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Landlord and Tenant -- Landlord's Liability for Negligence of Independent Contractor

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There would appear to be an apparent conflict between the result reached in the instant case and the Florida Supreme Court case of *McIntyre v. McIntyre*.[28] In that case, the wife left Florida for more than six months, returning for a few days to file for divorce. She alleged that she was a *bona fide* resident of Florida. The Florida Supreme Court held that the mere removal of the wife to another state, without more, is insufficient to rebut the presumption that the wife's domicile was that of the husband.[29] Therefore, the wife acquired the necessary residence time by virtue of the common law fiction that the domicile of the husband is that of the wife.

After careful review of the facts presented in the *Brown* case, it appears that the jurisdictional requirements should have been sustained by the District Court of Appeal, when viewed in the light of the *McIntyre* decision. In both cases the court held that the wife acquired the domicile of her husband, but, according to *McIntyre* this was sufficient to confer residence upon the wife.[30] It is submitted that the court improperly incorporated into the statute a new jurisdictional requirement for divorce. A complainant wife, whose husband has acquired a domicile in the state, must *now physically reside* six months in the state before the filing of her complaint. Although this would appear to be the better view, the change made by the court properly lay with the state legislature.

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LANDLORD AND TENANT — LANDLORD'S LIABILITY FOR NEGLIGENCE OF INDEPENDENT CONTRACTOR

The lessors voluntarily agreed to repair the roof of certain leased premises. They employed an independent contractor to perform the work. While the repairs were being made, rain came through the roof and damaged plaintiff's furniture and furnishings. The plaintiff sued the lessors for failure to exercise proper control over the contractor. The trial court granted defendants' motion to dismiss. On appeal, *held*, reversed: a lessor who gratuitously assumes to make repairs on leased premises may not absolve himself from liability by employing an independent contractor. *Easton v. Weir*, 125 So.2d 115 (Fla. App. 1961).

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28. 53 So.2d 824 (Fla. 1951).
29. *Ibid.*
30. *Ibid.*

At common law, a landlord was under no duty to repair the leased premises.[1] However, if he assumed such a duty either by agreement[2] or voluntarily,[3] and he[4] or one of his servants[5] made the repairs in a negligent manner, the landlord was responsible for resulting personal injury[6] or property damage.[7]

The courts are in conflict as to the responsibility of the landlord when an independent contractor is employed to perform the repairs. Some courts adopt the view that the hiring of an independent contractor will excuse the landlord's liability,[8] whereas the modern view holds the landlord answerable for the resultant damage.[9] However, all courts agree that when any of the following factors are present, the landlord will be liable: (1) employment of an incompetent contractor to do the work;[10] (2) taking any part in the direction of the repairs;[11] (3) using any portion of the repaired premises for his own purposes;[12] or (4) the work is inherently dangerous.[13] The tenant, however, may sue the contractor for his negligence,[14] or the landlord, after payment, may obtain indemnification from the contractor-tortfeasor.[15]

Most judicial authority allows recovery against the landlord when as a result of the independent contractor's repairs, the tenant[16] or someone

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1. Beard v. General Real Estate Corp., 229 F.2d 260 (10th Cir. 1956); Felshin v. Sir, 149 Fla. 218, 5 So.2d 600 (1942); Masser v. London Operating Co., 106 Fla. 474, 145 So. 72 (1932).

2. Chipman v. National Sav. Bank, 128 Conn. 493, 23 A.2d 922 (1942); Propper v. Kesner, 104 So.2d 1 (Fla. 1958); Kimmons v. Crawford, 92 Fla. 652, 109 So. 585 (1926); Weldon v. Lehmann, 226 Miss. 600, 84 So.2d 796 (1956).

3. Bailey v. Zlotnick, 80 U.S. App. D.C. 117, 149 F.2d 505 (D.C. Cir. 1945); Bowater v. Tassey, 81 Cal. App. 2d 651, 184 P.2d 931 (1947); Walker & Dunlop, Inc. v. Gladden, 47 A.2d 510 (D.C. Munic. Ct. App. 1946); Case v. Sioux City, 246 Iowa 654, 69 N.W.2d 27 (1955).

