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GENERALLY THE LANDLORD is not liable to his tenant or one in the right of the tenant for injuries resulting from the condition of the demised premises. This is so because the lease is the same as the sale of the premises during the term of the lease. Possession and control of the premises having been transferred by the operation of the lease, the liability and the duty for any injury which may result from the condition of the premises falls on the tenant.[1] An exception to the general rule is where the landlord has retained possession and control of a part of the demised premises. He may be liable to the tenant or one in the right of the tenant for failure to exercise ordinary care to keep that part of the premises over which he has retained possession and control in a reasonably safe condition.[2]

The problem arises over what portion of the premises the landlord has retained possession and control, especially when the lease contains no provision on this subject. The injured tenant will allege that the defect causing the injury was part of the common way while the landlord will answer that the injury occurred on a portion of the demised premises over which he parted with possession and control.

A landlord is not in possession or control of any part of the premises where the tenant is in actual possession.[3] But whether the tenant actually is in possession of any part or all of the premises is dependent upon the facts in each case.[4] A review of the principles and a sampling of various fact situations involving possession and control of the premises may indicate the manner in which courts approach the problem.

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1 33 Ohio Jur. 2d, Landlord and Tenant § 188.

2 33 Ohio Jur. 2d, Landlord and Tenant § 218. Davies v. Kelley, 112 Ohio St. 122, 146 N. E. 888 (1925).

3 Keiper v. Marquart, 192 Pa. Super. 88, 159 A. 2d 33 (1960) (allocatur refused); Turner v. Ragin, 229 S. W. 809 (Mo. App. 1921); rehearing den. April 9, 1921.

4 Guyer v. Horgan, 96 N. H. 288, 75 A. 2d 325 (1950).

Interior Stairways

An interior stairway of a building is generally not reserved by the landlord for the common use of the tenant unless in the ordinary use of the building such a stairway is used by more than one tenant. The court said in *Miller v. Mutual Mortgage Co.*: [5]

> A consideration entitled to much weight is the situation of the stairway with reference to the several apartments. If the enjoyment of the use by different tenants of apartments rented by them necessitate, or is rendered more convenient by the use of stairs, the status of which is under inquiry, this will usually be taken as indicating a retention of control by the landlord for the common benefit of several tenants. If the stairway be so situated as not naturally to be regarded as intended for a common use by the various tenants, but only for the use of one of them, this tends to signify that the parties intended it to be annexed to the premise included in the lease of such tenant.

The stairway is reserved by the landlord where in the ordinary use of it several tenants use it for ingress and egress to their apartments.[6] Ordinarily, if the stairway leads to only one apartment it is deemed part of the demised premises.[7] However, the landlord may signify his intent to reserve the possession and control of such a stairway by using the stairway in common with his tenant. The use of such a stairway by the landlord, along with the tenant, to reach storage rooms,[8] or to repair a skylight[9] is sufficient to show reservation of possession and control of that stairway.[10] Retention of the only key to the outside

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[5] 112 Conn. 303, 152 A. 154, 155 (1930).

[6] Papakalos v. Shaka, 91 N. H. 265, 18 A. 2d 377 (1941); Horan v. Harris, 12 N. J. Misc. 513, 172 A. 730 (1934). An invitee of the second floor tenant was injured on the interior stairway while descending from the second floor. The stairway was common because it extended to a third floor residence apartment. (It would seem that had the injury occurred on the portion of the stairway leading to the third floor apartment, it would be on an area which is part of the demised premise. See footnote 7.)

[7] Miller v. Mutual Mortgage Co., 112 Conn. 303, 152 A. 154 (1930).

[8] Weston v. David, 98 Ohio App. 55, 128 N. E. 2d 137 (1954). The landlord had to go through the tenant's second floor apartment to reach the storage rooms. Does this reserve the tenant's apartment to the landlord's use? Surely not. But the reasoning is tempting.

[9] Raune v. Doyle, 308 Mass. 418, 32 N. E. 2d 244 (1941). The landlord used part of the stairway and stair landing opposite the tenant's apartment to set up scaffolding to repair the skylight which was above the landing. (It appears that this is an extremely limited use of the stairway.)

[10] Schachter v. Cohen, 17 N. Y. S. 2d 88 (1940). But use of the stairway by

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door at the bottom of the stairway and evidence that the stairway might be used by other tenants as an emergency exit was held in *Guyer v. Horgan*[11] sufficient facts for the jury to find that the stairway is common.

