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Duty of a Landlord to Third Persons Outside the Premises

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NOTES AND COMMENTS

DUTY OF A LANDLORD TO THIRD PERSONS OUTSIDE THE PREMISES

The recent case of *Munger v. Union Savings & Loan Assn.*,[1] presents a phase of the rather interesting question, under what factual circumstances will the courts find that the landlord after having leased his premises will continue to be held responsible for the *general duties* of an occupant in relation to third persons who are injured outside the premises, at a place where such persons have a right to be, by a defective condition or nuisance existing on the premises demised. In this case D, occupying a four-story building adjoining a public street, rented the third and fourth floors of the building to a tenant to be used for hotel purposes, and retained the two lower floors for the transaction of its own business. The contract between the parties provided "that any and all signs placed in said building must have approval of lessor in writing." When the tenant showed D a "picture" of a sign which he proposed to erect, D gave its oral approval for the erection of the sign. Thereafter, a sign was constructed which the tenant negligently fastened to the outside walls of the third story, in plain view, so that D might easily have seen the manner in which it was attached to the building. During a gust of wind, as P was standing on the sidewalk, the sign fell on her and severely injured her. P commenced an action against D to recover for the injuries sustained on the theory that D was in possession of the premises and was bound not to so use the premises as to injure a pedestrian using the public street, and that when a person was so injured, a *prima facie* case of negligence was made out. *Held* P recovers. The court stated (1) that the defendant had not given up full control and possession of the premises used for hotel purposes, as it required the tenant to obtain permission to erect signs, (2) that the provision requiring approval of the lessor to be in writing is immaterial where the rights of a non-negligent third party, on a public street, are involved, (3) that the case falls within the doctrine of *Poth v. Dexter Horton Estate*,[2] which the court construed to hold that a *prima facie* case of negligence has been made out against an owner of a

[1] 175 Wash. 455, 27 Pac. (2d) 709 (1933).

[2] 140 Wash. 272, 248 Pac. 274 (1926) (noted in 2 Wash. L. Rev. 52). In this case the plaintiff was struck by a window shade which had fallen from the upper stories of defendant's building. At the time of the accident, the defendant had leased a part of its building to various tenants and through the use of independent contractors was renovating a portion of the rooms of the upper stories. No showing was ever made that the defendant had made any inspection or that it had approved of the work done by such contractors. *Held*: P recovers as the doctrine of *res ipsa loquitur* applies. The court said: "The respondent, at the time she was injured, was upon a public street, at a place where she had a right to be, and was guilty of no conduct which in any degree caused or contributed to her injury. The appellant owned and controlled the building

building when it is shown that an object fell from the upper story of the building, striking and injuring an innocent pedestrian upon a public sidewalk, and (4) that it was proper to give an instruction on the subject of *res ipsa loquitur* under the facts of this case.

Before entering into the consideration of this case, an attempt will be made to make a brief summarized survey of the factual situations wherein the courts have found that the landlord owes a duty to such third person mentioned above, but no effort will be made to define the extent of that duty,[3] although it is well to bear in mind that, according to the common law, the landlord's liability is not an absolute one, but is based on fault.

Where an owner surrenders control of his property by leasing it to a tenant, in the absence of an agreement to the contrary, the tenant and not the landlord is obligated to keep it in a proper condition, and is *prima facie* liable for injuries to third persons from an improper use of the premises.[4] But a landlord will remain liable, even though he has parted with possession and control, where at the time of the lease a nuisance exists, or the condition of the premises is such that they must necessarily become a nuisance by reasonable user.[5] Nor will the landlord be released from such liability even though the tenant has promised to remove the condition.[6] Furthermore, it is generally held that the landlord is

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from which the object which injured her came. It was the appellant's duty to see that the building was so constructed and maintained as not to be a source of danger to the users of the street in its front. Its neglect of this duty is negligence. When, therefore, the respondent showed that the injured respondent was herself without fault, and that the object which caused the injury came from a building owned by the appellant, and of which it presumably had the management and control, they made out a *prima facie* case, sufficient, without more, to sustain recovery against it."

[3] See Harper, The Law of Torts, sec. 102; Restatement of the Law of Torts, sec. 249.

