

liquidator under s. 162, but such a thing would be immaterial in its effect, as all money recovered would go into the general fund.

For the reasons which have been stated, in my opinion, there is no duty, statutory or otherwise, owed by the liquidator to the plaintiff in regard to the matter complained of which would have supported an action at common law for negligence during the period of the winding-up of the company; and, without expressing any opinion as to the anomalous type of case dealt with in *Devenish v. Pulsford* ([1903] 2 Ch. 625), there is also nothing which will support the plaintiff's cause of action after the statutory dissolution of the company.

Accordingly, judgment must be for the defendant in demurrer.

STREET and MAXWELL JJ. concurred.

*Judgment for defendant.*

Solicitors : *Remington & Co. ; McLachlan, Westgarth & Co.*

1935.

THOMAS  
FRANKLIN  
&  
SONS  
LTD.  
v.  
CAMERON.

*Davidson J.*

# CARR v. BAKER.

1936.

May 20, 21,  
28.  
Jordan C.J.  
Davidson J.  
Stephen J.

*Negligence—Evidence—Inference—Civil action based on felony  
—Whether action should be stayed—Compensation to  
Relatives Act, 1897 No. 31, s. 3.*

In an action by the plaintiff against the defendant under the provisions of the Compensation to Relatives Act, 1897, in respect of the death of her husband, the plaintiff was non-suited upon the ground that there was no evidence that the defendant was responsible for the wrongful acts complained of. The evidence showed that the plaintiff's husband was killed by the fall of portion of a building, which followed an explosion. This building was occupied by the defendant and in it a furniture business was carried on for him. On a Saturday night large quantities of inflammable liquid were brought on to the premises and poured over the floors and furniture. Some blankets in the vicinity of a safe were

1936.

CARR  
v.  
BAKER.

---

saturated with kerosene. This safe contained the business books, which were also saturated with inflammable liquid, and it had been blown open with an unusually large quantity of gelignite. The defendant's property was insured against damage by fire but not explosion, and the defendant had endeavoured to persuade an eye witness to suppress any reference to an explosion. Upon appeal,

*Held*, that there was some evidence from which the jury could infer, if it remained unexplained and unqualified, that the defendant was responsible for the explosion, and the non-suit should be set aside.

*Held*, also, that the rule, that civil proceedings based upon felonious acts of the defendant should be stayed until the defendant had been prosecuted, did not apply where injury resulted to a person only incidentally to the felony, and, in any event, the rule did not apply to actions based upon s. 3 of the Compensation to Relatives Act, 1897.

#### NEW TRIAL MOTION.

The following facts are taken from the judgment of the Chief Justice :—This is a motion for a new trial in an action in which the plaintiff was non-suited. The action was brought by the plaintiff under the provisions of the Compensation to Relatives Act, 1897, to recover damages from the defendant for the benefit of herself and her five children in respect of the pecuniary loss sustained by them by reason of the death of the plaintiff's husband. It was alleged in the declaration that an explosion occurred in a building occupied by the defendant, as the result of which, portion of the building fell upon the plaintiff's husband and killed him ; and it was alleged that this explosion was caused by, *inter alia*, negligence on the part of the defendant.

It was contended on behalf of the defendant that the facts proved by the plaintiff supplied no material from which it could be found that he caused the explosion or was in any way responsible for it. This contention was successful before the learned trial Judge ; and he granted a non-suit. Before this Court also, this was the defendant's main contention ; but he took the further point that if the facts proved anything against him, they proved arson, and that no action could be maintained against him until he had been prosecuted for the felony. It was argued also that arson could not be proved under the plaintiff's pleading.

There was evidence which, if the jury accepted it, enabled them to draw the inferences that the following facts probably existed. The building in which the explosion occurred, which