In *Hammersmith v. Cohn,*[12] a hall or areaway off to one side at the bottom of a stairway leading to a single basement apartment was used to store ash barrels. The stairway was used by the landlord's janitor to empty the barrels. Whether such use was sufficient to establish a common stairway was for the jury. But in *Finkelstein v. Schlanowsky,*[13] where an area only a few feet wide at the bottom of the stairway was used to store ash cans and there was evidence that many ash cans were located elsewhere in the building in areas provided for that purpose, the stairway was part of the demised premise.

The interior stairway is common where it leads to an area reserved for the common use of other tenants. Such an area is common where there is joint use of its facilities by the tenants. Where the tenants share the use of the only water closet in the building[14] or where each tenant does have his own facility but the facilities are located on one floor having but one stairway for ingress and egress, the stairway is common.[15]

Exterior Stairways

As with the interior stairway of a building, an exterior stairway is generally not reserved by the landlord for the common use of the tenant unless in the ordinary use of the building such a stairway is used by more than one tenant.[16] If the stair-

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the landlord in order to paint the roof once a year and to do repairs at the request of the tenant was not sufficient use to show that the landlord reserved possession and control. It would appear that the use of the stairway in the Raune case, footnote 9, to repair the skylight was a singular use whereas in the instant case the stairway would be used consistently at least once every year.

[11] 96 N. H. 288, 75 A. 2d 325 (1950). On separate occasions the landlord had to unlock the outside door to admit the tenant.

[12] 132 N. Y. S. 323 (1911).

[13] 135 N. Y. S. 783 (1912). It is interesting to note that the Hammersmith case was decided after the first trial of the Finkelstein case. In the subsequent trial of the latter case, evidence was introduced as to the ash cans at the bottom of the steps although there was no evidence of this in the first trial. The reviewing court made specific mention of this fact.

[14] Crudo v. Milton, 233 Mass. 229, 124 N. E. 30 (1919).

[15] The Coventry Leasehold Co. v. Welker, 43 Ohio App. 82, 182 N. E. 688 (1932); Brundrett v. Rosoff, 92 Conn. 698, 104 A. 67 (1918).

[16] Rice v. Ziegler, 128 Ohio St. 239, 190 N. E. 560 (1934).

way is used by more than one tenant it is common even though another stairway services the same area.[17] Even where the stairway is used by only one tenant, if it *can* be used by other tenants it is common.[18]

If the stairway leads to only one tenement it is part of the demised premises.[19] It remains part of the demised premises even though the lower portion of the stairway is used in common with other tenants.[20] In such a case, of course, the lower portion is a common stairway.

If the stairway leads to an area which is used in common it is not part of the demised premises. This appears to be the same rule as where an interior stairway leads to a common area reserved for the use of other tenants.[21] Therefore, the servicing of the only heating plant in a basement by the tenants[22] or use of an unfinished portion of a floor for storage purposes and the hanging of clothes by the other tenants[23] is an indication that the landlord retained possession and control over the stairway leading to these areas.

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[17] Dillehay v. Minor, 188 Iowa 37, 175 N. W. 838 (1920).

[18] West v. Hanley, 73 S. D. 540, 45 N. W. 2d 455 (1950); Thiel v. Kern, 34 S. 2d 296 (La. App. 1948); Karines v. Cullen, 183 Mass. 298, 67 N. E. 243 (1903). It is interesting to note that in this case the entrance doorways of the double house were side by side; and directly in front of the doorways was a single plank step which extended the width of both doorways and which rested on blocks at either end. It was held that the step was not in common. The plank came off when stepped upon by a member of a tenant's family. It would appear that each tenant could use the plank even if only to cross it at an angle. If this was so, it could have been argued that because more than one tenant used the plank (not merely that portion in front of each doorway) the step was common.

[19] Pitts v. Cincinnati Metropolitan Housing Authority, 160 Ohio St. 129, 113 N. E. 2d 869 (1953). The steps led up from the common yard directly to the doorway entrance. Flanders v. New Hampshire Savings Bank, 90 N. H. 285, 7 A. 2d 233 (1939). The stairway led directly to the tenement. Each tenement had its own entrance, porch and steps. Donovan v. Deeves, 167 N. Y. S. 942 (1917). The only separation between two stairways, one which led to a store and the other to a doorway to apartments, was a space of an inch or two. A tenant of one of the apartments was injured on the store stairway. There was evidence that the store stairway was expressly included in the store lease and that the store tenant and his customers used the store stairway exclusively.

