[HIGH COURT OF AUSTRALIA.]

LOTHIAN . . . . . APPELLANT;
PLAINTIFF,

AND

RICKARDS . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 21, 22, 23; *May* 22.

Griffith C.J., O'Connor and Isaacs JJ.

Negligence—Duty to take precautions against happening of an event—Intervening act of third person—Malicious act—Criminal Act.

Where damage may result to A by the happening of an event which is under the control of B under such circumstances that if the event happened by reason of his negligence alone he would be liable to A, then, if the happening of that event is likely to occur from causes independent of the malicious act of a third person, a duty arises on the part of B to take reasonable precautions against the happening of that event, and, where the event has happened and caused damage to A, B having neglected to take those precautions, in determining the liability of B it is immaterial whether the act of a third person, which brought about the happening of the event, was careless, mischievous or malicious.

Reid v. *Friendly Societies' Hall Co.*, N.Z.L.R. 3 C.A., 238, approved; *McDowall* v. *Great Western Railway Co.*, (1903) 2 K.B., 331; and *Cooke* v. *Midland Great Western Railway of Ireland*, (1909) A.C., 229, applied; *Dominion Natural Gas Co.* v. *Collins & Perkins*, (1909) A.C., 640, distinguished.

The goods of the plaintiff, who was the lessee from the defendant of a room in a building owned by the defendant, were damaged by the overflow of water from a lavatory basin on a higher floor in the same building, the water tap over the basin having been turned on and left running for several hours. There was evidence that the escape from the basin was insufficient in itself, and also that an overflow of the basin might have been caused as well by the tap having been carelessly left turned on as by the mischievous or malicious act of a third person. The jury found that the defendant was negligent in that he had not provided a lead cover to the floor of the lavatory.

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Held, by *Griffith* C.J. and *O'Connor* J. (*Isaacs* J. dissenting), that it was immaterial to inquire whether the overflow was caused by the mischievous or malicious act of a third person, and that therefore, notwithstanding a finding by the jury that the overflow was caused by the malicious act of a third person, the defendant was liable.

The liability of B is not affected by the fact that the act of the third person if malicious would be a criminal offence.

De la Bere v. *Pearson Ltd.*, (1907) 1 K.B., 483; (1908) 1 K.B., 280, followed; *Colonial Bank of Australasia Ltd.* v. *Marshall*, (1906) A.C., 559, distinguished.

Per Isaacs J.—(1) On the findings of the jury the only obligation of the defendant was to guard against overflow arising from negligence or accident. (2) The damage which occurred not being the result of either negligence or accident, but of a malicious act of some person, which could not have been reasonably anticipated, the defendant's neglect cannot be said to be the true cause of the damage, and defendant should not be held liable.

Decision of the Supreme Court of Victoria: *Lothian* v. *Rickards*, (1910) V.L.R., 425; 32 A.L.T., 53, reversed.

APPEAL from the Supreme Court of Victoria.

John Inglis Lothian brought an action in the County Court at Melbourne against Harry Rickards demanding by his plaint £359 2s. 11d. damages: (1) For injury caused by water to his stock in trade through the carelessness of the defendant, his servants or agents in the construction, maintenance, management and control of a certain lavatory basin and of the tap, pipes, water service and flooring connected therewith on premises, portion of which were rented by the plaintiff from the defendant, at 226 Little Collins Street, Melbourne; (2) alternatively, for injury arising from an implied covenant for quiet enjoyment in an agreement between the plaintiff and the defendant; (3) alternatively, for injury caused by the defendant wrongfully permitting large quantities of water to escape from the said basin and to flow into and upon the portion of the premises occupied by the plaintiff.

The action was tried before his Honor Judge *Chomley* and a jury, and at the close of the evidence the following questions were put to the jury, who gave the answers set after them respectively:—

"(1) Was the defendant or any of his servants or agents guilty of negligence (*a*) in not providing sufficient escape for water in case of an overflow resulting from accident or negligence having regard to the nature and the use of the rooms underneath? (*b*) in leaving the tap turned on on the night of 18th August 1909 or in omitting to discover on that night that the waste pipe was choked?"—Answer—"Yes. (*a*) We are of opinion that a lead safe was necessary on the floor of this particular lavatory and that same would have minimized risk. (*b*) No. We believe the evidence of Smith (caretaker) who asserts that the lavatory was in thorough order when he ceased duties."

"(2) Was such negligence (if any) the cause of the injury to the plaintiff's goods?"—Answer—"Yes. It was."

"(3) Damages—in any case."—Answer—"We assess the damage done to Lothian's property at £156."

The jury added at the end of these answers:—"We are of opinion that this was the malicious act of some person."

Upon these findings the learned Judge on the motion of the plaintiff entered judgment for the plaintiff for £156 and refused an application by the defendant for a new trial.

On appeal by the defendant to the Supreme Court the judgment was reversed and judgment was entered for the defendant: *Lothian* v. *Rickards* (1).

From that decision of the Supreme Court the plaintiff now appealed, by special leave, to the High Court.

The material facts sufficiently appear in the judgments hereunder.

Jacobs, for the appellant. There was evidence fit to be submitted to the jury of negligence on the part of the respondent, and the jury have found that the respondent was guilty of negligence in not providing a reasonably sufficient escape for water in case of an overflow resulting from accident or negligence. "Accident" there includes the malicious act of a third person: *Nisbet* v. *Rayne and Burn* (2). The respondent had a duty to take reasonable care to prevent water from this lavatory, which was under his control, overflowing from any cause so as to injure

(1) (1910) V.L.R., 425; 32 A.L.T., 53. (2) (1910) 2 K.B., 689.

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the occupiers of rooms on floors below: *Reid* v. *Friendly Societies' Hall Co.* (1); *Childs* v. *Lissaman* (2); *Hallenstein Bros.* v. *Dwyer* (3). The question is whether the respondent's negligence was the effective cause of the injury, and it is sufficient for that purpose to show that the respondent's negligence afforded an opportunity for the act of a third person: *Hill* v. *New River Co.* (4); *Burrows* v. *March Gas and Coke Co.* (5); *Clark* v. *Chambers* (6); *Illidge* v. *Goodwin* (7). In such a case whether the defendant's negligence was the effective cause of the injury is a question for the jury: *Engelhart* v. *Farrant & Co.* (8). *McDowall* v. *Great Western Railway Co.* (9), does not lay down any new principle of law, and is distinguishable on the facts, for there the van was left safe unless some malicious act was done. [He also referred to *Sullivan* v. *Creed* (10); *Beven on Negligence*, 3rd ed., p. 78.]

Mitchell K.C. and *Starke*, for the respondent. Upon the facts and findings of the jury the decision of the Full Court was right. Admitting as a general proposition that the landlord of a building who lets rooms in it to tenants is bound to take reasonable care that water from a lavatory in an upper floor does no damage to the goods of tenants of the rooms below, yet, if the landlord has a proper apparatus, he is not bound also to have a lead floor on the lavatory. The jury has only considered the use to which the lavatory was put in regard to accident or negligence, and not in regard to malicious acts. The word "accident" in the first question put to the jury does not include a malicious act, for the Judge distinguished between negligence and a malicious act in his summing up, and told the jury that if there was a malicious act of a third person the respondent would not be liable.

