2183.

COUNTY AGRICULTURAL SOCIETIES—MAY SUBLET FAIR GROUNDS FOR HOLDING AUTO RACES—WHEN LIABLE FOR INJURIES TO PATRONS.

SYLLABUS:

1. *County agricultural societies organized under the provisions of Section* 9880, *General Code, may lawfully sublet fairgrounds under their management and control for the holding of automobile races.*

2. *County agricultural societies, which lease fairgrounds under their management and control, with the knowledge of their contemplated use by the lessee, for holding automobile races or other public entertainments, are liable in damages for injuries received by patrons of said lessee, if said injuries are the direct and proximate result of patent defects in the premises themselves, existing at the time of the making of said lease, or by reason of latent defects existing at that time, if such latent defects are such that by the use of reasonable care they might have been discovered and guarded against.*

3. *A county, in which there exists an agricultural society, by virtue of Section* 9880, *General Code, which society conducts and manages county fairs on fairgrounds owned and acquired in accordance with law, is not liable in damages for injuries received by patrons of said fair or by patrons of the lessees of said agricultural society.*

COLUMBUS, OHIO, June 1, 1928.

HON. OTTO J. BOESEL, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion which is as follows:

"The Secretary of the Auglaize County Agricultural Society has requested me to advise whether or not said Society has the authority to rent the Auglaize County Fair Grounds to private individuals for the purpose of conducting automobile races during the coming summer. The Auglaize County Agricultural Society has been conducting a County Fair here for a number of years, and I have some doubts as to the right of said Board to rent said premises for such purposes, and besides, the renting thereof might involve the County for liability in damages, should an accident occur during the conduct of such races, even though the Auglaize County Agricultural Society has no interest whatever in the conduct of said racing enterprise.

In view of the fact that the staging of races of this kind are in themselves dangerous and might result in death or injury to those attending, I would be pleased to have you advise me at the earliest possible date, first, whether or not the Auglaize County Agricultural Society, under the law, has authority to rent its Fair Grounds and premises for the purposes hereinbefore indicated, and, second, if so, would the County incur liability in damages, should anyone be injured during the conduct of said races, even though the Agricultural Society has no interest whatever in the conduct of the races."

Sections 9880 and 9885, General Code, omitting nonpertinent portions, are as follow:

"Section 9880. "When thirty or more persons, residents, of a county organize themselves into a county agricultural society, which adopts a constitution and by-laws, selects the usual and proper officers, and otherwise conducts its affairs in conformity to law, and the rules of the state board of

agriculture, and when such society has held an annual exhibition in accordance with Sections 9881, 9882 and 9984 of the General Code, and made proper report to the state board, * * *"

Section 9885. "County societies which have been, or may hereafter be organized, are declared bodies corporate and politic, and as such, shall be capable of suing and being sued, and of holding in fee simple such real estate as they have heretofore purchased, or may hereafter purchase, as sites whereon to hold their fairs. * * *"

In an opinion of the Attorney General published in the Annual Report of the Attorney General for 1913, Vol. II, page 1253, it was held that a county agricultural society organized under Section 9880 et seq., General Code, is not a public corporation but is for legal purposes deemed to be a private corporation, and, as such, possesses the rights, and is subject to the liabilities of a private corporation, although it may serve a public purpose. To the same effect are a number of later opinions of this department.

In the case of *Markley* vs. *State of Ohio*, 12 O. C. C. (N. S.), page 83, the court said:

"In *Dunn* vs. *Agricultural Society*, 46 O. S. 97, the Supreme Court of Ohio held that this, the Brown County Agricultural Society, was a private corporation aggregate, being a number of natural persons associated together by their free consent for the better accomplishment of their purposes, and were bound to the same care in the use of their property and conduct of their affairs to avoid injury to others as natural persons, and a disregard or neglect of that duty involves a like liability.

If this association was a public agency established exclusively for public purpose by the state, and connected with the administration of the local governments, then it might well be said the Legislature had authority to regulate even to prohibition of acts which would interfere with its successful operation. The court, however, having found that it was a private corporation it must be treated the same as a natural person, though it may serve a public purpose."

