[HIGH COURT OF AUSTRALIA.]

TORETTE HOUSE PROPRIETARY LIMITED APPELLANT;
PLAINTIFF,

AND

BERKMAN . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, 1939, *Nov.* 15-17.

MELBOURNE, 1940, *Feb.* 19.

Latham C.J., Starke and Dixon JJ.

Nuisance—Rule in Rylands v. Fletcher—Domestic water supply—Escape of water from disconnected pipe—Presence of pipe not known to occupier—Liability for negligence of independent contractor.

The defendant was the owner of premises which adjoined the premises of the plaintiff. The defendant's premises were connected with the water supply. Amongst the pipes under the defendant's premises was a disconnected service pipe, shut off from the main by a stopcock, but unplugged at the disconnected end. There was no evidence upon which it could be found that the defendant knew or ought to have known of the presence under his premises of the disconnected pipe. The defendant employed as an independent contractor a plumber, whom he was entitled to assume to be competent, to effect certain alterations in the water supply to the defendant's premises. In the course of the work the plumber by mistake turned on the stopcock by which the disconnected service pipe was shut off from the main and omitted to turn it off. As a result water escaped from the open end of the disconnected pipe and soaked through into the plaintiff's premises, considerable damage to the plaintiff's property being caused before the escape was discovered.

Held that the plaintiff had no cause of action against the defendant either in nuisance or under the rule in *Rylands* v. *Fletcher*, (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H.L. 330, and that the case did not fall within any of the recognized grounds upon which a principal may be held liable for the negligence of an independent contractor.

Decision of the Supreme Court of New South Wales (Full Court): *Torette House Pty. Ltd.* v. *Berkman*, (1939) 39 S.R. (N.S.W.) 156; 56 W.N. (N.S.W.) 86, affirmed.

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APPEAL from the Supreme Court of New South Wales.

In an action brought in the Supreme Court of New South Wales the plaintiff, Torette House Pty. Ltd., claimed from the defendant, William Berkman, the sum of £1,000. The plaintiff company alleged that the defendant was possessed of certain premises contiguous to those of the plaintiff company and had on his premises and in his care, control and management certain water pipes, yet he by himself, his servants and agents (*a*) so negligently conducted himself in and about the said care, control and management that large quantities of water were allowed to escape into the plaintiff company's basement, whereby great damage was caused, and, in a second count, (*b*) so wrongfully and improperly conducted himself in and about the said care, control and management that large quantities of water were allowed to escape into the said basement causing damage.

The material facts were not in dispute.

The defendant was the co-owner of certain premises numbered 113, 115 and 117 King Street, Sydney, no. 117 being situated above nos. 113 and 115. The plaintiff company was the occupant of no. 119, which adjoined nos. 115 and 117. The defendant proposed to make alterations to the premises no. 113 so as to adapt them for use as a coffee shop. This involved making some changes in the water service at no. 113, to improve the supply. He employed a plumber to do the necessary work on the water service to no. 113; and it was not disputed that the defendant was entitled to assume that the plumber was competent, and also that he was employed as an independent contractor. The defendant was himself ignorant of the position of the water pipes in the building and of the position of the cocks by which water could be admitted to or excluded from the pipes connecting the pipes in the buildings with the water main under the street. The plumber began his operations on Saturday, 9th July 1938. He found that a pipe in no. 113 was leaking, and thought it desirable to turn off the water from those premises. The stopcock for no. 113, which had a separate service of its own, was reached by an opening in the footpath which had been covered by cement, and the plumber was unable to find it. He found, however, opposite no. 115, two stopcocks, one on and the other off. The one

which was on was connected with a pipe which supplied the water service to no. 115. The other served to shut off the water from a piece of pipe about thirty feet in length running beside the supply pipe under no. 115. This had apparently at one time supplied a water service to no. 115, but it had at some time in the past been disconnected, and the disconnected end had not been plugged off, though the other end was still connected with the main. The plumber turned off the cock which was on, but, finding that this produced no result in the premises no. 113, he returned and turned it on again. For some reason, presumably because he mistakenly supposed that he had turned both off, he turned the other on also. In the result water poured out through the open end of the thirty feet pipe under the premises no. 115, and this continued during the whole of Sunday. The water soaked through into the adjoining premises no. 119, and did considerable damage to the goods stored by the plaintiff company in its basement. The facts that the water was soaking into the basement and that it was escaping from the open pipe were not discovered until Monday morning. It was not disputed that prompt steps were then taken to cause the cock connected with the disused pipe to be turned off.

The trial judge directed the jury to find a verdict for the defendant.

This direction was affirmed by the Full Court of the Supreme Court: *Torette House Pty. Ltd.* v. *Berkman* (1).

From this decision the plaintiff company appealed to the High Court.

Bowie Wilson (with him *Snelling*), for the appellant. This case comes within the doctrine enunciated in *Rylands* v. *Fletcher* (2). The rule in that case is one of absolute liability; there are exceptions to the rule that liability is absolute in cases where there is a liability only if there has been negligence. An owner of land is under a legal duty to his neighbours to ensure that his land is not used negligently so as to cause damage to those neighbours. He is liable to the owners of property for any damage resulting to it from a failure on his part to take care in the performance of any work, and he is equally liable if instead of doing the work himself he

(1) (1939) 39 S.R. (N.S.W.) 156; 56 W.N. (N.S.W.) 86.

(2) (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H.L. 330.

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procures another, whether agent, servant or otherwise, to do such work for him (*Brooke* v. *Bool* (1)).

[DIXON J. referred to *Laugher* v. *Pointer* (2).]

