Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Harry Rickards, since deceased (now represented by John Charles Leete and others) v. John Inglis Lothian, from the High Court of Australia (P. C. Appeal No. 127 of 1911); delivered the 11th February 1913.

PRESENT AT THE HEARING:

THE LORD CHANCELLOR.
LORD MACNAGHTEN.
LORD ATKINSON.
LORD MOULTON.

[DELIVERED BY LORD MOULTON.]

The Appellants in this case are the personal representatives of Harry Rickards who was the Defendant in an action for damages brought by the Respondent against him in the Melbourne County Court, for damages occasioned to the stock in trade of the Plaintiff who was the tenant of the second floor of certain premises belonging to the Defendant by an overflow from a lavatory basin situated on an upper floor of the same premises. Though the sum involved is not large the legal questions raised by the case are of considerable importance and the litigation has been characterised by remarkable differences of judicial opinion upon them. Upon the findings of the jury the Judge at the trial directed judgment to be entered for the Plaintiff for 156*l.*, the amount of the damages found by the jury. On appeal to the Supreme Court of

[2] J. 210. 100.—2/1913. E. & S. A

Victoria that judgment was set aside and judgment entered for the Defendant in accordance with the views of a majority of that Court. This decision was reversed on appeal by the High Court of Australia in accordance with the views of a majority at that Court, and the present Appeal is brought by leave from that decision of the High Court of Australia. The circumstances out of which the action arose were as follows :—

The Defendant was the lessee under a long building lease of a building in Melbourne used for business purposes and the Plaintiff was tenant under him of part of the second floor of such building. On the fourth floor there was a room used as a mens' lavatory in which was fixed a wash-hand basin supplied with water by a screw-down tap situated immediately over it and connected by a pipe with the mains of the Metropolitan Water Supply System. The basin had the usual arrangements for getting rid of the water, viz., a vent-hole provided with a plug at the bottom of the basin and holes situated near its upper edge to act as an overflow. Through these holes the overflowing water passed down a pipe which connected with the waste pipe from the hole at the bottom of the basin, some little distance below its upper end. It was common ground that the basin and fittings above described were of ordinary construction and such as are in common use and it was proved that on their erection they had been inspected and passed by the officials of the Metropolitan Board of Works in the regular way. The lavatory was intended for the use of the tenants of the upper floors and persons in their employment.

The Defendant employed one Smith as a caretaker of the building, and part of his business was to see that the lavatory was in good working order. On the 18th August 1909, he was on duty until 10.20 p.m. He gave evidence

that at that hour he went to the lavatory and found it in proper order. On the Plaintiff arriving on the premises the following morning he found that his stock-in-trade there (which consisted mainly of school-books) was seriously damaged by water, and on examination it was discovered that the water-tap of the basin had been turned full on and the waste pipe plugged so that there had been an overflow from the basin to the extent of the full supply which the tap was capable of giving, and that this overflow had flooded the rooms below. There was no direct evidence as to the length of time that the water had been running in this way but the extent of the overflow was so great that it seems to have been accepted by all parties at the trial that it must have continued for some hours. It was for the damage thus caused to the Plaintiff's stock-in-trade that the action was brought.

On examining the basin it was found that the waste-pipe had been plugged up with various articles such as nails, pen-holders, string, and soap, and that the obstruction was situated so far down the pipe that it covered its junction with the waste-pipe from the overflow holes. It therefore blocked both waste pipes. The manner in which the plugging was effected furnished strong evidence that it had been intentionally done; indeed, the materials had been so tightly rammed together that it was difficult to clear the pipe. For the purposes of the trial the capacity of the waste-pipes for carrying off the water which the tap was capable of supplying was tested after the pipe had been cleared. It was found that at the ordinary pressure of the system during the daytime the waste-pipes were able to carry off all the water which the tap could supply even when fully open, but that during the night

the pressure rose somewhat and that at the night pressure the waste-pipes were not sufficient to take off the whole of the water which the tap could supply. The Plaintiff gave no evidence to show what fraction of the water which the tap was capable of so supplying during the night would fail to pass away by the waste-pipes if they were clear and unobstructed, but it would seem probable that the amount of the overflow in such circumstances would only be a comparatively small fraction of the water issuing out of the tap and that the major portion would pass off by the waste-pipes.