caused the death of the deceased, was a "Furniture Emporium," and up to the time of the explosion was being used for the purposes of a business of selling household furniture. At some time prior to about 2.30 a.m. on the night of the 1st-2nd December, 1934, which was a Saturday night, some person acting with or without assistance did the following acts. He brought on to the premises about 8 gallons of petrol (which would be a bulky package) and also some quantity of kerosene. He utilised the petrol partly by pouring it over one or more floors of the building, and partly by saturating with it the books of the furniture selling business. He also saturated with kerosene some blankets which were in the vicinity of the safe. having treated the books of the business in this way, he placed or replaced them in the safe, closed the door of the safe, and shot the lugs in the door into position in their sockets. He then applied to the safe door about 4 oz. of gelignite, this being about four times as much as a person experienced in safe blowing would have known to be sufficient. By some means he caused the gelignite to explode. By some means—probably not directly by means of the explosion—he caused the inflammable material which he had arranged in the building to become ignited. In the meantime, however, fumes had arisen from the large quantity of petrol which had been distributed about the building, and these had mixed with the air so as to form a large quantity of highly explosive gas. It would take about half an hour from the spreading of the 8 gallons for the explosive mixture to form. In the result, instead of the building and its contents being destroyed by fire alone, there was a violent explosion of gas, which occurred a few seconds after the explosion of the gelignite, and the walls of the building were blown out on to an adjacent residence in which the plaintiff's husband was sleeping.

1936.

---

CARR  
v.  
BAKER.

---

*Rooney and Parsonage*, for the appellant. There was evidence from which a jury could infer that the acts complained of were more probably those of the defendant than of any other person. In such a case as this the plaintiff would rarely possess positive or circumstantial evidence directly implicating the defendant, and as an alternative way of fixing responsibility on the defendant, the plaintiff can give evidence which ex-

---

1936.

---

CARR  
v.  
BAKER.

---

cludes other possible wrongdoers and leaves a probability of the defendant's guilt. The plaintiff relies on the following facts as excluding other persons and pointing to the defendant. The defendant was in occupation of the premises and owned the business. There was a violent explosion followed by a fire, caused by benzine being present in dangerous quantities. The furniture, flooring and bundles of blankets were soaked in inflammable liquid; the lock of the safe had been blown with such quantity of explosive as indicated that an inexperienced person had been active; within the safe the business books were found saturated with benzine; there was no evidence of any theft; the defendant was insured, and had attempted to suppress evidence. The only known employee lived in proximity, was uninsured and in danger from the fire, and can be excluded. Further, there was some evidence that the defendant kept a dangerous substance (benzine) on his premises and he must keep it at his peril. They referred to *Fitzpatrick v. Walter E. Cooper Pty. Ltd.* (54 C.L.R. 200); *Humphries v. Cousins* (2 C.P.D. 239); *Williams v. Commissioner for Road Transport & Railways* (50 C.L.R. 258).

*J. W. Shand and Clapin*, for the respondent. Within the authorities, there was no more than an equal probability pointing to the defendant as against other persons. If so, the plaintiff must fail. The onus is on the plaintiff to exclude other persons. No inference can be drawn from the facts relied on by the plaintiff; one can guess or speculate, but this is not enough: *Cerrutti v. John Grant & Sons Ltd.* (32 S.R. 215). The facts taken separately do not implicate the defendant and to multiply such facts adds nothing to the strength of the plaintiff's case. The existence of insurance is neutral, unless it be shown whether and to what extent the defendant would benefit. Similarly, the conversation with Ling is neutral. It is for the plaintiff to prove there was no robbery. They referred to *Harries v. Thomas* (86 L.J.K.B. 812); *Cofield v. Waterloo Case Co.* (34 C.L.R. 363); *Wakelin's Case* (12 App. Cas. 41); *Powell v. M'Glynn & Bradlaw* ([1902] 2 Ir. R. 154). In this case there is no proof that there was a motive, and the possibility of a motive in the defendant is not enough.

The rule in *Rylands v. Fletcher* (L.R. 3 H.L. 330) has no application in this case ; there is no evidence that the defendant knew or permitted the dangerous substance to be on his premises. As there is no evidence to exclude other persons from occupation and no evidence that the defendant was in actual occupation, it is equally consistent that the petrol was brought on to the premises by some person other than the defendant. Secondly, the plaintiff's case is based upon a felony committed by the defendant, and is therefore not maintainable unless and until the defendant has been prosecuted : *Smith v. Selwyn* ([1914] 3 K.B. 98); *Wilkinson v. Downton* ([1897] 2 Q.B. 57).

1936

---

 CARR  
 v.  
 BAKER.  


---

*Rooney*, in reply. *Smith v. Selwyn* (*supra*) has no application where the damage is only incidental to the crime : (Halsbury's Laws of England, 2nd ed., vol. 1, p. 45). In any event the words of s. 3 of the Compensation to Relatives Act, 1897, precludes the rule.

*Cur. adv. vult.*

May 28.