The malicious act of stopping up the outlet pipe was a thing which the respondent could not have expected or foreseen, and he is not liable for it: *McDowall* v. *Great Western Railway Co.* (9); *Cooke* v. *Midland Great Western Railway of Ireland* (11);

(1) N.Z.L.R. 3 C.A., 238.
(2) 23 N.Z.L.R., 945.
(3) 28 N.Z.L.R., 19.
(4) 18 L.T.N.S., 355; 9 B. & S., 303.
(5) L.R. 5 Ex., 67; L.R. 7 Ex., 96.
(6) 3 Q.B.D., 327.
(7) 5 C. & P., 190.
(8) (1897) 1 Q.B., 240, at p. 243.
(9) (1903) 2 K.B., 331.
(10) (1904) 2 I.R., 317.
(11) (1909) A.C., 229, at p. 233.

Dominion Natural Gas Co. v. *Collins* (1); *Carstairs* v. *Taylor* (2); *Ross* v. *Fedden* (3); *Lynch* v. *Nurdin* (4). In *Reid* v. *Friendly Societies' Hall Co.* (5), the tap was in a place where it was accessible to the public. The duty of the respondent was to take that care which an ordinary and prudent man would have taken to prevent the overflow of the basin. The extent of that duty is to anticipate and guard against all reasonable consequences, and does not extend to anticipating or guarding against that which no reasonable and prudent man would expect to occur: *Greenland* v. *Chaplin* (6). Is a reasonable and prudent man liable for the acts of a stranger? Those acts may be negligent or intentional, and if intentional they may be criminal or non-criminal. As to negligent acts it is a question for a jury whether they ought reasonably to have been foreseen. As to intentional criminal acts a reasonable and prudent man is not bound to anticipate them, and is not liable if they occur: *Marshall* v. *Colonial Bank of Australasia* (7). What was done in this case was a criminal act: *Crimes Act* 1890, sec. 222; *Police Offences Act* 1890, sec. 18. As to intentional acts which are not criminal, unless the party sought to be made liable has given the condition upon which the wrongdoer can operate he is not liable: *Beven on Negligence*, 3rd ed., pp. 77, 78; *Atchison, Topeka and Santa Fé Railway* v. *Calhoun* (8). It is the act in the particular case which the Court has to consider, and not the general result which follows such an act. There must be a finding that the act was such as a reasonable and prudent man could have anticipated. The Courts in England have drawn a distinction between the acts of children and those of adults: *Scholfield* v. *Mayor of Bolton* (9). If the respondent is not entitled to judgment, he is, at any rate, entitled to a new trial, for the question of liability for a wilful act was not put properly to the jury. They should have been asked whether a malicious act of this kind ought to have been foreseen and guarded against.

Jacobs, in reply.

Cur. adv. vult.

(1) (1909) A.C., 640.
(2) L.R. 6 Ex., 217.
(3) L.R. 7 Q.B., 661.
(4) 1 Q.B., 29.
(5) N.Z.L.R. 3 C.A., 238.
(6) 5 Ex., 243, at p. 248.
(7) 1 C.L.R., 632., at p. 656.
(8) 213 U.S., 1.
(9) 26 T.L.R., 230.

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The following judgments were read :—

GRIFFITH C.J. The plaintiff was lessee from the defendant of rooms situated on the second floor of a building in the City of Melbourne used for business purposes. On the fourth floor of the building was a lavatory in the possession and under the control of the defendant.

It was proved that when the pressure of water from the main was full the opening or plug-hole at the bottom of the wash-basin and the escape holes at its upper margin were together insufficient to carry off the water. It also appeared that at night the pressure is much increased and is at its maximum. During the night of 18th August 1909 the basin overflowed, and the water penetrated to the second floor, by which the plaintiff's goods were damaged.

In the morning the tap was found turned full on. There was evidence, which the jury might have accepted, that the plug-hole was found stopped up with a piece of soap apparently pushed into it, that no plug was to be seen, and that the double bend or water-seal of the waste pipe contained some small articles, pins and bits of string, &c., which would cause some little obstruction. Under these circumstances the plaintiff brought this action against the defendant for negligence. The breach of duty suggested was a failure to provide a lead floor or safe, as it is called, so as to prevent water which overflowed from the basin from percolating through the wooden floor of the lavatory on to the rooms below. It appeared that the lavatory was used by tenants of the building and their visitors, and was in fact open to be used by any one who had access to the building.

In answer to the question, "Was the defendant or any of his servants or agents guilty of negligence 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?" the jury said: "Yes, we are of opinion that a lead safe was necessary on the floor of this particular lavatory and that same would minimize risk." To the question "Was such negligence (if any) the cause of the injury to the plaintiff's goods?" they replied: "Yes, it was." After setting out the mode in which they had assessed damages they added: "We are of opinion that this was the malicious act of

some person." The word "malicious" is ambiguous. The jury may, and probably did, use it in the sense in which the learned County Court Judge in his summing up had used the word "malice," that is, as synonymous with deliberate mischief.

On these findings both parties claimed to be entitled to judgment. The learned County Court Judge gave judgment for the plaintiff, but the Supreme Court (*Cussen* J. dissenting) were of a contrary opinion, and gave judgment for the defendant (1).

The duty of a landlord to take reasonable precautions against injury to tenants of the demised premises from the unsafe condition or careless use of other parts of the building under his control was not controverted. On the other hand, it was not disputed that if the event to be feared is one which is not likely to occur without the deliberate wrongful act of a third person there is no need to take precautions against it; but the plaintiff maintains that if that event is likely to occur from causes independent of such a deliberate wrongful act the duty to take reasonable precautions arises, and that in such a case it is not material to inquire from what cause the event occurs in the particular instance. No English decision was cited to us which directly concludes the question. The case of *Reid* v. *Friendly Societies' Hall Co.* (2), decided by the Supreme Court of New Zealand in 1880 is, however, a direct decision on facts not distinguishable from those of the present case, and, if it is good law, establishes the plaintiff's right to succeed.

The effect of the intervention of an independent wrong-doer without which no injury would have resulted from the defendant's negligence has not often been the subject of discussion in the English Courts. There are, however, some cases in which the question has arisen. *McDowall* v. *Great Western Railway Co.* (3), was an action for damages for negligence, consisting, as alleged, in leaving certain trucks and a brake-van on a railway siding so insufficiently secured by brakes that they were likely to break away and run down an incline. Some boys mischievously uncoupled the brake-van, took off the brakes, and let it run down, causing the injury complained of. *Vaughan Williams*

(1) (1910) V.L.R., 425; 32 A.L.T., 53.

(2) N.Z.L.R. 3 C.A., 238.

(3) (1903) 2 K.B., 331.

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L.J. said (1):—"It seems to me that in every case in which the circumstances are such that any one of common sense having the custody of or control over a particular thing would recognize the danger of that happening which would be likely to injure others, it is the duty of the person having such custody or control to take reasonable care to avoid such injury." And, again: "Now, assuming that to be the law, I am of opinion, for the reasons I have already given, first, that there was nothing in the circumstances of this case which would induce an ordinary person of common sense and care to do anything more than the railway company did in respect of this van and the keeping of it in the place where it was kept, under the conditions in which it was kept; and of course if that is so, there is an end of the case altogether."

