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Commentary

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United Motors Service Inc. v. Hutson et al.

UNITED MOTORS SERVICE INC. v. HUTSON ET AL.—LANDLORD AND TENANT—NEGLIGENCE—LESSOR'S OBLIGATION TO INSURE—LESSEE'S LIABILITY—LESSOR'S RIGHTS—The decision of the Supreme Court of Canada in *United Motor Service Inc. v. Hutson et al.*¹ has recently gained attention as a result of the Ontario decision in *Shell Oil Co. of Canada Ltd. v. The White Motor Co. Ltd.*² Before analysing the problems posed by this judgment, it is intended to summarise the law on the subject down to the instant case.

At common law, lessees for years were not liable for accidental or negligent burning of demised premises. The Statutes of Marlebridge and Gloucester, however, rendered tenants liable for waste. In *Yellowly v. Gower*,³ it was held that the liability included permissive as well as voluntary waste. The Conveyancing and Law of Property Act, R.S.O. 1927, c. 137 stated in section 31: Lessees making or suffering waste in the demised premises without licence of the lessors shall be liable for the full damage so occasioned.

In the Accidental Fires Act, R.S.O. 1927, c. 146, the following provision is to be noted: 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. This statute is based on 6 Anne, c. 131 and 14 Geo. III c. 78. It was decided in 1847 in *Filliter v. Phippard*⁴ that the exemption "fire shall accidentally begin" did not include a fire caused by the tenant's negligence. This decision has never been doubted in Britain or Canada,

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¹ [1937] S.C.R. 294.

² [1957] O.W.N. 229.

³ (1855), 11 Ex. 274.

⁴ (1847), 11 Q.B. 347.

and it has been affirmed in two Canadian cases, *Canada Southern Railway Co. v. Phelps*⁵ and *Port Coquihlam v. Wilson*.⁶ The Ontario case of *Moriss v. Cairncross*⁷ affirmed that a tenant for years is liable for damages caused by negligence.

With this background in mind, the *Hutson* case can now be examined. The facts were these: United Motors Service leased a garage from Hutson. The following provisions appeared in the lease:

“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 will repair, according to notice in writing, reasonable wear and tear and damage by fire, lightning and tempest, riot or public disorder or act of any governmental authority only excepted. And that it will leave the premises in good repair, reasonable wear and tear and damage by fire, lightning and tempest only excepted”.

Employees of the garage company were cleaning the floor with gasoline and Oakite, which, according to the evidence, was a normal way of cleaning garage floors. The Oakite had to be applied hot, there being a tank heated by gas jets for this purpose. A metal scraper was being used to remove sticky material when suddenly the floor burst into flames. Much damage occurred. The tenant was sued by the landlord and by the insurance companies which had indemnified the former for his loss. A unanimous judgment of the Supreme Court of Canada affirmed the Ontario Court of Appeal's decision that the plaintiffs were entitled to recover on the principal of *res ipsa loquitur*. The case and statute law cited previously formed the basis of the judgment of Kerwin J., with whom Rinfret and Crocket JJ. agreed.

The first difficulty with the decision is that the landlord is apparently compensated twice, although he paid an undetermined amount to the insurance companies. The second difficulty concerns the plight of tenants who presume that they are covered by fire insurance: they cannot insure because the building cannot be insured many times over. Yet their rent pays the insurance while not releasing them from liability. The Supreme Court, however, had no choice on the basis of the previous decisions, so no quarrel can be joined with the reasoning of the Judges.

The present problem was emphasized in the recent Ontario case *Shell v. White*.⁸ Here, the landlord was suing for damages resulting from a fire which the court found was caused by the lessee's negligence. The lease provided that the lessor pay all insurance premiums on the premises and that in the event of any business being conducted on the premises “which will cause the rate of insurance to be raised on the said premises, the lessee will compensate the Lessor for any extra premium of insurance thereby required.” Kelly, J. found for the plaintiff on the basis of *Hutson*. The tenants obviously were amazed at having to pay damages when they were, in effect, paying

⁵ (1884), 14 S.C.R. 132.

⁶ [1923] S.C.R. 235.

⁷ 14 O.L.R. 544.

⁸ [1957] O.W.N. 229.

the insurance premiums. No distinction was drawn between "gross" and "ordinary" negligence.

The effect of these cases is that a tenant in an apartment building who forgets to snuff out a cigarette properly, thus consuming the whole building in a conflagration, is liable for the damage caused, even though the landlord is fully covered by insurance. The *Hutson Case* establishes liability for damages to premises occupied by the tenant. The law establishes a strict liability on the occupier for fire escaping, as is pointed out by Holdsworth:⁹

"The Law imposed 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 show that the fire had originated from the act of a stranger. A stranger is a person not of one's household who acts against a householder's will. Chief Justice Holt included an Act of God as a defence." The law is severe with tenants who cause fires.

