THE MUNICIPALITY OF THE CITY OF PORT COQUITLAM (DEFENDANT). } APPELLANT;

AND

ROBERT WILSON AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

THE MUNICIPALITY OF THE CITY OF PORT COQUITLAM (DEFENDANT). } APPELLANT;

AND

WILLIAM ROUTLEY (PLAINTIFF)..... RESPONDENT.

THE MUNICIPALITY OF THE CITY OF PORT COQUITLAM (DEFENDANT). } APPELLANT;

AND

DOLSON CRAIG AND OTHER (PLAINTIFFS) RESPONDENTS.

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*Oct. 11, 12.
Dec. 19.

ON APPEAL PER SALTUM FROM THE SUPREME COURT OF BRITISH COLUMBIA

Negligence—Municipal corporation—Fire originating in fire hall—Damage to adjoining property—Liability—Presumption of negligence—Onus—Misdirections of jury—Part of fire hall occupied by fire chief—Breach of municipal by-law in constructing chimney—Directions at a new trial in compliance with a judgment of an appellate court not appealed from—Res judicata or acquiescence.

The appellant municipality owned a wooden building described as a fire hall, in which a fire broke out which spread and destroyed property belonging to the respondents. The appellant, in preparing rooms for one McK., its chief of police and fire chief, had employed a plumber and paid the cost of installing a stove pipe bought by the appellant, extending from the kitchen stove, which was the property of McK. The pipe passed through a wooden ceiling, thence through an attic and thence out of the building through a wooden roof. A municipal by-law required that in such a case the pipe should be "enclosed in brick or tile walls with a space of at least three inches between the enclosing walls and the smoke pipe from bottom to top." Non-compliance with this by-law and that compliance would have prevented the escape of fire were admitted Some time before the fire occurred, the stove had been removed by McK. and another substituted, and one of the sections of the pipe

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

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was shortened in a manner which, it was alleged, added to the risk of fire. The trial judge directed the jury that the fact that a fire first broke out in appellant's premises was *prima facie* evidence of negligence and that the onus was on the appellant to acquit itself of liability by showing that the fire began accidentally; but he refused to direct that the appellant municipality was not liable for anything resulting from the act of McK. in making the pipe less safe. The verdict of the jury involved a finding that the fire originated from cinders or sparks escaping from the stove pipe into the attic.

Held, Mignault J. dissenting, that the appellant municipality was liable.

Held, also, Mignault J. *contra,* that there had not been misdirection as to the appellant's liability for the act of its servant McK. The appellant being responsible for the setting up in the first place of the stove, it was within the normal scope of McK.'s duty as appellant's servant to take notice of anything calculated to make the use of it a source of danger; McK.'s knowledge of what was done when the stove was changed was the knowledge of the municipality because his occupation was their occupation, and therefore McK.'s negligence was appellant's negligence.

Held, further, that owing to the jury's finding as to the cause of the fire, in view of the existence of its own by-law and of the fact that the fire would not have occurred if the by-law had been complied with, the appellant was *prima facie* liable for not having taken reasonable means to prevent harm to its neighbours by the escape of the fire it had authorized and that the charge of the trial judge, if textually open to criticism, was in substance unassailable. Mignault J. *contra.*

Per Idington and Mignault JJ.—The fact that directions given to the jury conformed to views expressed by the Court of Appeal in setting aside a former judgment dismissing this action and ordering a new trial does not prevent their correctness being challenged on appeal from the judgment based on the verdict at such new trial.

APPEAL *per saltum* from the judgment of the Supreme Court of British Columbia maintaining the respondents' actions.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgments now reported.

Farris K.C. for the appellant.

Lafleur K.C. for the respondent.

THE CHIEF JUSTICE.—For the reasons stated by my brother Duff, in which I concur, I would dismiss this appeal with costs.

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IDINGTON J.—Three actions were brought against appellant for damages alleged to have arisen from a fire originating in its fire hall, by reason of the negligence of said appellant, its servants or agents, and so spreading therefrom as to destroy real and personal property of each of the respective plaintiffs.

An order was made that the first of said actions should be tried as a test case and the others be stayed meantime, and I presume abide the result of such trial.

That case was accordingly tried and the verdict of the jury was for the defendant which upon appeal to the Court of Appeal for British Columbia was set aside and a new trial directed.

Upon the second trial which took place before Mr. Justice Morrison, the verdict of the jury was for the plaintiff and judgment entered accordingly with a direction that the damages should be determined by the registrar of the court.

Judgment was also entered in each of the others of the three cases in the same terms as in the case so tried.

Thereupon a motion was made before the Court of Appeal for leave to appeal to this court *per saltum* and such leave was given covering all the judgments in each of the three cases in question.