His liability extends to damage arising from negligence on the part of an independent contractor (*Lamb* v. *Phillips* (3) ; *Holliday* v. *National Telephone Co.* (4) ; *Honeywill and Stein Ltd.* v. *Larkin Brothers Ltd.* (5)). The mere escape of the water under pressure made the respondent liable. In the case of something which is likely to cause danger if it escapes, the owner owes a duty to exercise care, and he cannot avoid liability by delegating that duty to someone else (*McInnes* v. *Wardle* (6)).

[DIXON J. referred to *Hazelwood* v. *Webber* (7).]

The plumber was negligent in not making inquiries before turning on the stopcock. The respondent was bound to ensure that all necessary precautions were taken to prevent damage, therefore he was personally responsible notwithstanding the employment of an independent contractor (*The Snark* (8) ; *Bower* v. *Peate* (9) ; *Dalton* v. *Angus* (10)). Water under pressure is inherently dangerous unless precautions are taken to confine or control it. The duty of an occupier is shown in *McInnes* v. *Wardle* (11). The water was not brought in for the common use of the appellant and the respondent (*Western Engraving Co.* v. *Film Laboratories Ltd.* (12)). In *Rickards* v. *Lothian* (13) and in *Blake* v. *Woolf* (14) there was a common user of the water supply, and, also, in the latter case, the necessity for care on the defendant's part was lessened by the fact that the plaintiff had assented to the water being on the premises.

[LATHAM C.J. referred to *Collingwood* v. *Home and Colonial Stores Ltd.* (15).]

That case takes it out of the absolute rule in *Rylands* v. *Fletcher* (16), but there is nothing to take it out of the rule to take care. Owners and occupiers of premises owe a duty to their neighbours

(1) (1928) 2 K.B. 578.
(2) (1826) 5 B. & C. 547, at p. 560 [108 E.R. 204, at p. 209].
(3) (1911) 11 S.R. (N.S.W.) 109 ; 28 W.N. (N.S.W.) 40.
(4) (1899) 2 Q.B. 392.
(5) (1934) 1 K.B. 191.
(6) (1931) 45 C.L.R. 548.
(7) (1934) 52 C.L.R. 268.
(8) (1900) P. 105.
(9) (1876) 1 Q.B.D. 321.
(10) (1881) 6 App. Cas. 740
(11) (1931) 45 C.L.R., at p. 552.
(12) (1936) 1 All E.R. 106.
(13) (1913) A.C. 263 ; 16 C.L.R. 387
(14) (1898) 2 Q.B. 426.
(15) (1936) 3 All E.R. 200.
(16) (1866) L.R. 1 Ex. 265 ; (1868) L.R. 3 H.L. 339.

which they cannot delegate to independent contractors (*Odell* v. *Cleveland House Ltd.* (1); *Matania* v. *National Provincial Bank Ltd.* (2)). An owner or occupier of land who has work done on the land to his own advantage by an independent contractor is liable for damage arising from the negligence of such independent contractor (*Hughes* v. *Percival* (3)). The employment of independent contractors is dealt with in *Salmond* on *Torts*, 9th ed. (1936), pp. 117 et seq. In this case the respondent employed an independent contractor to do a lawful act which the respondent would have done himself at his own risk (*Rainham Chemical Works Ltd.* v. *Belvedere Fish Guano Co. Ltd.* (4); *Black* v. *Christchurch Finance Co. Ltd.* (5); *McInnes* v. *Wardle* (6)). The respondent should have known of the defective condition of the pipe. A nuisance was caused as the result of his lack of knowledge: See also *Winfield* on *Torts*, (1937), p. 484.

[DIXON J. referred to *Broder* v. *Saillard* (7) and *Job Edwards Ltd.* v. *Birmingham Navigations* (8).]

In *Job Edwards Ltd.* v. *Birmingham Navigations* (9) there was not any suggestion that the fire had been started by anyone with whom the landowner was connected; apparently it was a case of spontaneous combustion. The distinction between nuisance and trespass is shown in *Salmond* on *Torts*, 9th ed. (1936), p. 234. *Rainham Chemical Works Ltd.* v. *Belvedere Fish Guano Co. Ltd.* (4) depends wholly on the fact that the people in occupation were liable for the explosion caused by their independent contractors whom they had on their premises. That case does not displace *Honeywill and Stein Ltd.* v. *Larkin Brothers Ltd.* (10).

[STARKE J. referred to *Barker* v. *Herbert* (11).]

That case shows that the onus is upon the defendant to prove that the damage resulted from the action of a trespasser or the tortious act of a stranger. The negligence of, or nuisance caused by, the respondent is established by the evidence (*Hanson* v. *Wearmouth*

(1) (1910) 102 L.T. 602.
(2) (1936) 2 All E.R. 633.
(3) (1883) 8 App. Cas. 443.
(4) (1921) 2 A.C. 465.
(5) (1894) A.C. 48.
(6) (1931) 45 C.L.R. 548.
(7) (1876) 2 Ch. D. 692, at pp. 697, 700.
(8) (1924) 1 K.B. 341, at p. 355.
(9) (1924) 1 K.B. 341.
(10) (1934) 1 K.B. 191.
(11) (1911) 2 K.B. 633.

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Coal Co. (1); *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* (2); *Attorney-General* v. *Cory Bros. & Co.*; *Kennard* v. *Cory Bros. & Co.* (3); *Stewart* v. *Adams* (4)). The occupier is liable for the defective condition of the water service, covering and stopcock (*Batt* v. *Metropolitan Water Board* (5); *Mist* v. *Metropolitan Water Board and Creamilk Ltd.* (6)). The question of negligence should have been left to the jury.