Romer L.J. said (2):—"Having considered that evidence, it does not appear to me that upon it the jury could reasonably find that the railway company ought, under the circumstances in which they left this train, reasonably to have anticipated that the boys would do or might have done what they in fact did, or that there was at the time, known to the company, any such risk of the particular acts of the boys which caused the accident as called upon the railway company to take further precautions against those particular acts."

Stirling, L.J., after referring to the facts, said (3): "Now, was there any evidence to show that the company ought reasonably to have anticipated such an occurrence? The learned Judge, twice in the course of his judgment, states what the facts are. He says that for years the defendants had been troubled by boys trespassing on this part of the line and playing in and about vehicles standing upon it, and later on he says that, to the knowledge of the defendants, the boys used to get into trucks and vans and unlock the doors of the vans on the siding. That is the whole length the evidence went. Nothing further has been called to our attention. That had gone on for years, and no accident of any kind had occurred. In these circumstances it does not seem to me a fair inference to draw that the company

(1) (1903) 2 K.B., 331, at p. 337. (2) (1903) 2 K.B., 331, at p. 338.
(3) (1903) 2 K.B., 331, at p. 339.

ought to have reasonably anticipated any such act as was actually done by the boys in this case, or the result which came from it."

The actual decision in the case was that there was no evidence of negligence, the ground for the decision being that no inference could be drawn that the company ought reasonably to have anticipated any such act as was actually done, or the result which came from it. This case is authority for the proposition that a person who owes a duty to take precautions is bound to take them against such events as are likely to occur, and, in the absence of precautions, to cause injury.

The real question for determination in the present case is whether, when the act which is likely to occur and to cause injury is one that may be done either carelessly or mischievously or deliberately, the mental attitude of the person who does the act qualifies the nature of the act itself, or whether it is sufficient that the injurious consequence is likely to occur from a physical act of that kind, under whatever circumstances it is done ?

In the former view it is incumbent on the plaintiff to show affirmatively what was the mental attitude of the person by whose physical act the injury was immediately occasioned, a fact of which, in a large proportion of cases, he can have no knowledge or means of knowledge. In the latter view he discharges his onus of proof by establishing facts which in the ordinary course of events may be reasonably expected to be capable of ascertainment.

In *Cooke* v. *Midland Great Western Railway of Ireland* (1) Lord *Macnaghten*, moving the judgment of the House of Lords (on 1st March) quoted and adopted the language of Lord *Denman* C.J. in *Lynch* v. *Nurdin* (2):—" 'If,' says Lord *Denman*, 'I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first.' "

The word " unjustifiably," used by Lord *Denman*, does not

(1) (1909) A.C., 229, at p. 234. (2) 1 Q.B., 29, at p. 35.

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suggest any distinction between a wilful act and a negligent act whether of omission or commission.

Illidge v. *Goodwin* (1), *Clark* v. *Chambers* (2), and *Englehart* v. *Farrant & Co.* (3), are all cases in which this principle was adopted and applied. In the last-mentioned case Lord *Esher* M.R. said (4):—"If a stranger interferes it does not follow that the defendant is liable; but equally it does not follow that because a stranger interferes the defendant is not liable if the negligence of a servant of his is an effective cause of the accident." The negligence of a man's servant is for this purpose his own negligence. It is, of course, necessary in all cases to show that the negligence of the defendant is an effective cause of the injury. In the present case the findings of the jury establish that the defendant's negligence was the cause of the injury, unless in point of law the intervention of the malicious act of a stranger negatives that inference.

It was suggested that deliberately turning on the tap and blocking the plughole would be a criminal act under the law of Victoria, and that this is sufficient to negative the defendant's liability. That argument was advanced without success in the case of *De la Bere* v. *Pearson Ltd.* (5). Lord *Alverstone* C.J. said (6):—"The rule of law appears to me to be now well established, that if the defendants' breach of contract or duty is the primary and substantial cause of the damage sustained by the plaintiff, the defendants will be responsible for the whole loss, though it may have been increased by the wrongful conduct of a third person, and although that wrongful conduct may have contributed to the loss." The negligence complained of in that case was in recommending one Thompson as a stockbroker of good repute who could be safely entrusted with money, but who had applied to his own purposes money entrusted to him by the plaintiff. The learned Chief Justice, after stating these facts, went on (6):—"It may be that in so doing Thompson was committing a criminal offence. This is not, in my opinion, sufficient to prevent the application of the principle to which I have referred." An appeal

(1) 5 C. & P., 190.
(2) 3 Q.B.D., 327.
(3) (1897) 1 Q.B., 240.
(4) (1897) 1 Q.B., 240, at p. 243.
(5) (1907) 1 K.B., 483.
(6) (1907) 1 K.B., 483, at p. 488.

from his judgment was dismissed (1) on the ground that the duty of the defendants was to take reasonable care to recommend an honest man. The decision negatives any such absolute rule as contended for. The case of *Colonial Bank of Australasia* v. *Marshall* (2) was also referred to. So far as that case is relevant, it only established that the drawer of a cheque is not bound to anticipate and take precautions against forgery. But in the case of forgery the element of crime is involved in the concept of the act itself.

The contention that acts which are physically of the same kind may be discriminated according to the mental attitude of the actor was, however, said to be established by a passage in the judgment of the Judicial Committee in the case of *Dominion Natural Gas Co.* v. *Collins & Perkins* (3) delivered by Lord *Dunedin*. The passage relied upon is as follows (4):—" There may be, however, in the case of any one performing an operation, or setting up and installing a machine, a relationship of duty. What that duty is will vary according to the subject-matter of the things involved. It has, however, again and again been held that in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives and other things *ejusdem generis*, there is a peculiar duty to take precaution imposed upon those who send forth or instal such articles when it is necessarily the case that other parties will come within their proximity. The duty being to take precaution, it is no excuse to say that the accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter. A loaded gun will not go off unless some one pulls the trigger, a poison is innocuous unless some one takes it, gas will not explode unless it is mixed with air and then a light is set to it. Yet the cases of *Dixon* v. *Bell* (5); *Thomas* v. *Winchester* (6), and *Parry* v. *Smith* (7), are all illustrations of liability enforced. On the other hand, if the proximate cause of the accident is not the negligence of the defendant, but the conscious act of another

(1) (1908) 1 K.B., 280.
(2) (1906) A.C., 559.
(3) (1909) A.C., 640.
(4) (1909) A.C., 640, at p. 646.
(5) 5 M. & S., 198.
(6) 6 N.Y., 397.
(7) 4 C.P.D., 325.

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volition, then he will not be liable. For against such conscious act of volition no precaution can really avail."

It is contended that the last two sentences of this passage establish that in all cases the liability of the defendant for negligence is excluded if the conscious act of another volition intervenes. Such an interpretation would flatly contradict what had immediately preceded. The final sentence shows clearly that the kind of "act of volition" referred to was one against which no precaution could avail. This judgment was delivered on 30th July. Lord *Macnaghten*, who, in *Cooke's Case* (1), had based his argument on Lord *Denman's* judgment in *Lynch* v. *Nurdin* (2), was a member of the Board. Much has been said as to the inconvenience of the co-existence of two final and independent Courts of Appeal for the Empire, but it is inconceivable that the Judicial Committee should have intended, in July, by a statement which was merely obiter (since the point did not arise for decision), to declare the law for the British Dominions overseas in a contrary sense to that which had been declared in March by the House of Lords for the United Kingdom.

