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* Nov. 18, 19
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* Feb. 2.

UNITED MOTORS SERVICE, INCORPORATED (DEFENDANT) ..... APPELLANT;

AND

J. T. HUTSON AND H. HUTSON, CARRYING ON BUSINESS AS J. T. & H. HUTSON, AND J. T. & H. HUTSON; AND OTHERS (FIVE FIRE INSURANCE COMPANIES) (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Landlord and tenant—Negligence—Evidence—Fire occurring in building occupied by lessee—Claim by lessor against lessee for amount of loss—Fire starting during cleaning operations in which gasolene used—Cause of fire uncertain—Res ipsa loquitur.

Defendant was in possession of a building under a lease from the plaintiffs H. (hereinafter called the plaintiffs), who had erected it for defendant's use as an automobile service garage and in sale of automobile parts. While defendant's employees (on a hot day, when the windows and doors were open) were cleaning a cement floor on the ground floor of the building, using gasolene, and scraping and scrubbing, and washing with oakite, heated in a tank on the ground floor by means of two gas jets under the tank, and washing off with water from a hose, a "whoof" (so described) occurred and flames appeared over said cement floor and a fire occurred which damaged the building. Plaintiffs sued to recover from defendants for the loss.

In the lease plaintiffs covenanted to pay taxes and insurance premiums; defendant covenanted to "repair, according to notice in writing, reasonable wear and tear and damage by fire, lightning and tempest * * * only excepted" (but was not required to make repairs to the roof, nor exterior or structural repairs) and that it would "leave the premises in good repair, reasonable wear and tear and damage by fire, lightning and tempest only excepted." The lease provided that if the building should be "so damaged by fire or other casualty or happening as to be substantially destroyed," then the lease should cease and any unearned rent paid in advance should be apportioned and refunded to defendant; but in case the building was not substantially destroyed, the premises should be restored by plaintiffs and a just proportion of the rent should abate until such restoration.

The exact cause of the ignition was not shown. Expert witnesses for plaintiffs testified that gasolene when vaporized was dangerous and that, given the proper proportions of air and gasolene vapour, ignition might be caused by a naked flame or an electric spark or a hot body such as a red-hot iron. Witnesses for defendant testified that, in such cleaning, it was customary to use gasolene and scrapers and brushes followed by an application of some cleansing substance, the whole washed off with water; but, as found in this Court, the evidence fell short of proving that it was the usual practice to clean such an area as that in question in the elapsed time under the conditions that existed that day.

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

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Held (affirming judgment of the Court of Appeal for Ontario, [1936] O.R. 225) that defendant should be held liable.

Per Duff C.J. and Davis J.: The circumstances established in evidence afforded reasonable evidence of negligence in the sense that, in the absence of explanation, the proper inference was that the damage caused was the result of defendant's negligence; and the explanations advanced were not of sufficient weight either to overturn or to neutralize the force of the inference arising from the facts proved.

The application and effect, in certain classes of cases, of the principle called *res ipsa loquitur* discussed and explained.

Per Rinfret, Crocket and Kerwin JJ.: A tenant is liable in damages to his landlord for waste, voluntary or permissive (*Yellowly* v. *Gower*, 11 Ex. 274; *The Conveyancing and Law of Property Act*, R.S.O. 1927, c. 137, ss. 28, 31). By virtue of *The Accidental Fires Act*, R.S.O. 1927, c. 146, in the absence of any relevant stipulation between a landlord and tenant, the latter would not be liable for any damage occasioned by a fire which should "accidentally begin" on the premises. The words "accidentally begin," as used in the Act, do not include a fire caused by negligence (*Filliter* v. *Phippard*, 11 Q.B. 347; *Canada Southern Ry. Co.* v. *Phelps*, 14 Can. S.C.R. 132; *Port Coquitlam* v. *Wilson*, [1923] S.C.R. 235). The effect of the above-mentioned clauses of the lease (discussed) was to leave defendant liable for damage by a fire caused through its negligence. The evidence established negligence on its part: the operations being under its control and the accident being such "as in the ordinary course of things does not happen if those who have the management use proper care", the maxim *res ipsa loquitur* served to make the circumstances "reasonable evidence, in the absence of explanation by the defendant that the accident arose from want of care" (*Scott* v. *London & St. Katherine Docks Co.*, 3 H. & C. 596); defendant did not show that at the time of the explosion the gas jets were not lighted, and it failed to suggest any explanation or warrantable inference as to the cause of the fire, and plaintiffs were entitled to rely on said maxim.