[20] Bowman v. Goldsmith Bros. Co., 63 Ohio L. Abs. 428, 109 N. E. 2d 556 (1952), app. dism. 158 Ohio St. 121 (1952). There was evidence of the performance of janitorial services on the tenant's portion of the stairway.

[21] See footnotes 14 and 15.

[22] Murphy v. Illinois State Trust Co., 375 Ill. 310, 31 N. E. 2d 305 (1940).

[23] Brand v. Herdt, 45 S. W. 2d 878 (Mo. App., 1932).

Porches and Platforms

Where the tenant does not have the right to admit or exclude others, it is an indication that a porch is reserved for the common use of the tenants. In *Davies v. Kelley,*[24] a stairway led up to a second floor porch which extended across the rear of two apartments each of which had a doorway opening onto the porch. A member of the family of a downstairs tenant was injured due to a defect in the porch. Neither of the two rear tenants had the right or power to have exclusive possession of the entire porch. Therefore, it was held to be reserved by the landlord. But where the tenant acquires the power to admit or exclude persons, the porch becomes part of the demised premises.[25]

A porch is reserved for the common use of the tenants where it is used by two or more tenants,[26] and even though only a portion of the porch is used by two or more tenants, the entire porch is common because of such use.[27] In *Forguet v. DeSante*[28] the court said:

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[24] 112 Ohio St. 122, 146 N. E. 888 (1925).

[25] Cooper v. Roose, 151 Ohio St. 316, 85 N. E. 2d 545 (1949). A tenant had rented the upper two floors of a three floor tenement and subleased all but a rear apartment on the second floor. The tenant was injured due to a defect of the second floor porch. The tenant was in possession and control of the porch because it was part of the premise originally rented from the landlord.

[26] Lubritsky v. Lonergan, 140 Conn. 300, 99 A. 2d 187 (1953); Peterson v. Brune, 273 S. W. 2d 278 (Mo., 1954); Hinthorn v. Benfer, 90 Kans. 731, 136 P. 247 (1913). The porch was held common but there was evidence that the two tenants voluntarily divided the use of the porch to keep their various household goods separated. But in Phelan v. Fitzpatrick, 188 Mass. 237, 74 N. E. 326 (1905), a "platform" was held to be part of the demised premise even though a common stairway connected the platform with the one above and below. There was evidence that each tenant used his platform exclusively; the platform of the injured tenant, where the injury occurred, contained a water closet.

[27] Petrillo v. Maiuri, 138 Conn. 557, 86 A. 2d 869 (1952); Gill v. Jakstas, 325 Mass. 309, 90 N. E. 2d 527 (1949); Conroy v. Maxwell, 248 Mass. 92, 142 N. E. 809 (1924). In Klene v. Rider, 48 Ohio L. Abs. 1, 73 N. E. 2d 378 (1947), the porch was held to be for the joint use of each tenant and part of the demised premise! The porch was undivided and extended the width of the rear of a duplex. It was accessible only through the bedroom doorways of each apartment. However, when witnesses testified, they spoke of "our" side of the porch and the "other" (tenant's) side. This apparently impressed the court.

[28] 110 Conn. 367, 148 A. 139, 140 (1930); Schneider v. Dubinsky Realty Co., 344 Mo. 654, 127 S. W. 2d 691 (1939). It was held not necessary for the other tenant to pass over the portion of the injured tenant's porch to reach a stairway. However, there was also evidence that the landlord swept the area, that other tenants strung clothes lines on the porch, that it was used for the temporary storage of garbage.

> Where a portion of a porch is plainly reserved for a common use and the lease is silent, another portion shall not be held to be annexed to a particular tenement unless the intent of the parties to annex it appears with reasonable certainty.