Lippman v. Subway Terminal Corp., 115 Cal. App. 363, 1 Pac. (2d) 1056 (1931) *West Chicago Masonic Assn. v. Cohn*, 192 Ill. 210, 61 N. E. 439 (1901) *Lowell v. Spaulding*, 4 Cush (Mass) 277, 50 Am. Dec. 775 (1849) *Clancy v. Byrne*, 56 N. Y. 129, 15 Am. Rep. 391 (1874) *Knight v. Foster* 163 N. C. 329, 79 S. E. 614, 50 L. R. A. (n.s.) 286 (1913) *Spokane v. Crane Co.*, 98 Wash. 49, 167 Pac. 63 (1917) cf. *Ward v. Hinklemen*, 37 Wash. 375, 79 Pac. 956 (1905) see 1 Tiffany Landlord and Tenant, secs. 96, 97, 101, Restatement of the Law of Torts, sec. 247.

[5] *Dennis v. Orange*, 110 Cal. App. 16, 293 Pac. 865 (1930) *Cannon City & C. C. R. Co. v. Oxtoby*, 45 Colo. 214, 100 Pac. 1127 (1909) *Calway v. William Schaal & Son*, 113 Conn. 586, 155 Atl. 813 (1931) *Dalay v. Savage*, 145 Mass. 38, 12 N. E. 841 (1887) *Haas v. Booth*, 182 Mich. 173, 148 N. W 337 (1914) *Isham v. Broderick et al.*, 89 Minn. 397, 95 N. W 224 (1903) cf. *Ahern v. Steele*, 115 N. Y. 203, 22 N. E. 193 (1889) *Larson v. Calder's Park Co.*, 54 Utah 325, 180 Pac. 599, 4 A. L. R. 731 (1919) (action by lessee's business invitee against lessor) *Oerter v. Ziegler* 59 Wash. 421, 109 Pac. 1058 (1910) (action by lessee's business invitee against lessor) *Rosewell v. Prior* 2 Salk. 459, 91 Eng. Reprint 397 (1608) 16 R. C. L. sec. 594.

[6] *Updegraff v. Ottumwa*, 210 Iowa 382, 226 N. W 928 (1929) cf. *Isham v. Broderick*, note 5, *supra*, *contra Gwinnell v. Eamer* L. R. 10 C. P. 658, L. T. N. S. 835 (1875 Eng.) Shearman & Redfield, on Negligence, vol. 3 (6th ed.), sec. 709-a.

responsible where the use as contemplated by the parties creates a nuisance. or a dangerous condition, which injures an innocent third party, on the ground that the landlord is a party to the wrong.[7] Some courts, however, indicate that in order to make the landlord liable for such a condition it must be one necessarily arising from the tenant's ordinary use of the premises for some purpose for which they were let, unavoidable by reasonable care on the tenant's part.[8] The better view would seem to be that the landlord must expect that the premises will be used in any manner that the terms of the lease would ordinarily impart, and if he could reasonably foresee that the tenant in doing so would create a nuisance or dangerous condition, the landlord should be liable, even if the tenant could prevent the condition by using the property otherwise.[9] But in the absence of either actual or constructive notice of the fact that the tenant intends to use the premise for an inherently dangerous purpose, the landlord should not be liable if they are so used.[10]

All of the courts agree that where the landlord has covenanted to keep the premises in repair, and that where due to his failure to do so a third person *outside the premises* is injured, the landlord must respond in damages. This result is reached either on the fallacious reasoning of avoiding circuity of action, or upon the proper ground that in so covenanting the landlord remains under an obligation to the public while he was in actual possession.[11] But where the landlord merely reserves a right to enter and make repairs and does not covenant to do so, he has not been held responsible for injuries sustained by third persons due to a lack of repair of the premises, on the ground that he was under no duty to repair.[12] Nor is a subsequent oral promise to make repairs sufficient since the promise is a mere gratuity [13]

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[7] *Calway v. Schaal & Sons*, note 5, *supra*; *Helwig v. Jordon*, 53 Ind. 21, 21 Am. Rep. 189 (1876) *Maloney v. Hayes*, 206 Mass. 1, 91 N. E. 911, 28 L. R. A. (n.s.) 200 (1910) *Brown v. White*, 202 Pa. 297, 51 Atl. 962, 58 L. R. A. 321 (1902) *Louisville & N. Terminal Co. v. Jacobs*, 109 Tenn. 727, 72 S. W 954 (1902) *Larson v. Calder's Park Co.*, note 5, *supra*, 16 R. C. L. sec 598.