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario (1) reversing the judgment of Rose, C.J.H.C., dismissing the action.

The action was brought to recover for damage to a building by a fire which occurred while the building was in the defendant's possession under a lease to it from the plaintiffs Hutson. The action was brought in the names of the said plaintiffs Hutson and of certain fire insurance companies who alleged that they had paid the plaintiffs Hutson the sum of $19,493 for and in respect of the loss and damage caused to the plaintiffs Hutson by the fire in certain proportionate amounts and that the insurance companies respectively had demanded and accepted subrogation of all rights of recovery against the defendant to the extent of the payments made by said insurance companies

(1) [1936] O.R. 225; [1936] 2 D.L.R. 390.

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respectively to the plaintiffs Hutson. The plaintiffs claimed judgment for said sum of $19,493 in such proportionate amounts to the insurance companies and alternatively damages in the sum of $19,493.

Rose C.J.H.C. dismissed the action. The Court of Appeal allowed the plaintiffs' appeal and directed judgment for the plaintiffs in the sum of $11,000 (which amount had been suggested, upon reasons given, though not definitely fixed, by the trial judge, for assistance in settlement in case of a reversal of his finding upon the general question of liability. This amount was not in dispute in the appeals).

The material facts of the case are sufficiently stated in the judgment of Kerwin J. now reported. The appeal to this Court was dismissed with costs.

D. L. McCarthy K.C. and *W. J. Beaton K.C.* for the appellant.

W. N. Tilley K.C. and *F. Erichsen-Brown K.C.* for the respondents.

The judgment of Duff C.J. and Davis J. was delivered by

DUFF C.J.—I agree that this appeal should be dismissed.

On the argument of the appeal before us the respondents' case was put upon the ground of negligence and the sole question argued was whether or not the evidence justified the judgment of the Court of Appeal upon that basis. I am satisfied that the circumstances established in evidence afford reasonable evidence of negligence in the sense that, in the absence of explanation, the proper inference is that the damage caused was the result of the negligence of the appellants; and that the explanations advanced are not of sufficient weight either to overturn or to neutralize the force of the inference arising from the facts proved.

This is sufficient to dispose of the appeal, but it is desirable, perhaps, to add a word upon the principle which is often called *res ipsa loquitur*.

In truth, that phrase is comprehensively applied to cases widely differing in their essential characteristics. Most frequently it is applied where the principle stated in *Scott* v. *London and St. Katherine Docks Co.* (1) comes into play. It is there expounded in these words:

(1) (1865) 3 H. & C. 596, at 601.

There must be reasonable evidence of negligence. But where the thing is shewn 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 care.

Broadly speaking, in such cases, where the defendant produces an explanation equally consistent with negligence and with no negligence, the burden of establishing negligence still remains with the plaintiff. That is necessarily involved in the following passages from the judgment of Lord Halsbury in *Wakelin's* case (1):

My Lords, it is incumbent upon the plaintiff in this case to establish by proof that her husband's death has been caused by some negligence of the defendants, some negligent act, or some negligent omission, to which the injury complained of in this case, the death of the husband, is attributable. That is the fact to be proved. If that fact is not proved the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails, for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition; "*Ei qui affirmat non ei qui negat incumbit probatio.*" * * *

If the simple proposition with which I started is accurate, it is manifest that the plaintiff, who gives evidence of a state of facts which is equally consistent with the wrong of which she complains having been caused by—in this sense that it could not have occurred without—her husband's own negligence as by the negligence of the defendants, does not prove that it was caused by the defendants' negligence. She may indeed establish that the event has occurred through the joint negligence of both, but if that is the state of the evidence the plaintiff fails, because "*in pari delicto potior est conditio defendentis.*" It is true that the onus of proof may shift from time to time as matter of evidence, but still the question must ultimately arise whether the person who is bound to prove the affirmative of the issue, i.e., in this case the negligent act done, has discharged herself of that burden.

The phrase *res ipsa loquitur* is, however, used in connection with another class of cases where, by force of a specific rule of law, if certain facts are established then the defendant is liable unless he proves that the occurrence out of which the damage has arisen falls within the category of inevitable accident. One of these cases is that in which a ship in motion has run into a ship at anchor. The rule of

(1) *Wakelin* v. *London & South Western Ry. Co.*, (1886) 12 App. Cas. 41, at 44, 45.