K. A. Ferguson (with him *Black*), for the respondent. An employer is liable, if at all, for the acts of an independent contractor, not because the independent contractor has been guilty of any breach of duty, but because he himself has been guilty of a breach of duty which is personal to him towards the claimant; such a liability is not vicarious. Although an employer may be liable for the results which flow from the acts of an independent contractor, he is never liable for the negligent acts of an independent contractor, nor for any nuisance which is caused by the independent contractor, although he is liable for the result of it. A person is not liable for a nuisance unless he creates it himself or it is created by someone for whom he is responsible. The respondent was not the occupier of any of the subject premises.

[DIXON J. referred to *Fairman* v. *Perpetual Investment Building Society* (7); *Morgan* v. *Girls Friendly Society* (8).]

A person is not under a duty to make inquiries in respect of possible or probable latent defects. The pipe was perfectly innocuous at the date the respondent purchased the premises. There is not any liability unless the act is wrongful in itself or damage must necessarily result therefrom. A person is liable where the act would be unlawful unless authorized by statute and damage flows from the doing of the act beyond what was authorized; he cannot divest himself of that liability by employing an independent contractor unless the particular act of negligence is collateral. If an act is inherently dangerous the only duty is to use reasonable care to ensure that no damage flows from the act. To instal or repair

(1) (1939) 55 T.L.R. 747.
(2) (1914) 3 K.B. 772.
(3) (1921) 1 A.C. 521.
(4) (1920) S.C. 129.
(5) (1911) 2 K.B. 965.
(6) (1915) 84 L.J. K.B. 2041.
(7) (1923) A.C. 74.
(8) (1936) 1 All E.R. 404.

water pipes is not an inherently dangerous act, especially if a trained person is employed to do the work. A duty which is personal cannot be delegated. Liability for a breach of such a duty by an independent contractor remains with the employer: See *Salmond* on *Torts*, 9th ed. (1936), pp. 117 et seq.

[DIXON J. referred to *Wilsons & Clyde Coal Co. Ltd.* v. *English* (1); *Fanton* v. *Denville* (2); and *Ogden* v. *Melbourne Electric Supply Co. Ltd.* (3).]

Those cases are applicable in so far as they indicate that there are some duties which are personal to an employer himself and of which he cannot divest himself. A person is liable for the acts of an independent contractor only (*a*) when he employs the contractor to do something (i) which is tortious, and (ii) which necessarily causes damage; (*b*) when he owes an absolute duty to the person damaged, irrespective of negligence, to see that no damage befalls him; (*c*) when the duty is a statutory one—in such a case there is a duty to see that reasonable care is taken by whoever carries out the work; and, although this is doubtful, (*d*) when the independent contractor is employed to do an extra-hazardous act; here there is a duty to take reasonable care to prevent injury. A person is not liable for nuisance unless he causes it, or unless by the neglect of some duty he allows it to arise, or if and when nuisance has arisen without his own act or default he omits to remedy it within a reasonable time after he did or ought to have become aware of it (*Noble* v. *Harrison* (4)). In other words a person is liable for a nuisance only if he creates it or suffers it. The respondent neither created nor suffered the escape of water, and no time was lost in remedying the trouble (*Barker* v. *Herbert* (5); *Noble* v. *Harrison* (6)). Even if the respondent is liable for the act of the independent contractor, which is denied, the turning-on of the particular stopcock was outside the scope of the independent contractor's employment; it was an act which was collateral negligence. Apart from whether it was within the scope of the employment or not, the appellant does not come within any of the heads under which liability of the respondent can

(1) (1938) A.C. 57.
(2) (1932) 2 K.B. 309.
(3) (1918) V.L.R. 77.
(4) (1926) 2 K.B. 332, at p. 338.
(5) (1911) 2 K.B., at pp. 636, 637.
(6) (1926) 2 K.B., at p. 337.

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be established. The respondent is absolutely within *Blake* v. *Woolf* (1). That case was specifically upheld in *Rickards* v. *Lothian* (2) and was not cut down by, or explained in, *Western Engraving Co.* v. *Film Laboratories Ltd.* (3). The water service acted perfectly throughout.

[LATHAM C.J. referred to *Gill* v. *Edouin* (4).]

Here there was not any evidence that the respondent should have known of the pipe or should have made inquiries concerning it. Although, as shown in *R.* v. *Pedly* (5), a purchaser of a property on which there is an existing nuisance of which he knows cannot escape liability, here there was not any nuisance existing. There is not any general rule in respect of " extra "-hazardous acts (*Rainham Chemical Works Ltd.* v. *Belvedere Fish Guano Co. Ltd.* (6)). By dicta *Rainham Chemical Works Ltd.* v. *Belvedere Fish Guano Co. Ltd.* (7) displaces *Honeywill and Stein Ltd.* v. *Larkin Brothers Ltd.* (8), which is not an easy case to follow. Collateral negligence on the part of independent contractors was dealt with in *Hardaker* v. *Idle District Council* (9) and *Penny* v. *Wimbledon Urban Council* (10). The respondent was entitled to repair the water service which brought on to his premises water in ordinary and normal quantities. This is an exception from *Rylands* v. *Fletcher* (11) ; other persons must take the risk of damage apart from negligence on the part of the respondent.

[STARKE J. referred to *Quarman* v. *Burnett* (12), and *Garrett* on *Nuisances*, 3rd ed. (1908), p. 245.]

The pipe was not in the possession of the respondent.

Bowie Wilson, in reply. The duty of an owner of property to the owner of adjoining property in respect of water pipes was dealt with in *George Moffat & Co.* v. *Park* (13), and continuing nuisance was dealt with in *Law Quarterly Review*, vol. 49, p. 165.

Cur. adv. vult.