Having the status of a private corporation and the same control over its property as private corporations, I see no reason why it can not temporarily lease its grounds and the buildings and improvements thereon, for holding exhibitions such as race meets and the like, so long as such temporary use does not interfere with the primary use for which the grounds are required, and this would be true whether the county had paid a portion or all of the purchase money for the site in the first instance. The management and control of the grounds and the buildings thereon are in the agricultural society, and not in the county, even though the county had paid all or a portion of the purchase money when the fair grounds were acquired.

In the case of *Dunn* vs. *Agricultural Society*, 46 O. S. 93, referred to by the Circuit Court in *Markley* vs. *State of Ohio, supra*, it was held:

"A county agricultural society, organized under the act of February 28, 1846 (44 O. L. 70), and amendments thereto, which has constructed seats on its fair grounds for the use of its patrons, is liable, in its corporate capacity, to an action for damages, by a person who, while attending a fair held by it, and rightfully occupying the seats, sustains an injury in consequence of its negligence in their construction."

While what is now Section 9880, General Code, has been amended a number of times since the act of February 28, 1846 (44 O. L. 70), referred to in the Dunn Case, supra, and since the decision of that case, yet no change has been made therein which would affect the liability of county agricultural societies or change their status as private corporations.

Upon the authority of the Dunn case, supra, it follows that the liability of county agricultural societies for damages is to be measured by the same standards as is that of other private persons or corporations conducting similar institutions as county fairs, race meets or public exhibitions.

Although persons conducting places of public amusement or entertainment are held to a more strict accountability for injuries to patrons than owners of private premises generally, the rule is that they are not insurers of the safety of persons, who by invitation patronize their places of amusement, but that they owe to them only what under the particular circumstances is "ordinary" or "reasonable" care. There are exceptions to this rule, however, especially in cases involving scenic railways and similar amusement devices. In such cases, the principle of *res ipsa loquiter* applies, that is to say a presumption of negligence arises from the circumstances of an injury received on such amusement devices.

In the case of Martin vs. Senteker, 12 Ohio Appeals, page 46, it was held:

> "In an action for damages for injuries received in an amusement park while a passenger on a device commonly known as a coaster, the injury having been caused by the car leaving the track while rounding a curve, a presumption of negligence arises on the part of the defendant, and when the evidence is conflicting the question is for the jury."

There are many cases, involving injuries through the fall of grandstands or similar structures at places of public amusement, to the effect that the owner or manager of the premises owes a duty to the members of the public whom he invites to patronize the place, to see that such structures placed thereon for their use are reasonably safe, and that if injury occurs to a patron because structures of this kind are not reasonably safe, responsibility for the injury cannot be avoided on the ground that the negligence was that of an independent contractor, who built the stand.

A leading case on the question, is *Francis* vs. *Cockrell*, L. R., 5 Q. B. (Eng.) 501.

In the case of *Scott* vs. *University of Michigan Athletic Association*, 152 Mich. 684, it was held that the mere employment, by persons about to give an athletic exhibition, to which the public was invited upon payment of an admission fee, of competent persons to build and inspect a stand for the accommodation of patrons, did not absolve them for liability for injuries to a patron occasioned by the collapse of the stand through a patent defect, discoverable by the exercise of proper care, since, by inviting the public, and charging an admission fee, they impliedly contracted that, except for defects not discoverable by reasonable means, the stand was safe.

To the same effect is *Fox* vs. *Buffalo Park*, 47 N. Y. Supp. 788, affirmed without opinion in 163 N. Y. 559. In this case the court said:

> "Structures that are reared for public exhibitions, such as the one in question, are erected for the purpose of accommodating great numbers of people at times and under conditions often of excitement, when the numbers, activity, and demonstrations of the people may subject the structure to great weight and strain, and these conditions must be regarded as within the contemplation of the builders of the structures when they were created. These builders must be held responsible for the highest degree of care in constructing such concerns."

It was held also in *Fox* vs. *Buffalo Park*, (supra) that to render the defendant liable, actual notice to it of the defect was not necessary, and that liability could not be avoided on the ground that at the time the injury occurred the defendant had leased the premises to a club for holding races, and that it was the lessee, if any, that held out to the public the assurance of safety. The court said that the defendant participated in the profits of the undertaking, and that it was thus a party to the wrong of holding out an invitation to the public to come upon this dangerous and unsafe structure, and could not avoid liability.

