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conduct, it recognizes the doctrine of the parent's immunity from a suit by an unemancipated minor child, sounding in negligence.

In conclusion, it would seem that the cases run strongly to the effect that an unemancipated minor cannot maintain an action against his parent to recover damages for negligence.¹⁷ But there is a strong modern trend which accords with certain of the older rulings to allow an action by the unemancipated minor against his parent for negligence in some instance, and especially to allow the action where the injury is intentional, or resulted from wilful misconduct or an evil mind.¹⁸

LANDLORD AND TENANT—EXCULPATORY CLAUSE RELIEVES LESSEE OF LIABILITY FOR OWN NEGLIGENCE

The plaintiffs as lessor and the fire insurance subrogee under the lessor's insurance policy brought an action against the lessee to recover damages for the loss of the leased building, machinery, and equipment allegedly caused by lessee's negligence in causing a fire. A jury trial in the Superior Court of Cook County found that the fire and resulting damage were caused by the lessee's negligence. The Supreme Court of Illinois reversed the trial court and held that the exculpatory clause in the lease should be construed to release the lessee from tort liability for negligence. *Cerny-Pickas & Co. v. C. R. Jahn Co.*, 131 N. E. 2d 100 (7 Ill. 2d 393, 1956).

Three clauses in the lease were relied upon for the determination of the case:

(2) Lessee will keep said premises . . . in good repair . . . and upon the termination of this lease, in any way, will yield up said premises to lessor in good condition and repair (loss by fire and ordinary wear excepted).

(8) . . . And the lessee at his own expense will keep all improvements otherwise in good repair (injury by fire or other cause beyond lessee's control excepted) . . .

(14) Lessor shall pay for fire insurance on the building and equipment and machinery hereby leased, and lessee agrees to pay for any increase in fire insurance premium on such insurance policies due to any increase in the insurance rate due to the nature of lessee's business. . . .¹

In the first trial, the judge ruled as a matter of law that the lessee was exonerated from liability for loss due to fire, interpreting clause eight as an exculpatory clause. On appeal, the Appellate Court of Illinois for the

¹⁷ *Augustin v. Ortiz*, 187 F. 2d 496 (C.A. 1st, 1951); *Owens v. Auto. Mut. Indem. Co.*, 235 Ala. 9, 177 So. 133 (1937); *Schneider v. Schneider*, 160 Md. 18, 152 Atl. 498 (1930).

¹⁸ *Brown v. Cole*, 198 Ark. 417, 129 S.W. 2d 245 (1939); *Sorrentino v. Sorrentino*, 248 N.Y. 626, 162 N.E. 551 (1928).

¹ *Cerny-Pickas v. C. R. Jahn*, 7 Ill. 2d 393, 394, 131 N.E. 2d 100, 102 (1956).

First District held that clauses in a contract should not be construed to exempt a party from liability for loss resulting from his own negligence.² In effect, the Appellate Court said that for reasons of public policy the provisions in the lease would not be deemed to exonerate the lessee from liability caused by his own negligence. After the case was remanded but before it was tried on the merits, the Supreme Court of Illinois held in another decision that an exculpatory provision in a lease, whether it is general or specific, is not against public policy.³

The trial court was then left with but a two-fold question: if there was in fact an exculpatory clause in the lease, to what extent did it relieve the lessee from liability for fire damage resulting from his own negligence? The early common law predicated a lessee's liability for damage to the leased property on the theory of waste.⁴ It was later restricted to situations where the damage was caused by the lessee's negligence or wilful acts.⁵ This liability at common law in England evolved to tort liability based on negligence in America.⁶

From the American common law it can be seen that the lessee would not be liable for damages for fire not resulting from his own negligence.⁷ However, in *Lothrop v. Thayer*⁸ it was held that a tenant-at-will was not liable for his negligence in causing a fire which destroyed the landlord's building while the tenant was in possession. The court relied on the fact that a tenancy-at-will was involved and that the fire was the result of the negligent maintenance of heating equipment. The tenant-at-will was required to heat the building and fires resulting from such must, the court held, be caused by the wilful and wanton conduct of the tenant before liability would attach.

A contract to deliver up the premises in good order at the end of the term "damage by fire and other unavoidable casualty excepted" was held to include all fires regardless of how they started in *Day Wood Heel Co. v. Rover*.⁹ In *Slocum v. National Products Co.*¹⁰ under a similar lease, a tenant was held to be relieved from the duty of restoring the building

² Cerny-Pickas v. C. R. Jahn, 347 Ill. App. 379, 106 N.E. 2d 828 (1952).

³ Jackson v. First National Bank of Lake Forest, 415 Ill. 453, 114 N.E. 2d 721 (1953).

⁴ Tiffany Landlord & Tenant § 111 (Vol. 1, 1910). Lord Coke boldly asserted that burning of the house by negligence or mischance is waste. Such was asserted without any statement of authority.

⁵ Ibid.

⁶ How such evolution took place is subject at best to mere conjecture. The prominence of insurance companies and the broad protection afforded undoubtedly played an important role.

⁷ Tiffany, Landlord & Tenant § 111 (Vol. 1, 1910).

⁸ 138 Mass. 466 (1885).

⁹ 123 Ohio St. 349, 175 N.E. 588 (1931).