(1) (1898) 2 Q.B., at p. 428.
(2) (1913) A.C. 263 ; 16 C.L.R. 387.
(3) (1936) 1 All E.R. 106.
(4) (1894) 71 L.T. 762 ; (1895) 72 L.T. 579.
(5) (1834) 1 Ad. & E. 822 [110 E.R. 1422].
(6) (1921) 2 A.C. 465.
(7) (1921) 2 A.C., at pp. 476, 477.
(8) (1934) 1 K.B. 191.
(9) (1896) 1 Q.B. 335.
(10) (1899) 2 Q.B. 72.
(11) (1866) L.R. 1 Ex. 265 ; (1868) L.R. 3 H.L. 330.
(12) (1840) 6 M. & W. 499 [151 E.R. 509].
(13) (1877) 5 Rettie 13.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from an order of the Full Court of the Supreme Court of New South Wales refusing to order a new trial in an action for nuisance and negligence in which the learned trial judge directed a verdict for the defendant.

The defendant was a part owner of premises in King Street, Sydney (Nos. 113, 115 and 117), which adjoined the plaintiff's premises (No. 119). The ground floor of defendant's building was divided into two shops, no. 113 and no. 115. A passage in no. 115 led to some stairs which gave access to no. 117, which constituted the upper portion of the defendant's building. The defendant employed a plumber named Hunt to make some change in the water service in no. 113. The plumber found in the street opposite no. 115 two stopcocks upon pipes leading from the main into the defendant's premises. One of the stopcocks was turned off, and the other was turned on. He turned off the one which was turned on, and found that this caused no interruption to the water supply to no. 113, where the work was to be done. He or his mate then returned to the stopcocks and, with the idea that water must be left available for whatever premises were served by the pipes which bore the stopcocks, turned both the stopcocks on. One of the stopcocks was on a pipe which ran underneath the floor of the passage and into no. 115 where, at some time, this pipe had been cut, but the end had not been plugged or capped. Thus, when the stopcock was turned on, water flowed through the pipe. The water so flowed from Saturday morning to Monday morning and ran into no. 119, the premises of the plaintiff, and caused damage.

It is clear that the plumber was guilty of carelessness in turning on a stopcock which he found turned off without making any inquiry as to the possible result. The plumber was, it is agreed, an independent contractor, and not a servant or agent of the defendant. There is no evidence that the defendant knew or, indeed, that anybody knew, that there was underneath the floor an open pipe connected with the main. The plumber who did the work was unlicensed, but no question has been raised as to his competence. There was no personal negligence on the part of the defendant.

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The learned trial judge held that there was no case to go to the jury on nuisance, because the defendant had neither caused the nuisance nor knowingly continued it. An occupier of land is not subject to a duty to search for nuisances which may or may not exist. The learned judge relied upon *Job Edwards Ltd.* v. *Birmingham Navigations* (1) and *Sedleigh-Denfield* v. *St. Joseph's Society for Foreign Missions* (2). The Full Court agreed with this view, reference being made, *inter alia*, to *Barker* v. *Herbert* (3) and *Noble* v. *Harrison* (4). I add that the defendant did not employ the plumber to do any act of which the nuisance was the necessary or a natural consequence. In my opinion the decision of the learned trial judge upon this point was right.

The leading case of *Rylands* v. *Fletcher* (5) enunciated a principle of absolute liability, independent of negligence, in certain cases where the occupier of land collects and keeps upon his land anything likely to do damage if it escapes. This rule applies, however, only in cases where there is a non-natural use of land and where what is kept on the land is likely to escape. There must, in order to bring the principle into operation, be "some special use" of the land "bringing with it increased danger to others." It "must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community" (*Rickards* v. *Lothian* (6)).

The damage in this case was caused, not by the open pipe itself, but by the negligent act of the plumber in causing water to flow through it. It is now well established that the installation of an ordinary domestic water supply, though the water is under pressure, does not bring the occupier of land within the rule in *Rylands* v. *Fletcher* (5) (*Blake* v. *Woolf* (7); *Western Engraving Co.* v. *Film Laboratories Ltd.* (8); *Collingwood* v. *Home and Colonial Stores Ltd.* (9); *Hazelwood* v. *Webber* (10)). In my opinion, the principle in *Rylands* v. *Fletcher* (5) has no application to the present case.

The question is, therefore, whether there was evidence to go to the jury of negligence for which the defendant was responsible. As I have

(1) (1924) 1 K.B. 341.
(2) (1939) 1 All E.R. 725.
(3) (1911) 2 K.B. 633.
(4) (1926) 2 K.B. 332.
(5) (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H.L. 330.
(6) (1913) A.C., at p. 280; 16 C.L.R., at p. 401.
(7) (1898) 2 Q.B. 426.
(8) (1936) 1 All E.R. 106.
(9) (1936) 3 All E.R. 200.
(10) (1934) 52 C.L.R., at pp. 277-281.

already said, he was not guilty of any personal negligence. The question is whether he is liable for the negligence of the independent contractor.

As a general rule an employer is not liable for the acts of his independent contractor in the same way as he is responsible for the acts of his servants or agents, even though these acts are done in carrying out work for his benefit under the contract. But he is liable to a person who is injured by the act of his independent contractor if that contractor is employed to do an illegal act. It is plain that there was no illegality in or about the work which the plumber was employed to do in the present case. Further, if a person is himself bound to perform a particular duty, he cannot escape liability for failure to perform that duty by delegating performance of it to another person (*Robinson* v. *Beaconsfield Rural Council* (1)). There is nothing in the circumstances of the present case which brings the facts within this rule.

No question arises here of statutory power or duty to do an act which would otherwise be unlawful.