In his plaint the Plaintiff claimed to recover the damage done to his stock-in-trade as injury caused by water through the carelessness of the Defendant, his servants or agents in the construction, maintenance, management, and control of the lavatory basin and its pipes, &c., and alternatively as injury arising from a breach by the Defendant of an implied covenant for quiet enjoyment. At the trial he was permitted to add a third alternative whereby he claimed to recover such damage as injury caused by the Defendant wrongfully permitting large quantities of water to escape from the said basin and to flow into the premises occupied by the Plaintiff. By his defence the Defendant denied the allegations of negligence, covenant, and duty, and further denied that if any such covenant existed there had been any breach of it.

At the trial evidence was called on both sides and the above facts were proved. The claim upon implied covenant was obviously unsustainable and was apparently abandoned. The substantial case sought to be made on behalf of the Plaintiff was twofold; first, that Smith (for whose actions the Defendant was responsible) was guilty of negligence in leaving the tap

turned on and in omitting to discover that the waste-pipe was choked; and secondly, that the Defendant was guilty of negligence in not placing a lead safe with an outlet pipe on the floor of the lavatory underneath the basin. Smith was called as a witness on behalf of the Defendant and gave evidence that the basin was in proper condition when he left it on the evening before, and the tap turned off, and, as will presently be seen, the jury accepted his evidence. With regard to the second point, viz., whether it was necessary or usual to put a lead safe in such a lavatory, the evidence was very conflicting, the views of the various expert witnesses called for the parties differing widely.

The learned Judge summed up very carefully and at considerable length, calling the attention of the jury to the whole of the evidence given. In the course of his summing up he directed them that " if this " (*i.e.*, the plugging up) " were a deliberately mischievous act by some " outsider, unless it were instigated by the " Defendant himself, the Defendant would not be " responsible. He would not be responsible for " a malicious act under those circumstances, " because he could not guard against malice." This direction was in substance repeated in that part of the summing up which dealt with the question of the necessity of placing a lead safe in the lavatory. Referring to the contention of the Defendant that the damage was caused not by the absence of a safe but by deliberate mischief, he said :—

> " If it was, then, the Defendant would not be responsible " because the person who deliberately tried to flood the " place could overcome the precautions. He could stop the " plug of the basin, he could stop the overflow, and could " very easily stop the escape from the lead floors. Nobody " is expected to guard against deliberate malice or " mischief."

At the end of the summing up the Judge handed the following written paper to the jury :—

"Questions for the jury. To be taken in reference to "the evidence and the Judge's direction.

"(1) Was the Defendant, or any of his servants or "agents guilty of negligence ?

"(*a*) In not providing a reasonably sufficient escape "for water in case of an overflow resulting from "accident or negligence, having regard to the nature "of the use of the rooms beneath ?

"(*b*) In leaving the tap turned on on the night of "the 18th August 1909, or in omitting to discover on "that night that the waste pipe was choked.

"2. Was such negligence (if any) the cause of the injury "to Plaintiff's goods ?

"3. Damages, in any case ?

and the jury returned the following written answers :—

"1. Yes.

"(*a*) We are of opinion that a lead safe was "necessary on the floor of this particular lavatory, "and that same would minimise risk.

"(*b*) No. We believe the evidence of Smith "(caretaker), who asserts that lavatory was in "thorough order when he ceased duties.

"2. Yes, it was.

"3. We assess the damage done to Lothian's property "at 156*l*.

"We are of opinion that this was the malicious act of "some person."

The paper also showed the calculation by which the sum of 156*l*. was arrived at, which is omitted as not being relevant for the purpose of this Appeal. It shows that the damages were calculated on the basis of compensating for the whole of the damage to the Plaintiff's stock through the flooding.

