WILLIAM S. EVANS (PLAINTIFF).....APPELLANT; 1889

AND *Jan. 18, 19.
*Mar. 18.

LESLIE J. SKELTON *et al* (DEFENDANTS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

*Landlord and Tenant—Lease—Accident by fire—Arts.* 1053, 1627, 1629, *C.C.*

By a notarial lease the respondents (lessees) covenanted to deliver to the appellant (lessor) certain premises in the city of Montreal at the expiration of their lease "in as good order, state, &c., as the same were at the commencement thereof, reasonable wear and tear and accidents by fire excepted."

Subsequently, the appellant (alleging the fire had been caused by the negligence of the respondents) brought an action against them for the amount of the cost of reconstructing the premises and restoring them in good order and condition, less the amount received from insurance.

*Held*,—affirming the judgment of the Court of Queen's Bench for Lower Canada (Appeal Side), Ritchie C.J. and Taschereau J. dissenting, that the respondents were not responsible for the loss, as the fire in the present case was an accident by fire within the terms of the exception contained in the lease, and therefore articles 1053, 1627 and 1629 C. C. were not applicable.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (Appeal Side) (1) reversing a judgment of the Superior Court, by which the present respondents were condemned jointly and severally to pay to the present appellant the sum of $2,675.

In his action the present appellant alleged :—

"That on the 10th of January, 1882, the appellant was the owner of a certain store and factory, known

*PRESENT.—Sir W. J. Ritchie, C.J., and Strong, Fournier, Taschereau, and GwynneJJ.

(1) 31 L. C. Jur. 307; M. L. R. 3 Q. B. 325.

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as numbers 52 and 54 St. Henri street, in the city of Montreal.

"That on the said 10th of January, 1882, the appellant leased the said premises to the respondents, present and accepting, for the term of ten years from the 1st of May, 1882, at a rental of $2,000 per year for the first five years of the said term, and at a rental of $2,400 per year for the remainder of the said term, and all taxes and assessments which might be levied on the said premises during the said term;

"That by the said lease the respondents agreed and bound themselves to deliver the said premises to the appellant at the expiration of said lease in as good order, state and condition, as they were at the commencement of the said lease, reasonable wear and tear and accidents by fire excepted;

"That the said premises at the commencement of the said lease were in good order and condition and in a thorough state of repair;

"That on the 22nd of June, 1884, the premises so leased were totally destroyed by fire, which originated in the said leased premises, while the same were occupied by the said respondents as tenants under the said lease, and said fire was due to and caused by the fault and negligence of the said respondents;

"That in consequence of the said premises being totally destroyed, the said lease was terminated at the time of the said fire;

"That said respondents, at Montreal aforesaid, were indebted to the said appellant in the sum of $288.05, for the rental of said leased premises from the 1st day of May, 1884, up to the 22nd of June, 1884, and in the further sum of $84.00, being the amount of taxes and assessments due by said respondents on said leased premises for the year, from the 1st day of May, 1884, up to the 1st day of May, 1885, and which became due

and payable on the 1st day of November, 1884; and in the further sum of $1,211.95, for damages due the appellant, estimated at an amount equal to the rental of said premises, from the 22nd of June, 1884, to the 1st day of February, 1885; and in a further sum of $7,500, being the balance of the estimated cost of constructing the said premises, after deducting the amount of insurance thereon realized by the appellant, making in all a sum of $9,084;

"That the total estimated value of reconstructing said premises, and necessary to replace and put the said buildings in the same order, state and condition as they were before said fire, and at the commencement of said lease, was $17,500, and it was reasonably worth said sum to reconstruct said buildings, and replace said leased premises in good order and condition; that the said buildings and premises were insured by appellant against loss by fire to the extent of $10,000, which said sum has been paid to said appellant since the occurring of said fire;

"That the appellant, on the 1st of August, 1884, through the ministry of Phillips, notary, protested said respondents, and declared his willingness to allow said respondents to reconstruct said buildings and to restore said premises to the state and condition they were in before said fire, the same to be done within a reasonable delay, and to furnish the said respondents with the plans and specifications upon which said buildings were originally constructed, and to give credit to the said respondents for the amount of insurance on said premises, and should the said respondents elect so to do, such reconstruction and restoration to be in lieu of the estimated cost of said reconstruction as aforesaid;

"That said respondents did not elect to reconstruct and restore said premises to their former state and

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condition, and the said respondents refused and neglected to reconstruct said buildings, and to restore said premises to the state and condition in which they were before said fire, and at the commencement of said lease, though thereto often requested by the said appellant."