If a person employs an independent contractor to do a particular act as, for example, to break through his neighbour's wall, the employer is liable in respect of that act, independently of negligence, because the act of the contractor is the act of the employer himself. In such a case it is impossible to draw the distinction upon which the differentiation between a servant and an independent contractor is based. That distinction depends upon the fact that an employer is entitled to control the manner in which a servant does his work, and that he is not so entitled in the case of an independent contractor. Here, however, the defendant did not employ the plumber to do the very thing which caused the damage. He employed him only to repair or adjust his water supply, the manner of doing the required work being left to the skilled artisan.

It has, however, recently been held in the Court of Appeal that an employer is liable to another person who is injured by the act of an independent contractor who is employed to do an extra-hazardous act, that is, " an act which in its very nature involves in the eyes of the law special danger to others " (*Honeywill and Stein Ltd.* v. *Larkin*

(1) (1911) 2 Ch.188.

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Brothers Ltd. (1); *Matania* v. *National Provincial Bank Ltd.* (2)) —and see *Brooke* v. *Bool* (3). The Full Court held that the decision in *Rainham Chemical Works Ltd.* v. *Belvedere Fish Guano Co. Ltd.* (4) showed that there was no such rule as that stated in *Honeywill's Case* (5) and the *Matania Case* (2). In my opinion, however, it is not necessary to consider this legal question. The statement made in *Honeywill's Case* (5) and approved in the *Matania Case* (6), is as follows:—"It is clear that the ultimate employer is not responsible for the acts of an independent contractor merely because what is to be done will involve danger to others if negligently done. The incidence of this liability is limited to certain defined classes, and for the purpose of this case it is only necessary to consider that part of this rule of liability which has reference to extra-hazardous acts, that is, acts which, in their very nature, involve in the eyes of the law special danger to others" (1). The rule is said to apply to operations which are "inherently dangerous" (7). The ordinary employment of a competent plumber to repair a water service, which almost invariably involves turning the water supply off and on, cannot be regarded as an extra-hazardous or inherently dangerous operation which, by its very nature, must be regarded, as a matter of law, as involving special danger of damage to others. If the operation is conducted negligently, as in the present case, damage may undoubtedly be brought about. But the very statement of the principle excludes liability where it is only negligence in the manner of conducting the operation, as distinct from the character of the operation itself, which will cause or will probably cause damage to others. Thus the plaintiff is unable to bring the case within the rule relied upon and, as no other principle can apply to justify a finding of negligence on the part of the defendant, it must be held that there was no evidence of negligence to go to the jury, and, therefore, the decision of the learned trial judge was right.

In my opinion the appeal should be dismissed.

(1) (1934) 1 K.B., at p. 197.
(2) (1936) 2 All E.R. 633.
(3) (1928) 2 K.B., at p. 587.
(4) (1921) 2 A.C. 465.
(5) (1934) 1 K.B. 191.
(6) (1936) 2 All E.R., at p. 645.
(7) (1934) 1 K.B., at p. 201.

STARKE J. The appellant was the occupier of a shop numbered 119 in King Street, Sydney. The respondent was the co-owner of certain premises numbered 113, 115, 117, purchased in 1929, adjoining the appellant's shop. No. 113 was let to a tenant as a coffee shop, no. 115 was also let to a tenant and used as a carpet shop, no. 117 adjoined the appellant's shop. It was a passage containing a stairway which gave access to a room above. Underneath this passage-way close to the wall of the appellant's shop were two water pipes, one a service pipe, I gather, to the premises numbered 115, the other also a service pipe which had been disconnected but had not been plugged or "capped off." These service pipes were connected with the main and might be turned on or shut off from the main by means of two stopcocks which were in the footpath of King Street. The respondent and his co-owner retained the control and management of the passage and stairway and of the water pipes under the passage. But the presence of the pipes under the passage was unknown to the co-owners, and they knew nothing of their condition.

In July 1938, the tenant of no. 113 desired a better water supply to his premises and the co-owners instructed a plumber to put the service in no. 113 in a state that would give a satisfactory supply of water for the class of business carried on by the tenant. The plumber conducted his own business and was not a servant of the co-owners: he was, in short, an independent contractor. The plumber went to the premises no. 113 to ascertain the material required to put in the new service but found there a leaking pipe. He tried to find the cock to turn off the water and in his search found the stopcocks for the pipes in no. 117. But these stopcocks did not control the water supply to no. 113, which was in fact controlled, as was afterwards discovered, by a stopcock, which could not be seen, some two feet under the footpath outside no. 113. The plumber turned off, as he believed, the stopcocks outside no. 117, using a key to operate them, but found that they did not control the water supply to no. 113. Later he turned them on again. The water had been shut off from the service pipe, which had been disconnected but not plugged. The plumber made some mistake: he turned on the water from the main to the disconnected pipe and

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failed to shut it off again. The result was that water was discharged from the disconnected pipe, which flowed into and flooded a basement in the occupation of the appellant and made it damp, whereby the appellant suffered damage to its business, goods, and premises. Action was then brought against the respondent to recover from him the damage so sustained. But the trial judge directed the jury to find a verdict for the respondent, and this direction was affirmed on appeal to the Supreme Court, and now an appeal is brought to this court.

"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 prima facie answerable for all the damage which is the natural consequence of its escape." This is the law laid down in *Rylands* v. *Fletcher* (1); *Rainham Chemical Works Ltd.* v. *Belvedere Fish Guano Co. Ltd.* (2). But it is equally well established that an occupier of land is entitled to the reasonable enjoyment of that land; for instance, to instal a reasonable supply of water for domestic purpose or for sewage and so forth (*Rickards* v. *Lothian* (3); *Blake* v. *Woolf* (4); *Western Engraving Co.* v. *Film Laboratories Ltd.* (5); *Collingwood* v. *Home and Colonial Stores Ltd.* (6); *Hazelwood* v. *Webber* (7)). The rule of *Rylands* v. *Fletcher* (8) has, therefore, no application to the present case.