The objection was taken from the bench in course of the argument herein that the judgment in the action tried by granting a new trial overruled the direction of the learned trial judge on the first trial and as there was no appeal therefrom to this court it had the effect of creating a *res judicata* fatal to this appeal.

I cannot so hold for I think our decision in the cases of *Western Canada Power Co.* v. *Bergklint* (1), *Lavin* v. *Gaffin* (2), and *Kinney* v. *Fisher* (3), rather seem to ignore such a ground, though maintained by my brother Mr. Justice Duff.

I am on record in the second of these cases, if not all, as holding that the record of the judgment merely granted a new trial and did not pretend to definitely decide any point raised in argument.

(1) 54 Can. S.C.R. 285. (2) 61 Can. S.C.R. 356, at p. 360.
(3) 62 Can. S.C.R. 546 at p. 554.

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And in the lastly mentioned of these cases I pointed out that if the court below had so intended it could have so declared and put upon the party concerned the burden of appealing here before raising it again in the course of the new trial.

I still adhere to that view and in this case more decidedly so for the reason that Mr. Justice McPhilips, with whom Mr. Justice Eberts concurred, constituting the majority deciding, specifically declared that even if he erred in the view taken by him as to the direction of the trial judge, he explicitly held and declared that the verdict then in question was against the weight of evidence and perverse, and for that reason there must be a new trial, which left the whole matter open on the second trial and it was clearly conducted accordingly.

The material before the court herein upon which the Court of Appeal gave leave to appeal *per saltum* here, does not appear in the printed case before us.

Incidentally to my investigations of the point thus raised another of more serious import occurred to me as to the power to make such an order since the recent amendment to our Act. But as no such point taken in the argument I do not see that it should now be raised even if worth arguing.

Counsel before us did not seem to me desirous of taking the position suggested and above dealt with and I suspected felt bound by a possible assent when before the Court of Appeal to the course of coming here *per saltum* in hopes of ending the litigation at less expense.

In argument, however, counsel for appellant seemed desirous of giving to the charge of Mr. Justice Morrison the complexion that he was taking the view that he was bound by everything Mr. Justice McPhillips had said.

A perusal of the charge does not so impress me and I think it was clearly intended to apply the correct view of the law and that he succeeded therein.

And if a single sentence therein quoted by counsel for appellant is capable of the construction that he sought to place thereon—namely that, if a fire lawfully existing on the premises spread without any negligence, to the property of the plaintiff, then the defendant was liable unless and

until he the defendant established it was accidentally that it spread.

No such construction, I respectfully submit, can fairly be attributed to what the learned trial judge said.

The case was tried throughout, as it was claimed by the pleadings to rest, upon the negligence of the defendant (now appellant) or that of its servants for whom it must be held responsible and was so presented to the jury by the learned trial judge.

The appellant in preparing a place for its fire chief to live in by day and night, so that he would be close to the fire engine and other apparatus for extinguishing a fire, saw fit to use a bare stove pipe, reaching from the kitchen stove, up through a board floor above, and thence up to the roof of the attic, and unprotected in any way, such as directed by its own by-law which was in accord with common sense and ordinary procedure.

This was done by the tinsmith or plumber, whom the appellant employed to do the work, and paid therefor.

The by-law in question provided, amongst other things, as follows:—

> Metallic chimneys or smoke pipes shall not be used inside any building in such a way as to pass through the floors or roof of the same unless such metallic smoke pipe or chimneys are enclosed in brick or tile walls with an air space of at least three inches, between the enclosing walls and the smoke pipe from bottom to top. All outside metallic smoke stacks to be thoroughly anchored and guyed.

This is the rule which was laid down by appellant for others to follow and anything short of its observance by the appellant, unless something equally as safe, was in my opinion, gross negligence, such as should not, I submit, be tolerated or palliated by any court of justice, in such a case as this.

If the three-inch air space that section provides for between the metal and the brick or tile walls to enclose it, had existed, there never would have been that accumulation of soot on the part in question where the fire originated, and there would have been no fire such as in question.

The confusion apt to be created by telling about a new stove being brought in and substituted by the fire chief

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for the one first placed there, is all beside the question that was to be tried. He may or may not have made matters worse when so substituting one stove for another, but if he did he was the servant of the appellant in charge of that place and especially for the purpose of protecting the respondents and others from fire and his acts of negligence in that connection are such as his employer, the appellant, was in law responsible for.

Confusion is again apt to arise from the argument of counsel for appellant as to the law relevant to actions founded on a by-law.

It is not necessary to rest on any such right of action, nor was that contemplated by the learned judge's charge. The by-law is cogent evidence against appellant of what kind of care should be taken when a stove pipe is passed up through an attic board floor and thence to the roof to prevent such use of a stove pipe unless and until guarded in some such way as the by-law indicated.