Sir F. Pollock, in his work on *Torts*, 7th ed., p. 462, says: "It is impossible to lay down rules for determining whether harm has been caused by A's and B's negligence together, or by A's or B's alone. The question is essentially one of fact. There is no reason, however, why joint negligence should not be successive as well as simultaneous, and there is some authority to show that it may be. A wrongful or negligent voluntary act of Peter may create a state of things giving an opportunity for another wrongful or negligent act of John, as well as for pure accidents. If harm is then caused by John's act, which act is of a kind that Peter might have reasonably foreseen, Peter and John may both be liable; and this whether John's act be wilful or not, for many kinds of negligent and wilfully wrongful acts are unhappily common, and a prudent man cannot shut his eyes to the probability that some body will commit them if temptation is put in the way."

In my opinion this is both sound sense and good law. The test, in my judgment, is whether the act is "of a kind that might

(1) (1909) A.C., 229. (2) 1 Q.B., 29.

have been reasonably foreseen." And I think that in the rule so stated the word "kind" refers to the physical nature of the act, and has nothing to do with the motives of the actor.

In the present case the act to be guarded against was leaving the tap open, with or without an obstruction to the escape pipe. If it was left open the water would overflow at any time if the escape pipe was obstructed, and at night whether it was obstructed or not. I think that the words "accident or negligence" as used in the first question and as interpreted by the jury include any case of leaving the tap open, whether mischievously or by inadvertence: see *Nisbet* v. *Rayne and Burn* (1).

The act suggested in the *Dominion Natural Gas Co.'s Case* (2) was an act analogous to a wilful cutting of the supply pipe below the basin in a case like the present. Such a cutting would be an act of quite a different kind from the act of leaving the tap open, although its consequences would have been the same. One act might be reasonably anticipated, but not the other. I cannot suppose that the learned Lord who delivered the opinion of the Board overlooked this distinction.

It was suggested that, even if the defendant had provided a safe, a malicious person might have stopped up the outlet from the safe, the consequences of which would have been equally injurious. That is no doubt true, but the duty of the defendant would have been discharged by providing an outlet from the safe of such a nature as not to be likely to be stopped up by any act of a kind which might be reasonably anticipated. The complete plugging up of such an outlet would be an act of a quite different kind from any likely to be incident to ordinary use, and there would therefore be no negligence in not providing against it.

The learned County Court Judge is said to have directed the jury that if the leaving of the tap open and the plugging up of the hole with soap was a deliberately mischievous act the defendant would not be responsible. In my opinion such a direction, if given, would, for the reasons which I have stated, have been erroneous. But, as the learned Judge himself entered judgment for the plaintiff, I think that there must be some mistake in the report. His direction was not objected to, but his

(1) (1910) 2 K.B., 689.

(2) (1909) A.C., 640.

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error, assuming it to have occurred, is no longer of consequence in view of the special finding of the jury on the point, although if the degree of care required to be taken against acts of the same kind differed according as they are done negligently or mischievously, it might, perhaps, have disentitled the plaintiff to anything more than a new trial.

In my judgment it was open to the jury upon the evidence to find, as they did, that the defendant's negligence was the cause of the damage, and I think that their further finding was irrelevant. I think that *Reid's Case* (1) was rightly decided, and should be followed.

I think, therefore, that the appeal should be allowed.

O'CONNOR J. For the purpose of appeal this Court must take the facts as found by the jury. If it were not for the rider, the judgment entered for the plaintiff by the learned County Court Judge would clearly have been justified. The rider, however, is part of the finding; it must be given its due weight. The question is whether it has, as the respondent contends, so modified the whole finding as to entitle him to have judgment entered in his favour. The jury must be taken, in using the word "malicious," to have meant nothing more than "mischievous." The latter is the expression used by the learned County Court Judge in his summing up. There is no evidence of ill-will against the defendant, or of any intention on the part of any one to injure him or his property. I therefore construe the rider as meaning that the stopping of the plug-hole and waste pipe, and leaving the tap running, were simply wanton mischievous acts on the part of some third person. Turning now to the facts, it is, I think, clear that the jury had before them evidence on which they might find that a lavatory basin so situated in a building so used and occupied was liable to become stopped up occasionally by the action of mischievous persons in wilfully allowing the tap to remain running at night, or in wilfully leaving or placing soap or other substances in the plug-hole or in the waste pipe, and that an overflow so occasioned might occur at a time when there was no attendant at hand to stop it. Further, it was, I think, open to

(1) N.Z.L.R. 3 C.A., 238.

the jury on the evidence to find that the occurrence of occasional overflows of the basin from wilful and mischievous acts of that kind might reasonably have been anticipated and provided for by the defendant.

In interpreting the finding, and applying to it the principles of law by which the rights of the parties are to be adjusted, it is necessary to bear in mind that it was open to the jury to find expressly or impliedly in the plaintiff's favour in all these matters.

Turning now to the finding itself, it must be taken to have established the following facts. The choking of the plug-hole and waste pipe and the leaving of the tap running caused the overflow. To meet the risk of damage from that cause to the floors below it was necessary to provide a lead floor in the lavatory. The defendant neglected to provide the lead floor and it was by reason of that neglect that the overflow injured the plaintiff. The choking of the waste pipe and the turning on of the tap was not the act of the defendant or his servants, but of some malicious third person. No injury to the plaintiff would have resulted from the third person's act if the defendant had not failed to provide the lead floor. The defendant cannot however be made liable for the consequences of not providing a lead floor unless it was his duty under the circumstances to provide one. The difficulty in the case arises out of the terms in which the jury have expressly found what was the defendant's duty. The learned Judge directed them that, if the overflow was the result of a deliberately mischievous act by some outsider, the defendant would not be responsible, as he could not guard against malice. That was, as I shall show later on, an unnecessarily restricted view of the defendant's duty. Motive or intention of the third person may be under certain circumstances quite immaterial. Everything will depend upon the nature of the act which was the primary cause of the injury. If it was such that the defendant might reasonably have anticipated it as likely to happen it is immaterial, whether it was accidental or negligent or malicious. However, the direction does not appear to have been objected to by the plaintiff, and the learned County Court Judge, in accordance with his view, put to the jury the question as to the

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defendant's duty in terms expressly limited. The jury in the first place answered categorically "yes," thereby finding in express terms that the defendant had neglected a duty to provide a reasonably sufficient escape for water in case of an overflow of a basin resulting from accident or negligence, having regard to the nature of the use of the rooms beneath. But they added to their answer the finding that in their opinion a lead safe was necessary on the floor of that particular lavatory and that it would minimize risk, meaning the risk of injury to the floors below from an overflowing lavatory basin. If the jury had intended to restrict their finding of neglect of duty in accordance with the learned Judge's question, the first part of their answer would have been sufficient; but they went beyond that, and the additional finding must, in my opinion, be taken to mean that the defendant neglected the duty of putting a lead floor on the lavatory as a safeguard against the risk of damage to the floors below from overflowing basins. In other words, the jury found that the defendant's neglect of duty which caused the injury to the plaintiff was the neglect to so construct and keep the lavatory as to minimize risk to the floors below from the overflowing of lavatory basins. The question is whether on these findings judgment should be for the plaintiff as entered in the County Court, or should stand for the defendant as entered in the Supreme Court, or what other order should be made under the circumstances.