[8] *Howard v. Central Amusement Co.*, 224 Mass. 344, 112 N. E. 857 (1916) *Backer v. Gates*, 279 Mo. 630, 216 S. W 775 (1919) *Peterson v. Bullion-Beck & Champion Min. Co.*, 33 Utah 20, 91 Pac. 1095, 14 Ann. Cas. 1122 (1907).

[9] *Albert v. State*, 66 Md. 325, 7 Atl. 697 (1887) *Fow v. Roberts*, 108 Pa. St. 489 (1885) *Larson v. Calder's Park Co.*, note 5 *supra*, 26 Mich. L. Rev. 531, 539.

[10] *Godnick v. Cohen*, 271 N. Y. Supp. 669 (1934).

[11] *Denver v. Soloman*, 2 Colo. App. 534, 31 Pac. 507 (1892) *Boyce v. Tallerman*, 183 Ill. 115, 55 N. E. 703 (1899) *Glidden v. Goodfellow*, 124 Minn. 101, 144 N. W 428 (1913) *Burdict v. Cheadle*, 26 Ohio St. 396, 20 Am. Rep. 767 (1875) *Payne v. Rogers*, 2 H. Bl. 350, 126 Eng. Reprint 590 (1794) 19 Harv. L. Rev. 384, 35 Harv. L. Rev. 633.

[12] *Boston v. Gray*, 144 Mass. 53, 10 N. E. 509 (1887) see *Meyer v. Pepperell Mfg. Co.*, 112 Me. 265, 119 Atl. 625, 22 N. C. C. A. 695 (1923) but see *Appel v. Muller*, 262 N. Y. 278, 186 N. E. 785, 82 A. L. R. 477 (1933).

[13] *Margulies v. Beck*, 130 N. Y. Supp. 159 (1911) *Mills v. Temple-West* 1 Times L. R. (Eng.) 503-D. C. (1885).

Generally all of the above rules of liability apply where the landlord gives a renewal lease.[14] So where a tenant creates, during his term, a nuisance, or dangerous condition, or allows the premises to become in such dangerous disrepair that by ordinary use after the landlord gives a renewal or re-lease, an innocent third person is wrongfully injured, the landlord is held to be responsbile. The cases reach this result on the ground that the landlord has a right of re-entry at the expiration of the old lease, and that, therefore, it is his duty to see that such a condition does not exist.[15] A conflict exists as to whether actual notice of the condition is necessary at the time of the renewal in order to hold the landlord on this ground, but it would seem that if this view is correct, the landlord should be held where by the exercise of due diligence the condition could have been discovered.[16] Two jurisdictions have refused to adopt this legal fiction of re-entry and affirmance of the condition in case of periodic tenancies, on the ground that there is a continuing interest on the part of the tenant.[17] But the transferee of the reversion is not liable where a nuisance exists at the time of the transfer because he did not create, nor has he the power to abate it.[18] And the landlord has not been held liable where he has given a renewal before the expiration of the old lease, although a nuisance exists at that time, since he has no power to put a stop to the nuisance.[19]

The above cases, in imposing liability, have done so on the ground that at some time the landlord has had it within his power to perform the duty of keeping his property in a condition that will cause no harm to the public, and that in failing to do so he is guilty of fault, in short, that he had control of the situation. Ordinarily when the landlord leases his property, he loses for a limited period of time his right to possession and control. It was not strange that the law, motivated by a humane desire to place liability on the shoulders of the person immediately controlling the situation, early adopted the view that, in the absence of fault, the tort liability in respect to the premises passed to the tenant in occupancy Inasmuch as the law has always allowed an owner to partially alienate his interest, it seems logically to follow that the landlord may not have so completely alienated his interest as to be relieved of his liability in respect to the condition of the premises. This may be true either because of the peculiar nature

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[14] *Ingwersen v. Rankin*, 47 N. J. L. 18, 54 Am. Rep. 109 (1885).

[15] 49 A. L. R. 1418 (cases collected)

[16] *Whiffin v. De Tweede Northwest & P Hypotheekbank*, 52 Idaho, 12 Pac. (2d) 271 (1932) *Timlin v. Standard Oil Co.*, 126 N. Y. 514, 24 N. E. 786 (1891) contra *State v. Williams*, 30 N. J. L. 102 (1862).