This action is rested in the statement of claim solely upon negligence.

I am by no means to be taken as holding that it might not have been rested on that by-law alone for I have not seen why I should pass an opinion on such an irrelevant suggestion, though there might have been found serious objection if that had been the ground taken.

We have not the entire by-law before us as it would doubtless have been, and should have been, if any such attempt had been made to enable the court to apply the law as laid down by Lord Cairns in the leading case of *Atkinson* v. *Newcastle & Gateshead Waterworks Co.* (1), where he held that it must depend to a great extent on the purview of the particular statute in question.

The learned judge's charge heard by counsel was objected to briefly on a single point made by counsel for plaintiff and that explained without further objection and then appellant's counsel, he says, handed up some written memorandum not produced, of his objections.

The learned trial judge then took up the three points so made, point by point, and answered same to the appar-

(1) 2 Ex. D. 441.

ent satisfaction of the counsel, for nothing more was said by counsel anent same. If there was error in such explanation it was the duty of counsel to have pointed it out.

The second might have been more happily expressed but I can see no likelihood of it in any way having misled the jury.

If he had used the word "evidence" in support of the cause of action, instead of simply cause of action, when saying he could only repeat his explanation and so expressing what he said, it would perhaps have been better.

But no one could properly be misled by what was said. We must bear in mind the charge as a whole and its meaning so read, and credit the jury with common sense.

The third point in explanation was in substance a mode of putting in plain English which the jury could understand what lawyers and judges, when speaking to each other, refer to in latin as *res ipsa loquitur,* a perfectly well understood principle of law relative to evidence of negligence.

I see nothing in any of these, or other objections, to justify setting aside a verdict obtained on very clear evidence of negligence once the jury had got over the really difficult part of the case raised on much conflicting evidence to determine whether the fire originated from causes internal or external in relation to the fire hall.

Once they decided in favour of the former proposition the case was a simple one.

And with regard to this finding appellant does not now complain.

I think therefore the appeal should be dismissed with costs.

DUFF J.—The argument on this appeal touched upon heads of the law under which there are points still unsettled and in respect of which there is room for considerable difference of opinion; but the case before us is, I think, without difficulty once the facts and proceedings are clearly understood. The appellant municipality had a wooden building, described as a fire hall, in which a fire broke out in August, 1920; the fire spread and destroyed some property of the respondent. The building was primarily used

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as a place for keeping the fire engine and other apparatus for fire extinguishment used by the municipality. One McKinley, who was the chief of police and fire chief was in charge of the building for the municipality, occupying with his family certain rooms. In one of these rooms there was a stove which was the property of McKinley to which was attached a pipe that passed through a wooden ceiling, thence through an attic and thence out of the building through a wooden roof. This pipe was supplied by the municipality and the municipality paid the expense of putting it in. Some time before the fire broke out the stove was removed and another substituted and one of the sections of the pipe was shortened in a manner which, it was alleged, added to the risk of fire.

The principal controversy of fact at the trial was whether the fire which destroyed the building originated from cinders or sparks escaping from the stove pipe into the attic or from cinders alighting on the roof emanating from some source outside the premises. It is quite clear, I think, and it was not disputed on the argument that the verdict of the jury necessarily involved a finding that the fire originated from the stove.

At the time the stove and the pipe were set up there was in force a by-law requiring certain precautions to be taken to reduce the risk of fire from metal stove pipes or chimneys passing through a wooden or plaster partition or roof. The by-law required that in such cases the metal pipe should be surrounded by a casing of brick and it was not disputed that if the directions of the by-law had been complied with the precautions prescribed would have afforded sufficient protection in the circumstances in which the fire arose.

The responsibility of the occupier of a building or other premises for damage caused by a fire lighted there and escaping was from the earliest times governed by a rigorous rule.

> The law imposed (says Mr. Holdsworth, 3 Hist. of English Law at p. 309), a duty upon all householders to keep their fires from damaging their neighbours. Hence if a fire arose in a house by the act of any of the servants or guests, and damage was caused to the house of others, the owner was liable. He could only escape from liability if he could shew that the fire had originated from the act of a stranger.

The phrase "act of a stranger" is explained by the language of the authority cited by Mr. Holdsworth, Y.B. 2 Hy. IV Pasch, pl. 6:

Mes si home de hors ma meason encounter ma volunte boute la fewe en le straw de ma meason * * * de ceo jeo ne serra pas tenus de responder a eux.

