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IN THE

SUPREME COURT OF APPEALS OF VIRGINIA

AT RICHMOND

B. M. JACOBS, DOING BUSINESS UNDER THE FIRM NAME OF CHATHAM JEWELRY AND OPTICAL COMPANY,

v.

J. L. CARTER

ARGUMENT OF COUNSEL FOR DEFENDANT IN ERROR

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The facts of the case from the standpoint of the defendant in error are as follows: That J. L. Carter, the defendant in error, was the owner of the building and premises at the time of the damage sued for in this case. The building was owned by Mr. Hargrave until several years previous, when it was conveyed to the said J. L. Carter, therefore, at the time of the damage the defend-

ant was a landlord of the plaintiff and other lessees in the same building, all the rooms having been rented as offices to other lessees; that the defendant had no control over any of the rooms of the building or the water system in same or any of the rooms, but that the respective lessees had complete control of the space occupied in said building and the water system; that same was not in the care and possession of the defendant Carter; that the cut-off was not in his care or possession, nor did he have any control over it. That under the law of landlord and tenant he was a stranger to the premises because he never reserved any rights to or control over an inch of the premises, nor was there any contract requiring him to look after the property or water system in case of cold weather or at any other time.

The plumbing was of a good standard in every way so far as he knows and believes, and that he had never had any complaint from any of his lessees, including the plaintiff in error, about the condition of the plumbing and the fixtures in connection with the water system and so far as he knows the pipes were not defective, hence he was not negligent in any way in connection with the bursting of the water pipes. See evidence of J. L. Carter on page 20 of the record in this case which is uncontradicted.

It is true, as counsel for plaintiff in error says, on page 2 of the record, that the lease contained no stipulation as to whose duty it was to cut off the water and it is also true that the plaintiff had no control over the water pipes that burst and flooded his store-room, but it is not true, as counsel for plaintiff in error says, on page 2 of the record, that Dr. C. D. Bennett exercises no dominance or control over the cut off to said water pipe but on the other hand Dr. Bennett was the person who did have control over

the water pipe and cut off; see his testimony on page 15 of the record, and J. L. Carter's testimony on page 20 of the record, and it will be seen that the evidence of these two gentlemen shows that Mr. Carter had no control over it and never at any time cut off the water unless he was instructed to do so by Dr. Bennett.

Dr. Bennett occupied two rooms for his offices, as stated by counsel for plaintiff in error, having had his toilet and drinking water in one of them.

Mr. Carter, the defendant, had no occasion to examine the water pipes to see whether or not they were defective because no complaints about any defects had ever been made to him, see evidence of J. L. Carter on page 20 of the record.

Counsel for plaintiff in error cites *Adams* v. *C. & O. Railway Company,* 118 Va. 500, and 88 S. E. 171, in his contention that the defendant in error is liable. From a careful reading of this case it will be readily seen that it was an undisputed fact that the defendant, C. & O. Railway Company, had exclusive possession of one-third of the floor space on the first floor of its two-story brick building and was partitioned off from remainder of floor, and all the rest of the first floor and all of the second floor were reserved by the lessor and was wholly in its possession. A six inch iron pipe extended from beneath the floor where it was connected by another with a city water main along the wall of the building through the leased space into the second story where a fire hose was maintained. The pipe was not for the use of the lessees in any way, they had nothing to do with it. It was under the control of the defendant the entire distance, therefore, the ruling in the case cited has

no application to the law and facts in this case and in the case cited the court properly reversed the lower court.

Counsel for plaintiff in error also cites in support of his contention *Kecoughtan Lodge* v. *Steiner and Kaufman,* 106 Va. 589, and 56 S. E. 569. The main facts in the case cited are as follows: The defendants in error, who were dry goods merchants, occupied one of the rooms on the ground floor of a large three story building in the town of Hampton, known as the "Pythian Castle," as tenants of the plaintiffs in error. During a period of exceptionally cold weather in January, 1905, in the night time a pipe conducting water to the closet on the second floor burst from freezing and the water flowed from the broken pipe into the store room of the defendant in error below, causing injury to their stock of goods. The building was in charge of a janitor employed by the defendants, whose exclusive duty it was to keep the water pipes in repair and cut off the water on the upper floors; that the plaintiff had no duty to perform in that regard or control of the water supply of the building which they occupied; that the water could be cut off from the entire building by means of a stop cock, the key to which was to be applied on the street outside but that defendants in error had no authority to use this key and cut off the water and deprive tenants of other parts of the building of water, and according to this case the defendants in error had no right or control over or responsible for the water pipes but, as will be seen, the plaintiff in error had complete control over the second story. There is nothing in the facts stated in the case cited to break down the evidence of the plaintiffs in error and the jury decided accordingly. The verdict of the jury was upheld by the lower court and also by the Supreme Court.