[17] *Hull v. Sherrod*, 97 Ill. App. 298 (1901) *Glass v. Colman*, 14 Wash. 635, 45 Pac. 310 (1896), followed in *Ward v. Hinkleman*, note 4, *supra.*

[18] *Woran v. Noble*, 41 Hun. 398 (1836).

[19] *Cunningham v. Rogers*, 225 Pa. 132, 73 Atl. 1094 (1909) but this rule should not apply where the landlord has knowledge.

of the tenancy or because of simple contract principles. Therefore, it is necessary in any determination of a landlord's liability to examine the particular leasehold interest which has passed.[20]

When a landlord leases the various parts of a building to different tenants, it is uniformly held that those parts of the building used in common by all which are necessary to the enjoyment of the portion leased, do not pass to the tenants, but remain under the control of the landlord, so that the landlord's tort obligations in respect to such parts are not altered by the lease.[21] And so, where an occupant of a building would be liable for injuries sustained by a pedestrian due to a defective condition in the building or because of a defect in the sidewalk in front of a building, the landlord is liable if he has leased the building to different tenants, where he exercises general control of the entire building.[22] But where the landlord remains in possession of a portion of a building, leasing the ground floor with an abutting sidewalk in which there is a coal hole, or similar appurtenance, the cover of which becomes defective after the execution of the lease, there is a conflict of authority, as to whether the landlord should be held liable where a pedestrian is injured, if the appurtenance was used exclusively by the tenant. One group of cases hold that the tenant, and not the landlord, is liable on the ground that the tenant is in full possession and control of the defective premises, so that the landlord would in effect be a trespasser if he attempted to make any repair.[23] The other group of cases hold the landlord liable on the theory that where an owner or landlord of a building is granted the privilege of excavating a vault under the sidewalk of a public thoroughfare, and has constructed in the sidewalk a grating, an appurtance through which light may enter, or a coal hole, or other similar device for the admission of air for the benefit of his premises, he assumes, by implication, the duty of keeping the sidewalk in as good a condition and as safe for the public as if such appurtenance had never been made, and that such duty is imposed by law for the public safety, and that, while the alienation of the entire premises, either permanently or temporarily, will transfer the duty to the grantee or tenant, still the lease of a portion only of the premises will not relieve the owner or

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[20] 26 Mich. L. Rev. 531, 542.

[21] *Young v. Talcott*, 114 Conn. 675, 159 Atl. 881 (1932) *Woodman v. Shepard*, 238 Mass. 196, 130 N. E. 194, 13 A. L. R. 982 (1921) *Klepper v. Seymour House Corp.*, 246 N. Y. 85, 158 N. E. 29, 62 A. L. R. 955 (1927) *O'Connor v. Andrews*, 81 Tex. 28, 16 S. W 628 (1891) *Leuch v. Dessert*, 137 Wash. 293, 242 Pac. 14 (1926).

[22] *Kirby v. Boylston Market Assn.*, 14 Gray (Mass.) 249, 74 Am. Dec. 682 (1859) *Jennings v. Van Schaick*, 108 N. Y. 530, 15 N. E. 424, 2 Am. St. Rep. 459 (1888) *Bruder v. Philadelphia*, 302 Pa. 378, 153 Atl. 725 (1931) *Poth v. Dexter Horton Estate*, note 2, *supra*.

[23] *West Chicago Masonic Assn. v. Cohn*, note 4, *supra*, *Runyon v. Los Angeles*, 40 Cal. App. 383, 180 Pac. 837 (1919), apparently overruled without mention in *Granucci v. Claasen et al.*, 204 Cal. 509, 269 Pac. 437, 59 A. L. R. 435 (1928).

landlord of the duty he owes to the public and place it upon the tenant of such leased portion of the entire premises, even though the opening of the sidewalk has no relation to any other part of the building than that in possession of the tenant.[24]

But a pedestrian on a public street who has sustained injuries occasioned through the defective condition of a part of a building demised to a tenant cannot hold the tenant's landlord responsible, where the only ground on which he is sought to be held liable is, that the landlord is in possession of other portions of the same building, though not the portion wherein the injury was occasioned.[25] One who leases a building or a part thereof for business purposes has the exclusive right, in the absence of an express provision to the contrary, to use the outside walls of the portion demised for advertising purposes, or for any purpose which does not amount to an unreasonable use.[26] The landlord is, therefore, not responsible for the negligence of his tenant in attaching a sign, or similar appurtenance, in a negligent manner to the portion demised,