As to the general principles of law applicable to the facts of the case there is to my mind no room for controversy. Mr. Justice *à Beckett* in the Court below held that, in order to render the defendant liable, evidence was necessary that the defendant's negligence tended to induce the act of the third party which caused the injury, and that in this case there was no such evidence. With all respect to the learned Judge I find myself unable to assent to that statement of the law. The defendant's neglect must, of course, be of such a nature as to afford opportunity to the third party to commit the act which causes injury, and the act itself must be of a kind which it is the defendant's duty to provide against. But there is a substantial difference between the negligence which gives opportunity to the third party to commit the injurious act, and the negligence which

tends to induce its being committed. The general principle is well stated in the judgment of *Vaughan Williams* L.J. in *McDowall* v. *Great Western Railway Co.* (1) as follows:—"I do not think that Mr. Williams was wrong when he said that, in those cases in which part of the cause of the accident was the interference of a stranger or a third person, the defendants are not held responsible unless it is found that that which they do or omit to do—the negligence to perform a particular duty—is itself the effective cause of the accident. Bearing that in mind, it seems to me that in every case in which the circumstances are such that any one of common sense having the custody of or control over a particular thing would recognize the danger of that happening which would be likely to injure others, it is the duty of the person having such custody or control to take reasonable care to avoid such injury."

The two matters, therefore, to which inquiry must be directed where a claim of this kind arises, are, first, what was the defendant's duty, secondly, was his neglect of that duty the effective cause of the accident.

Where the initial cause of the injury was the unauthorized or unlawful or malicious act of a third person, the defendant's liability will depend upon whether it was his duty to provide against acts of that nature and whether his failure to make the provision was the effective cause of the accident, or, to put it another way, whether the initial act of the third person would have caused any injury to the plaintiff if the defendant had fulfilled his duty. If the defendant had reason to suppose, having regard to the mode in which the building was occupied, and to the class of occupants and other persons to whom the lavatory would be accessible, that the plug-holes and waste pipes of the basins were likely to become choked from time to time by foreign substances left there accidentally or negligently, or placed there mischievously, it would be his duty to guard against the consequences of the plug-holes or waste pipes becoming choked in that way. Whether the choking arose from accident or from negligence or from mischief the mode of preventing injury to the floors below would be precisely the same,

(1) (1903) 2 K.B., 331, at p. 337.

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namely, the laying down of the lead floor. The duty would be to take precautions, not against individual acts, but against the arising of a certain condition of things—the choking of the plug-hole or waste pipes by foreign substances brought there by third parties using the lavatory. The presence or absence of mischievous or malicious intent in the third parties, whose acts brought about that condition of things, seems to me to be absolutely immaterial. In general, no doubt, the unauthorized and mischievous or malicious interference of third persons is not reasonably to be anticipated. But there may be circumstances, such as those that have arisen in this case, in which the condition of things which it is reasonable to anticipate and provide against may be as effectively created by a mischievous or malicious act as by an accident or a negligent act. In such cases it is the defendant's duty to have his premises so constructed and kept as to meet effectively the injurious condition of things when it has arisen. If he neglects so to construct and keep his premises, I know of no principle of law which will render him liable, when the condition of things which he has failed to provide against has arisen from the accidental or negligent act of a third party, but will relieve him of liability when it has arisen from a malicious act of the third party.

The decisions which have laid down the law as to a defendant's liability, where his negligence is the effective cause of the injury, even though the first link in the chain of causation is the unauthorized act of a third party, are based on principles which, under ordinary circumstances, take no account of the motive or intention of the third party. In *Lynch* v. *Nurdin* (1) the acts of the children in the street, which were the primary cause of the injury, were not accidental or negligent, but merely irresponsible and thoughtless. The defendant's neglect of duty was in leaving the cart unattended, so as to afford them the opportunity of mounting and driving it. The owner's breach of duty was thus in failing to provide against the acts of children in the street. He could not have escaped liability by showing that the children's acts, in mounting and moving the cart, arose from a malicious desire to injure him. Similarly, in *Englehart* v. *Farrant & Co.* (2) the

(1) 1 Q.B., 29.

(2) (1897) 1 Q.B., 240.

effective cause of the injury was the driver's negligence in leaving the boy in charge with the opportunity of driving. It would be surely immaterial to inquire whether the boy, in wrongfully availing himself of the opportunity, was acting negligently or recklessly or mischievously, or was acting with the intent of injuring the owner of the cart. In *Clark* v. *Chambers* (1), if a similar question were put, a similar answer would have to be given as to motive or intention of the third party, whose action, in moving part of the spiked barrier from the carriage-way and placing it across the footway, was the primary cause of the accident. In the latest case on the subject in the House of Lords, *Cooke* v. *Midland Great Western Railway of Ireland* (2), the defendant's liability is placed on grounds which make it impossible to draw any distinction between accidental acts, merely thoughtless acts, and mischievous acts on the part of the children who set in motion the turntable which caused the injury. *Reid* v. *The Friendly Societies' Hall Co.* (3) was in many respects like the present case. The tap was left running by a third party, but whether he had acted negligently or wilfully there was no evidence to show. The jury's finding was that the defendant had been negligent in providing insufficient arrangements for carrying off the overflow. The duty implied by that finding is wide enough to cover the taking of precautions against an overflow caused by any act of a third party, whether accidental, negligent or mischievous, which might reasonably be expected to occur. Mr. Justice *Williams'* statement of the defendants' duty is in these terms (4): —"The apparatus in question was on the defendants' premises and under the control of the defendants, and the defendants must be taken to have known that if the tap were accidentally or intentionally left turned on the water must of necessity have flooded the premises of the plaintiff, as no provision had been made for carrying off the overflow if such an accident happened. The defendants knowing this allowed not only their own tenants on the upper floors, their clerks and workmen, to use the basin, but allowed the room in which the basin was to be left open to a a staircase which communicated with the street, and allowed the

(1) 3 Q.B.D., 327.
(2) (1909) A.C., 229.
(3) N.Z. L.R. 3 C.A., 238.
(4) N.Z. L.R. 3 C.A., 238, at p. 251.

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street door to be left open during the day, so that any person whomsoever could come up from the street without hindrance. Under these circumstances the defendants must have expected that the basin would be used by a very considerable number of persons, of many of whom the defendants would know nothing. The simple question is, would a prudent man under these circumstances have considered it a reasonable probable contingency that, through accident or design, some one of the persons, who were thus given an opportunity of access to the basin by the defendants, might leave the tap turned on? If such were a reasonable probable contingency, then it was the duty of the defendants to take steps either to prevent it happening or to avert the consequences of it in case it happened. That it was a contingency a prudent man ought to have looked forward to is, I think, unquestionable."