To this action the respondents pleaded, that it is true the respondents leased the said premises from the appellant; that the said lease was terminated on or about the 22nd June, 1884, by the total destruction of the premises, but not by fire, that the respondents, through the ministry of Marler, notary, tendered to appellant the rent of said premises up to the termination of said lease, and respondents declared their willingness to pay the taxes for so much of the current year as had expired, when the same became due, and on the 9th January, 1885, tendered the said rent and taxes, in all the sum of $321.78.

By a second plea, respondents further alleged:—"That as lessees of said premises they at all times used the same as prudent administrators, and exercised the greatest possible care in their use and conservation, according to the purposes for which they were leased; that it is true a fire broke out in the said premises on or about the 22nd day of June, 1884, but respondents deny that the said fire was caused by their fault or by any person in their employ, and also deny that the said fire was the cause of the destruction of the premises; that the said building was defective, and appellant failed and neglected to maintain the same in a fit condition for the use for which it was intended under said lease; that the said building was imperfectly and improperly built and constructed, as the said appellant well new, and had been frequently notified both by the city authorities and by respondents, and that its destruction, on the date aforesaid, was caused by its faulty and imperfect

construction, and not by fire, which might easily have been extinguished had said building been properly and substantially built; that the chimney on the north-west side of said building was faulty and defective and imperfectly built, and was not properly joined to the wall against which it was built, as appellant well knew and had been notified; that by the terms of said lease the said respondents were relieved from liability for loss resulting from accident by fire, and that the fire in question was the result of accident, and could not have been caused by the fault of respondents."

By a third plea respondents say:—"That the loss occasioned by said fire was amply covered by the insurance on said building effected by appellant, and which he collected; that if there was any further or other loss in excess of the amount of said insurance, the same was not caused by the said fire, but by the faulty and imperfect manner in which said building was built; that the appellant failed to keep said premises in a proper state of repair."

By a fourth plea respondents say:—"That by the terms of said lease the respondents obliged themselves to pay any and all extra premiums of insurance which the appellant might have to pay by reason of the nature of the business carried on by said respondents, that by law and the terms of the said lease, the appellant thereby undertook to insure the said premises against loss by fire and to relieve the respondents from any such risk; that during all the term of said lease, the respondents regularly paid said extra premiums of insurance to appellant, who, from time to time, accepted the same."

By a fifth plea respondents reiterated the allegations contained in their preceding four pleas.

The appellant answered generally to the first plea, and further that the rent and taxes for which the

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respondents were liable under said lease up to the time of said fire, amounted to $372.05; that the total destruction of the said premises was caused by the fire while the respondents used and occupied said premises under said lease

To the second plea appellant answered generally, and further specially denied that the said buildings so leased were improperly built, but, on the contrary, alleged that the said buildings were well and strongly built, and were in a good state of repair at the time of the said fire; that previous to the date of the said lease—10th January, 1882—the said respondents had been in possession of the said premises, and used and occupied the same for a period of about nine years immediately preceding the date of said lease, and were well aware at the date of said lease, as well as the time of the said fire, that the said buildings were well and strongly built and in a good state of repair; that the chimney mentioned in said plea had been taken down some months before said fire and rebuilt, and was well built, and in a good state of repair at the time of said fire; that the respondents had the said leased buildings completely filled with goods, packed up in paper boxes, both goods and boxes being of a very inflammable material, and the consequence was, that when the said fire broke out the whole building was rapidly destroyed, and said respondents are by law, and the terms of said lease, responsible for the loss suffered by appellant, caused by the said fire.

To the third plea appellant answered, that the said buildings leased were well and strongly built and were in a good state of repair; that the said buildings were destroyed by fire while the respondents used and occupied the same under said lease; that respondents' alleged tender was illegal and insufficient.

To the fourth plea appellant answered that the said

respondents did not at any time pay, or agree to pay, the ordinary insurance on said buildings, but only the extra insurance on said buildings which the insurance company in which said buildings were insured might charge, by reason of the hazardous nature of the business carried on by the said respondents, and the nature of the material stored in said buildings by the said respondents; that there was no undertaking between said parties by which appellant was obliged to insure said buildings for any fixed amount, nor was appellant obliged to insure said buildings at all under said lease.

To the fifth plea appellant answered that the allegations of said plea were false; that the buildings leased were strongly built, and in a good state of repair; that it was not true that respondents used the greatest possible care in and about said premises, but, on the contrary, respondents stored and completely filled said premises with immense quantities of goods of an inflammable material, packed in paper boxes; and, moreover, said respondents had a fire and machinery in operation on the third and fourth flats of the said buildings at the time of said fire; and appellant prayed *acte* of the admission of respondents that they had a fire in said premises at the time of the destruction of the said buildings, although it was in the month of June that said fire occurred; and said respondents did not take proper and sufficient care and precaution in regard to the fire they were using at the said time in said buildings; and respondents were not justified in using a fire at the time on said third and fourth flats of said buildings, in close proximity to goods the material of which was of an inflammable nature.

