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*Feb. 4.
*Mar. 8.

SCYTHES & COMPANY LIMITED (PLAINTIFF) ..... } APPELLANT;

AND

GIBSON'S LIMITED (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Landlord and tenant—Lease of parts of building—Bursting of standpipe in leased premises—Damage to lessee's goods—Alleged liability of landlord.

Defendant, lessee of a building, sublet parts thereof to plaintiff. The premises sublet were described as floor spaces, the superficial dimensions being ascertained by the measurement of horizontal distances along the interior surfaces of the walls and partitions. A standpipe, for conducting through the building water from the city's system for fire protection, which passed through plaintiff's premises, burst thereon, in a part used for storage purposes, and plaintiff's goods were damaged by water. Plaintiff sued defendant for damages, alleging that the pipe froze and burst through defendant's negligence in failing to heat the premises, in failing to turn off the water and drain the pipe during the cold weather, or in failing to take certain other precautions. The lease to plaintiff contained no provision for heating. There were no means within the building of turning off the water. There was a valve at the standpipe connection in an area under the street sidewalk and perhaps another at the junction with

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

the city water main, but it was not shown that defendant had control of these.

Held, defendant was not liable; there was no evidence that in fact defendant had possession of, or exercised any control over, those portions of the pipe which were within plaintiff's premises; it could not be said that, by reason of the description of the demised premises as floor spaces of defined areas within walls and partitions, the pipe was not included in the description; *Hargroves* v. *Hartopp* ([1905] 1 K.B. 472), *Dunster* v. *Hollis* ([1918] 2 K.B. 795), and *Cockburn* v. *Smith* ([1924] 2 K.B. 119), distinguished. There was no room for application of the rule in *Rylands* v. *Fletcher* (L.R. 3 H.L. 330), either in its general effect or subject to any of its modifications.

The fact that a radiator in plaintiff's office was supplied with heat from a small furnace which defendant operated did not justify an implication that defendant undertook to keep the room where the break occurred free from frost or its consequences.

Anglin C.J.C., while concurring in the reasons above indicated, also agreed with the grounds taken by Macdonald C.J.A. and M. A. Macdonald J.A. in the court below ([1926] 3 W.W.R. 129).

Judgment of the Court of Appeal of British Columbia ([1926] 3 W.W.R. 129) affirmed.

APPEAL by the plaintiff from the judgment of the Court of Appeal of British Columbia (1) which allowed an appeal taken by the defendant from the judgment of Morrison J. in favour of the plaintiff in an action for damages to plaintiff's goods caused by the bursting of a standpipe on premises leased by the plaintiff from the defendant. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

I. F. Hellmuth K.C. and *W. Zimmerman* for the appellant.

R. S. Robertson K.C. for the respondent.

The judgment of the majority of the court (Duff, Mignault, Newcombe and Rinfret JJ.) was delivered by

NEWCOMBE J.—The defendant (respondent) company, being lessee of the three story building belonging to the Crane Company, situate at the corner of Alexander and Carrall streets at Vancouver, sublet parts of the building to the plaintiff (appellant) company by indenture of 1st September, 1923, in pursuance, as stated in the instrument, of the *Leaseholds Act* of British Columbia. The premises sublet are described as floor spaces, the superficial dimen-

(1) [1926] 3 W.W.R. 129.

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sions being ascertained by the measurement of horizontal distances along the interior surfaces of the walls and partitions. The plaintiff company occupied a part of the ground floor, where its office and business headquarters were, and, for warehouse purposes, the greater part of the first floor, and all of the second floor. The defendant company occupied those parts of the building which were not demised to the plaintiff until November, 1924, when it moved out.

There was no provision in the plaintiff's lease for the heating of the building, but in fact there was a very small, coal burning, hot water furnace in the basement, from which the water pipes extended to the ground floor, and to one of the rooms occupied by the defendant on the first floor, but there was only one radiator in the premises sublet to the plaintiff, and that was in the office on the ground floor. The defendant kept up the fire in the furnace after moving, but, during the latter part of December, the weather was, for the greater part of the time, according to the record of the Meteorological Service, below freezing, and the temperature fell as low as 8 degrees on the 17th. There were some complaints, during this time, that the plaintiff's radiator was cold, and there is a difference in the testimony as to whether or not the fire was not occasionally allowed to go out, but the defendant maintains that it was kept burning. The learned trial judge finds that the furnace was not kept up to a sufficient degree of heat to prevent frost in the building, and that may be taken as established; but it seems moreover to be proved that the heating equipment of the building was insufficient, in the existing conditions, even when operated to its capacity, to exclude frost in those parts of the upper stories where there were no radiators. About the 21st, the gravity tank on the third floor froze and burst, and was renewed by the defendant, and there were also some taps frozen in the plaintiff's premises on the second floor.