These questions were not happily framed. For example, the word "negligence" in 1 (*a*) is used twice, and evidently refers to two different things in the two places where it occurs. In the earlier part of the question, it must refer to

negligence in the construction of the apparatus, but in the latter part it must refer to negligence in user. But this is not the most serious defect in these questions. There is also a fatal omission. The Judge had directed the jury that if the act was malicious, the Defendant would not be liable unless he instigated it, which was not even suggested. Yet this issue was not put to them nor, indeed, was any question asked bearing upon it. It is evident that this omission puzzled the jury. The course they took was, on the whole, one directed by common sense. They found a verdict upon that vital issue, although it had not been separately left to them, and they then proceeded to answer the questions specifically put to them. As their language shows, these questions related solely to the issue of negligence—the first asking as to its existence, the second as to the damage being a consequence of it, and the third as to the amount of that damage. It is difficult to understand the answer of the jury to the second question, in view of the finding that the act was malicious, because if the act was malicious the negligence in not providing the lead safe could not be, legally speaking, the cause of the damage. But there can be no doubt of the meaning of the finding as to the act having been malicious, and therefore their Lordships consider that the only reasonable interpretation to be put upon the answer to the second question is that the jury thought that the negligence in omitting to provide a lead safe was physically the cause of the damage in the sense that the provision of a lead safe would have prevented the damage if the overflow had been due to negligence or accident.

Their Lordships are of opinion that there was abundant evidence to support the finding of the jury that the plugging of the pipes was the

malicious act of some person, and indeed it is difficult to see how upon the evidence any other conclusion could reasonably have been arrived at. The answers to Question 1 (*a*) and (*b*) were also answers which the jury were competent to give upon the evidence, and no objection can be taken to them. By their answer to 1 (*a*) the jury show that they appreciated in an exceptionally clear way the nature of the question for their decision. In the face of the evidence as to its being an ordinary practice not to have such lead safes, and as to the lavatory being of ordinary construction and approved of by the water authorities it would have been difficult, if not impossible, to give any finding of general application as to the duties of a house owner with regard to water fittings of this kind. Indeed, no such general finding could as a matter of law be sustainable. The degree to which it is incumbent upon a householder to provide automatic protection against careless user must depend on the nature of the user. In a laboratory for instance where the fitting would only be used by trained persons in the course of careful scientific work such automatic safeguards against overflow might not be needed, whereas in a lavatory where the user was more indiscriminate it might be reasonable to have elaborate protective devices. But in this case the jury viewed the place, and their finding is a cautious one entirely within their competence. They found that it was negligent to omit to provide a lead safe on the floor of this particular lavatory. Their Lordships are satisfied that a finding so express and so carefully limited cannot be impugned.

It is clear that on these findings the Plaintiff did not make good his claim as a claim in an ordinary action of negligence. To sustain such a cause of action it must be shown that the negligence is the proximate cause of the damage. The

proximate cause of the damage here was the malicious act of a third person. The only negligence which the jury found in this case was the omission to provide against accident by placing a lead safe under the lavatory. Such automatic devices are security against accident or negligent user but they are inoperative against intentional and mischievous acts. The person who did the malicious act in this case was obliged to do three distinct things to secure the success of his plan, namely, to open the screw tap to its utmost limit, to block the waste pipe from the bottom of the basin, and to block the waste pipe from the overflow holes. It cannot be doubted that the presence of a lead safe would have formed no obstacle to his plan, because the outlet from that safe could have been blocked up as easily as the two waste pipes. The arguments on behalf of the Plaintiff in the Courts of Appeal were therefore mainly directed to bringing the case under one of two other well-known types of action, viz. :—

(1) It was contended that the Defendant ought to have foreseen the probability of such a malicious act, and to have taken precautions against it, and that he was liable in damages for not having done so.

