THE CROWN DIAMOND PAINT COMPANY, LIMITED ..... } APPELLANT;

AND

ACADIA HOLDING REALTY LIMITED ..... } RESPONDENT.

1951 *Nov. 27

1952 *Mar. 23

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK APPEAL DIVISION

*Negligence—Nuisance—Escape of water from unheated building through cellar wall due to dislodging of reducing plug from 4" water pipe—Liability—Forseeable risk—Whether maintenance of such pipe an ordinary user—Principle of Rylands* v. *Fletcher.*

The respondent was the owner of a building divided into four adjoining units, the fourth of which was under lease to the appellant. The basement of the first unit was separated from the second by a 2' thick stone and concrete wall; the second from the third by a wooden partition; the third from the fourth by a stone wall in which there were two wooden doors. Water entered into the first unit from a 12" street main through a 4" pipe. The end of this pipe was enlarged into a "bell" into which, for the purpose of reducing the flow to 2", an iron plug was inserted. At the time the action arose, March 1, 1948, the first unit was undergoing alterations, then in progress some two months. The ground floor windows were without glass and boarded up and at least one window in the basement was broken or open. The unit was unheated except for portable oil burners used during the day. There was a 4" trap to carry off water in the

*PRESENT: Rinfret C.J. and Kerwin, Rand, Estey and Locke JJ.

1952

CROWN DIAMOND PAINT CO. v. ACADIA HOLDING REALTY CO.

basement floor but this drain at the time was covered with 18" of concrete and sand. The temperature dropped from 19 degrees above zero during the day to 9 degrees below zero at midnight. At about 10:15 p.m. water was noticed flowing out of the basement windows, and the Water Department and Edgar LeBlanc, president of the respondent company, notified. The water officials thereupon closed off the water but LeBlanc, believing nothing further could then be done, did not visit the premises until 8 o'clock the next morning. It was then found that the reducing plug had been dislodged from the bell and that water had seeped through the different basement walls into that of the appellant causing damage to goods stored there in respect of which it claimed to recover damages. Its action was dismissed by the trial judge whose judgment was affirmed by the Supreme Court of New Brunswick.

*Held:* (Locke J. dissenting) that the appeal should be allowed and the case referred back to the trial Court to fix the amount of damages on evidence adduced at the trial with liberty to both sides to adduce further evidence.

*Per:* Rinfret C.J. and Rand J. The Appellant's claim was put on three grounds: negligence, nuisance, and the rule in *Rylands* v. *Fletcher,* L.R. 3 H.L. 330. The case for negligence was not made out. On the other grounds the first question was whether the maintenance of a 4" water pipe was an ordinary or necessary use or one to be treated as special? It was not so to the requirements of the respondent: it was equally exceptional in the general use of water; and it created a substantial addition to the ordinary risks to the neighbouring premises. These enhanced risks were prima facie risks of the person creating them and there was nothing before the Court to take the case outside the scope of the rule. *Richards* v. *Lothian,* [1913] A.C. 263 at 280 approving *Blake* v. *Woolf,* [1898] 2 Q.B. 426. *Musgrove* v. *Pandelis,* [1919] 2 K.B. 42 and *Mulholland* v. *Baker,* [1939] 3 All E.R. 253 followed. When the respondent was notified the basement had filled a duty to act promptly arose and as a minimum of precaution it should have apprised the appellant. *Sedleigh-Denfield* v. *O'Callaghan,* [1940] A.C. 880; *Pope* v. *Fraser & Southern Rolling and Wire Mills Ltd.,* 155 L.T.R. 324; *Northwestern Utilities Ltd.* v. *London Guarantee & Accident Co.,* [1936], A.C. 108.

*Per:* Kerwin and Estey JJ. The evidence justified the conclusion that the plug was forced out by the freezing of the pipes and that the respondent was negligent in not taking steps to prevent such an occurrence. *McArthur* v. *Dominion Cartridge Co.,* [1905] A.C. 72; *Fardon* v. *Harcourt-Rivington,* [1932] A.C. 215.

The finding that LeBlanc had reasonable grounds for believing that the water would not escape through the wall into the adjoining premises could not be supported. A reasonable man having regard to the location of the wall and its age would have appreciated the possibility of seepage.

*Per:* Locke J. (dissenting). There was no direct evidence of any freezing and the trial judge was right in declining to draw an inference that the frost caused the plug to be dislodged. There was no duty upon the respondent to provide a drain of such size as to carry off water admitted into the basement without fault on its part. The failure of the respondent to take steps to rid the basement of water until

8 o'clock the following morning was not in the circumstances actionable negligence. Assuming that the condition in the respondent's basement constituted a nuisance, the condition not having been brought about by any voluntary or negligent act of the appellant, failure to take steps to abate it until 8 o'clock the following morning was not undue delay imposing liability upon the respondent. *Noble* v. *Harrison,* [1926], 2 K.B. 332 at 338; *Sedleigh-Denfield* v. *O'Callaghan,* [1940] A.C. 880 at 893 and 904.

There was no evidence upon which to base a conclusion that to bring water for commercial use into a business premises in a four-inch pipe was a non-natural and not merely an ordinary use and the principle in *Rylands* v. *Fletcher* did not apply. *Sedleigh-Denfield* v. *O'Callaghan, supra* at 888.

Decision of the Supreme Court of New Brunswick, Appeal Division (27 M.P.R. 159), reversed.

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division (1), Hughes J. dissenting, affirming the judgment of Anglin J., dismissing an action for damages.