Then it was said that the respondent and his co-owner created or suffered a nuisance upon their premises which resulted in damage to the appellant (*Broder* v. *Saillard* (9); *Reinhardt* v. *Mentasti* (10); *Job Edwards Ltd.* v. *Birmingham Navigations* (11)). The nuisance, as I understood the argument, consisted of keeping an unplugged or uncapped water pipe upon the premises of the respondent and his co-owner which might damage the premises of the appellant if anyone opened the turncock in the street and turned the water into the unplugged or uncapped pipe. It was immaterial, according to

(1) (1866) L.R. 1 Ex., at p. 279; (1868) L.R. 3 H.L., at pp. 339, 340.
(2) (1921) 2 A.C. 465.
(3) (1913) A.C. 263; 16 C.L.R. 387.
(4) (1898) 2 Q.B. 426.
(5) (1936) 1 All E.R., at p. 109.
(6) (1936) 3 All E.R. 200.
(7) (1934) 52 C.L.R., at p. 281.
(8) (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H.L. 330.
(9) (1876) 2 Ch. D. 692.
(10) (1889) 42 Ch. D. 685.
(11) (1924) 1 K.B. 341.

the argument, whether the water was turned on deliberately or carelessly. But the respondent and his co-owner could not possibly be expected to anticipate the deliberate and wrongful act of another (*Box* v. *Jubb* (1); *Rickards* v. *Lothian* (2); *North Western Utilities Ltd.* v. *London Guarantee and Accident Co. Ltd.* (3)). Ought they nevertheless to have anticipated the risk of someone carelessly turning on the water? In my opinion the respondent and his co-owner owed a duty to their neighbours to exercise reasonable care and skill in the supervision of the pipes under their control and management, so that if water escaped they should not be damaged: See *Laugher* v. *Pointer* (4). But the degree of care which the duty involved is, as was said in *North Western Utilities Ltd.* v. *London Guarantee and Accident Co. Ltd.* (3), proportioned to the degree of risk involved. The respondent and his co-owner knew nothing of the position or condition of their water service pipes and made no investigation. The turncock was in the footpath and the pipe was unplugged. But even if the respondent and his co-owner had known this, should they as reasonable and prudent men have plugged the pipe and prevented the risk of injury to their neighbour? The turncock was immovable, I understand, without a key, whereby leverage could be obtained. Such keys are ordinarily in the possession only of skilled persons, e.g., persons employed by water authorities or plumbers. This part of the case has caused me some misgiving, but I am not prepared to dissent from the unanimous opinion of all the learned judges of the Supreme Court that, in the circumstances, there was no evidence fit to be submitted to a jury of any neglect of duty on the part of the respondent and his co-owner.

Finally it was argued that the respondent and his co-owner were answerable for the negligence of the plumber, whom they employed, in turning on the water to the unplugged and uncapped pipe. He was, as already indicated, in the position of an independent contractor. The work for which the respondent and his co-owner had employed him was lawful in itself and of such a character that if executed with due care it involved no injurious consequences to others; there was no special or peculiar hazard in the work which the plumber

(1) (1879) 4 Ex. D. 76.
(2) (1913) A.C. 263; 16 C.L.R. 387.
(3) (1936) A.C. 108.
(4) (1826) 5 B. & C. 547 [108 E.R. 204].

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was employed to execute. Under these circumstances the rule of law is that an employer is not responsible for the acts of a person who is not his agent or servant but an independent contractor (*Rapson* v. *Cubitt* (1); *Honeywill and Stein Ltd.* v. *Larkin Brothers Ltd.* (2); *Quarman* v. *Burnett* (3)).

The appeal should accordingly be dismissed.

DIXON J. The damage of which the plaintiff complains arose from the flow of water from the adjoining premises, of which the defendant may be taken to be the owner. The premises consist of a building comprising two shops and an upper storey. To give access to the upper storey a short passage leads from the street to a stairway. The passage runs between the nearer of the two shops and the wall which the plaintiff's premises adjoin. Under the floor of this passage there was an old water-service pipe connected with the street main. The pipe was unsealed, and the water which did the damage was discharged by it. The two shops were let to tenants, but, on the pleadings and the evidence, the defendant must be regarded as in occupation of that part of his building from which the water issued. These facts, if the reason for the discharge of water stood unexplained, might be enough to support a verdict for the plaintiff. But an explanation has been given the honesty of which is not impugned, and the question is whether on the facts which it discloses the defendant is entitled to a verdict or nonsuit.

It appears that the pipe from which the water came had at some stage in the history of the building been thrown out of use. Instead of disconnecting it from the main or sealing it up those who did the work turned off the water at the stopcock in the footpath in front and left the pipe open. The stopcock was enclosed in an iron box with a flap fitting tightly down flush with the pavement and the tap could be turned only with a plumber's key. The work must have been done before the defendant became the owner of the premises, and he was quite unaware of the existence of the pipe, which was concealed by the floor. Among the numerous plates along the footpath the stopcock escaped notice. Until the occasion

(1) (1842) 9 M. & W. 710 [152 E.R. 301].
(2) (1934) 1 K.B. 191.
(3) (1840) 6 M. & W. 499 [151 E.R. 509].

now in question no one had used it to turn on the water and as the open pipe did no harm it had remained undiscovered for years. The cause of the trouble was a plumber whom the defendant called in to do some work at the other shop, that is, the shop next but one from the plaintiff's place of business. He found it desirable to turn off the water in that shop, and in looking for the stopcock to do so he tried two which he found further up the street. One of these proved to be the old stopcock of the open pipe. He turned it on without any immediately apparent result and then for some reason failed to turn it off again. As a consequence water flowed into the defendant's premises for some considerable time. This omission on the part of the plumber might well be found to be negligent, but he was an independent contractor and not a servant of the defendant. His negligence, however, would not have brought about the damage if it had not been that the pipe was unsealed and there was no valve except the stopcock in the pavement. A pipe in such a condition involved an unnecessary risk to the property of the adjoining occupiers, because it left their safety from flooding to depend on the closed valve of the stopcock in the street, which in the course of time someone was not unlikely to open, whether from mischief, thoughtlessness or mistake. Indeed, the by-laws of the water authority appear to require precautions greater than the shutting of the stopcock: See by-law 86, cll. 40 and 43, *N.S.W. Rules, Regulations and By-laws*, vol. 17 (1928), pp. 143, 144. There are, therefore, two independent points at which fault occurred, viz., the improper condition in which the pipe was left when the service was disconnected and the negligent omission of the plumber to close the stopcock he had mistakenly opened.