A stranger is a person who is not one of my household either as guest or servant and who acts against my will. Act of God would no doubt also have been an answer. *Tuberville* v. *Stamp* (1), per Holt C.J. Indeed the law on this head might be considered an application to a special case of the principle which afterwards came to be recognized as the rule in *Rylands* v. *Fletcher* (2). It is true that the old form of declaration ran *quare negligenter custodivit ignem suum in clauso suo,* but *negligenter* here does not mean negligently in the sense of modern law. The import of it was that the defendant has failed to observe his legal duty to prevent his fire escaping and damaging others. *Lord Canterbury* v. *The Queen* (3), per Lord Lyndhurst. The law was changed by the statute of Anne and again by the statute of 14 Geo. III, c. 27, sec. 86) which no doubt is in force in British Columbia, and by which it was provided:

No action, suit, or process whatever, shall be had, maintained or prosecuted against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall * * * accidentally begin.

There are points still unsettled as to the effect of this statute. It was held in *Filliter* v. *Phippard* (4), that a fire is not accidental within the statute if it begins through negligence and it may be taken to be the law that fires intentionally lighted and fires arising through negligence are outside the statute and that responsibility in respect of them is governed by the common law. 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,—the view accepted by Macdonald C.J., in this case.

(1) (1697) 1 Salk. 13.
(2) L.R. 3 H.L. 330.
(3) 12 L.J. Ch. 281.
(4) [1847] 11 Q.B. 347.

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It is not necessary I think to pass upon the point for the purposes of this appeal. Again the judgments of the Lords Justices in the recent case of *Mosgrave* v. *Pandelis* (1), suggest some interesting questions; whether, for example, a fire which originated in a coal or cinder escaping from a domestic stove is, for the purpose of applying the statute, to be treated as beginning with the lighting of the fire in the stove or with the fire kindled through the agency of the escaping fragment. The effect of the statute as constructed by *Filliter* v. *Phippard* (2) is to impose upon the occupier of premises in which a fire is lighted at the very lowest the duty to take all reasonable precautions to prevent the fire getting beyond his own premises and doing injury to others; and an obligation to take reasonable precautions in dealing with such a dangerous element as fire is an obligation to take special care, *Ellerman* v. *Grayson* (3). The dictum of Atkin L.J. was expressly approved in the House of Lords by the Lord Chancellor as well as by Lords Finlay and Parmoor. To express this concretely in its application to the case before us the appellant municipality owed (at least) an obligation to its neighbours to take special care that the fire lighted by its servant in the stove should not, through the emission of cinders or otherwise, cause a fire to start in some unprotected part of the building which might spread beyond the premises and expose the neighbouring property to the risk of injury. If the view of Sir Henry Duke expressed in *Mosgrave* v. *Pandelis* (2) be the correct view the obligation was higher than this; it was an obligation to compensate a person suffering damage as the result of the escape of a fire intentionally lighted by their servant in the stove.

The jury having found that the fire originated through the escape of burning material from the stove and it being undisputed that the injurious consequences of the escape of such material would probably have been avoided if the precautions prescribed by the by-law had been observed, it is doubtful indeed whether a verdict in favour of the municipality by the jury could, given these premises, have been sustained as a reasonable finding. The municipality

(1) [1919] 2 K.B. 43. (2) 11 Q.B. 347.
(3) [1919] 2 K.B. 514.

by its council had in execution of statutory powers imposed the duty upon the owners of buildings to take the prescribed precautions. In so doing they had formally declared not only that these precautions ought reasonably to be expected from owners but that the considerations in favour of the adoption of them were so cogent and so obvious as to justify the council calling into play its legal authority in order to make the observance of them legally obligatory. I am unable to understand by what process the conclusion could be arrived at that the municipality taking neither these precautions nor any other precaution in substitution for them was taking all reasonable means to prevent harm by the escape of the fires it had authorized.

It seems at least to be beyond dispute that when the learned trial judge told the jury that *prima facie* the failure to observe the precautions laid down by the by-law was negligence he was giving a direction of which the municipality had no ground to complain.

These considerations afford also a complete answer to the objection that the learned trial judge misdirected the jury in telling them, as it may be conceded for the purpose of discussion he did, that the onus was on the municipality to acquit itself of the responsibility for the fire. I must observe in passing and I think it is quite clear that the learned trial judge stated in effect to the jury that they must first satisfy themselves that the fire originated on the appellant's premises. Assuming that to be found against the municipality, a finding involving, of course, the conclusion that the fire was caused by the escape of burning matter from the stove, the learned trial judge would have been quite right in directing the jury on any theory of the law that on the admitted facts (the existence of the by-law and the absence of the precautions prescribed by the by-law) the onus was on the municipality to acquit itself of responsibility; and even assuming on this point that the charge is open to some criticism textually it is impossible, I think, to assail the substance of it successfully.