On these pleadings the issues were joined.

The evidence taken at the trial as to the origin of the fire is reviewed in the judgments hereinafter given.

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The principal provisions of the lease referred to by the counsel at the argument of this appeal are the following:—

"And further, that the said lessees shall furnish the said leased premises with a sufficient quantity of household furniture or goods to secure the payment of said rent, pay the cost of the present lease, keep the premises in repairs, *reparations locatives*, during the said term, and deliver the same at the expiration of the present lease, in as good order, state and condition, as the same may be found in at the commencement hereof, reasonable wear and tear and accidents by fire excepted * * *

"The said lessees shall pay all extra premium of assurance that the company, at which the premises now leased may be insured, shall exact in consequence of the business or work done and carried on therein by the said lessees.

"And further, to keep the premises generally, during said lease, and leave the same at the expiration thereof, free from all ashes, dirt and snow, in accordance with the regulations of police and of the board of health, for the said city of Montreal."

*McMaster*, Q. C. and *Hutchison* for appellants, contended that no amount of care that a lessee may prove to have bestowed upon the premises leased by him can alone relieve him from the legal presumption in favor of the lessor that the loss by fire of the premises was caused by the fault of the lessee, or of the persons for whom he is responsible; and unless he proves the contrary, he is answerable to the lessor for such loss; citing Arts. 1627, 1628, 1629, C.C.; *Belanger* v. *McArthur* (1); *Rapin* v. *McKinnon* (2); *The Seminary of Quebec*

(1) 19 L.C.J. 181. (2) 17 L.C.J. 54.

v. *Poitras* (1); *Allis* v. *Foster* (2); *Pilon* v. *Brunette* (3); *DeSola* v. *Stephens* (4); and after reviewing the evidence contended that the proof showed there was no defect in the building, and that there had been negligence on the part of the respondents by keeping ashes from four stoves in an ordinary flour barrel in the upper part of the building, and without any other protection than that afforded by a piece of zinc beneath it, resting upon the wooden floor. The learned counsel also cited *Byrne* v. *Boadle* (5); *Lloyd* v. *General Iron Screw Collier Co.* (6); *Phillips* v. *Clark* (7).

*Lacoste* Q. C. and *Atwater* for respondents, contended that the cases relied on by appellant's counsel ignored such a provision in the contract of lease existing between the parties as that contained in the lease existing in the present case, namely, that loss resulting from accidents by fire were excepted from the tenant's liability.

The insertion of such a provision clearly indicates the intention of the lessor to relieve the tenant from such loss as is the result of an accident, and if the lessee use all the care of a prudent administrator in accordance with his obligations under article 1626 of the Civil Code, and if in spite of this a fire breaks out, it is clearly accident. Such words in a contract must be interpreted in a sense which will have some effect rather than in one which will have none.

By article 1626 of the Civil Code of Lower Canada it is provided that the principal obligations of the lessee are:

1. To use the thing leased as a prudent administrator for the purposes for which it was designed and according to the terms and intention of the lease.

(1) 1 Q.L.R. 185.
(2) 15 L.C.J. 13.
(3) 12 Rev. Lég. 74.
(4) 7 Leg. N. 172.
(5) 2 H. & C. 722.
(6) 3 H. & C. 284.
(7) 2 C. B. N. S. 156.

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2 To pay the rent or hire of the thing leased.

Articles 1627, 1628 and 1629 C. C. provide that if the lessee does not use the thing leased as a prudent administrator, and is thereby guilty of *faute*, he is liable for all damages to the building.

The word *faute* occurring in Articles 1627 and 1629 evidently has reference to duty imposed upon the lessee by article 1626, and virtually means default in that duty. The onus of proving that there was no default in his duty is cast by Articles 1627 and 1629 upon the lessee; consequently, all that he has to show is that he used the premises as a prudent administrator.

The presumption against him arises, from the fire, that he has neglected his duty as a prudent administrator, but if he shows that he has not so neglected his duty the presumption is destroyed, because the contrary to that which is presumed is proved.

In France, in face of the wording of Article 1733, C. N. which is more precise and severe than that of our article, it is permitted to the tenant to contradict the presumption created by the law by other presumption, and to prove that he exercised the care of a prudent administrator. Marcadé (1); Laurent (2); Troplong, Louage (3); Demante (4)

On the question of negligence the learned counsel contended that every possible care was taken by the defendants as was shown by the evidence; that the theory of the fire originating through a defective chimney was supported by the evidence; and that the lessor, having stipulated to receive extra premiums, tacitly agreed to assume the extra risk or to insure.

*MacMaster* Q.C. in reply.