There was in the building what is called a standpipe, the purpose of which was to conduct through the building water from the city's water system for purposes of fire protection. It is not shown whether or not the standpipe was introduced in compliance with municipal regulations, but

it is said that the water could not be shut off from it without permission from the city; it is independent of the pipes which supply the building with water for other purposes, and terminates on the third floor in a dead end, affording no circulation or outlet, except by use of the hose attachments. The area under the sidewalk of Carrall St., on the west side of the building, is excavated, and it was in this excavated area that the standpipe was connected with the branch leading to the building from the water main in Carrall St. There is a valve in the area, and perhaps another at the intake from the main, where the water may be turned off, but there are no means within the building of excluding the water from the standpipe, and it appears to be inconsistent with its purpose that the water should be turned off. The standpipe enters the building through the area, passing through the foundation, whence it is carried backward and upward by steps or sets off, and rises through the plaintiff's office on the ground floor, through the first floor, near the middle, in that part of it which was occupied by the plaintiff, through the second floor, and to the third floor. There was connected with this pipe, on the first floor, and also on each of the other floors, a hose attachment.

On the afternoon of Saturday, 27th December, when the plaintiff's premises were closed, "the T. to which was attached the fire hose pipe burst and let the water over the stock in the warehouse." And, when the plaintiff's manager went to the place on the afternoon of the following day, he found the first and ground floors flooded and the stock damaged by the water.

The plaintiff seeks to recover these damages, alleging that the defendant, having vacated the building in November, 1924,

> negligently failed to heat the premises thereafter, whereby the water in the standpipe froze, and the said standpipe, controlled by the defendant, burst, and flooded the plaintiff's premises, and damaged its stock of goods, wares and merchandise, on or about the 27th day of December, 1924.

The particulars of the negligence are alleged as failure to turn off the water and drain the standpipe during the period of excessive cold; failure to keep the water in the standpipe circulating, and allowing it to freeze and burst; failure to protect the standpipe by suitable covering to pre-

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vent frost, and failure to heat the building, so as to keep the water in the standpipe from freezing. It is moreover alleged, in the 8th paragraph of the statement of claim, that:

> The said standpipe and the valve for turning off the water supply thereto and controlling the same were at the times aforesaid always under the control and management of the defendants and their servants and the plaintiff had no control thereof whatsoever.

There is however no proof of this paragraph in so far as it is intended to allege that the defendant had control of the valve in the area under the sidewalk, or at the junction with the city main, and no means were provided for turning off the water elsewhere.

The learned trial judge found for the plaintiff, and directed the damages to be assessed, for the reason as he states, referring to the defendant company, that:

> It was their duty to take reasonable care that the premises and its amenities retained in their occupation and possession were not in such a condition as to cause damage to the parts demised.

He said that the defendant had not succeeded in negativing negligence, and that the proximate cause of the damage was the water from the pipe, which was under the control of the defendant, and which had been allowed to burst as a result of the frost. The Court of Appeal unanimously reversed this judgment, and dismissed the action, although Galliher J.A., expressed some doubts. Upon the appeal to this Court it was argued for the appellant that the defendant company, notwithstanding its sub-lease to the plaintiff, retained the possession and control of the standpipe, because the demised premises were, by the description, confined to floor space, and therefore did not include the walls, partitions, pillars, and pipes enclosing, standing upon or passing through the floors which were demised; and it was contended therefore that the defendant became liable under the law as expounded in such cases as *Hargroves* v. *Hartopp* (1); *Dunster* v. *Hollis* (2); and *Cockburn* v. *Smith* (3), in which it was held that, in the circumstances, it was the duty of a landlord to exercise care to prevent damage to his tenant. It was also urged that the learned judges of the Court of Appeal erred in so far as

(1) [1905] 1 K.B. 472.
(2) [1918] 2 K.B. 795.
(3) [1924] 2 K.B. 119.

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their expressed view of the facts differed from that of the learned trial judge, but, in my judgment of the case, the liability is not affected by these differences and their solution becomes unnecessary. The material facts are not in question.