To succeed I think the plaintiff must fix the defendant with responsibility for or by reason of one or other of these matters. For the escape of water from pipes placed in a city building as part of the system of civic water supply cannot in my opinion be brought within the rule which makes an occupier liable for damage done by the escape from his control of harmful agents brought upon his premises notwithstanding he has taken all reasonable care to safeguard others from harm. The application of that rule is excluded by the consideration that an urban building not supplied with water

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would be regarded by everyone as defective and incomplete. " 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 recognized 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 " (per Lord *Moulton*, delivering the judgment of the Privy Council in *Rickards* v. *Lothian* (1)). These observations apply whether the occupier of the building uses the water for domestic purposes only or in the course of carrying on a business or an industry. But it does not follow that the rule of strict liability will not govern his operations with the water obtained from the water system.

If a trade or manufacture involves an accumulation of water or the use of a volume or flow bringing a new or increased risk of its escape, the question will be, not whether to instal and maintain a water service makes the occupier liable under the rule of special responsibility when he applies the water to an industrial purpose, but whether the use by him of the water obtained from it should be considered as within the principle by which that rule is qualified, namely, that " when the use of the element or thing which the law regards as a potential source of mischief is an accepted incident of some ordinary purpose to which the land is reasonably applied by the occupier, the prima facie rule of absolute responsibility for the consequences of its escape must give way " (*Hazelwood* v. *Webber* (2)). In determining such a question the advantage to the occupier who succeeds in the harmless use of an agency such as a large quantity of water which is a potential source of mischief, and the frequency of its use by other occupiers, are not the only considerations. " The degree of hazard to others involved in its use, the extensiveness of

(1) (1913) A.C., at pp. 281, 282; 16 C.L.R., at p. 402.
(2) (1934) 52 C.L.R., at p. 277.

the damage it is likely to do and the difficulty of actually controlling it are even more important factors" : Cf. *Hazelwood* v. *Webber* (1). Time, place and circumstance, not excluding purpose, are of course most material considerations. This, I think, is all that is meant by the decision in *Western Engraving Co.* v. *Film Laboratories Ltd.* (2) that manufacturers who for the purpose of washing cinematograph films used large quantities of circulating water in a closed apparatus, a boiler, and a constant flow of water were liable for the consequences of its escape under the rule of strict responsibility : Cp., per Lord *Wright*, *Collingwood* v. *Home and Colonial Stores Ltd.* (3). The present case, therefore, notwithstanding that the building was used for the purpose of business, is not governed by the rule of special responsibility for the escape of water brought by an occupier upon his premises ; and the plaintiff must depend upon some other principle of liability.

As the plumber was an independent contractor the defendant cannot, in my opinion, be held vicariously responsible for his negligent act. It may be conceded or assumed that the stopcock and the box containing it are in the legal control and ownership of the defendant : Cf. *Birch* v. *Australian Mutual Provident Society* (4) ; *Batt* v. *Metropolitan Water Board* (5). But the case cannot be treated as one where an occupier allows an independent contractor so to use or deal with his premises that they become a source of harm to his neighbour. The plumber was employed to do some work at the fittings of the shop further down the street which had been let to a new tenant. Other questions might have arisen if through his negligent plumbing water had escaped from that shop. His negligent act did not affect the condition of the premises to which he had been admitted. It was done in preparation for and in the course of the work he had been commissioned to do, but it is now well established that the circumstance that the employment of an independent contractor relates to fixed property is not enough to impose upon the occupier who is his principal responsibility for acts of negligence in the course of his work. None of the recognized grounds upon which the principal may be held liable for a contractor's negligence appears

(1) (1934) 52 C.L.R., at p. 278.
(2) (1936) 1 All E.R. 106.
(3) (1936) 3 All E.R., at p. 208.
(4) (1906) 4 C.L.R. 324.
(5) (1911) 2 K.B. 965.

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to me to extend to the present case. Indeed, it is enough to say that the question is covered by the judgment of *Wright* J. in *Blake* v. *Woolf* (1), which has the approval of the Privy Council (*Rickards* v. *Lothian* (2)). There the defendant had called in a plumber to repair his leaking cistern. Owing to negligent performance of this task, the cistern continued to leak and the plaintiff suffered damage. *Wright* J. decided that the defendant was not liable. "It has been contended," he said, "that where realty is concerned a person employing an independent contractor to execute works is just as liable for any damage occasioned by him as if the works were done by his own servant. I do not think that that is established" (3). After distinguishing cases where a plaintiff complains of the infringement of an absolute right, such as that of support, or as that to be preserved from the injurious consequences of the escape from an occupier's control of some dangerous agency, and saying that no such right existed in the case before him because it fell within the exception, that is, because the water was brought upon the premises, an urban building, in the ordinary way, *Wright* J. continued:— "Therefore, I think that the ordinary rule that a person is not responsible for the negligence of an independent contractor applies, and that the defendant is not liable. It is not like the case of a statutory duty, where, of course, the person who performs it by an independent contractor is responsible for any damage that he does. The test is, was there negligence on the part of the defendant? I think that there was none" (3). As Dr. *Charlesworth* says, in reference to the escape of water of a domestic supply, "if the negligence is not that of the defendant or his servants but that of an independent contractor, the defendant will not be liable. This is because, although liability under the general rule is absolute, yet this liability under the exception is only for negligence, and to an action for negligence the employment of an independent contractor is a good defence" (*Liability for Dangerous Things*, (1922), p. 170).