(1) 6 Vol. Art. 1733, Par. 2, pp. 472-3, Note 1.
(2) 25 Vol. Nos. 279 and 280, pp. 305 to 311.
(3) Nos. 376, 383-386 and 389.
(4) No. 179 *bis*.

Sir W. J. RITCHIE C. J.—I am of opinion the appeal should be allowed with costs. I agree withMr. Justice Taschereau in this case.

STRONG J.—The law imposes upon a lessee the obligation of restoring the thing let to the lessor in as good condition as it was in at the date of the lease, ordinary wear and tear excepted; in other words, and in the terms of articles 1627 and 1628 of the Civil Code, the lessee is responsible for injuries and loss which may happen to the thing leased during his enjoyment of it, unless he proves that the loss was not occasioned by his fault or by the acts of persons of his family or of his sub-tenants. In case of the destruction of the subject of the lease by fire the lessee does not relieve himself from the responsibility which the law thus imposes on him by shewing that the fire was accidental in the sense that its origin is unknown, for article 1629 expressly declares that in cases of loss by fire there is a legal presumption that it was caused by the fault of the lessee or of those for whom he is responsible and that the lessee must answer for the loss unless he proves the contrary. This article 1629 is said, though differently worded, to be in legal effect the same as the article 1733 of the French Code. A question has arisen under both codes whether a lessee seeking to exonerate himself from responsibility by bringing himself within the terms of the exceptions in the articles in question, is bound to prove affirmatively how the fire occurred, or if it is sufficient that he should prove facts and circumstances shewing that it did not happen through his fault or by the acts of his family or servants. In both France and the province of Quebec the jurisprudence on this point has varied and the opinions of legal treatise writers are also far from being uniform (1).

(1) See Guillouard Louage, (Ed. 2,) vol. I, Nos. 249 to 308; also Laurent Vol. 25, No. 276 *et seq*; Aubry and Rau Ed. 4, Vol. 4, p. 484 *et seq*.

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This question, however, although much discussed upon the argument, does not seem to me to be at all involved in the decision of the present appeal. The provision of article 1629 is not a law of public order, it is merely declaratory of one of the obligations which the law implies in a contract of lease, and it is therefore quite competent to a lessor to renounce the benefit which it confers upon him.

It being thus open to the parties by their conventions to restrict the responsibility imposed upon lessees by the general law, the primary question we have to decide is whether they have done this effectually by the stipulations contained in the lease now before us. The majority of the court of Queen's Bench considered that they have so done by the exception contained in the clause bearing "that the lessees should keep the premises in repair during the said term and deliver the same at the expiration of the present lease in as good order, state and condition as the same may be found in at the commencement hereof, reasonable tear and wear and accidents by fire excepted." I am of opinion that this was a correct conclusion. The expression "accidents by fire," according to the ordinary meaning and interpretation of the words used, includes all losses by fire the origin of which is not ascertainable. It is reasonable to suppose, as the learned Chief Justice of the Court of Queen's Bench has pointed out, that the parties meant by this clause to exempt the lessees from the responsibility in respect of fires which the law ordinarily attaches to lessees and this is done by attributing to the word "accidents" any one of its ordinary and general significations as meaning "an event that happens when unlooked for," "an unforeseen and undesigned injury," or a "mishap." Accepting any of these meanings of the expression "accidents," it was beyond all doubt established that the loss in the present case

arose from an "accident by fire," and the lessees therefore bring themselves within the terms of the exception of responsibility contained in the clause before set forth.

Article 1629 can consequently have nothing to do with a case like the present where the common law is controlled by the convention of the parties. The parties having thus derogated from the ordinary responsibility of lessees, which in the case of destruction by fire throws upon them the burden of exonerating themselves from a presumption of fault, the only remedy open to the appellant was that general one of the action given by article 1053, by which every one is made responsible for the damage caused to another by his positive act, imprudence, neglect or want of skill. We must therefore consider this action in every respect as one founded on the article last referred to. Then in such an action, according to the ordinary principles of evidence, there is no presumption against the defendant, but the onus of establishing his case rests upon the plaintiff and it is for him to prove the fault of the defendant to which he attributes the damage he has suffered. The enquiry in the present case is thus narrowed to the question of the sufficiency of proof, and all we have to decide is whether the evidence established that the fire was occasioned by the negligence, imprudence, or other fault of the respondents.

The pretensions of the appellant in this aspect of the case are that he has succeeded in proving negligence on the part of the respondents in two respects: First, it is said that the respondents were guilty of neglect inasmuch as they placed the ashes taken from the stoves in a barrel which was an unsafe receptacle for them. Secondly, it is contended that they should be held responsible for the loss because they imprudently omitted to keep a watchman on the premises at night.