(2) It was contended that the Defendant was liable apart from negligence on the principles which are usually associated with the well-known case of *Fletcher* v. *Rylands*

In the argument on the first of these points, *Lynch* v. *Nurdin* (1 Q.B. 29, *Cook* v. *The Midland and Great Western Railway of Ireland*, 1909, A.C. 229), and other decisions of the same type were relied upon. There is, however, a short and conclusive answer to this contention. To make good such a cause of action the Plaintiff must show that the Defendant ought to have reasonably anticipated the likelihood of a deliberate choking of the pipe so that it became his duty to take precautions to prevent such an act

causing damage to others. This is an issue of fact in which the burden is upon the Plaintiff, and he has obtained no finding from the jury in support of it. It is perhaps irrelevant to consider who is responsible for this omission because it is for the Plaintiff to see that the questions necessary to enable him to support his case are asked of the jury. But in this case the Defendant specifically requested the Judge to put the question whether the Defendant ought reasonably to have anticipated the deliberate choking of the pipe, and the Plaintiff's Counsel did not support the request, but accepted the questions framed by the Judge. The absence of this finding is fatal to this part of the Plaintiff's case, and it is not necessary, therefore, to enquire into it further. But it must be pointed out that there was no evidence which could have supported such a finding, and moreover, that the only duty incumbent upon the Defendant in such a case would have been to take reasonable precautions to prevent such an act causing damage, and throughout the whole of the case there was no suggestion of any precaution which would have had that effect; nor was there any finding by the jury that the Defendant had in this respect omitted to do anything which he should have done. The only omission found against him was of something wholly irrelevant from this point of view. It is impossible, therefore, to support the Plaintiff's claim so far as it is based upon the legal principles illustrated by the above class of cases.

The principal contention, however, on behalf of the Plaintiff was based on the doctrine customarily associated with the case of *Fletcher* v. *Rylands*. (L.R. 1 Ex. 265, and L.R. 3, E. and I, Appeals 330) It was contended that it was the Defendant's duty to prevent an overflow from the lavatory basin,

however caused, and that he was liable in damages for not having so done, whether the overflow was due to any negligent act on his part or to the malicious act of a third person.

The legal principle that underlies the decision in *Fletcher* v. *Rylands* was well known in English law from a very early period, but it was explained and formulated in a strikingly clear and authoritative manner in that case and therefore is usually referred to by that name. It is nothing other than an application of the old maxim "*sic utere tuo ut alienum non lædas.*" The Defendants in that action had constructed a reservoir on their land to collect and hold water for the purpose of working their mill. Under that land were situated underground workings of an abandoned coal mine the existence of which was unknown to everybody. After the reservoir had been filled the water found its way down to those underground workings through some old shafts and escaping through them flooded the Plaintiff's colliery. The Defendants had been guilty of no negligence either in the construction or use of the reservoir, and they contended that in the absence of negligence they were not liable. The Plaintiff contended on the other hand that the Defendants having brought and stored the water upon their land for their own purposes were bound to keep it safely there and that if it escaped to adjoining lands and did damage, the Defendants were liable for the breach of this duty whether or not it was due to negligence.

The argument took place on a special case stated by an Arbitrator setting forth the facts and the contentions of the parties. It was heard in the first instance before the Court of Exchequer which by a majority decided in favour of the Defendants, Bramwell, B., dissenting. Error was brought from this judgment and the Court of Exchequer Chamber (consisting of Willes,

Blackburn, Keating, Mellor, Montague Smith and Lush, JJ.) reversed the decision of the Court of Exchequer by a unanimous judgment which was read by Blackburn, J. On appeal to the House of Lords the judgment of the Exchequer Chamber was affirmed—both Cairns, L.C., and Lord Cranworth (who delivered the judgments on the hearing of the Appeal) expressly approving of Blackburn, J.'s, statement of the law on the subject in the judgment appealed from. The formulation of the principle which is to be found in that judgment is therefore of the highest authority as well from the fact that it received the express approval of the ultimate tribunal as from the eminence of the Judges who took part in the decision.

So far as is necessary for the present case the law on the point is thus laid down by Blackburn, J. :—

" We think that the true rule of the law is that the person
" who, for his own purposes, brings on his land and collects
" and keeps there anything likely to do mischief if it
" escapes, must keep it in at his peril ; and if he does not
" do so, is *primâ facie* answerable for all the damage which
" is the natural consequence of its escape. He can excuse
" himself by showing that the escape was owing to the
" Plaintiff's default ; or, perhaps, that the escape was the
" consequence of *vis major*, or the act of God ; but as nothing
" of this sort exists here, it is unnecessary to inquire what
" excuse would be sufficient."