JORDAN C.J. I think that it is convenient to dispose of the latter points first. As regards the pleading, I think that it was open to the plaintiff to take the line which she has sought to take. An act which is done with a criminal purpose may be done with such recklessness or negligence as to injure tortiously a third party against whom the perpetrator had no criminal intention. As regards the ground that the plaintiff must first prosecute for felony, this rule applies only in the case of a person injured by a felonious act, who owes a duty to the public to prosecute. It does not apply to persons who are only incidentally and not directly injured by the felonious act : Halsbury's Laws of England, 2nd ed., Vol. 1, p. 44. In any event, I think that it follows from the language of s. 3 of the Compensation to Relatives Act, 1897, that the fact that the death has been occasioned by a felony, and that there has not been any prosecution, is not a ground for staying proceedings brought under that Act.

It is necessary, therefore, to determine whether there was any evidence upon which a jury could reasonably find as a fact that the defendant was responsible for the explosion.

1936.

CARR  
v.  
BAKER.

Jordan C.J.

In a Court of justice, the question whether a particular fact has been proved must be determined by considering evidence and seeing whether the existence of the fact is probable in the light of that evidence. In a civil matter, it is necessary, in order that a fact may be regarded as established, that the evidence should be such that it is more probable that it exists than that it does not. The position is the same whether the evidence is direct or circumstantial: *Simpson v. L. M. & S. Rly. Co.* ([1931] A.C. 351 at p. 359). In a criminal matter, it is necessary, if the fact is to be proved by the prosecution, that the evidence should be such that not only is it more probable than not that the fact exists, but that there is no reasonable probability that it does not: it must be proved that it is so probable that no reasonable doubt exists that it is the fact: *Peacock v. The King* (13 C.L.R. 619 at pp. 630, 651-2). In an ordinary action at law, it is the civil onus only which a plaintiff has to discharge, notwithstanding that the act sought to be proved is one which would support a criminal prosecution: *Doe d. Devine v. Wilson* (10 Moore P.C. 502); *Brown v. McGrath* ([1920] S.A.L.R. 97; 8 A.L.J. 207). It has been clearly and emphatically laid down by the House of Lords that in no case can a fact be regarded as established unless its existence is at least a reasonable inference from some matter proved in evidence. It is not sufficient that there should be some ground for conjecturing that the fact exists. There must be evidence affording ground for treating it as existing as a matter of inference and not of conjecture: *Jones v. Great Western Railway Co.* (47 T.L.R. 39 at pp. 41, 45). The existence of a fact may be inferred from other facts when those facts make it reasonably probable that it exists; if they go no further than to show that it is possible that it may exist, then its existence does not go beyond mere conjecture. Conjecture may range from the barely possible to the quite possible. Inferences of probability may range from a faint probability—a mere scintilla of probability such as would not warrant a finding in a civil action: *Hiddle v. National Fire & Marine Insurance Co. of N. Z.* (17 N.S.W.L.R. 46 at p. 49)—to such practical certainty as would justify a conviction in a criminal prosecution. "In discussing whether there is in any case evidence to go to

the jury, what the Court has to consider is this, whether, assuming the evidence to be true, and adding to the direct proof all such inferences of fact as in the exercise of a reasonable intelligence the jury would be warranted in drawing from it, there is sufficient to support the issue": *Jones Case* (47 T.L.R. 39 at p. 45). It is well established that if there is no piece of evidence which, taken at its highest, is more than equally consistent with the existence and with the non-existence of a fact, it cannot be treated as established: *Cofield v. Waterloo Case Co. Ltd.* (34 C.L.R. 363 at pp. 374-377). This situation may arise in two different ways. First, there may be no piece of evidence which suggests that the existence of the fact is more than possible. In such a case, since there is nothing to show whether the existence of the fact is probable or not, it is just as likely that it does not exist as that it does. There is no probability either way; and nothing equals nothing. *Wakelin v. L. & S.W. Rly. Co.* was a case of this type (12 App. Cas. 41 at p. 49). There may, however, be a case in which the evidence is such that in some aspects it raises a probability that the fact exists, and in other aspects it raises a probability that it does not. If, in such cases, the two counter-vailing probabilities are in perfect equipoise, the fact cannot be treated as established. It was pointed out, however, by Kay L.J. in *Smith v. South Eastern Railway Co.* ([1896] 1 Q.B. 178 at p. 188) that where a jury are judges of the facts "it should be a very exceptional case in which the Judge could so weigh the facts and say that their weight on the one side and the other was exactly equal," so as to justify him in taking the case from the jury. Lord *Blanesburgh* has recently expressed agreement with this view in *Jones v. Great Western Railway Co.* (47 T.L.R. 39 at p. 42). "If there are two reasonable views to be taken on the evidence, or if there is any inference to be drawn from the evidence, the case is one for the jury": *Commissioner for Rlys. v. Leahy* (2 C.L.R. 54 at p. 62).