In the case of *Jerrell* vs. *Harrisburg Fair & Park Association*, 215, Ill., App. 273, it was held that it is the duty of an association conducting an automobile race to use reasonable care to keep the grounds set apart for guests, adjacent to and surrounding a short turn in the race track, reasonably free from danger likely to occur in consequence of the race. In this case a patron of an association conducting an automobile race upon a half-mile track recovered damages for an injury sustained when one of the automobiles left the track at a sharp turn, injuring such patron, who was in the space set apart for spectators adjoining this part of the track.

In *Higgins* vs. *Franklin County Agricultural Society*, 100 Me. 565, it was said that a patron of a fair association, which maintains a track for horse racing, is not, in attempting to drive from one side to the other of the track, when assured of the safety of so doing by the attendant at the opening, bound to maintain a constant lookout for horses which may be approaching on the track.

There are many cases in which fair associations and the managers of race meets are held liable for failure to use reasonable care in the conducting of such meetings. This liability even extends to the using of reasonable care for the protection of the participants in the races. *Goodale* vs. *Worcester Agr. Soc.* 102 Mass. 401.

The question arises as to what this liability is, so far as it extends to third persons, as between lessor and lessee. It is a general rule that the duties and liabilities of a landlord to persons on leased premises, by the license or invitation of the tenant, are no greater than those owed by the landlord to the tenant himself. For this purpose they stand in the tenant's shoes. That is to say, a guest of the tenant is usually held to be so identified with the tenant that his right of recovery as against the landlord is the same as that of the tenant would be had he suffered the injury. Visitors, customers, servants, employees and licensees in general of the tenant are on the premises as guests of the tenant, and *not* of the landlord. Whatever rights such invitation or license from the lessee may confer as against such lessee, as against the lessor, it can give no greater rights than the lessee himself has. With regard to the liability of a landlord to licensees of the tenant for injuries received from defects on the premises existing at the time of the lease, it is generally conceded that so far as any contractual liability is concerned, the rule applies that the landlord does not, by making the lease, impliedly warrant that the premises are safe or fit for the use to which the lessee may intend to put them.

Notwithstanding the general rule above stated, exempting the landlord from liability for injuries arising from defects in the premises existing at the time of the lease, there are a number of decisions which hold that when the property is leased for public or semi-public purposes, and at the time is not safe for the purposes intended, or when there is a dangerous condition on the premises, which is in the nature of a nuisance, and the owner knew, or by the exercise of reasonable care ought to have known, of such condition, he can not evade liability for damages resulting from such condition, but it is his duty to make such property reasonably safe for the purpose intended, or to discontinue the conditions which are in the nature of nuisances, as the case may be. With reference to this rule, it is said in R. C. L. Vol. 16, page 1069:

> "This rule has been applied in the case of wharves or piers, hotels or where the use for which the premises are let is that of a public exhibition,

> meeting, etc. The public are deemed to be invited in such cases by the owners and they cannot receive rent for such uses and permit their tenants to bring, in large numbers, upon their property those who do not have the opportunity to inspect the property, unless the owners have exercised due care to see that it is safe. * * * There are also decisions in which the liability of the landlord for negligently leasing defective premises is extended to cases in which the owner has failed to employ reasonable skill and diligence in the erection of buildings to be leased to tenants."

In Cole, vs. Rome Savings Bank, 161 N. Y. Supp. 15, it was held that where premises leased consist of buildings or other structures in which public exhibitions and entertainments are to be given, for which the lessor receives compensation, there is an implied obligation on his part that they are reasonably fit and safe for that purpose. To the same effect is *Camp* vs. *Wood*, 76 N. Y. 92; *Albert* vs. *State*, 66 Md. 337; *Fox* vs. *Buffalo Park*, supra, and many others.

In *Junkermann* vs. *Tilyou Realty Co.* 213 N. Y. 404, a lessee who had sublet an amusement park intended for public use was held liable for an injury to a patron by the collapse of a defective boardwalk, when at the time of the lease the walk was in a dangerous condition, known to the lessee, or which by reasonable diligence might have been known to him. In this case the court said:

> "We may say that those who enter a structure designated for public amusement are there at the invitation, not only of the lessee who maintains it, but also of the lessor who has leased it for that purpose, and that the latter's liability is merely an instance of the general rule which charges an owner of property with a duty toward those whom he invites upon it."