It will be seen that Blackburn J., with characteristic carefulness, indicates that exceptions to the general rule may arise where the escape is in consequence of *vis major*, or the act of God, but declines to deal further with that question because it was unnecessary for the decision of the case then before him. A few years later the question of law thus left undecided in *Fletcher* v. *Rylands* came up for decision in a case arising out of somewhat similar circumstances. The Defendant in *Nichols* v.

Marsland (L.R. 2, Ex. Div. 1), had formed on her land certain ornamental pools which contained large quantities of water. A sudden and unprecedented rainfall occurred, giving rise to a flood of such magnitude that the jury found that it could not reasonably have been anticipated. This flood caused the lakes to burst their dams, and the Plaintiff's adjoining lands were flooded. The jury found that there was no negligence in the construction or maintenance of the lakes. But they also found that if such a flood could have been anticipated, the dams might have been so constructed that the flooding would have been prevented. Upon these findings the Judge at the trial directed a verdict for the Plaintiff, but gave leave to move to enter a verdict for the Defendant. On the argument of the rule the Court of Exchequer directed the verdict to be entered for the Defendant, and on appeal to the Exchequer Chamber that judgment was unanimously affirmed.

The judgment of the Court of Exchequer Chamber (Cockburn, C.J., James and Mellish, L.JJ., and Baggallay, J.A.) was read by Mellish, L.J. After pointing out that the facts of the case rendered it necessary to decide the point left undecided in *Fletcher* v. *Rylands*, he proceeds to lay down the law thereupon in the following language:—

" . . . . . the ordinary rule of law is that when " the law creates a duty, and the party is disabled from " performing it without any default of his own, by the act of " God, or the King's enemies, the law will excuse him; but ' when a party by his own contract creates a duty, he is " bound to make it good notwithstanding any accident by " inevitable necessity. We can see no reason why that rule " should not be applied to the case before us. The duty of " keeping the water in and preventing its escape is a duty " imposed by the law, and not one created by contract. If, " indeed, the making a reservoir was a wrongful act in " itself, it might be right to hold that a person could not " escape from the consequences of his own wrongful act.

"But it seems to us absurd to hold that the making or the
"keeping a reservoir is a wrongful act in itself. The
"wrongful act is not the making or keeping the reservoir,
"but the allowing or causing the water to escape. If,
"indeed, the damages were occasioned by the act of the
"party without more—as where a man accumulates water
"on his own land, but, owing to the peculiar nature or
"condition of the soil, the water escapes and does damage
"to his neighbour—the case of *Rylands* v. *Fletcher* establishes
"that he must be held liable. The accumulation of water
"in a reservoir is not in itself wrongful; but the making it
"it and suffering the water to escape, if damage ensue,
"constitutes a wrong. But the present case is distinguished
"from that of *Rylands* v. *Fletcher* in this, that it is not the
"act of the Defendant in keeping this reservoir, an act in
"itself lawful, which alone leads to the escape of the water,
"and so renders wrongful that which but for such escape
"would have been lawful. It is the supervening *vis major*
"of the water caused by the flood, which, superadded to the
"water in the reservoir (which of itself would have been
"inocuous), causes the disaster. A Defendant, cannot, in
"our opinion, be properly said to have caused or allowed
"the water to escape, if the Act of God or the Queen's
enemies was the real cause of its escaping without any
"fault on the part of the Defendant. If a reservoir was
"destroyed by an earthquake, or the Queen's enemies
"destroyed it in conducting some warlike operation, it
"would be contrary to all reason and justice to hold the
"owner of the reservoir liable for any damage that might
"be done by the escape of the water. We are of opinion
"therefore that the Defendant was entitled to excuse
"herself by proving that the water escaped through the act
"of God."

Their Lordships are of opinion that all that is there laid down as to a case where the escape is due to "*vis major* or the King's enemies" applies equally to a case where it is due to the malicious act of a third person, if indeed that case is not actually included in the above phrase. To follow the language of the judgment just recited —a Defendant cannot in their Lordships' opinion be properly said to have caused or allowed the water to escape if the malicious act of a third person was the real cause of its escaping without any fault on the part of the Defendant.