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As regards the first of these positions, it is conclusively answered in the way in which it has been met by the learned Chief Justice of the Queen's Bench. To establish the respondents' liability it is not sufficient to prove that they were on some occasions or in some particular respect guilty of positive acts or omissions which would, if they had been found to have caused damage to the appellant, have amounted to actionable fault, but these acts or omissions must be so connected by proof, direct or circumstantial, with the actual damage complained of as to be fairly considered to have been the causes of the loss the appellant seeks to be indemnified for. Then it is quite out of the question to say that the record before us contains any evidence which would warrant such a conclusion; the utmost which could be said is that the proofs give rise to a conjecture that the cause of the loss may have been ashes in the barrel: but the same may be said of numberless other possible causes of the fire, and it would be quite out of the question to act judicially on such suspicions, or to treat such hypotheses as sufficient legal proof. Further, if we were compelled on the proofs before us to attribute the fire to the most probable cause to which it has been suggested its origin may be traced, I should certainly say that the probability was in favor of the respondents' theory that it was to be attributed to the defective construction of the chimney, a cause for which the appellant was alone responsible. This, however, would also be mere speculation, and I do not desire to rest my judgment upon it. It is sufficient to say that it was incumbent on the appellant to prove that the loss was caused by the respondents' negligence and fault, and that he has entirely failed to do so.

The omission to maintain a watchman on the premises at night and on Sundays and holidays cannot by itself and in the absence of any evidence of usage

be regarded as such imprudence on the part of the respondents as to make them liable. If the lessor had required such extreme vigilance he should have stipulated for it and have had a clause to that effect inserted in the lease.

The appeal must be dismissed with costs.

FOURNIER J.—L'appelant Evans a poursuivi les intimés pour les faire condamner à l'indemniser des dommages qui lui ont été causés par l'incendie d'une maison qu'il leur avait louée,et qu'ils occupaient comme locataires au moment de l'incendie. La maison a été complètement détruite. L'appelant se fondant sur l'article 1529, C. C., pretend que les intimés sont responsables des conséquences de cet incendie, et réclame d'eux la somme de $9,084 comme valeur des dommages qui lui ont été ainsi causés. L'article 1529 s'exprime ainsi :

Lorsqu'il arrive un incendie dans les lieux loués, il y a présomption légale en faveur du locateur, qu'il a été causé par la faute du locataire ou des personnes dont il est responsable et à moins qu'il ne prouve le contraire, il répond envers le propriétaire de la perte soufferte.

Les intimés ont plaidé que la présomption légale établie par cet article a été détruite par la preuve qu'ils ont faites, que l'incendie en question n'avait été causé par aucune faute ou négligence de leur part, qu'au contraire, ils avaient toujours pris les précautions nécessaires pour se garantir contre les accidents par le feu, que la plus grande partie des dommages avait été causée par la construction défectueuse de la bâtisse, qui l'exposait particulièrement au danger du feu, plutôt que par l'incendie même—la bâtisse s'était écroulée peu de temps après le commencement de l'incendie—tandis que si la dite bâtisse eut été solidement construite, le feu aurait pu être éteint avant qu'il n'eut causé de grands dommages, que la dite bâtisse étant assurée, le propriétaire appelant avait retiré en vertu de sa police

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d'assurance tout le montant des dommages causés, qu'enfin il avait été convenu par le bail passé entre les parties que les intimés locataires rendraient à l'expiration du bail, les lieux loués en aussi bon état qu'il les avaient reçus, en tenant raisonnablement compte de l'usage qui en aurait été fait, et en exceptant les accidents par le feu, *reasonable wear and tear and accidents by fire excepted.* Il fut aussi convenu que la bâtisse louée serait assurée, et que dans le cas où un taux plus élevé d'assurance serait exigé en conséquence des risques plus considérables auxquels l'industrie particulière des intimés pouvaient exposer la bâtisse, ceux-ci s'obligeaient à en payer la différence, ce qu'ils firent, qu'il était particulièrement du devoir d'Evans, le propriétaire, d'assurer sa propriété pour sa pleine valeur, et que s'il lui résulte une perte en conséquence de l'insuffisance de son assurance, lui seul est tenu de la supporter.

La preuve a établi que la bâtisse était défectueuse dans une certaine mesure, et surtout en ce qui concernait la cheminée qui n'avait qu'une seule brique d'épaisseur, au lieu de deux qu'elle aurait dû avoir pour le mur de derrière, de plus elle n'était pas liée au mur, les joints n'en avaient pas été tirés. Il y avait entre un des murs de côté et celui de derrière une crevasse laissant un espace de quatre pouces au troisième étage —crevasse qui se prolongeait dans trois étages. On pouvait voir d'un côté à l'autre entre le mur et la cheminée. On voyait monter la fumée.