In *Schofield* vs. *Wood*, 170 Mass. 415, it was held that the questions of negligence, and of contributory negligence were for the jury, and that a judgment for the plaintiff should be affirmed in an action for injury to a spectator at a polo game in the defendant's building, by the fall of the guard rail in front of the gallery.

To the same effect is the holding in the case of *Tulsa Entertainment Co.* vs. *Greenlees*, 205 Pac. 179, in which it was held that where the owner of a baseball park leases the same, or permits some other person to use it for the playing of baseball, and at the time of giving such lease or permission the seats for spectators of the game are in a dangerous condition, which is known to the owner, and on account of this condition, the seats collapse, to the injury of patrons, the owner is liable in damages for the injury; and the fact that he donates the use of the same, or leases it without monetary compensation paid to him by the persons so using it, does not make the patrons of the park, licensees on the premises, and change the owner's liability.

This liability of the lessors in the case under consideration would not in my opinion extend to the county, even though it had contributed a part or all of the purchase money for acquiring the fairgrounds in the first instance. The county is not a proprietor in the sense that the agricultural society is, and has nothing whatever to do with the management or conduct of the premises constituting the fairgrounds, or with the conduct and management of exhibitions held thereon, other than in a governmental capacity, and cannot be held liable in damages for injuries received by patrons of fairs conducted by the agricultural society, or other exhibitions or entertainments conducted by lessees of the agricultural society.

I am therefore of the opinion:

First, that the Auglaize County Agricultural Society may legally sublet the fairgrounds under their control for the holding of automobile races.

Second, that if said agricultural society lease these fairgrounds with the knowledge of their contemplated use by the lessees, for holding automobile races, and the patrons of the races are injured as a direct and proximate result of patent defects in the premises themselves, or by reason of latent defects in said premises, which by the use of reasonable care might have been discovered and guarded against, the agricultural society would be liable in damages for such injuries.

Third, the county of Auglaize would not be liable for injuries received by patrons of fairs conducted by the Auglaize County Agricultural Society or by patrons of the lessees of said Auglaize County Agricultural Society.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2184.

COURT—SUSPENSION OF SENTENCE—NO INHERENT AUTHORITY AFTER TERM—SPECIFIC CASE.

SYLLABUS:

1. *Where a court, in passing sentence in a criminal case, has acted under a misapprehension of the facts necessary and proper to be known in fixing the amount of the penalty, it may, in the exercise of judicial discretion, and in furtherance of justice, at the same term, and before the original sentence has gone into operation, or any action has been had upon it, revise and increase or diminish such sentence within the limits authorized by law.*

2. *Courts do not possess inherent power to suspend the execution of sentences imposed in criminal cases, except to stay the sentences for a time after conviction for the purpose of giving an opportunity for a motion for a new trial or in arrest of judgment, or during the pendency of a proceeding in error, or to afford time for executive clemency.*

3. *In the enactment of statutory provision dealing with the suspension of sentences in criminal cases, it will be presumed that the Legislature has exhausted the legislative intent in that respect and that it has not intended the practice to be followed in such cases to be extended further than the plain import of the statutory provisions.*

4. *The provisions of Section* 1666, *General Code, relating to the power of juvenile courts to grant conditional suspension of sentences in juvenile cases; of Section* 13010, *General Code, relating to conditional suspension of sentences in non-support cases; and of Section* 13706 *and related sections of the General Code, permitting the suspension of the imposition of sentences in criminal cases generally, are exclusive, and trial courts in Ohio are without power to grant suspensions of the execution or imposition of sentences except as may be authorized in one of these sections, or in the several sections, relating to the suspension of the execution of sentences during error proceedings.*

5. *Where a person convicted of operating, while intoxicated, a motor vehicle on the public streets or highways, is sentenced to pay a fine and costs and to be imprisoned in the county jail for a definite period of time, and such sentence has been carried into execution to the extent of committing such person to the county jail, the trial court is without power and jurisdiction to suspend so much of the jail sentence as remains unserved and release the prisoner, upon payment of the fine and costs.*