That is, I think, an accurate statement of the duty which the law in the circumstances of that case imposed on the defendant. It necessarily rests upon the broad principle which I have explained, and is a strong authority in favour of the view which would render the defendant liable in this case, if the facts, upon which his responsibility must rest, are taken to have been found by the jury against him. In support of the contention that the defendant could not be made liable where the primary cause of the injury was the malicious act of a third party reliance was placed on the following passage from the judgment of Lord *Dunedin* in *Dominion Natural Gas Co.* v. *Collins and Perkins* (1):—"On the other hand, if the proximate cause of the accident is not the negligence of the defendant, but the conscious act of another volition, then he will not be liable. For against such conscious act of volition no precaution can really avail."

It is difficult to see what is exactly the conception which the phrase "conscious act of another volition" was intended to convey in this connection. The language used cannot be taken literally. If it were, it would be capable of including the negligent acts of the third person. But can it be assumed that the learned Lord intended to declare, contrary to all previous authority, that, under no circumstances, could a defendant be

(1) (1909) A.C., 640, at pp. 646-7.

made liable for failing to take precautions against the negligent acts of third persons? The fact is the judgment must, if it is to be fairly read, be taken in connection with the facts of the case. It was the opinion of the learned Lord that the defendants were not bound to provide against the kind of acts on the part of third parties which was the immediate cause of the injury. Hence the effective cause of the injury was not the neglect of any duty by the defendant but the wrongful act of the third party. In the case before us I have assumed, for the purpose of stating the general principle of law to be applied, that it was the defendant's duty to take precautions against the occurring of the state of things which the third party's act has brought about, and that, if he had taken those precautions, the act of a third party would have caused no injury to the plaintiff. There was, as I have pointed out, evidence upon which the jury could find the facts so assumed. If the facts have been so found by the jury the plaintiff is, in my opinion, entitled to have judgment entered in his favour. The only real difficulty in the case is to determine whether the facts have been so found, in other words, whether the jury's answers ought to be interpreted as a finding that it was the defendant's duty to take precautions not against certain acts of third parties, but against the arising of a certain condition of things produced by the acts of third parties, irrespective of whether those acts were accidental or negligent or mischievous. After much consideration I have come to the conclusion that the jury's findings can and ought to be so interpreted, and that effect can be given to the finding of the jury only by treating the limitations of the defendant's duty as stated in the learned Judge's questions as being irrelevant. In his charge to the jury the learned Judge no doubt distinguished between a duty to take precautions against the accidental or negligent acts of third persons and against the malicious acts of third persons. And his express direction was that the defendant could be under no obligation to take precautions against the latter. To his question founded on that view the jury have answered "yes." But there was no reason why they should not have added the opinion already referred to which impliedly finds the neglect of a wider duty of the defendant, namely, the duty so to construct and keep his premises as to minimize the injurious effects of basins

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overflowing in the lavatory. If the learned Judge's direction had been right, the finding of the duty as so limited could alone have been given effect to. But the direction being erroneous, as I have pointed out, the finding of the limited duty may be disregarded and the finding of the larger duty, which is in accordance with the obligation which the law imposes, must be given effect to. For these reasons I am of opinion, as it appears on the face of the jury's finding that the defendant has neglected a legal duty to the plaintiff, and that the neglect has been the effective cause of the plaintiff's damage, the judgment for the plaintiff entered by the learned County Court Judge must be restored, the judgment of the Supreme Court set aside, and the appeal allowed.

ISAACS J. This case raises a clear cut and fundamental question of law on which I regret to be at variance with the majority of the Court.

The action is based on negligence, but that term in itself carries no definite meaning. As Lord *Herschell* L.C. said in *Membery* v. *Great Western Railway Co.* (1), "it is of the utmost importance, in order to avoid confusion and the danger of mistake, to remember that negligence implies the allegation of a breach of duty—a duty to take care—and to inquire at once what duty, if any, there was on the part of the person charged with negligence to take care, and if there was any such duty, what was the extent of it at the time and under the circumstances which existed on the occasion when negligence is alleged to have been committed."

It is the extent of the duty and the limits of responsibility which the law prescribes for breach of it which is the material consideration here.

The relation of the parties was that the plaintiff in 1907 became a tenant on the second floor of premises in Little Collins Street, called Rickards' Buildings, constructed for letting to various tenants for commercial and business purposes, and the defendant was the landlord, who in 1908 constructed an extra lavatory basin on the fourth floor so situated that water over-

(1) 14 App. Cas., 179, at p. 190.

flowing from it would probably find its way through to the lower floors unless means were taken to conduct it elsewhere.

In view of the argument it is necessary first to consider the meaning of the jury's findings.

The plaintiff's case in the County Court was rested, as appears from the charge of the learned Judge of that Court, on two acts of negligence. His Honor said to the jury: "He bases his claim on the alleged negligence of the defendant or his servants or his employés. This negligence is put in two ways; in the first place it is said that the defendant was negligent in not providing a reasonable escape for water in the case of overflow from those top lavatories arising from accident or negligence. In the second place he charges that he or his servants in this case were negligent in leaving a tap turned on in the men's lavatory on the night of 18th August and omitting to observe that on that night the escape from the basin where the tap was turned on was choked."

These were the only two breaches of duty upon which the plaintiff rested; in other words, no duty was alleged beyond that of taking care to avoid the consequences of accidental or negligent overflow.

As far as any duty rests upon the conclusions which a jury would be at liberty, but not bound, to draw as reasonable men, the plaintiff cannot now be heard to aver it. See *per* Lord *Halsbury* L.C. in *Browne* v. *Dunn* (1) and *Nevill* v. *Fine Art and General Insurance Co. Ltd.* (2).

The learned County Court Judge went on to tell the jury that the defendant not only denied the alleged negligence, but also said the real cause of the occurrence was that some person for mischief, whether malignant or simply humorous mischief, had turned on the tap and stopped the plug-hole with soap. Malignant mischief is malicious mischief; humorous mischief is not malicious. Then said the learned Judge:—"Of course, if this were a deliberately mischievous act by some outsider, unless it was instigated by the defendant himself the defendant would not be responsible." "Deliberately mischievous" conveys the same idea as "malignant mischief" (and see folios 215 and 217) and so his Honor added—"He would not be responsible for a malicious act

(1) (1894) 6 R., 67, at pp. 75, 76. (2) (1897) A.C., 68, at p. 76.

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under those circumstances because he cannot guard against malice."

The rest of the charge is an elaboration of the point so indicated.

The jury in answer to the written questions sent to them found there was negligence in the defendant, that is, a breach of duty on his part, in not providing a lead safe, as a reasonably sufficient escape for an overflow of water "*resulting from accident or negligence.*" "Accident" and "negligence" then are the only two possible causes of overflow which the plaintiff invited the jury to declare, and which the jury did declare, were to be reasonably apprehended and guarded against and were not reasonably guarded against. The jury found against the plaintiff on the second charge of negligence. The jury also said that the defendant's want of precaution as to the first head was the cause of the injury to the plaintiff's goods; but added "this was the malicious act of some person."

In the reasons given by the learned County Court Judge for his judgment, he says "the act referred to the choking up of the pipe and the turning on of the tap, *i.e.*, the two things together," and further observes that what the jury said amounted to this—"There was a malicious act, but the cause of the injury was the negligence of the defendant without which this particular malicious act would not have caused the injury." That simply means the malicious act of stopping the hole and turning on the tap would not have been effectual to injure the plaintiff if the lead safe had been there with a means of escape; or, in other words, that the absence of the lead safe was a *causa sine quâ non* of the damage to the plaintiff though the malicious act was the operating cause. There is therefore no doubt as to the meaning of the findings of the jury. They found, in short, that the damage arose not from the normal use of the apparatus as a lavatory at all, but from its distortion to a wholly uncontemplated purpose.