It is remarkable that the very point involved in the present case was expressly dealt with by Bramwell B. in delivering the judgment of the Court of Exchequer in the same case. He says :—

"What has the Defendant done wrong? What right "of the Plaintiff has she infringed? She has done nothing "wrong. She has infringed no right. It is not the "Defendant who let loose the water and sent it to destroy "the bridges. She did indeed store it, and store it in such "quantities that if it was let loose it would do as it did, "mischief. But suppose a stranger let it loose, would the "Defendant be liable? If so, then if a mischievous boy "bored a hole in a cistern in any London house, and the "water did mischief to a neighbour, the occupier of the "house would be liable. That cannot be. Then why is "the Defendant liable if some agent over which she has no "control lets the water out? . . . . I admit that it is "not a question of negligence. A man may use all care to "keep the water in . . . but would be liable if through "any defect, though latent, the water escaped. . . . . "But here the act is that of an agent he cannot control."

Following the language of this judgment their Lordships are of opinion that no better example could be given of an agent that the Defendant cannot control than that of a third party surreptitiously and by a malicious act causing the overflow.

The same principle is affirmed in the case *Box* v. *Jubb* (L.R. 4 Ex. Div. 76). In that case the Defendants had a reservoir on their land which was connected both for supply and discharge with a water course or main drain. Through the sudden emptying of another reservoir into the drain at a higher level than their reservoir and by the blocking of the main drain below, the Defendants' reservoir was made to overflow and damage was done to the lands of the Plaintiff. The Defendants were guilty of no negligence either in the construction or maintenance of the reservoir and the acts which led to its overflow were done by persons over whom they had no

control. In giving judgment Kelly, C.B., says :—

" The question is, what was the cause of this overflow ?
" Was it anything for which the Defendants are responsible
" Did it proceed from their act or default, or from that of a
" stranger over which they had no control ? The case is
" abundantly clear on this, proving beyond a doubt that the
" Defendants had no control over the causes of the over-
" flow and no knowledge of the existence of the obstruction.
" The matters complained of took place through no default
" or breach of duty of the Defendants, but were caused by a
" stranger over whom and at a spot where they had no
" control. It seems to me to be immaterial whether this is
" called *vis major* or the unlawful act of a stranger ; it is
" sufficient to say that the Defendants had no means of
" preventing the occurrence. I think the Defendants could
" not possibly have been expected to anticipate that which
" happened here and the law does not require them to
" construct their reservoirs and the sluices and gates leading
" to it to meet any amount of pressure which the wrongful
" act of a third person may impose."

Their Lordships agree with the law as laid down in the judgments above cited, and are of opinion that a Defendant is not liable on the principle of *Fletcher* v. *Rylands* for damage caused by the wrongful acts of third persons.

But there is another ground upon which their Lordships are of opinion that the present case does not come within the principle laid down in *Fletcher* v. *Rylands*. It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community. To use the language of Lord Robertson in *The Eastern and South African Telegraph Company* v. *The Cape Town Tramways Companies* (1902, Appeal Cases, 393) the principle of *Fletcher* v. *Rylands* " subjects to a " high liability the owner who uses his property

"for purposes other than those which are "natural." This is more fully expressed by Wright, J., in his judgment in *Blake* v. *Woolf* (L.R. [1898] 2 Q.B. 426). In that case the Plaintiff was the occupier of the lower floors of the Defendant's house, the upper floors being occupied by the Defendant himself. A leak occurred in the cistern at the top of the house which without any negligence on the part of the Defendant caused the Plaintiff's premises to be flooded. In giving judgment for the Defendant Wright, J., says :—

> "The general rule as laid down in *Rylands* v. *Fletcher* is "that *primâ facie* a person occupying land has an absolute "right not to have his premises invaded by injurious matter, "such as large quantities of water which his neighbour "keeps upon his land. That general rule is, however, "qualified by some exceptions, one of which is that, where "a person is using his land in the ordinary way and damage "happens to the adjoining property without any default or "negligence on his part, no liability attaches to him. The "bringing of water on to such premises as these and the "maintaining a cistern in the usual way seems to me to be "an ordinary and reasonable user of such premises as these "were; and, therefore, if the water escapes without any "negligence or default on the part of the person bringing "the water in and owning the cistern, I do not think that "he is liable for any damage that may ensue."