In the cases upon which the appellant relies the damage suffered was due to the neglect of the landlord to take care that damage was not caused to the tenant through the landlord's failure to maintain in safe condition, or his misuse of, those portions of the building comprising the demised premises which were retained in his possession and control. In *Hargroves* v. *Hartopp* (1), a case which is said to have received the approval of the House of Lords in *Fairman* v. *Perpetual Investment Building Society* (2), the landlord had retained possession of the roof, but he allowed the gutter to become stopped up, and neglected to clear it after notice, and, by reason of the stoppage, the rain-water found its way into the tenant's premises. It was held that the landlord was under a duty to take care that the water collected by the gutter did not cause damage to the tenant. In *Dunster* v. *Hollis* (3), there was a common stairway controlled by the landlord which, through his neglect, was unsafe. *Cockburn* v. *Smith* (4), is another case of damage by water collected on the roof which remained in the landlord's possession and control. In the present case there is no evidence that in fact the landlord had the possession of, or exercised any control over, those portions of the standpipe which were within the demised premises, and the damage was caused by the bursting of the pipe in a part of the premises which was demised. The argument upon which the case is principally founded, that the standpipe was not included in the description of the lease, is not, I think, worthy of serious consideration. That part of the first floor, where the break occurred, was leased and occupied by the plaintiff for storage purposes. The standpipe was there, with hose connected, for fire protection. The lessee covenanted to repair, and that the lessor might enter and view the state of repair, and the lessor covenanted for quiet enjoyment. And when, in the description contained

(1) [1905] 1 K.B. 472.
(2) [1923] A.C. 74.
(3) [1918] 2 K.B. 795.
(4) [1924] 2 K.B. 119.

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in the lease, the demised premises were described as floor spaces of defined areas within walls and partitions, it is impossible, I think, reasonably to suggest that these spaces did not contemplate extent in three dimensions, or did not include space upward from floor to ceiling, including the walls, partitions and fixtures within. Space in a newspaper means one thing; space in a warehouse means another. The word should be interpreted having regard to the obvious use for which the space is required, and, in the latter case, it includes "room." It is a rule of the common law that, in the absence of covenants providing otherwise, a tenant who takes a floor in a house must be held to take the premises as they are and cannot complain that the landlord does not repair, or that the house was not constructed differently. *Pomfret* v. *Ricroft* (1); *Carstairs* v. *Taylor* (2). A landlord is not liable for the consequence of letting a house which is out of repair, even if the state of disrepair be dangerous, and I think it must follow that he is not liable, unless by stipulation, for damages caused to the tenant by frost or its consequences. It is reasonable that this should be so. No means had been provided by the landlord for the heating of the room in which the break in the pipe occurred. It appears that the building had been in use for many years, and it was not known that the standpipe had previously been frozen, but when the temperature fell below the freezing point, and especially when it went to 8 degrees, the tenant must have known as well as the landlord that there was risk of the pipe freezing, and being in possession, had the means to prevent it, or to avoid the consequences.

It was pointed out by Scrutton L.J. in *Cockburn* v. *Smith* (3), that

there are exceptions which modify the rule in *Rylands* v. *Fletcher* (4), and reduce the duty of insuring against damage to an obligation to take reasonable care that damage does not occur. One of these exceptions is where the premises on which the artificial construction is erected and the premises damaged by the escape of water are in one house and the construction is erected for the use of both premises. In this case the occupier of the latter premises takes the ordinary risks of damage from escaping water. * * * In my view his [the landlord's] duty may be based upon

(1) [1669] 1 Saunders 321.
(2) (1871) L.R. 6 Ex. 217, at p. 222.
(3) [1924] 2 K.B. 119, at pp. 132, 133.
(4) (1868) L.R. 3 H.L. 330.

that modified doctrine of *Rylands* v. *Fletcher* (1) which is applicable where he retains in his control an artificial construction which becomes a source of danger to his tenant.

See also *Anderson* v. *Oppenheimer* (2). But, in the present case, I see no room for application of the rule in *Rylands* v. *Fletcher* (1), either in its general effect or subject to any of its modifications. Indeed I do not perceive any principle upon which the landlord is answerable. The fact that the radiator in the plaintiff's office, on the ground floor, was supplied with heat from the small furnace which the defendant operated in the basement does not, in my judgment, justify an implication that the defendant undertook to keep the room occupied by the plaintiff on the first floor free from frost, or its consequences.

The appeal should be dismissed with costs.

ANGLIN C.J.C.—While fully concurring in the opinion of my brother Newcombe, I should be prepared to dismiss this appeal on the ground taken by the Chief Justice of the Court of Appeal and Mr. Justice M. A. Macdonald.

Appeal dismissed with costs.

Solicitors for the appellant: *Wherry, Zimmerman & Osborne.*

Solicitors for the respondent: *Mayers, Lane & Thomson.*