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[24] The leading case expressing this doctrine is *Canandaigua v. Foster* 156 N. Y. 354, 66 Am. St. Rep. 575, 41 L. R. A. 554 (1898) followed in *Seattle v. Puget Sound Improvement Co.*, 47 Wash. 22, 91 Pac. 255, 125 Am. St. Rep. 884, 12 L. R. A. (n.s.) 949 (1907) criticized in *West Chicago v. Cohn*, note 4, *supra*, *Runyon v. Los Angeles*, note 23, *supra*. For an excellent discussion of both doctrines see *Mitchell v. Thomas*, 91 Mont. 370, 8 Pac. (2d) 639 (1932), wherein Justice Matthews, in a concurring opinion, criticizes both views as follows:

> "The financially responsible landlord, the owner of the building improved by the construction of any of these appurtenances or easements to his property who profits by reason of the special-privilege accorded him and not some fly-by-night tenant whose whereabouts may be unknown when action is to be brought, and, if available, may be judgment proof, should respond in damages for an injury suffered because that which enhances the value, the rent, or the rentability of his building, is suffered to become out of repair. It is to the owner, not the occupant of the building, that the privilege of using a portion of the sidewalk, for the benefit of the building is accorded, on the implied condition that he will not permit the appurtenances to become a public nuisance by becoming out of repair.
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> "As between themselves, the landlord and tenant may, of course, contract that the latter will make the repairs necessary but the public cannot be bound by their private contract, and the landlord cannot evade his public duty by private agreement to shift it to another, although such a contract may permit the landlord to recoup his losses from his tenant. Why then, should the mere fact that the owner has leased the building, in whole or in part, change the rule of liability recognized in all of decisions in this class of cases? In fact, those decisions which make the statement that it does, overlook the public duty of the owner and consider the duty of the landlord and tenant *inter sese*."

[25] *Boston v. Gray*, note 12, *supra*; *Rice v. White* (Mo. Sup.), 239 S. W 141 (1922) *Schroeck v. Reiss*, 46 App. Div. 502, 61 N. Y. Supp. 1054 (1900).

[26] *Smith v. Jensen*, 156 Ga. 814, 120 S. E. 417 (1932) *Snyder v. Kulesh*, 163 Iowa 748, 144 N. W 306 (1913) *Lowell v. Strahan*, 145 Mass. 1, 12 N. E. 401, 1 Am. St. Rep. 422 (1887) *Salinger v. North American Woolen Mills et al.*, 70 W Va. 151, 73 S. E. 312 (1911).

even though other tenants, or the landlord is in possession of the remainder of the premises, since it is not within his power to restrict the tenant in the use of the portion within the possession of the tenant.[27] Consequently, it has been held that a landlord who let different floors of her building to various tenants who had exclusive possession and control thereof, was not responsible for the negligence of a tenant in attaching a sign to the outside walls of the portion demised, though she had given her consent prior to its erection, as required by an ordinance, and even though the landlord had retained control of the outside walls for the purpose of making repairs. To support this decision it was pointed out that the ordinance was merely a recognition of the landlord's common law right to grant or withhold consent, that an erection of the sign was no nuisance in itself, that consent to its erection was no authorization to do such act in a wrongful manner so that the landlord could be treated as a party to the wrong; that the control retained arising from the duty to repair did not require the landlord to inspect the building except for the purposes of repair, and that although the landlord had retained some control of the outer walls for the purpose of making repairs, the sign had not fallen because the wall was not kept in repair, but because it was negligently erected or maintained, and that, therefore, the landlord was guilty of no breach of duty to the public in giving the tenant exclusive control of the sign.[28]

In any determination of a landlord's liability mentioned above, it is always necessary to ascertain whether or not the occupant is a tenant. This problem is, perhaps, best illustrated by the rooming-house cases. Where the occupant of a room in a rooming-house creates a dangerous situation, whereby a person on a public street is injured, it is held to be a question of fact as to whether the occupant is a lodger or a tenant. In cases the occupant is merely a lodger, the landlord has a right to enter the room and alleviate the evil, in which event he should be held responsible, but if the occupant is a tenant, the landlord has no such control and, therefore, no liability should attach for his failure to do anything about the condition.[29]

