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Res Ipsa Loquitur: The Thing Speaks Again

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"It has many times been held that it is not essential to the creation of a condition subsequent that a forfeiture clause should be inserted,"[36] and,

"It is not material that a re-entry clause is not included in a conveyance, before the court will uphold the claim of a reversionary interest, if the language of the conveyance plainly imports that the grant conveys only a conditional fee,"[37] and,

"Where the language employed declares a condition and imports a forfeiture a clause of re-entry is not necessary,"[38]

may contain some technical truth, the facts are that since 1901 no condition relied upon to gain a forfeiture has been upheld by the California appellate courts unless a provision for forfeiture or right of entry for condition broken was expressly included.

A review of recent California cases,[39] where the conveyance was held sufficient to create an estate on condition subsequent indicates that an effective instrument would provide: (1) that the grant is made "*upon the express condition subsequent that*"; (2) that the use of the property designated is to be "the exclusive use"; (3) that the grant is made on the condition that the grantee not only initiate such use of the land but that he maintain such use "perpetually" and "forever"; (4) that "all the foregoing provisions are declared to be conditions in favor of the grantor upon which the title of the grantee shall depend, the grantor reserving to himself the power of termination, to re-enter on breach of any of the said conditions and terminate the estate of the grantee."

One infrequent example of such draftsmanship may be found in *Rosecrans v. Pacific Electric Railroad.*[40]

As the number and size of civic and charitable organizations continue to grow, limited grants of real property for their use will be made with greater frequency. If the limitations as to the use of the property are to have any effect beyond what resulted in the *Faust v. Little Rock School District* case, the draftsmen of the conveyancing instrument must compensate for this ever-strengthening bias of the courts against forfeiture by spelling out in exacting detail the intention of the grantor to create an estate on condition subsequent.[41]

Howard J. Privett.

RES IPSA LOQUITUR: THE "THING" SPEAKS AGAIN.—Alex Rohar was a careful man. At least the jury must have thought so when they reached a verdict in his favor, because Rohar could not have won if they had felt differently. But win he did—thanks to a legal doctrine which, although well known in the profession of law, was in all likelihood unknown to Rohar until his attorneys found that it might be employed in his suit against Henry Osborne, Sr., and his son, Henry, Jr., proprietors of Shank's Economy Store. Res ipsa loquitur—"the thing speaks for itself"—was then extended a little further by the California courts, and made to "speak" in Rohar's behalf.

The case[1] was born when defendants Osborne, who operated a hardware store known as Shank's Economy Store, rented a weed burner to plaintiff Rohar, a general

[36] Victoria Hospital Assn. v. All Persons, 169 Cal. 455, 147 Pac. 124 (1915).

[37] See note 25 *supra.*

[38] Fitzgerald v. County of Modoc, 164 Cal. 493, 129 Pac. 794 (1913).

[39] Rosecrans v. Pacific E. Ry., 21 Cal.2d 602, 134 P.2d 245 (1943); Romero v. Dept. of Public Works, 17 Cal.2d 189, 109 P.2d 662 (1941); see Miller v. Shaw, 50 Cal.App. 702, 195 Pac. 743 (1920); Firth v. Los Angeles Pac. Land Co., 28 Cal.App. 399, 152 Pac. 935 (1915).

[40] 21 Cal.2d 602, 134 P.2d 245 (1943).

[41] This estate and determinable estates are distinguished in Shultz v. Beers, 111 Cal.App.2d 820, 245 P.2d 334 (1952); Santa Monica v. Jones, 104 Cal.App.2d 463, 232 P.2d 55 (1951).

[1] Rohar v. Osborne, 133 A.C.A. 441, 284 P.2d 125 (1955).

hand on a chicken ranch operated by one W. E. Pruitt. Rental of the equipment was more or less of a courtesy extended by defendants to their customers, the rental being $1. The weed burner had been in use for some five years at the time that it was rented to plaintiff, and had been acquired by defendants from a manufacturing firm—which firm was also named as a defendant in this action, but whose case will not be discussed here. Suffice it to say that the manufacturer was absolved from liability in the trial court, and that plaintiff did not appeal.

The weed burner in question consisted of a cylindrical tank with a plate welded on at each end, the top end having a two-inch tube housing a small pump. This tube could be removed, and it was established at the trial that if this were done, then the inside of the tank would be visible. Attached to the top of the tank was a steel tube, which in turn connected to a flexible hose at the end of which was a heating coil and fire jet. The fuel, kerosene, would be poured into the two-inch hole, the top screwed on, and the pump operated so as to create pressure inside the tank. The kerosene would then be forced out through the hose and ignited.

Plaintiff testified that after obtaining the weed burner from the defendants he took it to the ranch where he was employed, filled it about two-thirds full, pumped it up to fifteen pounds pressure, and ignited it—all of which was found to be proper procedure. He used the burner for some time, occasionally laying it down while he went about fifty feet away to change a water hose. On the last occasion, he was stooping over to pick up the tank, when it exploded and injured him.

Evidence was given at the trial tending to show that the side walls and bottom panel of the tank were rusted on the inside, probably because of improper storage by defendants, that defendants had failed to inspect the inside of the tank for several years prior to the accident, and that by a visual inspection it could be ascertained that rust had weakened the metal.