Mr. Farris in his able argument dwelt upon the part played by McKinley, the fire chief, and argued that the jury should have been directed that the municipality was not responsible for anything resulting from what McKin-

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ley did in making the pipe less safe when the change of stoves occurred. I think the trial judge was right in refusing to give that direction. The responsibility of the municipality was as occupier of the fire hall. It was admitted that as regards the room in which the stove was McKinley was in occupation of it as the servant of the municipality as "fire chief."

That the premises should be sufficiently heated to make them habitable was a necessary incident of McKinley's occupation. The municipality was indisputably responsible in fact as well as in law for the setting up in the first place of a stove with metal pipes. It would be within the normal scope of McKinley's duty as servant of the municipality to permit the use of the stove for the purpose of heating the apartment. It would be within the normal scope of his duties as "fire chief" to take notice of anything calculated to make the use of the stove for heating purposes a source of danger to the building or the contents of the building; if he had observed, for example, that sections of the pipe had become disconnected in such a way as to constitute a manifest danger when the fire was lighted; so when the first stove was replaced by the second if the manipulation of the pipe created a danger or was likely to create a danger, then it was his duty as caretaker to see to it that the stove was not thereafter used until the defect was remedied. This was his duty and his knowledge of what was done when the pipes were changed was the knowledge of the municipality because his occupation was their occupation. McKinley's negligence therefore in permitting the stove to be used after the change was made was the negligence of the municipality.

On the assumption that the relevant fire is the fire that started in the attic, the question was this, was this fire ignited by matter escaping from the stove through the negligence of the municipality, that is to say, through the negligence of somebody for whom the municipality is responsible? Now the fire was put in the stove by or by permission of the servant of the municipality who was occupying the premises for the municipality who was aware of the *ex hypothesi* negligent setting up of the pipes which had taken place some time before. As between the municipal-

ity and the caretaker, the caretaker was no doubt guilty of a grave dereliction of duty on this hypothesis in lighting a fire in circumstances which exposed the building to the risk of being burned but he was nevertheless about the municipality's business and for the negligent conduct of that business it is responsible.

The old authorities lay down in general terms that the occupier of a house is responsible for fires set by his guests and by his servants. For example, in the authority cited above from Mr. Holdsworth's book, vol. III, it is stated at p. 309:

Si mon servant ou mon hosteller mette un chandel en un pariet, et le chandel eschiet en le straw, et arde tout ma meason et le meason de mon vicine auxi, en cest case jeo respondra al mon vicine del damage que il ad, *quod concedebatur per curiam.*

And in *Crogate* v. *Morris* (1), it is said:

If my friend come and lie in my house and set my neighbour's house on fire the action lieth against me.

On the other hand it has been laid down that the occupier is not responsible for the fire brought about by the act of a servant who is doing something entirely outside his employment, *McKenzie* v. *McLeod* (2); the theory apparently being that the act of the servant in such circumstances is the act of a "stranger."

But here we have a servant who admittedly as servant occupies for his master and whose occupation is therefore his occupation and who moreover as incidental to his occupation has his master's authority to light fires. An interesting case having a general similarity to the present came before the High Court of Australia a year or two ago. *Bugge* v. *Brown* (3). The defendant who was the owner of grazing land employed a servant who was entitled as part of his remuneration to be supplied with cooked meat. On one occasion the servant was supplied with raw meat with instructions to cook it at a certain house. Notwithstanding his instructions he lighted a fire in the open and by his negligence it escaped and damaged the plaintiff's land. It was held that the defendant was responsible on

(1) 1 Brownl & G. 197.
(2) 10 Bing. 385.
(3) 26 C.L.R. 110.

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the principle that where the act done is one of a class of acts which in given circumstances would be part of or incidental to the servant's duty the master is responsible unless the servant so acts as to make him a stranger in relation to his master with respect to the act he has committed so that what he does is the unauthorized act of a stranger. The same principle was applied in *Black* v. *Christ Church* (1). The present case presents even less difficulty because of the admission that McKinley's occupation was the occupation of the municipality.

What I have said is sufficient to dispose of the grounds upon which the appeal is based and I do not refer to the other questions discussed on the argument.

The appeal should be dismissed with costs.

ANGLIN J.—I concur with my brother Duff.

BRODEUR J.—I concur with my brother Duff.

MIGNAULT J. (dissenting).—There are three cases here which were tried together and consolidated for the purposes of this appeal.

The appellant obtained from the Court of Appeal of British Columbia special leave to appeal *per saltum,* under section 37 of The Supreme Court Act (Canada), from three judgments of Mr. Justice Morrison giving effect to a general verdict of a jury in favour of the respondents in three actions claiming damages for the destruction of their buildings and furniture by a fire which started on the appellant's property.