The landlord cannot argue that only so much of the porch as is necessary for the use of the other tenants to reach the common stairway is reserved for the common use.[29] It does not matter where on the porch the injury occurs once it is established that the landlord retained possession and control.[30]

Even where two or more tenants or a tenant and a landlord do use a porch, mere occasional use alone is not enough to show that the porch is for the common use of the tenants.[31] Use of the tenant's porch by the landlord so as to conveniently reach the roof[32] or by another tenant who did not have a porch[33] or by another tenant who used the porch to haul furniture up onto the porch and then hauled the furniture from the porch through an upper floor window[34] is not enough to show that the landlord retained possession and control of the porch. These cases appear to indicate that if the use is but a singular act and not repeated the landlord has not retained possession and control. It seems difficult to justify a retention of possession and control because of mere occasional use, yet this is enough in some situations.[35]

Use of a porch by children for play purposes can justify a finding that the landlord did not part with possession and control.[36] Children appear to have a special place in the law, and courts do not seem to have any difficulty in allowing the children to recover.

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[29] Petrillo v. Maiuri, 138 Conn. 557, 86 A. 2d 869 (1952); Forguet v. De Sante, 110 Conn. 367, 148 A. 139 (1930).

[30] Lubritsky v. Lonergan, 140 Conn. 300, 99 A. 2d 187 (1953); Gill v. Jakstas, 325 Mass. 309, 90 N. E. 2d 527 (1949); Schneider v. Dubinsky Realty Co., 344 Mo. 654, 127 S. W. 2d 691 (1939); Forguet v. De Sante, 110 Conn. 367, 148 A. 139 (1930); Miller v. Geeser, 180 S. W. 3 (Mo. App. 1915), rehear. den. Nov. 23, 1915.

[31] Peterson v. Brune, 273 S. W. 2d 278 (Mo., 1954).

[32] Kilmer v. White, 254 N. Y. 64, 171 N. E. 908 (1930).

[33] Ludder v. Schwartzs, 291 Mass. 320, 196 N. E. 870 (1935); Cohen v. White, 206 Ky. 209, 266 S. W. 1078 (1924).

[34] Condon v. Winn, 252 Mass. 146, 147 N. E. 562 (1925).

[35] See footnotes 9 and 10.

[36] Bolcar v. Muntz, 119 N. J. L. 219, 195 A. 619 (1937), aff'd. 120 N. J. L. 186, 198 A. 847 (1938); Widing v. Penn Mutual Life Ins. Co., 95 Minn. 279, 104 N. W. 239 (1905).

The use of a post of a porch to attach clothes lines is more than mere occasional use when done by several tenants, and is thus a reservation by the landlord.[37] But when done by one tenant after obtaining permission from the other tenant of a two family dwelling it is not.[38]

Simply because a particular apartment or room is vacant at the time of injury has been seized upon by the landlord to argue that the passageway, stairway or porch cannot be in common because only one tenant has been using it. The courts have rejected this argument with various answers. One court asks, "Will the way be in common when the tenancy comes into existence?" [39] Another court has stated that the common way does not fluctuate with the renting of rooms or apartment.[40] An empty tenement does not give the sole tenant the right to occupy or control any of the empty tenements.[41] The best answer appears to be that the landlord will be presumed to reserve possession for the benefit of all who will have occasion to use the premise.[42]

When a yard, porch or stairway is used in common, the theory has been advanced that because some other area sought to be included as common rested upon the common way, it is part and parcel of it. Simply because steps rest upon a common yard[43] or because a porch is supported by the posts of the common porch below[44] is not enough to show that the landlord retained possession and control.

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[37] Boletho v. Muntz, 106 N. J. L. 449, 148 A. 737 (1930).

[38] Johnson v. Swarts, 27 N. Y. S. 2d 716 (1941). In a somewhat similar fact situation and decision, the court raised the question whether the right to use the upstairs clothes line went with the downstairs tenement. Spyredakis v. Poore, 94 N. H. 11, 45 A. 2d 220 (1946).

[39] Cuscuna v. Road, 289 Mass. 213, 193 N. E. 795 (1935).

[40] Dillehay v. Minor, 188 Iowa 37, 175 N. W. 838 (1920).

[41] Papakalos v. Shake, 91 N. H. 265, 18 A. 2d 377 (1941).

[42] Rice v. Ziegler, 128 Ohio St. 239, 190 N. E. 560 (1934).

[43] Cooper v. Roose, 151 Ohio St. 316, 85 N. E. 2d 545 (1949).

[44] Pitts v. Cincinnati Metropolitan Housing Authority, 160 Ohio St. 129, 113 N. E. 2d 869 (1953); Flanders v. New Hampshire Savings Bank, 90 N. H. 285, 7 A. 2d 233 (1939).