Although plaintiff alleged other causes of action, including warranty, the court held that the case could well be decided on the basis of res ipsa loquitur—this despite the fact that the doctrine of res ipsa in California historically required exclusive control by the defendant of the instrumentality causing the damage. In *White v. Spreckels*,[2] decided in 1909, the court held that the doctrine was inapplicable where the instrumentality which exploded was not under the control of the defendant, or where the circumstances were such as to leave it doubtful whether it was the negligence of the plaintiff instead of the defendant which caused the injury. Thus the doctrine was found inapplicable to the case of an explosion of a radiator in possession of a lessee, which occurred while the lessee was drying towels thereon.

In 1928 it was said in *Michener v. Hutton*[3] that:

> "The courts of this state have long since adopted the rule as expressed in 1 Shearman and Redfield on Negligence (6th Ed.) p. 132, viz.: 'Where the thing is shown to be under the management *of the defendant* or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of due care." (Emphasis added.)

From these cases it seems evident that over the years some development must have taken place in California which has resulted in application of res ipsa loquitur even in situations where the defendant does not have actual and exclusive control of the instrumentality which does the harm. It appears that use of the words "probably," "probable," "probability," and "probabilities" in many decisions has given the doctrine its greatest opportunity for change.[4] In *Escola v. Coca Cola*

[2] White v. Spreckels, 10 Cal.App. 287, 101 Pac. 920 (1909).
[3] Michener v. Hutton, 203 Cal. 604, 607, 265 Pac. 238, 239 (1928).
[4] Harrison v. Sutter Street Ry. Co., 134 Cal. 549, 552, 66 Pac. 787, 788 (1901); Osgood v. Los

Bottling Co.,[5] decided in 1944, the court was concerned with the explosion of a bottle of carbonated beverage which the defendant therein had delivered to a restaurant where the plaintiff, a waitress, was employed. The court said:

> "An explosion such as took place here might have been caused by an excessive internal pressure in a sound bottle, by a defect in the glass of a bottle containing safe pressure, or by a combination of these two possible causes. The question is whether under the evidence there was a *probability* that defendant was negligent in any of these respects. If so, the doctrine of res ipsa loquitur applies." (Emphasis added.)[6]

This reasoning permitted the court to emphasize the other aspects of res ipsa loquitur while minimizing what appeared to be a head-on conflict between the old "control by defendant" requisite and the actual fact of no control by him at the time of the explosion. The court held that control by the defendant at a time prior to the explosion, that is, when the negligent act *probably* occurred (perhaps referring to a defect caused at the time of manufacture or at the time of bottling the beverage) was sufficient for purposes of applying the doctrine "*provided* plaintiff first proves that the condition of the instrumentality had not changed after it left defendant's possession."[7]

In 1952 another "exploding bottle" case arose—*Zentz v. Coca Cola Bottling Co.*[8] By then the California courts had decided to speak more plainly on the subject of control, and part of that opinion reads as follows:

> "Further, it is settled that the fact that the defendant relinquishes control of the instrumentality which causes the accident does not preclude application of the doctrine provided there is evidence that the instrumentality had not been improperly handled by the plaintiff or some third person, or its condition otherwise changed, after control was relinquished by the defendant. (Citations.) Of course, it must appear that the defendant had sufficient *control or connection* with the accident that it can be said that he was more *probably* than not the person responsible for plaintiff's injury." (Emphasis added.)[9]

It seems noteworthy that the court continued to indulge the word "control."

And finally in 1955 our principal case, *Rohar v. Osborne*, was taken on appeal to the California District Court of Appeal, Second District. That court went beyond the "exploding bottle" cases, and allowed recovery on the basis of res ipsa loquitur in a situation where the defendant not only did not have control of the instrumentality at the time of injury, but where plaintiff had obviously changed its condition (by placing kerosene in the tank, pumping up pressure, etc.). But nonetheless the court gave sanction to the rule as stated in the *Zentz* case, already quoted. A subsequent petition for a hearing in the California Supreme Court was denied.

Thus, the *Thing* has managed to retain its hold on the word "control," but it is today an infinitely weaker word than before. "It would be far better, and much confusion would be avoided, if the idea of 'control' were to be discarded altogether, and if we were to say merely that the apparent cause of the accident must be such that the defendant would be responsible for any negligence connected with it."[10] Will the California courts take that final step?

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Angeles, etc., Co., 137 Cal. 280, 282, 70 Pac. 169 (1902); Smith v. O'Donnell, 215 Cal. 714, 722, 12 P.2d 933 (1932); Godfrey v. Brown, 220 Cal. 57, 66, 29 P.2d 165 (1934); Honea v. City Dairy, Inc., 22 Cal.2d 614, 617, 620, 621, 140 P.2d 369 (1943); Leet v. Union Pac. R.R. Co., 25 Cal.2d 605, 619-621, 155 P.2d 42 (1944); LaPorte v. Houston, 33 Cal.2d 167, 169, 199 P.2d 665 (1948); Raber v. Tumin, 36 Cal.2d 654, 659-661, 226 P.2d 574 (1951).

[5] Escola v. Coca Cola Bottling Co. of Fresno, 24 Cal.2d 453, 150 P.2d 436 (1944).

[6] *Id.*, at 459, 150 P.2d at 439.

[7] *Id.*, at 458, 150 P.2d at 438.

[8] Zentz v. Coca Cola Co., 39 Cal.2d 436, 247 P.2d 344 (1952).

[9] *Id.*, at 44, 247 P.2d at 348.

[10] PROSSER, RES IPSA LOQUITUR IN CALIFORNIA, 37 Calif. L. Rev. 183 (1949).