Counsel for the defendant in error refers the court to the case of *Dudley* v. *Lewis,* 73 S. E. 434, Virginia case. In said case the defendant in error was a tenant of the plaintiff in error, occupying one of the several stores in the Dudley block, situated on the corner of Main and Union streets, Danville, Virginia. The second and third stories of the building which connects all of the stores in the block were occupied by tenants as offices, lodge rooms, club rooms, etc., the landlord occupying no part of the building and retaining no part for her own use. The building was supplied for the convenience of tenants with certain water pipes taking water to the respective apartments, it was not supplied with heat and water and attended to by a janitor or any other person in the employment of the landlord. A water closet was on the second floor which was used by Dr. Robinson, one of the tenants on that floor. On the night of December, 1909, the pipe in this closet burst as a result of freezing and thawing and the water overflowing the closet went through the ceiling into the store below of the defendant in error and greatly damaged his stock of goods. In the case cited by the plaintiff in error, the defendant in the court below, the jury rendered a verdict in favor of the plaintiff, which verdict the court sustained and an appeal was taken by Dudley and the Supreme Court reversed the lower court.

The court says in the case of *Kecoughtan Lodge* v. *Steiner, etc.,* cited by plaintiff in error in this case, that where the building was superintended and under control of a janitor, who was the employee and agent of the landlord, quoting from Farnham on Waters and Water Rights, it is said: If the injury caused by a leakage from pipes in other portions of the building than that used by the agent and tenants the case of the landlord's liability will depend

upon his connection with the injury and that he is liable for his own negligence. In the same case the Supreme Court cited the case of *McCarthy* v. *New York County Savings Bank,* 43 Am. Rep. 591, wherein it was said that water was introduced into the building by the bank and that they caused the pipes to be laid and maintained and paid the water rents and that landlord might enter if necessary, to change or repair the pipes, but while the room with its fixtures is in the possession of a tenant it is he who sustains to third persons the liability of an occupant as the landlord sustains that of owner. And the liability of the landlord does not follow from the fact that the building does not contain the latest and most improved system of water pipes. He does not insure against the negligence of his tenants, nor is he bound to contract it so as to reduce the possibility of damages from such negligence to an absolute minimum.

The court will readily see that the case of *Dudley* v. *Lewis* is similar to the case at bar relative to the control of the water pipes in the building by the landlord.

The court reversed the case of *Dudley* v. *Lewis* because instructions were given which were calculated to impose upon Dudley, the landlady, a duty she was under no obligation to perform because there was no evidence then to show that it was the duty of the defendant to look after and to care for the pipes in Dr. Robinson's office or to keep it from freezing and bursting, but on the contrary the evidence showed that Dr. Robinson was in exclusive possession and control of the water closet to which no one else, not even the landlady, had access.

Counsel for defendant in error is not able to see wherein any of the facts and principals announced in cases cited by

counsel for plaintiff in error conflict with his views and does not question the wisdom of the decision of the Supreme Court in those cases.

Counsel for plaintiff in error says on page 4 of the record that the pipe was inside of building and was protected. That being true, there is no way that the defendant in error should be held responsible for damage caused by the break when no complaint had ever been made to him and he had no control over it.

Dr. Bennett says in his evidence on pages 15 and 16 of the record that the only interest that he had ever taken in regard to cutting off water was occasionally to remind the defendant that the weather was cold and that it might be well to cut the water off; that on being reminded that the weather was cold and that it should be done, the defendant did at his request cut the water off and that he, Dr. Bennett, did at the same time open faucets so as to drain pipes and toilet. Mr. Carter, the defendant, says in his evidence on pages 20 and 21 of the record that he never at any time cut the water off unless directed by Dr. Bennett. Counsel for plaintiff in error asks the court to read evidence of these two men.

The attention of the court is called to the fact that there is no conflict in the evidence of these two witnesses and the evidence of J. L. Carter on page 21 of the record is that he never attempted or exercised the least control over the property and that the cut off in Dr. Bennett's office and that the cut off of the plaintiff were on the property leased to them; that it was not his business or obligation to furnish a key to the cut offs of his tenants. This is uncontradicted.

The verdict of the jury was plainly wrong, because there was no conflicting evidence on the question of liability of

the defendant's right of control over water pipes and cut offs otherwise. There is no real conflict in evidence throughout the case. The defendant, J. L. Carter, is not liable to anyone but Dr. C. D. Bennett, the evidence clearly shows, is the man liable to damages to the plaintiff because it shows that he had control over the water pipes that burst at the time.

According to the authorities presented by counsel for plaintiff in error and counsel for defendant in error and the facts in this case the judgment of the lower court should be affirmed.

Respectfully submitted,

N. E. CLEMENT,

Counsel for J. L. Carter,

Defendant in Error.