¹⁰ 292 Mass. 455, 198 N.E.747 (1935).

regardless of how it may have been damaged. Both of these cases were resolved on principles of contract alone. These cases were relied upon in the leading case of *General Mills v. Goldman*¹¹ where it was held that a provision in the lease that the "tenant should return the property in good condition loss by fire excepted" acted as a complete release of the lessee both in contract and tort. The parties, the court found, intended a loss by fire as is ordinarily intended when men provide for the risk of loss from fire in business dealings.

The instant case relied on the *General Mills* case and with good reason because the leasing provisions in the cases were almost identical. In both, particular insurance was to be carried by the lessee and it was so stipulated in the lease. The court did, however, recognize authority to the contrary.

In *Carstens v. Western Pipe and Steel Co.*¹² the court held that it would not be likely that the lessors would willingly release the lessee from damages caused by the lessee's own active negligence and, further, if such was intended it would have been stated in clear terms. In *Morris v. Warner*¹³ the lease contained the provision "damage by fire or elements excepted" and the court held that such a provision cannot be construed as relieving the lessee from liability for a fire caused by his own negligence. Both of these cases can be distinguished from the instant case in that the leases were entirely silent as to insurance. In *Winkler v. Appalachian Amusement Co.*¹⁴ leasing provisions were similar to those found in the instant case but the court held that exculpatory clauses should be strictly construed and will not exempt a tenant from liability unless clear and explicit words show such intent of the parties. In this regard the North Carolina Supreme Court relied on the dissenting opinion in the *General Mills v. Goldman*¹⁵ case and a since overruled Illinois Appellate Court case.¹⁶

It would appear after a reading of the cases and an examination of the leases and the intention of the parties to such leases, that a release of contract liability is also a release of tort liability. The Illinois court recognized that there are areas in the law where the distinction between liability in tort and liability in contract may be significant. This distinction was held not to be relevant in determining the meaning to be given words used by laymen in defining their rights and obligations.¹⁷ The unqualified

¹¹ 184 F. 2d 359 (C.A. 8th, 1950).

¹² 142 Wash. 257, 252 Pac. 939 (1927).

¹³ 207 Cal. 498, 279 Pac. 152 (1929).

¹⁴ 238 N.C. 589, 79 S.E.2d 185 (1953).

¹⁵ 184 F. 2d 359 (C.A. 8th, 1950).

¹⁶ *Cerny-Pickas v. C. R. Jahn*, 347 Ill. App. 379, 106 N.E.2d 828 (1952).

¹⁷ *Cerny-Pickas v. C. R. Jahn*, 7 Ill. 2d 393, 131 N.E.2d 100, at page 103 (1956).

use of the word fire was meant to include all fires regardless of their origin.¹⁸

This appears to be the sounder view in that the prudent lessor should contemplate fires and provide for loss occasioned by them even though caused by the tenant's negligence.

LOTTERIES—GROCERY STORE PROMOTIONAL SCHEME HELD A LOTTERY

Declaratory judgment was sought by a corporation to determine whether its proposed method to stimulate business was a lottery within the meaning of the New Jersey Lottery Act¹ which provides that any person who "gives, barter, sells, or otherwise disposes of, or offers to give . . . a ticket in a lottery, is guilty of a misdemeanor." The Act contains no definition of the term "lottery." Plaintiff contracted with a chain of super marts to operate its scheme, whereby the contestants filled out coupons on calendars mailed to them free of charge, whether customers or not, to be placed in a receptacle in the named store after which a drawing was held to determine the winner. Said scheme was determined to be a lottery by the Supreme Court of New Jersey, the court deciding that consideration did exist, both in a detriment to the contestant and a benefit to the store proprietor. The court went on to say that even if consideration were not present, the scheme would still be a lottery within the New Jersey Lottery Act, since the Act was broad enough to cover even that situation. *Lucky Calendar Company v. Cohen*, 19 N.J. 399, 117 A.2d 487 (1955).

The term "lottery" has been defined as a distribution of prizes and blanks by chance, a game of hazard in which small sums are ventured for the chance of obtaining a larger value, either in money or in other articles² or, a scheme for the distribution of prizes by lot or chance.³ Regardless of the definition a particular court sees fit to use, all are in accord that a lottery consists of these three elements: prize, chance, and consideration.⁴ Most of the statutes in the various states prohibiting lotteries fail to de-

¹⁸ *Ibid.*

¹ N.J.S. 2A: 121-1 et seq., N.J.S.A.

² *Long v. State*, 74 Md. 565, 22 Atl. 4 (1891); *Cross v. People*, 18 Colo. 321, 32 Pac. 821 (1893); *Wilkinson v. Gill*, 74 N.Y. 63 (1878).

³ *Horne v. United States*, 147 U.S. 449 (1893); *Yellow-Stone Kit v. State*, 88 Ala. 196, 7 So. 338 (1890); *Meyer v. State*, 112 Ga. 20, 37 S.E. 96 (1900); *People v. Monroe*, 349 Ill. 270, 182 N.E. 439 (1932).

⁴ *Little River Theater Corp. v. State*, 135 Fla. 854, 185 So. 855 (1939); *State v. Hunding* 220 Iowa 1369, 264 N.W. 608 (1936); *People v. Wassmus*, 214 Mich. 42, 182 N.W. 66 (1921); *National Thrift Assn. v. Crews*, 116 Ore. 352, 241 Pac. 72 (1924).