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Landlord and Tenant: Surrender--Construction of Lease

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are several instrumentalities, plaintiff's inability to show which caused the injury will not prevent *res ipsa* applying. But, under the Ybarra case, each defendant must have had control of at least one of these possibly harmful instrumentalities. In the Raber case the instrumentality was known, but it was not shown to have been in the control of the defendant employee.

It should be added that in the Ybarra case the court emphasized the peculiar relationship existing between an unconscious patient and all those who have control over his body while he is in that state, and in its conclusion, carefully limited itself to the particular facts of the case.[12] This could be a recognition by the court that they were extending the application of *res ipsa* and, hence, a desire on their part to see that caution was used in the future.

The doctrine of *res ipsa loquitur* is a doctrine of probabilities.[13] Yet in the Raber case we find that *res ipsa* applies against a defendant who *might* have had control of the instrumentality. Thus, it applies against one who *might* have been negligent. It does not take much imagination to see the possibilities which flow from that. Because there were only two defendants in the Raber case, the result may not seem too harsh and this may have moved the court to decide as it did. But suppose that the lessee had, instead of one, a dozen employees on the premises. Following the Raber case, would *res ipsa* apply against them all? As suggested by Traynor, J. in a dissenting opinion in the Raber case, a plaintiff who is struck by a falling flower-pot while passing a multistoried apartment building may recover judgment against all tenants because any one of them might have had control of the harmful object, and none of them can point out the guilty party. While this may seem a ridiculous example, it does illustrate the necessity of setting a limit somewhere, and the Raber case opens wide the gate.

Louis Edmunds.

LANDLORD AND TENANT: SURRENDER—CONSTRUCTION OF LEASE.—*A* recent California case applies an unusual rule for surrender by operation of law. In *Gates* v. *Reid*[1] a tenant leased a tourist resort for a term of five years. After taking possession and paying the agreed rental for a period of twenty months the tenant vacated. A clause in the lease gave the landlord an option in the event of the tenant's abandonment either (1) to terminate the lease and recover from the tenant the damages caused by his breach, or (2) to reenter and relet the premises to a new tenant without effecting a termination of the lease and recover any deficiency between the old and the new rental. Upon the tenant's abandoment the landlord reentered and operated the premises

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[12] *Id.*, at page 494. "We do not at this time undertake to state the extent to which the reasoning of this case may be applied to other situations. . . . We merely hold that where a plaintiff is unconscious and in the course of medical treatment, all those defendants who had any control over his body or the instrumentalities which might have caused the injuries may properly be called upon to meet the inference of negligence by giving an explanation of their conduct."

[13] "The plaintiff must satisfy the triers of fact that fifty-one per cent of the probabilities are in his favor. In a negligence case he is required only to convince the jury that it is more likely that his injuries were caused by negligence than that they were not. . . . A case of *res ipsa loquitur* is no exception to these familiar rules." (Prosser, *Res Ipsa Loquitur in California*, 37 Cal. L. Rev., at page 194.) "The rule of *res ipsa loquitur* is founded upon the doctrine of probabilities." (Bowley v. Mangrum & Otter (1906), 3 Cal. App. 229, 84 P. 996.) "The presumption arises from the inherent nature and character of the act causing the injury. Presumptions arise from the doctrine of probabilities." (107 Cal. 556, 40 P. 1021, 48 Am. St. Rep. 146.)

[1] 36 A. C. 12.

on his own account for nearly a year. He then relet them to a third party at a reduced rental and for a period extending beyond the term of the original lease. About a month later the landlord brought this action to recover the difference in rental between that provided in the original lease and that payable under the new lease. *Held:* The landlord may recover but the tenant may set off the amount of income derived from the premises by the landlord during the period of operation on his own account. Justice Edmonds dissented on the ground that the exercise of dominion over the premises by the landlord on his own behalf constituted a surrender of the lease by operation of law which prevented the landlord from thereafter pursuing either of the remedies provided by the lease.

A surrender of a tenancy may take place by express agreement or by operation of law.[2] The more difficult problems arise in cases involving the latter type of surrender. A common situation which gives rise to a surrender by operation of law is when a landlord resumes possession on his own behalf of premises abandoned by his tenant.[3] The theory on which a surrender by operation of law is founded is that the landlord may not do that which is inconsistent with the rights of the tenant's leasehold interest in the premises. If he retakes possession on his own account or does other acts inconsistent with the tenant's interest a surrender by operation of law results.

On abandonment by the tenant a landlord now has four possible remedies: (1) to take possession of the premises on his own behalf and terminate the lease; (2) to remain out of possession and sue for the rent as each installment falls due; (3) to relet the premises to a new tenant after giving notice of his intended action to the old tenant and then sue the old tenant for the difference between the agreed rental and the rental realized upon the reletting[4]; (4) to sue immediately on the theory that there has been an anticipatory breach of a contract of lease and recover damages measured by the difference between the reasonable rental value of the property and the agreed rental for the remainder of the term. In applying the third remedy it has been said that the landlord by reletting was in effect acting as agent for the tenant. The tenant's consent to the agency may be implied from his abandonment. Thus it can be said in these cases that there is no termination of the lease. The fourth remedy is a relatively modern development in the law of landlord and tenant. An example of this remedy is found in another recent California case[5] involving a mining lease in which the court allowed damages on the theory of anticipatory breach, but laid emphasis on the additional fact that the tenant covenanted to develop the property,[6] and therefore was to be distinguished somewhat from an ordinary lease.

Under the terms of the lease of the present case the landlord had two options upon abandonment by the tenant. The first was to terminate the lease and recover from the tenant all damages caused by the breach. Thus, in effect, the fourth remedy of anticipatory breach mentioned above was spelled out in the instrument. The other

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[2]4 Tiffany, sec. 961; Rognier v. Harnett, 46 Cal. App. 2d 570, 116 P. 2d 155; McCoy v. Celestin, 23 Cal. App. 2d 1, 71 P. 2d 936; Welcome v. Hess, 90 Cal. 507, 27 P. 369.

[3]4 Tiffany, sec. 962; Bernard v. Renard, 175 Cal. 230, 165 P. 694; Welcome v. Hess, *supra*; Baker v. Eilers Music Co., 26 Cal. App. 371, 146 P. 1056.

[4]Bradbury v. Higginson, 162 Cal. 602, 123 P. 797; Oliver v. Loydon, 163 Cal. 124, 124 P. 731; Melone Co. v. Acquistapace, 73 Cal. App. 199, 238 P. 734; Siller v. Dunn, 103 Cal. App. 154, 284 P. 232; Phillips-Hollman, Inc. v. Peerless Stages, 210 Cal. 253, 291 P. 178; De Hart v. Allen, 26 Cal. 2d 829, 161 P. 2d 453.

[5]Gold Mining and Water Co. v. Swinerton, 23 Cal. 2d 19, 142 P. 2d 22.

[6]The tenant expressly covenanted to enter into immediate possession of the property, and to have all water facilities and improvements fully completed and all machinery in operation, in time to take advantage of the water run off for the season of 1937-1938.