In the principal case, in the absence of the restriction contained in the lease, it is submitted that if there is a presumption raised by the doctrine of the *Poth* case, *supra,* it would have been rebutted by the owner merely showing that he had leased the upper floors of his building to a tenant, since there was no question as to the manner, or place, in which the sign was fastened and because

[27] *Walter v. Dennehy*, 93 Mo. App. 7 (1902) *Di Marco v. Isaac*, 74 Misc. 459, 132 N. Y. Supp. 363 (1911) (where the court apparently overlooked a landlord's liability where a renewal lease is given) *Smith v. Miller*, 31 Ohio C. C. 171 (1909).

[28] *Zolezzi v. Bruce-Brown*, 243 N. Y. 490, 154 N. E. 535, 49 A. L. R. 1414 (1926) (noted in 26 Mich. L. Rev. 116).

[29] *Wolk v. Pittsburgh Hotels Co.*, 284 Pa. St. 545, 131 Atl. 537 (1925) 26 Mich. L. Rev. 531, 542.

a lease ordinarily carries with it the right of exclusive possession and control.[30] The fact that the landlord is in possession of the lower floors should be immaterial.[31] Nor should the doctrine expressed in the "coal hole cases"[32] have any application since here the tenant creates a condition which the landlord would be powerless to prevent, nor can it be said that the landlord has gained anything by its creation. In the absence of the restriction, it would seem, therefore, to logically follow that the landlord should not be held responsible.

It is almost too apparent to require comment that the restriction was imposed by the landlord for its own benefit, and not for the benefit of the general public. Inasmuch as this retention of control is for its benefit, since it owes no duty to the public to divest itself of such control, and as the common law favors complete alienation, it would seem to follow that the landlord could relieve itself of its tort obligations owed to the public in respect to the portion let by merely relinquishing its right of control at any time, in any manner that it should choose. Then, the only basis upon which the court could have predicated liability would seem to be that, as a matter of fact, the consent given was not sufficient in form to evidence a relinquishment of the control retained. This conclusion could have been possibly reached on one of two gounds either that the facts showed a retention of control by the landlord, or that the provision was so broad that the giving of consent to the erection of the sign did not relieve the landlord of a power to supervise this sign. But it is submitted that the court must have found on the first ground, as the provision is apparently not as broad as indicated. When the court found that the landlord had retained control, of course, the case was clearly brought within the general principle holding the landlord liable.

In closing, it may be noted that the Washington Court has apparently again given, what is believed, undue weight to the doctrine of *res ipsa loquitur* in its application. Generally for the doctrine to apply there must be a concurrence of two facts—first, the accident must be one which does not ordinarily happen unless some one has been negligent, second, the defendant must have had control over the act causing the accident. The main fact in issue in the instant case was whether or not the defendant did have control. A study of the counsels' briefs reveals that at the close of the case, the plaintiff had proved without serious objection, that the sign had been negligently erected by the tenant on the outside walls of the portion demised, that the defendant had proved that it had leased the premises to a tenant who held the same subject to a restriction in regard to signs, and that the defendant had offered proof tending to show, at least, that the landlord had given up control over the sign. As previously stated, if an owner pre-

[30] Notes 25, 27, and 28, *supra.*
[31] See *Walter v. Dennehy,* note 27, *supra.*
[32] *Seattle v. Puget Sound,* note 24, *supra.*

sumably has possession and control of his property, such presumption should ordinarily be rebutted when it is proved that he has leased the premises. But here the defendant, in proving the lease, proved that it had retained control over the sign. Without the aid of any presumption whatsoever, the defendant was under a plain duty to prove that it had relinquished control.[33] This it attempted to do by offering proof, for which the very least that could be said is, that it tended to prove that fact. Therefore, it appears that the Washington Court has again allowed the plaintiff to rely upon the doctrine, as well as upon the evidence, to win his case.

ORVILLE K. ALGYER.

[33] It is submitted that if the above analysis is corrected, it would appear that the defendant would be obligated to put in an affirmative defense. Consequently, an instruction on the burden of proof on this issue would have been proper, and inasmuch as the Washington Court has in the past used the doctrine of *res ipsa loquitur* to shift the burden of proof, instead of the burden of coming forward with the evidence, the proper result was probably obtained.