The trial before Mr. Justice Morrison was the second trial of the respondents' actions. A first trial had taken place before Mr. Justice Murphy and a jury, and the verdict being in favour of the present appellant, judgment was rendered accordingly. The present respondents appealed from these judgments to the Court of Appeal on the ground of misdirection to the jury by the trial judge and also on the ground that the verdict was against the weight of evidence, and they succeeded in their appeals. The judgment of the court was rendered by Mr. Justice

(1) [1894] A.C. 48 at p. 55.

McPhillips, with whom Mr. Justice Eberts concurred, the Chief Justice dissenting. In his reasons for judgment, Mr. Justice McPhillips found error in the direction given to the jury in that the jury were told that the onus of proving negligence was on the plaintiffs and not on the defendant in whose building the fire originated, and against whom therefore there was established a *prima facie* case of negligence. Mr. Justice McPhillips further expressed the opinion that in not constructing its chimney in the manner required by its by-law, the defendant committed a breach of a statutory condition which imported negligence, and that the trial judge erred on this point in his charge to the jury. He also said that the defendant was liable for the condition of the building and for the acts of its servant, McKinley, in whose premises the fire originated. The conclusion of Mr. Justice McPhillips was that the learned trial judge had misdirected the jury, but that at all events the verdict of the jury was against the weight of evidence and perverse, and he ordered a new trial.

No appeal was taken from the judgment of the Court of Appeal, but a new trial took place and the learned trial judge (Mr. Justice Morrison) charged the jury in substantial compliance with the judgment of the Court of Appeal as rendered by Mr. Justice McPhillips, possibly adding thereto when he told the jury that where a thing is shewn to be under the management, control or custody of the defendant or its 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 event arose from want of care on the part of the defendant (see *Scott* v. *London and St. Katherine Docks Co.* (1).

The verdict this time having been against the present appellant, the latter now appeals by leave directly to this court and the grounds of its appeal are solely that the learned trial judge misdirected the jury. The direction here in question having been given to the jury in substantial compliance with the judgment of the Court of

(1) 3 H. & C. 596.

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Appeal, this appeal really questions the soundness of the latter judgment from which the appellant did not appeal. The question now is whether it should be allowed to do so.

The respondent objects that there is *res judicata* against the appellant; that the direction given to the jury in the second trial was the proper direction; or at least that the appellant having acquiesced in the judgment of the Court of Appeal and taken the chances of a new trial cannot now complain that the jury were charged in compliance with that judgment.

I do not think that the doctrine of *res judicata* applies here. What was decided was that the first judge misdirected the jury and the first trial was set aside. A second trial took place and the second judge charged the jury substantially as the Court of Appeal decided the first judge should have done. The appellant now claims that the second judge misdirected the jury. Nothing was determined, unless it could be said to have been determined in advance, with respect to the correctness and legality of the charge to the jury in the second trial, but at the most there was an expression of opinion as to the proper direction to give the jury in a case such as that disclosed by the evidence adduced in the first trial. This does not therefore bring the matter within the rule of *res judicata.*

The objection of acquiescence by the appellant, or, more properly expressed, the objection that the appellant is now estopped from contending that directions given to the jury in substantial compliance with the judgment of the Court of Appeal, are misdirections in law,—is certainly a much stronger one. I have carefully looked at the cases, but have failed to find any case where a judgment ordering a new trial was held to estop a party from afterwards contending in the new trial that the jury should not be charged as the appellate court held that the first judge should have charged them. It may however be noted that Halsbury (Laws of England) vol. 13 vo. *Estoppel,* no. 463, says:

> Provided a matter in issue is determined with certainty by the judgment, an estoppel may arise where a plea of *res judicata* could never be established * * * A party is precluded from contending the contrary of any precise point which, having been once distinctly put in issue, has been solemnly found against him.

But none of the decisions referred to in the notes were in connection with new trials. There are however two decisions of this court in which a somewhat similar question arose in reference to the effect of an order for a new trial.

In *Western Canada Power Co.* v. *Bergklint* (1), Mr. Justice Duff, at p. 299, said:—

> There is some authority indicating that where a court of appeal in granting a new trial decides a substantive question in the litigation, that question, for the purposes of that litigation, is to be taken to have been conclusively determined as between the parties. I refer without further discussion to the observations of Lord Macnaghten in *Badar Bee* v. *Habib Merican Noordin* (2), and to their Lordships' decision in *Ram Kirpal Shukul* v. *Mussumat Rup Kuari* (3), (see especially p. 41 as to the effect of determinations in interlocutory judgments upon the rights of parties in the suits in which the judgments are given). It seems quite clear that for this purpose we are not confined to the formal judgment *Kali Krishna Tagore* v. *Secretary of State for India* (4), and *Pether-permal Chetty* v. *Mumandi Servai* (5).