1936.

CARR  
v.  
BAKER.

Jordan C.J.

It is necessary to apply these principles to the evidence given in the present case.

I think that it might reasonably be inferred from this that the person responsible for the explosion was a person who was able to introduce a bulky parcel of petrol into the building,

**1936.**

---

CARR  
v.  
BAKER.

---

---

Jordan C.J.

---

who desired to destroy the stock-in-trade of the business and also the books of the business, and who was able to open and close the safe at will, but wished to make it appear that he could not. There was plenty of evidence that the explosion was caused by the work of some person who wanted to produce the impression that the safe had been blown open by a burglar, and that a fire had been caused by accident or design on the part of a burglar.

To whom do these facts point ? It was suggested that they pointed indifferently (1) to a burglar ; (2) to a pyromaniac ; (3) to some malicious enemy of the owner of the business ; (4) to a dishonest debtor of the business, who might desire to destroy the records of his indebtedness ; (5) to a dishonest employee, who might desire to destroy the records of his speculations ; or (6) to the owner of the business, who might desire to commit an insurance fraud. I think, however, that although these are all possibilities, upon the evidence it is definitely improbable that it was a burglar, and that none of the solutions numbered 2, 3 and 4 can be said to be probable. This leaves Nos. 5 and 6. It is urged that these, too, are mere possibilities, and alternatively that if they can be regarded as having some degree of probability, it is a mere scintilla such as could not support a finding. Finally, it is urged that if the probabilities of 5 and 6 go beyond this, they are in such complete and perfect equilibrium that it is impossible that a jury could reasonably prefer one to the other.

It is necessary, therefore, to consider the evidence given with respect to the defendant and his employees. As regards the defendant, there was evidence which, if accepted, went to prove the following matters. He was the owner of the furniture-selling business. The books which were saturated with petrol were his books, and the safe was his safe. The defendant's property which was damaged by the fire was insured against such damage, except where the primary cause of the fire was explosion. At the time of the fire, there was a good deal of furniture on the ground floor, but a witness who saw the upper floor during the progress of the fire, said that on so much of the floor as was left there was no furniture and very little of anything else. The defendant, a week or two after the fire, visited an employee of the Municipal Council, who



had been in the street near the building when the explosion which destroyed the building occurred, asked him what statement he had given to the police, and told him that it would be better if he left the expolsion out, as he, the defendant could not get his insurance if it were proved to be an explosion. As regards employees, the evidence is that one Mainwaring was the manager of the shop for the defendant. He lived in the wooden part of the shop on the top floor at the back with his wife and child; and his personal furniture was uninsured. It did not appear whether there were any other employees.

Upon this material, if unexplained and unqualified, I am unable to say that a jury could not infer that there was a reasonable probability that the defendant was responsible for the explosion, and that it was more probable that it was he who was responsible than any employee of his acting on his own initiative. It has been pointed out that a plaintiff "has to prove his case, but he is not required to demonstrate his case or to exclude by evidence every possibility that may be suggested": *Kerr v. Ayr Steamship Co. Ltd.* ([1915] A.C. 217 at p. 224). The present case is somewhat near the line. "There are no judicial differences in these cases greater, strange to say, than the differences between Judges as to whether a reasonable man could have come to a certain conclusion": *Ibid.* at p. 234. On the whole, however, I think that the case should have been left to the jury. In saying this I must not, of course, be taken to express or to imply any opinion as to whether the defendant was in fact responsible. I merely think that there was evidence from which a jury of reasonable men might—not should—so find, if nothing else were placed before them.

For these reasons I am of opinion that there should be a new trial.

DAVIDSON J. I agree.

STEPHEN J. I agree.

Solicitors: *C. Jollie Smith & Co.; Walker & Gibbs.*

1936.

CARR

v.

BAKER.

Jordan C.J.