This was reasonable when, as in the days of *Filliter v. Phippard*,¹⁰ landlords suffered real losses. It was natural that, when someone occasioned fire, he should bear the consequences. The development of fire insurance, however, has changed this and the fact that tenants generally are ignorant that the "insurance" mentioned in the lease protects only the landlord shows that the law is not known generally. It is instructive to compare this attitude, rooted as it is in ancient English notions of property, to the American viewpoint. Recent judgments there have settled the law in a way that Anglo-Canadian courts probably would not accept.

In the 1956 case of *Army-Pichas v. C. R. Jahn Co.*,¹¹ the circumstances were exactly the same as in the *Shell case*,¹² but the Supreme Court of Illinois saw it differently. The court stated that the lessee can relieve himself of liability from negligence by contract. The Supreme Court of the United States had held in *Santa Fe, Prescott and Phoenix Railway v. Grant Bros. Construction Co.*¹³ that such an agreement was valid and did not offend public policy. In *Slocum v. Natural Products Co.*,¹⁴ the Massachusetts Supreme Court held that the lessee is fully freed of all *contracted* liability by the clause "lessee will turn over the premises in good condition and repair (loss by fire and ordinary wear excepted)". The Court pointed out that "under the construction urged by the lessor, it would be necessary for both parties to carry insurance if they are to be protected." In *Lothrop v. Thayer*,¹⁵ another Massachusetts case, it is stated that: "The Ancient law has been acquiesced in, and consciously or unconsciously, the cost of insurance to the landlord, or the value of the risk, enters into the amount of the rent".

⁹ *History of English Law*, III, 309.

¹⁰ (1847), 11 Q.B. 347.

¹¹ 131 N.E. (2d) 100.

¹² *ante* footnote 2.

¹³ 33 S. Ct. 474.

¹⁴ 292 Mass 445; 198 N.E. 747.

¹⁵ 138 Mass 466 at p. 475.

The leading American case is *General Mills v. Goldman*,¹⁶ a decision of the Federal Circuit Court. The court observed:¹⁷ "They (the parties) necessarily consciously figured on the rentals to be paid by the tenant as the source of the insurance premiums and intended that the cost of the insurance was to come from the tenants. On practical effect, the tenants paid the cost of the fire insurance". In a 1956 Ohio case¹⁸ there are some interesting observations on the rights of subrogation of fire insurance companies which clash dissonantly with the views of Kelly J. in *Shell*:¹⁹

"It is elementary that the rights of the insurers (against the defendant) cannot rise higher than the rights of the Lessor, since the insurers, as subrogees, in contemplation of law stand in the place of the Lessor".

The Court goes on to suggest principles of construction of leases:

"What did the parties to the lease have in mind in the use of the expression 'loss by fire . . . excepted'? . . . Mr. Justice Holmes said in an earlier case: 'Business contracts must be construed with business sense, as they would naturally be understood by intelligent men of affairs' . . . Now the phrase 'loss by fire' has a universally recognized connotation when used in a fire insurance policy. The usual and ordinary meaning therein is the damage resulting from a fire caused by an act of God or accidentally or negligently, by the hand of man. The person who insures his property against damage by fire knows that he is covered for any loss by fire, regardless of the causation, deliberate purpose excepted. That is common knowledge."

The writer's sole disagreement with this forthright statement is that such ideas are "common knowledge". Can it be that the only place where they are unknown is in the courts of Great Britain and Canada.

*Filliter v. Phippard*²⁰ effectively emasculated The Accidental Fires Act, and this principle is so rooted in High Court decisions here and in England that there is no possibility of distinguishing the cases. The only manner in which the law can be revised is through legislation. The writer suggests that a new clause be added to the Short Form of Leases Act, to the following effect:

The Lessor covenants that the Lessee will be held safe from all actions with respect to fires caused on the demised premises by the Lessee, his agents, guests, or invitees arising from any act or omission whatever, deliberate damage alone excepted.

In many respects the law has come a long way since Anatole France remarked, "The law, in its magnificent equality, forbids the rich as well as the poor, to beg in the streets, to sleep under bridges and to steal bread." The suggested revision, it is submitted, will remove one of the last vestiges of old attitudes no longer in keeping with public ideas about Justice.

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¹⁶ 8 Circ. 184 F. 2d 359.

¹⁷ *Ibid.*, at p. 366.

¹⁸ *U.S. Fire Insurance Corp. v. Phil-Mar Corp.* 131 N.E. (2d) 445.

¹⁹ [1957] O.W.N. at p. 230.

²⁰ (1847), 11 Q.B. 347.