I have carefully examined the cases cited by my learned brother but in none of them had a new trial been granted, the question being as to the effect of a former judgment in proceedings between the same parties.

But in *Kinney* v. *Fisher* (6) a new trial of a libel action had been ordered and all the judges of the appellate court had expressed the opinion that the letter containing the alleged libel was written on a privileged occasion. The head-note of the report of the decision of the appellate court (7) is misleading, for it assumes that the action was dismissed. The report itself shows however that the court was evenly divided, as to the dismissal of the action, and in the result, which the report does not mention, a new trial was ordered. At the new trial the action was dismissed at the close of the plaintiff's case and on a second appeal the appellate court, again expressing the opinion that the occasion was privileged, sent the case back for retrial on the issue of malice. The defendant then appealed to this court, but his appeal was dismissed by a majority

(1) 54 Can. S.C.R. 285.
(2) [1909] A.C. 615 at p. 623.
(3) 11 Ind. App. 37.
(4) 15 Ind. App. 186 at p. 192.
(5) 35 Ind. App. 98, at p. 102.
(6) 62 Can. S.C.R. 546.
(7) 53 N.S.R. Ep. 406.

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on the ground that as the first order for a new trial was without restriction and the evidence given on the former trial was not before the court, there was no *res judicata* on the question of privilege. Mr. Justice Duff dissented from the judgment in this court, relying on the opinion he had expressed in the *Bergklint Case* (1).

Kinney v. *Fisher* (2) would seem therefore to support the argument that no question of *res judicata* can arise here, nor would it leave room for the contention that independently of *res judicata* there is ground for estoppel, for the order for the new trial, in this case as in *Kinney* v. *Fisher* (2), was made without restriction. It is proper to add that here the new trial was ordered not merely because, in the opinion of the appellate court, the trial judge had misdirected the jury, but because it was considered that the verdict was against the weight of evidence. It would have been, to say the least, very unlikely that this court would have set aside an order for a new trial under these circumstances, (Cameron's Practice and cases cited, vol. 1, p. 197 et seq.), and the failure of the defendant to appeal from the judgment of the court of appeal does not necessarily shew that it acquiesced in all the reasons for which a new trial was ordered.

Coming now to the merits of the present appeal, which is brought here solely on the ground of misdirection by the learned trial judge, the appellant, in its factum, particularizes the alleged misdirections as follows:

1. In directing the jury that there was a presumption of negligence against the defendant if the jury found that the fire originated on its premises.

2. In directing the jury that "where the thing is shown to be under the management, control or custody of the defendant or its servants * * * and the accident or incident 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 event arose from want of care on the part of the defendant."

3. In directing the jury in effect that this presumption could only be rebutted by showing it was "pure accident," namely, that it was due to "some extraneous circumstance or condition over which the agent or servant or employee of the municipality had no control."

4. In directing the jury that the municipality was liable for the acts of its servant (the chief of police) in changing the stoves.

(1) 54 Can. S.C.R. 285. (2) 62 Can. S.C.R. 546.

5. In directing the jury that the breach of the building by-law was the breach of a statutory duty *prima facie* giving a right of action to the person injured.

I will deal with each of these alleged misdirections in the order mentioned.

1. Consideration of the first point raises the important question of the liability of a person for damage caused by a fire which originates on his premises.

A short but authoritative statement of the law, before it was changed by statute, may be found in the judgment of Lord Tenterden C.J., in *Becquet* v. *MacCarthy* (1):

> By the law of this country before it was altered by the statute 6 Anne c. 31, s. 6, if a fire began on a man's own premises, by which those of his neighbour were injured, the latter, in an action brought for such an injury, would be bound in the first instance to shew how the fire began, but the presumption would be (unless it were shewn to have originated from some external cause) that it arose from the neglect of some person in the house.

The change made by statute (see 14 Geo. III, ch. 78, sect. 86) was as follows:

> 86. No action, suit or process whatever shall be had, maintained, or prosecuted against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall * * * accidentally begin, nor shall any recompense be made by such person, for any damage suffered thereby, any law, usage or custom to the contrary notwithstanding.

The object of the statute is to relieve a person from liability when the fire begins accidentally, and it is of the nature of an exception to the general rule of liability. It would seem to follow that the onus of shewing that the fire did begin accidentally is on the person who claims the benefit of the statute in order to escape from the legal presumption of negligence. In other words, the statute affords a defence, and it is not for the plaintiff to shew, in the first instance, that the fire did not begin accidentally; he can rest on the presumption until the defendant has rebutted it by shewing that the fire began accidentally.

I think therefore there was no misdirection as to the first point.