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law in such a case is set forth by Fry, L.J., in *The Merchant Prince* (1):

> It is a case in which a ship in motion has run into a ship at anchor. The law appertaining to that class of case appears to be clear. In the case of *The Annot Lyle* (2) it was laid down by Lord Herschell that in such a case the cause of the collision might be an inevitable accident, but unless the defendants proved this they are liable in damages. The burden rests on the defendants to shew inevitable accident.

That appears to be the kind of case contemplated by the passage in the judgment of the Judicial Committee delivered by Lord Wright in *Winnipeg Electric Co.* v. *Geel* (3). There appears to be no satisfactory ground for thinking that their Lordships in that passage intended to say that where the circumstances, in the absence of explanation, afford reasonable ground for negligence, the onus is in the strict sense always shifted and that, in point of law, the burden always rests upon the defendant to establish affirmatively that he is not guilty of negligence. The fair construction of that passage seems to be that their Lordships there are dealing with cases in which there is a presumption of law established by the law itself that, certain facts being established, the defendant is liable. When that is so, to recur to the passage quoted above from Fry, L.J., the onus is upon the defendant to establish affirmatively inevitable accident or, in other words, absence of negligence on his part.

The appeal should be dismissed with costs.

The judgment of Rinfret, Crocket and Kerwin JJ. was delivered by

KERWIN J.—The appellant company (defendant) is the lessee of certain premises in Toronto owned by Hutson Brothers (two of the respondents), by virtue of a lease under seal. Only the following provisions of the lease need be mentioned:

> And the said Lessee covenants with the said Lessor to pay rent and to pay water and gas rates, electric lighting charges and accounts for power used for any purpose by the Lessee.
>
> And the said Lessor covenants to pay all taxes in connection with the demised premises and all premiums of insurance upon the buildings erected thereon.
>
> And the said Lessor may enter and view state of repair.

(1) [1892] P. 179, at 189. (2) (1886) 11 P.D. 114.
(3) [1932] A.C. 690.

And that the said Lessee will repair, according to notice in writing, reasonable wear and tear and damage by fire, lightning and tempest, riot or public disorder or act on the part of any governmental authority only excepted; provided nevertheless that the Lessee shall not be required to make repairs to the roof, nor exterior or structural repairs.

* * *

And that it will leave the premises in good repair, reasonable wear and tear and damage by fire, lightning and tempest only excepted.

* * *

If the building or buildings hereby let shall be so damaged by fire or other casualty or happening as to be substantially destroyed, then this lease shall cease and come to an end and any unearned rent paid in advance by the Lessee shall be apportioned and refunded to it, but in case the building or buildings are not substantially destroyed, then the demised premises shall be restored to their condition immediately prior to such damage or destruction with due diligence by the Lessor and a just proportion of the rent hereinbefore reserved, according to the extent of the injury or damage sustained by the demised premises, shall abate until the demised premises shall have been so restored and put in proper condition for use and occupancy. * * *

On June 16th, 1934, while the appellant was in possession under the lease, the building on the land was damaged. This building had been erected by Hutsons for the appellant company, to be used by the latter in its business of servicing automobiles and the sale of automobile parts. The building is on the south side of St. Albans street, and the westerly part of the ground floor has a cement floor. About eleven o'clock in the morning of the day the damage occurred, certain employees of the appellant company commenced to clean this floor. While counsel for the appellant strenuously argued that the sketch prepared by the present respondents and placed before the Court of Appeal for Ontario was misleading, and incorrectly indicated the lay-out of this portion of the building and the positions at the relevant time of three witnesses (employees of the appellant), and while he indicated before us, by reference to a plan filed at the trial, where in his opinion the various sections on the ground floor numbered from one to ten in the sketch used before the Court of Appeal should be, I have come to the conclusion that that sketch correctly shows the situation. It appears as part of the reasons for judgment of Mr. Justice Masten, and may be found on page 233 of the Ontario Reports for 1936.

It should be explained that the squares are not separated by partitions, but apparently correspond to the division lines in the cement floor as it was originally constructed. The cleaning operation consisted of applying approximately