4. Chipman v. National Sav. Bank, 128 Conn. 493, 23 A.2d 922 (1942); Verplanck v. Morgan, 90 N.E.2d 872 (Ohio Dist. Ct. App. 1950); Black v. Partridge, 252 P.2d 760 (Cal. Dist. Ct. App. 1953).

5. Mumby v. Bowden, 25 Fla. 454, 6 So. 453 (1889); Southern Apartments, Inc. v. Emmett, 269 Ala. 584, 114 So.2d 453 (1959); Weldon v. Lehmann, 226 Miss. 600, 84 So.2d 796 (1956).

6. Bailey v. Zlotnick, 80 U.S. App. D.C. 117, 149 F.2d 505 (D.C. Cir. 1945); Kimmons v. Crawford, 92 Fla. 652, 109 So. 585 (1926).

7. Mumby v. Bowden, 25 Fla. 454, 6 So. 453 (1889).

8. Silveus v. Grossman, 307 Pa. 272, 161 Atl. 362 (1932).

9. Sutton v. Texas Co., 90 F. Supp. 7 (E.D.N.C.), *aff'd*, 183 F.2d 383 (4th Cir. 1950); Bailey v. Zlotnick, 80 U.S. App. D.C. 117, 149 F.2d 505 (D.C. Cir. 1945); Weldon v. Lehmann, 226 Miss. 600, 84 So.2d 796 (1956); Easton v. Weir, 125 So.2d 115 (Fla. App. 1961).

10. Ozan Lumber Co. v. McNeely, 214 Ark. 657, 217 S.W.2d 341 (1949); Lawrence v. Shipman, 39 Conn. 586, 590 (1873) (dictum).

11. Lawrence v. Shipman, note 10 *supra*; Mumby v. Bowden, 25 Fla. 454, 6 So. 453 (1889); Meany v. Abbott, 6 Phila. Rep. 256 (Pa. Dist. Ct., Phila. County, 1867).

12. See Mumby v. Bowden, *supra* note 11.

13. Wertheimer v. Saunders, 95 Wis. 573, 70 N.W. 824 (1897).

14. St. Johns & H.R. v. Shalley, 33 Fla. 397, 14 So. 891 (1894).

15. It is a fundamental principle of tort law that the tortfeasor is liable for his torts, and if another person has paid for the resultant damages, he is entitled to indemnification. See PROSSER, TORTS § 46 (2d ed. 1955).

16. Bailey v. Zlotnick, 80 U.S. App. D.C. 117, 149 F.2d 505 (D.C. Cir. 1945).

rightfully on the premises[17] suffers *personal injury*. Prior to the instant case, only one jurisdiction had decided that the landlord would be compelled to answer for damage to the tenant's *property*, its *ratio decidendi* being that of the personal injury cases.[18] This rationalization has been adopted by the *Restatement of Torts*.[19]

In the 1889 Florida case of *Mumby v. Bowden*,[20] the lessors leased one-half of their building to the plaintiffs, occupying the other side for their own business. The lessors had covenanted to keep the premises in good repair. Upon the lessees' request, the lessors hired a certain company to repair the roof. The lessors went upon the roof with the workers who performed the repairs in a negligent manner. Rain came through the roof, damaging the lessees' goods. The lessors admitted the damage, but contended that they had employed an independent contractor to do the work, and that the independent contractor insulated them from liability. The Florida Supreme Court recognized the general rule that when one employs a contractor to do a job, and the work is done negligently so as to cause injury or damage to a third person, the employer is not responsible for the damage. Nevertheless, the court was of the view that the rule was not applicable for the following reasons: (1) there was no occasion for surrender of the premises, (2) there was no contract taking the control of the roof from the lessors, (3) there was even some indication that the defendants exercised control over the workers, and (4) the work was necessary to prevent leakage into that portion of the store used by the lessors. The court held that in legal contemplation the laborers were the lessors' servants for that particular job, and therefore the lessors were liable under the theory of respondeat superior. Whether or not the court would have absolved the lessors from liability for the negligence of the independent contractor had none of the other elements been present was not decided in the *Mumby* case, but rather the statement of this general rule when applied to the facts was a mere dictum.[21]