"Accident," as used by the learned Judge and adopted by the jury, clearly meant accidental casualty, some chance occurrence arising from the liability of such appliances, notwithstanding all reasonable care in construction and intended use, and though not misapplied to any improper purpose, to get out of order at times,

and permit the water to escape. That is a chance reasonably incidental to the presence and use of such a thing, and if it had occurred it would fully satisfy the second finding, because it would have been the *cause* of the overflow.

"An accident" in the sense of injury the *result* as distinguished from the *cause* of the overflow would be a use of the word in quite a different sense, rather that of misfortune to the sufferer. The jury could not have meant this, in view of the direction as to the effect of a deliberately malicious act. In *Fenton* v. *J. Thorley & Co. Ltd.* (1) Lord *Lindley* says:—"Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss." I should add that the person who committed the malicious act was guilty of a criminal offence: See *Crimes Act* 1890, sec. 222; and *Police Offences Act* 1890, sec. 18.

The defendant appealed to the Supreme Court, and two learned Judges thought him entitled to succeed, while the third considered he was not entitled to final judgment, but in view of the opinion of his colleagues did not say whether he thought a new trial should be directed. The headnote in (1910) V.L.R., 425, stating the view of the third Judge as to the law, is I think in accord with his judgment at pp. 439 and 440. and is adverse to the appellant's contention here. None of their Honors said the plaintiff was entitled to judgment as the case stood.

Here, however, the appellant contends he is so entitled. His contention should not prevail unless either (1) the facts required a direction to the jury that in the special circumstances the defendant was under a legal duty to provide means of escape for an overflow caused by the malicious act of any person; or (2) the law imposes on every landlord installing a basin lavatory on an upper floor the absolute duty of taking precautions against an overflow irrespective of its cause, that is, whether from accident or negligence in the normal, legitimate and obvious use of the article, or from the malicious and unauthorized conversion of a lavatory basin into a totally different article—in effect a mere flooding apparatus for the sole purpose of injuring the tenants below.

(1) (1903) A.C., 443, at p. 453.

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The first alternative is admittedly unsustainable. The evidence (fols. 80 and 100) is that the people allowed to use the men's lavatories were the Master Builders, Beckwiths (proprietors of the Commercial College) their teachers, Faussets, Tonkin and Bardwells, that is, the tenants and their employés, all grown men. The position of the lavatory on the fourth floor, to be reached only by a lift (and also I suppose some lofty stairs) and then a somewhat devious passage, renders it highly improbable that any general use would be made of it by casuals, and no such use was suggested. Nowhere does it appear that any previous misuse of the basin ever occurred or could be reasonably anticipated. This at once places the case outside the rule of Lord *Denman* C.J. in *Lynch* v. *Nurdin* (1). Not only did the respondent not know it to be extremely probable that some other person would *unjustifiably* set the lavatory basin in motion solely as a flooding apparatus to the injury of the appellant, but the extreme improbability of such an act placed it outside all serious contemplation. The appellant never attempted here or below to assert a duty to guard against such an act.

The second alternative gives rise to what learned counsel for the respondent properly described as the vast and far reaching importance of this case. One precedent only so far as I am aware, *Reid* v. *Friendly Societies' Hall Co.* (2), lends any support to the proposition necessary to the appellant's success. I am not sure all the facts are reported, and the observations as to wilfulness are not, I think, necessary to the decision. But there are observations as to wilfulness being immaterial which at first sight tell distinctly in appellant's favour. These if taken baldly appear to me to be in conflict with the law as stated in authorities some of which bind me and others I would feel morally constrained to follow. But when carefully read they are susceptible of qualification, On p. 248 there is the assumption that a wilful act was an ordinary use of the appliance. If that assumption is intended universally it cannot hold: if based on the particular facts of the case it is inapplicable here. But from the words of *Prendergast* C.J. it is clear that assumption is the basis of his judgment: (see also per *Chapman* J. in *Hallenstein* v. *Dwyer*

(1) 1 Q.B., 29.

(2) N.Z.L.R., 3 C.A., 238.

(1). At the same page in *Reid's Case* (2) the Chief Justice says: "If the act were apparently not negligent only, but on its face wilful, it may be that the defendants would not have been bound to provide against it—as for instance a hole bored in a pipe." His Honor stated that as an instance; and possibly he would have regarded the present case where the soap was manifestly pressed into the plug-hole and as a deliberately mischievous act of devastation, as another instance of non-liability. If so the case does not help the appellant.

The obligation of a landlord in the position of the respondent is, in my opinion, to take reasonable care with respect to the lavatory to prevent damage to his tenants arising from such injurious occurrences as an ordinarily prudent man in such circumstances would apprehend as likely to happen. And the penalty for neglect to take such care—in other words for negligence—is the ordinary one, that if damage ensues from such occurrences, he must repair it.

But as I understand the law that obligation is confined to the consequences of acts against which his duty was to guard, and does not extend to consequences of acts arising from a cause which was beyond the ambit of his duty. And a cause is beyond the ambit of his primary duty, and therefore outside his reparative obligation, if it is not one which an ordinarily prudent man in that situation would consider as in some degree likely to occur. "The reasonable man, then," says *Pollock on Torts*, (8th ed., 41), "to whose ideal behaviour we are to look as the standard of duty, will neither neglect what he can forecast as probable. nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things." And see *Atchison Topeka and Santa Fé Railway Co.* v. *Culhoun* (3).

I do not think that, without very special circumstances, a landlord can be expected to anticipate such a gross misuse of a lavatory as making it an instrument of maliciously swamping the building would be. That might happen though he had never let the top flat at all but kept it for his own use exclusively, and

(1) 28 N.Z.L.R., 19, at p. 23. (2) N.Z.L.R., 3 C.A., 238, at p. 248.
(3) 213 U.S., 1, at p. 9.

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some stranger burglariously had broken in and committed the act. On the appellant's argument he would still be liable.

The fundamental principles relevant to the case have been laid down in many cases (notably, *Clark* v. *Chambers* (1) and the cases quoted in *Beven on Negligence*, 3rd ed., pp. 77, 78), but it is unnecessary to review them as the law so laid down is approved in two recent cases of the very highest authority. The first is *Cooke* v. *Midland Great Western Railway of Ireland* (2). The defendants were held liable because in the words of Lord *Macnaghten* (3) "there was a likelihood of some injury happening to children resorting to the place and playing with the turntable," and yet did not take precautions to prevent "such an accident as that which occurred," that is, an accident caused by young Monahan and his playmate making the turntable revolve to the injury of the appellant. But notwithstanding the omission to guard against the anticipated interference by children, I do not think it is consistent with the judgments of the learned Lords to suppose that they would have held the defendant liable, if instead of young Monahan it had been some malicious adult who revolved the turntable and intentionally injured the child. That would not have been what Lord *Macnaghten* called "such an accident as that which occurred."

His Lordship says (4):—"No precaution was taken to prevent an accident of a sort that might well have been foreseen and very easily prevented." Unless "an accident of a sort" included an accident brought about by a malicious adult the passage is an authority against the appellant.