L'attention de l'appelant ayant été plusieurs fois attiré sur l'état de la cheminée, et ayant même été protesté par les autorités civiques, il fit quelques réparations en 1874 et en 1883, mais tout à fait insuffisantes d'après le témoignage de Duplessis, qui avait été employé pour ces ouvrages. L'ouvrier chargé de l'ouvrage en plâtre, ainsi que l'intimé protestaient contre l'insuffisance de

ces réparations, qui ne s'étendaient qu'à une partie endommagée de la cheminée, le reste fut laissé dans le même état qu'auparavant. Les planchers s'étaient retirés de la bâtisse adjoignante d'environ un pouce à un pouce et quart, laissant entre les planchers et les plafonds dans les différents étages, un espace dans lequel les étincelles montant dans le cheminée pouvaient facilement se loger et y brûler lentement avant d'éclater.

Les flammes ne furent d'abord aperçues que du côté de Shorey, par les fenêtres des troisième et quatrième étages. Après la chute de la bâtisse on pouvait voir la partie réparée de la cheminée qui adhérait au mur de Shorey, tandis que celle qui ne l'avait pas été était toute tombée et laissait voir des briques noircies et brulées sur le mur de Shorey autour de la cheminée indiquant que le feu avait dû originer à cet endroit. Cairns, un membre expérimenté de la brigade du feu, auquel est faite la question suivante :

Did you notice anything in the debris or on the walls which would indicate to you where and how the fire had commenced?

A. There was; round where the remaining part of the chimney, round the wall, there were indications on the building, as I would say, that the fire had originated close to that wall, by the blackened and charred color of the brick just around that part.

Q. Near the chimney?

A. Yes, just in the vicinity of the chimney, below it was not blackened.

Ce témoignage est corroboré par ceux de Cowan, Mann et Nolan, tous compétents dans cette matière, qui laissent peu de doute que la cheminée défectueuse a été la cause de l'incendie.

Si la bâtisse eut été construite plus solidement, le feu aurait pu être éteint avant d'en avoir causé la destruction entière. C'est l'opinion positive d'un autre membre de la brigade du feu, Harris :

Q. From your experience of fires, if the building had not fallen, could the brigade have put that fire out?

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A. I have no hesitation in saying so. We should have saved the two flats, if it had not fallen; we have done it with other buildings, and we surely could have done it with this.

Indépendamment des vices de construction de la cheminée, il est prouvé que les supports de la bâtisse étaient insuffisants, qu'elle tremblait chaque fois qu'on y remuait des articles pesants, et aussi à chaque mouvement dans la rue. Les murs de derrière et de côté avaient considérablement surplombé. L'inspecteur des bâtisses de la cité avait déjà, en 1874, ordonné la démolition de la cheminée en question—

As being in a dangerous condition, or repaired and made secured as regards fire. At present such chimney is in such state that it endangers public safety, &c., &c.

Il est vrai que c'est longtemps après cet avis que les réparations dont il a été question plus haut ont été faites, mais on a vu aussi qu'elles l'avaient été d'une manière si insuffisante que la cheminée n'avait pas cessé d'être un danger pour la sécurité publique, et qu'il n'y avait qu'une démolition et une reconstruction totale, comme le disait l'inspecteur, qui pouvait mettre cette cheminée dans un état de sécurité conforme aux règlements de la cité. La bâtisse était connue comme dangereuse par les hommes de la brigade du feu, qui sont unanimes à dire qu'ils n'ont jamais vu une bâtisse s'écrouler de cette manière. Le toit n'était pas même brûlé, et ils sont d'accord à dire qu'ils auraient pu éteindre le feu si la bâtisse ne se fût pas écroulée aussi promptement. Dans ces circonstances, si l'appelant avait quelque recours contre les intimés, il ne pourrait réclamer le montant entier de sa perte, car si la bâtisse avait été solidement construite, les dommages eussent été moins considérables et le montant de son assurance aurait été parfaitement suffisant pour l'indemniser.

L'appelant prétend que la manière dont les cendres étaient gardées dans la bâtisse constitue un acte de

négligence qui a l'effet de rendre les intimés responsables de l'incendie. Le témoignage de Donaldson prouve que les cendres après avoir été déposées dans un baril placé sur un plancher recouvert en zinc, étaient toujours éteintes avec de l'eau. Il jure positivement qu'il en a agi ainsi le matin du 21 juin 1884. On déposait aussi dans ce baril les restes d'emploi délayé dont on s'était servi la veille, ainsi que les feuilles de thé mouillées. Donaldson dit de plus que lorsqu'il enlevait les cendres des poëles et fournaises le matin, elles étaient refroidies et il pouvait les prendre avec les mains. Le matin même de l'incendie, à 7½ heures, près de 24 heures avant que le feu se fut déclaré, il y avait mis un plein seau d'eau dans le baril aux cendres. D'après toutes précautions prises et rapportées par Donaldson, il est impossible que le feu ait pris par les cendres.

