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Real Property—Liability of Landlord Out of Possession

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operates subject to the dominion of the owner,[7] possesses only a bare license. Thus in the instant case, where the concessionaire did not have exclusive possession of any defined areas of the defendant's theaters, where the contract did not specify where his stands and machines were to be located, and where he was allowed to hawk his wares anywhere in the theater, a bare license existed, and the defendant was not subject to prosecution for larceny for misappropriation of complainant's deposit.

Liability of Landlord Out of Possession

In *De Clara v. Barber Steamship Lines,*[8] the Court was faced with a difficult problem concerning the liability in tort of a landlord out of possession. The action was one for wrongful death brought by the administratrix of decedent's estate. By a lease agreement defendant landlord had covenanted to make repairs at tenant's request and in addition had reserved the right to enter and inspect the premises at any time. In pursuance of this agreement landlord maintained an elaborately equipped repair crew on the property at all times with the understanding that landlord should be solely responsible for all repairs. Landlord was aware of the faulty equipment, which caused decedent's death, for some time prior to the accident.

The Court held, reversing the Appellate Division,[9] that a landlord has reserved such privileges of ownership as to incur liability in tort where he may enter the premises at will to inspect for and correct any defects he may find.

The owner of a public building or one which abuts upon a public thoroughfare owes a duty of care toward the public even though he has leased the premises to another, if he has covenanted to repair the property[10] Aside from this exception, which does not apply in the instant case, it was held in *Cullings v. Goetz,*[11] that a mere covenant to repair will not create such possession and control of the premises in the landlord so that he may be held liable for injuries to persons resulting from failure to repair.

The *Cullings* case, the leading New York case on the question of landlond liability, sets forth a general review of the New York law. Both the majority and

7. *Halpern v. Silver,* 187 Misc. 1023, 65 N. Y. S. 2d 336 (City Ct. 1946); *Muller v. Concourse Investors, supra,* note 6.
8. 309 N. Y. 620, 132 N.E. 2d 871 (1956).
9. 285 App. Div. 1062, 139 N. Y. S. 2d 568 (2d Dep't 1955).
10. *Appel v. Muller,* 262 N. Y. 278, 186 N.E. 785 (1933).
11. 256 N. Y. 287, 176 N.E. 397 (1931); This is no more than "the assumption of a burden for the benefit of the occupant with the consequences the same as if there had been a promise to repair by a plumber or contractor."

the dissent in the instant case seized upon this case as authority for their positions. In the view of the dissent, the *Cullings* case stands for the proposition that a person cannot be held liable for injuries incurred upon his property unless he has such control thereof that he may admit and exclude persons at will. It is probably true that absent any factors such as are present in the instant case, a landlord cannot be held liable if he does not have the power to admit and exclude. However, the *Cullings* case inferred that in some instances sufficient control to impose liability could be present though it fell short of such power.

It is, of course, established law that where a landlord has actually made repairs he is liable for his negligence in so repairing.[12] In view of this it is not a hard decision to hold him liable where he so controls the maintenance that the tenant could not repair the premises even had he so desired. The express holding of the Court, however, seems to be too great a departure from settled law. The Court was undoubtedly influenced by the facts in the case but neglected to so mention in its actual holding. The decision should be restricted to those situations where the tenant is unable to repair the premises himself without duplication of materials and effort. There would be no question but that the latter rule would be in complete harmony with existing law.

It is suggested that the Court could have reached a comparable decision without undue effort had it approached the problem from a different view. There is generally no liablity in tort to third persons where a person has completely failed to act even though he may be bound by contract.[13] He is considered in such cases merely to have withheld a benefit.[14] However, if he has gone forward under his promise to the point where failure to act would be not merely withholding a benefit but would be the working of an injury, he has a duty to all who might be injured by his failure to act to complete his contract.[15] In the instant case, defendant had obviously gone forward under his promise to repair to this extent. Thus the Court could have found liability for his failure to act under these circumstances without the danger of establishing an overly liberal precedent.

12. *Noble v. Marx,* 298 N. Y. 106, 81 N.E. 2d 40 (1948); *Antonsen v. Bay Ridge Sav. Bank,* 292 N. Y. 143, 54 N.E. 2d 338 (1944).

13. *H. R. Moch Co. v. Rensselaer Water Co.,* 247 N. Y. 160, 159 N.E. 896 (1928).

14. Note 13 *supra.*

15. *Marks v. Namhil Realty Co.,* 245 N. Y. 256, 157 N.E. 129 (1927); The liability is not on the breach of the contract to perform but on the failure to perform once having undertaken the job. See *Glanzer v. Shepard,* 233 N. Y. 236, 135 N.E. 275 (1922).