This is entirely in agreement with the judgment of Blackburn, J., in *Ross* v. *Fedden* (L.R. 7 Q.B. 661). In that case the Defendants were the occupiers of the upper floor of a house of which the Plaintiff occupied the lower floor. The supply and overflow pipes of a water-closet which was situated in the Defendants' premises and was for his use and convenience got out of order and caused the Plaintiff's premises to be flooded. Negligence was negatived. In giving judgment in favour of the Defendant Blackburn, J. says :—

> "I think it is impossible to say that Defendants as "occupiers of the upper storey of a house were liable to the "Plaintiff under the circumstances found in the case. The "water-closet and the supply pipe are for their convenience

"and use, but I cannot think there is any obligation on
"them at all hazards to keep the pipe from bursting or
"otherwise getting out of order. The cause of the overflow
"was the valve of the supply-pipe getting out of order and
"the escape pipe being choked with paper, and the Judge
"has expressly found that there was no negligence; and the
"only ground taken by the Plaintiff is that the Plaintiff
"and Defendants being occupiers under the some landlord,
"the Defendants being the occupiers of the upper storey,
"contracted an obligation binding them in favour of the
"Plaintiff, the occupier of the lower storey, to keep the
"water in at their peril. I do not agree to that; I do not
"think the maxim, '*Sic utere tuo ut alienum non lædas*'
"applies. Negligence is negatived; and probably, if the
"Defendants had got notice of the state of the pipe and
"valve and had done nothing, there might have been ground
"for the argument that they were liable for the con-
"sequences; but I do not think the law casts on the
"Defendants any such obligation as the Plaintiff contends
"for."

Their Lordships are in entire sympathy with these views. The provision of a proper supply of water to the various parts of a house is not only reasonable but has become, in accordance with modern sanitary views, an almost necessary feature of town life. It is recognised as being so desirable in the interests of the community that in some form or other it is usually made obligatory in civilized countries. Such a supply cannot be installed without causing some concurrent danger of leakage or overflow. It would be unreasonable for the law to regard those who instal or maintain such a system of supply as doing so at their own peril, with an absolute liability for any damage resulting from its presence even when there has been no negligence. It would be still more unreasonable, if, as the Respondent contends, such liability were to be held to extend to the consequences of malicious acts on the part of third persons. In such matters as the domestic supply of water or gas, it is essential that the mode of supply should be such as to permit ready access for the purpose

of use, and hence it is impossible to guard against wilful mischief. Taps may be turned on, ball cocks fastened open, supply pipes cut, and waste pipes blocked. Against such acts no precaution can prevail. It would be wholly unreasonable to hold an occupier responsible for the consequences of such acts which he is powerless to prevent, when the provision of the supply is not only a reasonable act on his part but probably a duty. Such a doctrine would, for example, make a householder liable for the consequences of an explosion caused by a burglar breaking into his house during the night and leaving a gas tap open. There is, in their Lordships' opinion, no support either in reason or authority for any such view of the liability of a landlord or occupier. In having on his premises such means of supply he is only using those premises in an ordinary and proper manner, and although he is bound to exercise all reasonable care, he is not responsible for damage not due to his own default, whether that damage be caused by inevitable accident or the wrongful acts of third persons.

On the above grounds their Lordships are of opinion that the direction of the learned Judge at the trial to the effect that "if the plugging up "were a deliberately mischievous act by some "outsider unless it were instigated by the "Defendant himself, the Defendant would not "be responsible," was correct in law and that upon the finding of the jury that the plugging up was the malicious act of some person, the Judge ought to have directed the judgment to be entered for the Defendant.

The Appeal must therefore be allowed and judgment entered for the Defendant in the action with costs in all the Courts, and the Plaintiff must pay the costs of this Appeal, and their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

HARRY RICKARDS, SINCE DECEASED (NOW REPRESENTED BY JOHN CHARLES LEETE AND OTHERS)

v.

JOHN INGLIS LOTHIAN.

DELIVERED BY LORD MOULTON.

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