Les intimés ne se sont pas rendus coupables d'infraction aux règlements de la cité en déposant les cendres comme ils l'ont fait. L'inteprétation que l'appelant a donnée au règlement n'est point correcte, le règlement défend bien de garder les cendres de bois enlevées des poëles dans des boîtes de bois, mais ne fait pas mention des cendres de charbon qui se refroidissent beaucoup plus promptement et sont beaucoup moins dangereuses pour le feu, ainsi qu'il est prouvé par plusieurs témoins. Il a complètement failli dans sa tentative de prouver que les cendres avaient été la cause du feu. D'après la preuve le feu ne peut guère être considéré autrement que comme un accident, dont les intimés ne peuvent être tenus responsables, parcequ'en vertu de leur bail, ils se sont, par convention spéciale, mis à l'abri de la présomption légale établie par l'article 1629, en stipulant qu'ils ne seraient pas responsables des accidents causés par le feu. Cette stipulation n'ayant rien de contraire à l'ordre public ni à la morale est parfaite-

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ment légitime et doit recevoir son exécution. Appel renvoyé avec dépends.

TASCHEREAU J.—I would allow this appeal. The law of the case is clear.

Art. 1053.—Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

Art. 1627.—The lessee is responsible for injuries and loss which happen to the thing leased during his enjoyment of it, unless he proves that he is without fault.

Art. 1628.—He is answerable also for the injuries and losses which happen from the acts of persons of his family or of his sub-tenants.

Art. 1629.—When loss by fire occurs in the premises leased, there is a legal presumption in favour of the lessor that it was caused by the fault of the lessee or of the persons for whom he is responsible; and unless he proves the contrary he is answerable to the lessor for such loss.

This fire, therefore, is presumed to have been caused by the respondents' fault. The words "accidents by fire excepted" in this lease have not the effect to destroy this presumption of law that the fire was caused by the lessee's fault. On him rested the onus to plead and to prove that the fire was caused by an accident. This proof he has failed to make. The contention that I remark in his factum, that the word "accident" may be defined to be an event which is not the result of intention, is untenable. Nothing but a criminal and wilful setting on fire of these premises would make this lessee liable according to this contention. Such is not the law. The word "fault" in Arts. 1627 and 1629 C. C. means, as in Art. 1053, not only a positive act, but also acts of imprudence or negligence.

The respondents seem to think that if they have proved that the cause of the fire is unknown they have proved that it was an accidental fire. But the law is exactly to the contrary. If the cause of the fire is unknown, the presumption is that it was due to the

lessee's fault. Bourjon (1); Pothier (2); Domat, Lois Civiles (3); Dalloz (4). Bretonnier (5) justly remarks, that if the burden of proving that the fire was caused by the lessee's fault or negligence was on the lessor, the lessees would hardly ever be liable, because it would be generally impossible for him to get at the evidence as in the house there is generally only the lessee and his family.

In Ancien Denizart (6) a case of Aug. 22, 1793, is cited, where a proprietor who had himself lost his house by a fire was obliged to indemnify his neighbors to whose property the fire had extended, upon the only ground that the fire had originated in the defendant's house. This judgment, says Denizart, is based on the principle, that in the event of a fire, the *cas fortuit* is not presumed, if not proved.

In another case, *loc. cit.* (*Quentin's*) the defendant was condemned, because the fire had originated on his premises in an unknown manner, *sans qu'on pût savoir comment.*

I need not refer specially to the authorities under Art. 1733 C.N. They may easily almost all be found under the article in Sirey, Codes annotés.

"Accidents by fire excepted" in this lease means "fire not by or through his fault," so that, for instance, if an incendiary had caused the fire the lessee would not have been responsible. Or, if the fire had been caused by a coal oil lamp accidentally falling from any one's hands, or by a rocket or fire-cracker fired from the street, or anything of that kind, then on the proof of any such fact the respondents would have been exonerated. But otherwise they are liable; the pre-

(1) 2 Vol. P. 47.
(2) Louage, 194.
(3) C. P. 181.
(4) 85, 2, 140; 81, 2 111.
(5) 2 Henrys, 140.
(6) Vo. Incendie.

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sumption, as I have already remarked, is that they were in fault. They had to rebut that presumption by proving that they were not in fault, that is to say, by proving that the fire was caused by an accident, by a *vice de construction* or *force majeure*, or by an incendiary. They do not prove an accident when they prove that the cause is unknown, or no negligence on their part. They, in fact, contend that the words "accidents by fire excepted" mean "loss by fire excepted." That construction is untenable.

As to the defective chimney, there is nothing to help the respondents. It was a very far-fetched defence. If the chimney was really defective, they should have informed their landlord of it. Then there had been no fire for over twenty-four hours in any of the stoves communicating with it.