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one gallon of gasolene to each square, and scraping the surface where necessary with a metal scraper and scrubbing with a stiff brush; after which the surface would be washed with a preparation known as oakite. This oakite was heated in a tank at the south end of the ground floor by means of two gas jets under the tank. After the application of the hot oakite, water from a hose would be turned on each square and the loose material washed into the sewer. Work had commenced at the southwest corner and had proceeded square by square to the north on the west side, and the workmen had then dealt similarly with the other squares on the east side, but proceeding from north to south. As workmen were available, and considering that some, if not all, would be away for lunch, work continued in this way until about three o'clock in the afternoon. The weather on the day in question was hot, and the windows and doors were open. The evidence discloses that the witness, Legassicke, was at the point indicated on the sketch; at his request another witness, Bailey, poured gasolene in front of Legassicke, so that the latter might brush the floor with the gasolene. Either he had commenced to brush or was about to do so, when what is described as a "whoof" occurred, and the entire westerly ground floor appeared to be in flames. From the time of the pouring of the gasolene, Bailey had time to walk but a few steps to the east. Best, another workman, also called as a witness, was a little further to the north and considerably east of the other two workmen, and he was burned and was forced to run through the battery room and thence through a window. Bailey and Legassicke ran through the door on the west side of the building, adjoining a lane. It is true that Jones, the appellant's service manager, gives a different version as to the positions of these men and as to where the fire first occurred. However, Jones was at the front or north end of the building, and, without referring further in detail to the evidence, I am satisfied that Jones is mistaken.

Professor Rogers and Professor Bain, called as expert witnesses for the plaintiffs (respondents), testified that gasolene when vaporized was dangerous, and that, given the proper proportions of air and gasolene vapour, ignition might be caused by a naked flame or an electric spark or a hot body such as a red-hot iron. The exact cause of the

ignition of the fumes is not shown, but the learned trial Judge concluded that it appeared sufficiently from the evidence that it might have been caused by a spark originated by the scraping or brushing of the floor; and he considered that the testimony of various witnesses called by the defendant showed that the method used by the defendant on the day in question was an ordinary and proper means of cleaning cement floors in garages. It is true that these witnesses testified that, where it was required to clean oil and grease from such floors, it was customary to use gasolene and scrapers and brushes followed by an application of some cleansing substance, the whole washed off with water. But the evidence falls short of proving that it was the usual practice to clean such an area in the elapsed time under the conditions that existed that day. This being so, I am left with the situation that, under the circumstances described, a fire occurred, and no definite explanation is forthcoming as to the cause.

Various grounds of liability were suggested by the respondents but a consideration of the relationship between the lessor and lessee and of the rights and duties flowing from that relationship and under the lease will, I believe, resolve the question.

By the common law lessees for years were not answerable to their landlords for the accidental or negligent burning of buildings upon the demised premises; but this was altered by the Statutes of Marlebridge and Gloucester, making such tenants liable in damages for waste. This included permissive as well as voluntary waste—*Yellowly* v. *Gower* (1); and see also the provisions of *The Conveyancing and Law of Property Act*, R.S.O. 1927, ch. 137, ss. 28 and 31:

> 28. A tenant by the curtesy, a dowress, a tenant for life, or for years, and the guardian of the estate of an infant, shall be impeachable for waste, and liable in damages to the person injured.
>
> 31. Lessees making or suffering waste on the demised premises without licence of the lessors shall be liable for the full damage so occasioned.

If there had been any doubt as to the decision in *Yellowly* v. *Gower* (1), the word "suffering" in s. 31 of the Ontario statute would seem to have removed it.

The Statutes of Marlebridge and Gloucester were followed by those of 6 Anne, ch. 31, and 14 Geo. III, ch. 78,

(1) (1855) 11 Ex. 274.

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which formed the basis of the Ontario statute now found as *The Accidental Fires Act*, R.S.O. 1927, ch. 146:

> No action shall be brought against any person in whose house or building or on whose land any fire shall accidentally begin, nor shall any recompense be made by him for any damage suffered thereby; but no contract or agreement made between landlord and tenant shall be hereby defeated or made void.

In the absence of any relevant stipulation between a landlord and tenant, the latter, by virtue of the provisions of this Act, would not be liable for any damage occasioned by a fire which should "accidentally begin." Many years ago it was decided that this expression did not include a fire caused by negligence—*Filliter* v. *Phippard* (2), and this decision has been followed ever since. For two examples in this Court see *Canada Southern Ry. Co.* v. *Phelps* (3), and *Port Coquitlam* v. *Wilson* (4).

The concluding portion of the Act, "but no contract or agreement made between landlord and tenant shall be hereby defeated or made void," renders it necessary to consider the terms of the lease.

That document contains the lessee's covenant to repair according to notice in writing. No question, however, was raised as to the absence of notice; in fact, the pleadings and the argument before this Court contain no reference as to the effect of the covenants, the respondents alleging liability on the ground of waste and on other grounds unconnected with the provisions of the lease. But the question of negligence was fought out at the trial and argued in the successive courts.