It is difficult for this writer to understand the reasoning of the court in the *Easton* case. When a landlord has given up control of the premises, and does not use any part of the building for his own purposes, there is no logical reason for holding the landlord liable. Unless the court

17. Donahoo v. Kress House Moving Corp., 25 Cal. 2d 237, 153 P.2d 349 (1944).
18. Weldon v. Lehmann, 226 Miss. 600, 84 So.2d 796 (1956).
19. RESTATEMENT, TORTS § 426 (1934).
20. 25 Fla. 454, 6 So. 453 (1889).
21. In City of Mount Dora v. Voorhees, 115 So.2d 586, 589 (Fla. App. 1959), the District Court of Appeal recognized the rule that "one who engages an independent contractor to perform a job for him, without reserving control and direction of the work, will not become liable for the negligence of the independent contractor." The court cited the *Mumby* case as authority, characterizing the statement as the holding of the *Mumby* case. It is the opinion of this writer that since the court in the *Voorhees* case recognized the general rule, and that the facts of the *Easton* case bring it within the general rule, it would thus appear that the results in *Voorhees* and *Easton* are inconsistent.

adopted the view that repairing of a roof is an inherently dangerous task, the court's holding that the lessor "was under a duty to see that no injury would be sustained by the tenant in the making of the repairs" cannot be upheld. The court has made the landlord an absolute insurer for everything done by the contractor within the scope of his employment. It is submitted that if the court meant to do this, it should have stated what it was doing in unequivocal terms, rather than attempting to justify a result by citing Florida cases which do not support the view adopted by the court.

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FEDERAL REMOVAL — JURISDICTIONAL AMOUNT

The plaintiff, a longshoreman and citizen of Florida, filed suit in a Florida circuit court to recover damages allegedly due to the negligence of the defendant, or to the unseaworthiness of the defendant's vessel. The complaint alleged that the defendant was a Connecticut corporation with an office and principal place of business[1] in Florida, and demanded damages in excess of 5,000 dollars.[2] Defendant removed the action to a federal district court alleging the requisite diversity and jurisdictional amount in the petition for removal. The plaintiff moved to remand, claiming the *ad damnum* clause of the complaint did not meet the federal jurisdictional requirement, but the motion was denied. A jury trial resulted in a verdict for the defendant. On appeal, *held*, reversed and remanded: a complaint demanding damages in excess of 5,000 dollars is not removable from a state court to a federal court in the absence of affirmative proof that the damages claimed exceed 10,000 dollars. *Gaitor v. Peninsular & Occidental S.S. Co.*, 287 F.2d 252 (5th Cir. 1961).

A civil action brought in a state court may generally be removed by the defendant to a federal district court, provided the federal court could have had jurisdiction originally.[3] The right to remove is one granted by

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1. "For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." 28 U.S.C. § 1332(c) (1958). The issue of diversity of citizenship was not raised prior to trial. The issue was raised on appeal but was not ruled upon as other grounds were present to reverse and remand the action.

2. The Circuit Court for Dade County, Florida has jurisdiction of all actions at law provided the amount in controversy exceeds the sum of $5,000. FLA. CONST., art. 5, § 6(3); FLA. STAT. § 33.02 (1959). See note 23 *infra*.

3. American Fire & Cas. Co. v. Finn, 341 U.S. 6 (1951); Gold-Washing & Water Co. v. Keyes, 96 U.S. 199 (1877); Delpit v. United States Shipping Board Emergency Fleet Corp., 19 F.2d 60 (9th Cir. 1927); City of Corbin v. Varden, 18 F. Supp. 531 (E.D. Ky. 1937); Belcher v. Aetna Life Ins. Co., 3 F. Supp. 809 (W.D. Tex. 1933).