As to the extra premium clause, I cannot see that it can in any way be read as removing in any degree from the respondents the liability which, as tenants, the law imposed upon them. The appellants were not even bound to insure at all (1).

The evidence in the case, as to the hot ashes in a wooden barrel, shows the grossest negligence possible on the part of the respondents, and I concur fully with Church J. when he said in the Court of Appeal:

> The plaintiff has shown more than he was bound to do, for, in my opinion, he has shown gross negligence of the commonest prudence on the part of his tenant, and has afforded satisfactory presumptive evidence of the cause of the fire in the absence of any countervailing proof.

The absence of a watchman on the premises, considering the danger that the extreme heat required in the business involved, is also evidence of negligence. It is proved that the premises must have been on fire for a long time before any alarm was given, and that

(1) See cases cited in No. 58, in note under Art. 1733, Sirey Codes annotés and Dalloz 85, 2, 137.

consequently the fire brigade's services were of no use to save the building. Now, had there been a watchman there, not only could the brigade have been called out in time to save the building and, perhaps, confine the damage to a few dollars, but the watchman himself it may be would have checked the fire at its origin with a bucket of water. Merlin Répertoire (1); Arrêts de Louet (2); Marcadé (3).

On peut d'ailleurs, en certains cas, imputer au locataire d'avoir laisse les lieux sans gardien (4).

The jurisprudence supports entirely the appellant's case:—

A tenant, in order to free himself from the responsibility of the burning of the leased premises, must show satisfactorily that the fire was not caused by his fault, or the fault of those for whom he is answerable. *Belanger* v. *McArthur* (5).

Where the leased premises have been injured or destroyed by fire, the legal presumption is that the fire is caused by neglect or default on the part of the tenant or those for whom he is responsible, unless the contrary is proved. *Rapin* v. *McKinnon* (6).

In order to destroy the presumption declared in Article 1629 of the Civil Code, it is not sufficient for the tenant to show that he acted with the care of a prudent administrator, and if the fire which destroyed the premises leased could not be accounted for, he must show how the fire originated, and that it originated without his fault. *The Seminary of Quebec* v. *Poitras* (7) confirmed unanimously in appeal.

The tenant is responsible for the destruction by fire of leased premises from the neglect of his servants, &c. *Allis* v. *Foster* (8).

And in such case the *onus probandi* is on the tenant to prove that the fire was not the result of neglect on the part of his servants when the premises are burnt while in their occupation. *Ib.* (9).

An unreported case of *Pouliot* v. *Turcotte*, Superior Court, Kamouraska, June, 1875, confirmed in Review, is in the same sense.

With the hardship of the law we have nothing to do.

(1) Vo. Incendie par. 9.
(2) Page 29.
(3) Vol. 6 Page 464.
(4) Boiteux, 77.
(5) 19 L. C J. 181.
(6) 17 L. C. J. 54
(7) 1 Q. L. R. 185.
(8) 15 L. C. J. 13.
(9) See also *Pilon* v. *Brunette*, 12 R. L. 74, and *De Sola* v. *Stephens*, 7 L. N. 172.

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The Code gives no new law on the subject. It does nothing but to re-enact the principles of the Roman law, universally adopted in France, and always held to have been the law of the Province of Quebec. With a constant and uniform jurisprudence as to its construction before their eyes, the Legislature of Quebec has not seen fit to in any way alter the article. Under these circumstances, can we be asked to modify or deviate from that jurisprudence ?

Then, if there is any hardship on the tenant in that law, would there be no hardship in making the landlord bear the loss in case of the destruction of his premises when occupied by his tenant, or in putting on him the burden of proving facts which necessarily must be in the intimate knowledge of his tenant.

La loi ne peut balancer entre celui qui se trompe, et celui qui souffre, (says Bertrand de Grenille). Partout ou elle aperçoit qu'un citoyen a essuyé une perte, elle examine s'il a été possible à l'auteur de cette perte de ne pas la causer, et si elle trouve en lui de la légèreté ou de l'imprudence, elle doit le condamner a la réparation du mal qu'il a fait.

I think the appeal should be allowed with costs.

GWYNNE J.—Whatever might be the result upon the construction of article 1629, C.C., and whether that article is or is not to be read in connection with article 1626, I am of opinion that under the terms of the lease entered into between the parties the defendants are relieved from liability to reinstate the damage done by the fire in the present case which destroyed the leased house. The fire in the present case was clearly, in my judgment, an accident, or casualty by fire, which is the same thing, within the terms of exception in the lease.

*Appeal dismissed with costs.*

Solicitors for appellant: *Macmaster, Hutchinson, Weir & MacLennan.*

Solicitors for respondents: *Atwater & Mackie.*