The tenor of the speeches of all the learned Lords is similar.

Lord *Macnaghten* refers approvingly to the opinions of *Romer* and *Stirling* L JJ. in *McDowall's Case* (5). *Romer* L.J. said (6):—"It does not appear to me that . . . . the jury could reasonably find that the railway company ought, under the circumstances in which they left this train, reasonably to have anticipated that the boys would do or might have done what they in fact did." He speaks of "precautions against those particular acts."

(1) 3 Q.B.D., 327, at p. 336.
(2) (1909) A.C., 229.
(3) (1909) A.C., 229, at p. 234.
(4) (1909) A.C., 229, at p. 235.
(5) (1903) 2 K.B., 331.
(6) (1903) 2 K.B., 331, at p. 338.

Stirling L.J. said (1):—"Was there any evidence to show that the company ought reasonably to have anticipated such an occurrence," and later speaks of "any such act as was actually done by the boys."

Again I cannot doubt that if a malicious adult who came upon the scene for the first time had gone through the operation of starting the trucks the learned primary Judge (*Kennedy* J.) would have given judgment for the defendants without hesitation, because he quotes Lord *Denman's* rule and states why he applied it.

Then there is the case of the *Dominion Natural Gas Co.* v. *Collins & Perkins* (2). The appellant company had installed a gas machine, which was dangerous unless proper precautions were taken. One precaution which should have been taken, but was neglected, was running a pipe up through the roof of the blacksmith's chambers. The safety valve was installed so as to emit the gas direct into the shop instead of into the open air. An explosion ensued and the respondent was injured. The defendant sought to escape liability on the ground that some railway servants had caused the accident by hammering a punch on top of the safety valve, thus interfering with the working of the safety valve. Plainly the negligence was present all the time, just as in this case, and there, equally with the case now under consideration, the accident could not have happened if that negligence had not occurred. But their Lordships of the Privy Council still thought it necessary to consider the effect of extraneous interference. A dangerous article had been set up, intended for use, and the mere fact that some outside interference had intervened was not sufficient to exonerate the appellants from responsibility. Something more had to be shown, namely, that the outside interference was the proximate cause. Lord *Dunedin*, in stating their Lordships' opinion as to the law so as to ascertain the legal standard applicable to such cases, said (3):—"If the proximate cause of the accident is not the negligence of the defendant, but the conscious act of another volition, then he will not be liable. For against such conscious act of volition no precaution can really avail."

(1) (1903) 2 K.B., 331, at p. 339. (2) (1909) A.C., 640.
(3) (1909) A.C., 640, at p. 646.

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His Lordship proceeded as he said to apply the principles he authoritatively enunciated to the facts in hand. Initial negligence being established he asked (1):—"Have the defendants been able to show affirmatively that the *true cause* of the accident was the conscious act of another volition, *i.e.*, the tampering with the machines by the railway company's workmen?" He then said:—"Their Lordships think that on the evidence the *true cause* of the escape is left in doubt," and so the initial position is left undisturbed.

It was argued here that the test applied by the Judicial Committee was unnecessary to the case and obiter. I do not so regard it, and think a part of Lord Chancellor *Halsbury's* speech in *Watt* v. *Assets Co. Ltd.* (2) is in point. I do not quote the whole passage, but extract two lines which I apply to Lord *Dunedin's* words:—"It is part of the law which is guiding his judgment, and part of the law he is bound to expound in the judgment he is pronouncing."

Now here the defendant's negligence in not guarding against the effects of accident or negligence played no part whatever in the result. The absence of the lead safe is not synonymous with negligence: the negligence consisted merely in the disregard of the probable effects of accident or negligent use, and if these be eliminated—as they are on the facts—there was no duty to have a lead safe, and therefore no negligence in not providing one. Lord *Herschell's* words in *Membery's Case* (3) are not to be forgotten. The risks neglected not occurring are irrelevant; the actual occurrence did not come within the sphere of duty. The conscious act of another volition which admittedly caused the overflow was neither intended by the defendant, nor within his reasonable contemplation as a probable occurrence. Its results might or might not prove to be similar to those of an event for which the defendant would be responsible, had it happened; but the two events, one to be foreseen and guarded against, and the other not, are still essentially distinct. One would carry responsibility, the other not. The unknown malicious person, by his act in relation to the premises as they stood, deliberately

(1) (1909) A.C., 640, at p. 647. (2) (1905) A.C., 317, at pp. 330, 1.
(3) 14 App. Cas., 179, at p. 190.

transformed an article of common household convenience and comparatively harmless into a totally different thing, for which, to him and everyone else, it was manifestly never intended, an act not substantially different from boring a hole in the water pipe leading to the basin, or knocking off the tap with a hammer. His act and not the respondent's negligence was the *true cause* of the plaintiff's damage. To use the words of Lord *Dunedin* (1) "against such conscious act of volition no precaution can really avail," for as no limits can be imagined to the acts of a malicious person bent on destruction, so no limits can be reasonably assigned to the measures required to counteract them.

One weighty reference may be added. It is *In re United Service Co.*; *Johnston's Claim* (2). There a company negligently allowed the claimant's securities to be in the uncontrolled power of their manager, who forged the claimant's name and obtained a transfer. The owner was put to costs in recovering his shares, and claimed these costs as the result of the company's negligence. *James* L.J. (with the concurrence of *Mellish* L.J.) held that the *causa causans* of the litigation was not the neglect but the forgery. And the following passage indicates the principle on which the Court proceeded (3):—"Suppose the bailee of a key carelessly allowed the key to fall into the possession of a man who committed a burglary, and by means of that key opened a box which contained valuable property. It is scarcely possible to hold that the negligence of the bailee with regard to the key would be followed by responsibility for the loss of every article obtained by the burglar through the instrumentality of the key." *Mutatis mutandis* the analogy is complete.

Since the argument we have been referred by learned counsel for the appellant to the case of *De la Bere* v. *Pearson, Ltd.* (4). So far as it touches this case it is really in line with the other authorities I have cited. The defendant had contractually undertaken to use reasonable care to name "a good stockbroker," which meant, as was held, a stockbroker both skilful and trustworthy. This is an obvious interpretation because honesty is

(1) (1909) A.C., 640, at p. 647.
(2) L.R. 6 Ch., 212.
(3) L.R. 6 Ch., 212, at p. 218.
(4) (1907) 1 K.B., 483; and (1908) 1 K.B., 280.

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the very first quality in an agent, and the defendant negligently named a man who was untrustworthy, and it was naturally held that he was liable for the result of that untrustworthiness even though it took the form of a criminal act.

That was substantially held or assumed to be a consequence that a reasonable man would be expected to anticipate, where an untrustworthy broker was employed, and so would reasonably provide against, and no question of a conscious third volition entered into the case. *Vaughan Williams* L.J., (1) said: "Under the circumstances of the present case I think that the cases as to the intervention of a crime do not apply."

In my opinion this appeal should be dismissed.

Appeal allowed. Order appealed from discharged. Judgment of County Court Judge restored. Respondent to pay costs of the appeal.

Solicitor for the appellant, *James Hall.*

Solicitors for the respondent, *Williams & Matthew.*

B. L.

(1) (1908) 1 K.B., 280, at p. 289.