Certain exceptions to the obligation to repair are contained in the covenant, viz.:

> reasonable wear and tear and damage by fire, lightning and tempest, riot or public disorder or act on the part of any governmental authority only excepted;

and by the last of the clauses extracted from the lease it is provided that if the building is

> so damaged by fire or other casualty or happening as to be substantially destroyed

then the lease should cease,

> but in case the building or buildings are not substantially destroyed, then the demised premises shall be restored * * * by the Lessor.

and a provision is added for the proportionate abatement

(2) (1847) 11 Q.B. 347. (3) (1884) 14 Can. S.C.R. 132.
(4) [1923] S.C.R. 235.

of the rent until such restoration. The effect of these various clauses is to leave the appellant liable for damage by a fire caused through its negligence. Even without the clause last referred to, the appellant could not be relieved from such liability under the exception in the covenant to repair. It would require much stronger language to permit the appellant to escape payment for damages caused by its negligence; and while the terms "casualty or happening" in the last clause may be susceptible of an innocuous meaning in this connection, so far as the appellant is concerned, they may certainly not be treated as assisting it in any contrary interpretation.

So far as the courts of Ontario are concerned, the view here expressed was set forth in a judgment of the Divisional Court as long ago as 1907 in *Morris* v. *Cairncross* (1), as appears from the judgment of that court delivered by Sir William Meredith at page 570,—in this respect agreeing with the opinion of Chancellor Boyd, as expressed at p. 549.

In *Port Coquitlam* v. *Wilson* (2), which was not a dispute between landlord and tenant, it was stated at page 243 that,

> On principle, since the statute creates an exception to the general rule, the onus ought to be upon the defendant alleging that the statute applies to shew that the fire did accidentally begin; but the point is no doubt an arguable one with the weight of *dicta* probably in favour of an answer in the opposite sense.

It was found unnecessary to pass upon the point in that case and it is also unnecessary in the case at bar, since the evidence clearly establishes negligence on the part of the appellant.

Presuming the onus to rest upon the respondents, the record discloses that the appellant used gasolene in the manner and under the circumstances already specified and that a mixture of gasolene fumes and air is dangerous and will ignite in the ways described by Professors Rogers and Bain; an explosion did occur; gasolene had been used in the past in other garages to clean cement floors without an explosion; at the time of the fire the appellant's servants were working near the gas jets. The operations being under the control of the appellant and the accident being such "as in the ordinary course of things does not happen if those who have the management use proper care," the

(1) 14 Ont. L.R. 544. (2) [1923] S.C.R. 235.

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doctrine *res ipsa loquitur* serves to make these circumstances "reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." *Scott* v. *London & St. Katherine Docks Co.* (1).

The appellant did not show that at the time of the explosion the gas jets were not lighted, and, as already indicated, I agree with the Court of Appeal that there is nothing to warrant the inference that the fire occurred in the manner suggested by the appellant and mentioned by the trial Judge. The appellant therefore failed to suggest any explanation of the cause of the fire and the respondents are entitled to rely on the maxim.

It was argued that, because, subsequent to the fire, the Hutsons and the appellant had entered into an agreement whereby the latter would, during the course of repairing the building or the demised premises, use another building in which the Hutsons were interested, and that the rent paid for the latter should be deducted from the rent agreed upon by the lease in question, the Hutsons must be held to have agreed that the fire had occurred without negligence. It suffices to say that there is nothing in the document warranting any such conclusion, and it is therefore unnecessary to consider what would be the position if it were otherwise, in view of the fact that several insurance companies are plaintiffs (respondents) as well as the Hutsons. These companies had insured the building in question against loss or damage by fire, and, after notice to the appellant, had paid the Hutsons a sum which had been agreed upon to indemnify the latter against the loss.

The fact that the owners as well as the insurance companies are plaintiffs renders it unnecessary to consider the two cases cited by Mr. Justice Masten of *Mason* v. *Sainsbury* (2), and *Darrell* v. *Tibbitts* (3), and also the doctrine that a right of action for damages in the nature of waste, being in respect of a tort, is on grounds of public policy not capable of assignment (see *Defries* v. *Milne* (4)).

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Beaton, Bell & Ross.*

Solicitors for the respondents: *Erichsen-Brown & Strachan.*

(1) (1865) 3 H. & C. 596.
(2) (1782) 3 Dougl. 61.
(3) (1880) 5 Q.B.D. 560.
(4) [1913] 1 Ch. 98.