For these reasons I think that the plumber's negligence in failing to close the stopcock he had mistakenly turned on does not constitute a cause of action upon which the plaintiff may recover against the defendant.

(1) (1898) 1 Q.B. 426.
(2) (1913) A.C., at p. 280; 16 C.L.R., at p. 401.
(3) (1898) 2 Q.B., at p. 429.

But the question remains whether the improper condition of the open pipe supplies a ground for imposing liability upon the defendant. In the course of his dissenting judgment in *Job Edwards Ltd.* v. *Birmingham Navigations* (1) *Scrutton* L.J. said :—" In my view it is clear that a landowner or occupier is liable to an action by a private person damaged by a nuisance existing on or coming from his land : (1) if he or his servants or agents created the nuisance ; (2) or if an independent contractor acting for his benefit created the nuisance, though contrary to the terms of his employment : *Black* v. *Christchurch Finance Co. Ltd.* (2) ; (3) or if being a tenant, or successor in title, he took the land from his landlord or predecessor with an artificial nuisance upon it : *Broder* v. *Saillard* " (3). His Lordship, as the rest of his judgment shows, assumed for the purpose of his third case that the existence of the artificial nuisance was a thing of which the occupier is or ought to be aware. In *Noble* v. *Harrison* (4) *Rowlatt* J. stated the grounds of liability as follows : " A person is liable for a nuisance constituted by the state of his property : (1) if he causes it ; (2) if by the neglect of some duty he allowed it to arise ; and (3) if, when it has arisen without his own act or default, he omits to remedy it within a reasonable time after he did or ought to have become aware of it."

If the condition which amounts to or causes a nuisance arises from a failure to repair, an occupier, at all events if repair is his responsibility and not, for example, his landlord's, may be liable notwithstanding that he is neither aware of nor by reasonable diligence could have discovered the conditions (*Wringe* v. *Cohen* (5)).

In the present case there was no nuisance or other wrongful act on the part of anyone of which the plaintiff could complain until the water began actually to flow into the plaintiff's premises. But the unsecured pipe existed, the condition of which formed a cause or part of the cause of the invasion of the plaintiff's occupancy by water. In point of fact a finding that the defendant knew or ought to have known of its existence or its condition could not reasonably

(1) (1924) 1 K.B., at p. 355.
(2) (1894) A.C. 48.
(3) (1876) 2 Ch. D., at p. 700.
(4) (1926) 2 K.B., at p. 338.
(5) (1939) 4 All E.R. 241.

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have been made upon the evidence. Thus, the state of facts is that an escape of water, capable, according to modern authority, of amounting to a nuisance, arises from a potential source of mischief improperly created in the premises before ownership or occupation was acquired by the defendant, who, and whose servants, neither knew nor ought, exercising due diligence, to have known of the defect or danger and had no reasonable opportunity of preventing the outbreak of water or of stopping its flow before the whole damage was done. In such circumstances I do not think that the occupier is liable. If, at the time a defendant enters into occupation of premises, they are in such a state that an infringement of a neighbouring occupier's right to the undisturbed enjoyment of his land is taking place, the duty to remedy their condition must attach to the defendant as an occupier. But the existence of an unsecured pipe involved no present invasion of any right belonging to the occupier of the neighbouring shop. An analogy may be found in the cases which deal with the withdrawal of support. If an owner of land make an excavation which ultimately leads to a subsidence of adjoining land, but he parts with the ownership and occupation of the excavated land before the disaster takes place, the new occupier and owner in whose time the subsidence occurs has been held to be under no liability to the adjoining owner or occupier. The reasoning upon which his freedom from responsibility is justified is explained in the following passage :—" The rule acted on in these cases would seem to be acceptable in principle. It is true, indeed, as we have already seen, that where a continuing nuisance exists upon land, the occupier for the time being of that land is liable for the continuance of the injury, although the creation of it was due not to him but to his predecessor in title. It seems, however, that the case of interference with the right of support does not in truth fall within the same principle. There is here no continuing injury—no continuing duty running with the land to supply artificial support for the natural support which has been taken away by the act of a predecessor in title. The easement of support does not amount to a positive duty to support the dominant land ; it only amounts to a negative duty not to interfere with the natural support possessed by that land. This negative duty is

broken once for all by him who originally made the excavation, and he alone is and remains responsible for the consequences of his act whenever those consequences ensue" (*Salmond* on *Torts*, 9th ed. (1936) (*Stallybrass*), pp. 266, 267).

The same process of reasoning leads to the conclusion that to enter into occupation of land upon which a potential source of nuisance or of mischief to others exists is not enough to impose liability for the consequences upon the new occupier. Some element of fault on his part is necessary. Here there was no fault; the failure to discover the defect or to guard against its possible existence and consequences implied no neglect of the duty of an occupier of fixed property, no want of prudence or of reasonable diligence and no omission to keep in repair. I do not think that the plaintiff can succeed under any other head. A cause of action founded on the by-law already mentioned was suggested, but the suggestion cannot be sustained.

In my opinion the defendant was entitled to a verdict or nonsuit and the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Harold J. Price & Co.*

Solicitors for the respondent, *Frank A. Davenport & Mant.*

J. B.