28 (1874).

[14] WALSH, LAW OF PROPERTY (2d ed. 1934) § 177.

[15] 1 TIFFANY, LANDLORD AND TENANT (1910) § 101; Tomle v. Hampton, 129 Ill. 379, 21 N. E. 800 (1889); Dalay v. Savage, 145 Mass. 38, 12 N. E. 841 (1887).

[16] Jennings v. Van Schaick, 101 N. Y. 530, 15 N. E. 424 (1888); Ahern v. Steele, 115 N. Y. 203, 22 N. E. 193 (1889).

[17] Instant case at p. 449.

[18] Melker v. City of N. Y., 190 N. Y. 481, 83 N. E. 565 (1908); Doll & Sons v. Ribetti, 203 Fed. 593 (C. C. A. 3d, 1913).

[19] 1 TIFFANY, LANDLORD AND TENANT (1910) § 101, p. 676; Gould v. Stafford, 91 Cal. 146, 27 Pac. 543 (1891).

[20] Jackman v. Arlington Mills, 137 Mass. 277.

[21] Mehler v. Fisch, 65 Misc. 549, 120 N. Y. Supp. 807 (1910); Doll & Sons v. Ribetti, 203 Fed. 593 (C. C. A. 3d, 1913); Zolezzi v. Bruce-Brown, 243 N. Y. 490, 154 N. E. 535 (1926).

[22] Weilbacher v. Putts, 123 Md. 249, 91 Atl. 343 (1914); *cf.* Davis v. Whiting & Son Co., 201 Mass. 91, 87 N. E. 199 (1909); McHarge v. Newcomer, 117 Tenn. 595, 100 S. W. 700 (1907).

ciple of liability.[23] A review of the most recent decisions handed down shows such a diversity of opinion that its future path is a matter of mere conjecture.[24]

E. F. A.

WILLS—DECEDENT ESTATE LAW—ADOPTION.—Testatrix left a will devising and bequeathing all her property, both real and personal, to her brother. The brother predeceased her leaving surviving the plaintiff, his adopted daughter, and no other children or descendants. The defendant administrator contends that the gift lapsed as Section 29 of the Decedent Estate Law,[1] which provides that if a legatee or devisee who is a brother, sister, child or descendant of the testator predeceases said testator, the property will vest in a surviving descendant, is limited to blood relatives. *Held,* for the plaintiff. The gift to the brother did not lapse but passed to the adopted daughter pursuant to Section 29 of the Decedent Estate Law, as the words "child" and "descendant" in the statute are not limited in meaning to blood relatives. *Matter of Walter,* 270 N. Y. 201, 200 N. E. 786 (1936).

A child when adopted is the same as a natural child for the purposes of inheritance from its foster parents,[2] except that, as to the limitation over of property in trust dependent on the foster parent dying without heirs, such child shall not be deemed to sustain such a relation to its foster parent as to defeat rights of remaindermen.[3] Similarly, the foster parents inherit from an adopted child, as though the child was born to them in lawful wedlock.[4] The adopted child, how-

[23] Instant case, dissenting opinion of Lehman, J., at p. 451; *cf.* Kirby v. Newman, 239 N. Y. 470, 147 N. E. 69 (1925).

[24] Leonard v. City of Hornellsville, 166 N. Y. 590, 59 N. E. 1125 (1899); Schneyer v. Leblang Realty Corp., *et al., etc.,* N. Y. L. J., Sept. 28, 1936.

[1] N. Y. DECEDENT ESTATE LAW § 29, reads as follows: "Whenever any estate, real or personal, shall be devised or bequeathed to a child or other descendant of the testator, or to a brother or sister of the testator, and such legatee or devisee shall die during the lifetime of the testator, leaving a child or other descendant who shall survive such testator, such devise or legacy shall not lapse, but the property so devised or bequeathed shall vest in the surviving child or other descendant of the legatee or devisee, as if such legatee or devisee had survived the testator and had died intestate."

[2] Matter of Cook, 187 N. Y. 253, 79 N. E. 991 (1907); Carpenter v. Buffalo Gen. Elec. Co., 213 N. Y. 101, 106 N. E. 1026 (1914); Matter of Horn, 256 N. Y. 294, 176 N. E. 399 (1931); Dodin v. Dodin, 16 App. Div. 42, 44 N. Y. Supp. 800 (2d Dept. 1897), *aff'd,* 162 N. Y. 635, 57 N. E. 1108 (1900).

[3] N. Y. DOM. REL. LAW § 114; Matter of Horn, 256 N. Y. 294, 176 N. E. 399 (1931); Dodin v. Dodin, 16 App. Div. 42, 44 N. Y. Supp. 800 (2d Dept. 1897), *aff'd,* 162 N. Y. 635, 57 N. E. 1108 (1900); Von Beck v. Thomsen, 44 App. Div. 373, 60 N. Y. Supp. 1094 (1st Dept. 1899).

[4] Gilliam v. Guaranty Trust Co., 186 N. Y. 127, 78 N. E. 697 (1906); Matter of Cook, 187 N. Y. 253, 79 N. E. 991 (1907); Carpenter v. Buffalo