2. The words which the appellant quotes from the learned judge's charge are taken from the judgment of

(1) 2 B. & Ad. 951.

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Erle C.J., in *Scott* v. *London & St. Katherine Dock Co.* (1), and are generally considered as expressing the rule *res ipsa loquitur*. This rule admits of a presumption of negligence similar to the one just adverted to. Inasmuch as by law the person in whose premises a fire begins is liable for the damage it causes to neighbouring property unless he shews that it began accidentally, no prejudice could be caused by stating to the jury the rule in the terms of *Scott* v. *London & St. Katherine Dock Co.* (1), which is very largely to the same effect as the other rule. This ground of alleged misdirection therefore also fails.

3. Taken with the context, I do not think that the few words quoted by the appellant amount to misdirection. The learned judge correctly stated that there is a presumption of negligence against the person on whose premises a fire originates. He then added that it is for such person to show that the fire was accidental. The distinction between "accident" and "pure accident" is perhaps a difficult one for the jury's understanding. Nevertheless I do not consider that the jury were misled. The learned trial judge had previously told them that it was for the defendant to satisfy them that he was not, as charged by the plaintiff, negligent in the handling of that fire. Subject to what I will say on the question whether the defendant here is liable for the acts of McKinley who occupied the premises where the fire originated, I think this objection to the finding of the learned trial judge is not well taken.

4. The fourth objection is that the learned trial judge misdirected the jury in telling them that the municipality, that is to say this defendant, was liable for the acts of its servant, McKinley, in changing the stoves.

McKinley was an employee of the appellant, being chief of police and fire chief. With his wife and child, he lived in rooms at the rear and on the second story of the fire hall, one of these rooms being the kitchen where the stove in question was installed. The free occupation of these rooms as a dwelling was granted by the appellant to McKinley probably as one of the considerations of his con-

(1) 3 H. & C. 598.

tract of employment, and this, I think, is the scope of the appellant's admission that as a servant of the appellant McKinley was in lawful occupation or possession of the room in which the said stove or range was situate, for the admission cannot mean that that as a servant of the appellant McKinley kept house for his wife and child in these rooms. The evidence justifies the conclusion that McKinley was in as full control of these rooms as he would have been had he rented a house from the appellant. The municipality had paid for the installation of the stove pipe, but the stove was furnished by McKinley, and the new stove or range put in during the preceding winter, which necessitated the shortening of the pipe, was paid for by McKinley, who had no authority from the appellant to effect this change. In respect to this point, there was a material difference between the two trials because an admission made in the first trial that the appellant had paid for the erection of the stove and pipe was withdrawn with the permission of the court in the second trial.

In my opinion, the relation of master and servant between the appellant and McKinley did not extend to, or engender liability for, acts performed by the latter in keeping house for himself and his family in his own dwelling, whether this dwelling was a part of the fire hall or a separate building belonging to the appellant. In other words, nothing he did in his own dwelling for the purposes of housekeeping was in the course of McKinley's employment as a servant of the appellant. I may add that in the decisions dealing with the legal presumption of negligence where a fire is communicated from a building in which it originates to another building belonging to a different owner, I have found no case where this presumption was asserted against the owner or lessor as distinguished from the occupier or tenant of such a building. It seems to me that the foundation of the presumption is occupation of the premises where the fire originates and if, as here, the owner does not occupy the building or part of building where the fire took place he would seem to be outside the rule. But it is probably sufficient to decide here that when McKinley installed or changed his stove and shortened the stove pipe, and when he lit the fire, he was not acting in

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the course of his employment as a servant of the appellant, and with respect, I think the learned trial judge should have so directed the jury. This objection, therefore, appears to me to be well taken.

5. The learned trial judge directed the jury as a matter of law that the non-performance of the statutory duty imposed by the building by-law, causing injury to a member of the class for whose benefit the by-law was imposed, *prima facie* gives a right of action to the person injured. There might be no quarrel with an abstract proposition of this kind (*Groves* v. *Wimborne* (1)), but the difficulty is to determine whether the by-law, of which we have only three extracts, is a by-law of this character. In the absence of the whole by-law, and in view of what I have said as to the fourth objection of the appellant, I do not think it necessary to express any opinion with respect to the direction of the learned trial judge on this point.

I have however reached the conclusion that there was material misdirection of the learned trial judge in instructing the jury that the appellant was, as McKinley's employer, responsible for the latter's act in changing the stove or stove pipe, and on that ground I think the verdict cannot stand.

I would allow the appeal with costs and order a new trial.

Appeal dismissed with costs.

Solicitor for the appellant: *G. A. King.*

Solicitors for the respondents: *Bird, McDonald & Co.*

(1) [1898] 2 Q.B. 402 at p. 407.