*D. K. McTavish K.C.* and *J. C. Osborne* for the appellant. The appellant alleged at the trial and on the appeal (1) Negligence on the part of the respondent. (2) Nuisance created by the respondent. (3) The respondent had in its control something which escaped and under the rule in *Rylands* v. *Fletcher* (2) was liable for damage done as a result of the escape. On the question of negligence, the appellant alleges that the water pipes were solely within the control of the respondent and burst as a result of freezing action, the respondent having failed in sub-zero weather to heat the premises or take any precautions to avoid such freezing. If the evidence supports the allegations made by the appellant, that is proof of such allegations and, in the absence of any explanation by the respondent, adequate proof, which must be accepted by the Court. It is not up to the appellant to establish these allegations beyond a reasonable doubt as this is not a criminal matter. The three learned judges who rendered the judgment which is the subject of this appeal, agreed that the evidence was sufficient to justify an affirmative inference (1) that the water in the pipes froze and (2) that as a result the pipes burst or expanded forcing out the plug or reducer. They further agreed that the evidence was sufficient to justify a finding that the unheated cellar

(1) 27 M.P.R. 159; [1951] 1 D.L.R. 265.

(2) (1868) L.R. 3 H.L. 330.

1952

CROWN DIAMOND PAINT CO. v. ACADIA HOLDING REALTY CO.

caused the freezing of the water in the pipes, resulting in the forcing out of the reducer and plug, the escaping of the water into the cellar, its seeping through the basement wall of the Creamery premises and the damage to the appellant. The appellant respectfully agrees with the conclusions reached by the learned judges in this respect. The standard definition of negligence is stated by Alderson B. in *Blyth* v. *Birmingham Water Works Co.* (1) as: "The omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do".

The respondent did not show that he had taken all reasonable precautions and therefore was negligent in respect to the freezing of the pipes. *MacArthur* v. *Dominion Cartridge* (2).

The respondent was negligent towards the appellant by reason of the fact that the water so released by the bursting pipes seeped through several walls into the premises of the appellant, thus damaging its stock stored in the basement. There was additional negligence on its part in that its president and general manager, Leblanc, did nothing to prevent this seeping after he was advised that there was water on the Creamery premises which was flowing out of the basement windows. A reasonable person would have taken some action to prevent the spread of this water and if the respondent had even advised the appellant, it might have been able to remove all of its stock from the basement and the damage would have been avoided. In addition to the negligence alleged in connection with the freezing of the pipes, the respondent was negligent in not having the drain in the Creamery premises in proper working order. With respect to the finding by the Chief Justice in the Court below that it could not be reasonably held that LeBlanc should have known or suspected that the water would seep through the cellar wall. It is submitted that this finding is incorrect and that any reasonable person and more particularly an experienced plumber such as LeBlanc should instantly have foreseen the danger. In any event whether the respondent could, or could not,

(1) (1856) 11 Ex. R. 781 at 783. (2) (1905) 74 L.J.P.C. 30.

have forseen the ultimate result of its negligence, is not a question to be considered in fixing liability. It could have forseen that if a large amount of water accumulated on its premises so that water was flowing out of the basement windows damage might result to some one and therefore it owed a duty of care and the fact that it could not forsee the water seeping through several walls into the premises of the appellant is not a question to be considered. *In Re Polemis* (1); Salmond's Law of Torts, 10 Ed. 137; *Smith* v. *London & Southwestern Ry. Co.* (2).

The appellant, apart from the question of negligence, alleges the respondent created a nuisance which resulted in damage to the property of the appellant and is therefore liable to the appellant for that damage. Nuisance is wrongful interference with another's enjoyment of his lands and premises by the use of land or premises either occupied or owned by oneself. Negligence is not an essential ingredient. *Sedleigh-Denfield* v. *St. Joseph's Missions* (3); *Charing Cross* v. *London Hydraulic Power Co.* (4). These cases are in point with the appellant's case. The respondent by letting water escape from its premises to those of the appellant created a nuisance for which it is responsible in damages. See also *Humphries* v. *Cousins* (5).

The principle laid down in *Rylands* v. *Fletcher* (6) is applicable in this case. "The true rule of law is that the person who for his own purposes brings on his lands and collected and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is prima facie answerable for all the damage which is a natural consequence of its escape." The uncontradicted evidence shows that the water supply from the pipes in question was brought on the premises for the sole benefit of the respondent and not for the communal benefit of the appellant or any one else so that this case is to be distinguished from that line of cases where the defendant was held not liable for damage resulting from the release of water from a plumbing fixture which was installed in the interests of both parties. The use of

(1) (1921) 90 L.J.K.B. 1353 at 1360.
(2) (1871) L.J.C.P. 21.
(3) [1940] 3 All E.R. 349.
(4) (1914) 83 L.J.K.B. 1353.
(5) (1877) 46 L.J.Q.B. 438.
(6) L.R. 3 H.L. 330.

1952

CROWN DIAMOND PAINT CO. v. ACADIA HOLDING REALTY CO.

water by the respondent was not for ordinary domestic purposes but was an unnatural user in the circumstances so as to bring the case within the principle. Under that rule the respondent must at its peril keep such water from escaping which it failed to do and therefore the appeal should be allowed and a new trial directed to the question of damages only.

*W. G. Stewart* for the respondent. There was no negligence on the part of the respondent or alternately, if there was, then the damages were such as could not reasonably have been contemplated and are such that the respondent is not liable at law. It is the obligation of the appellant to prove its case as required by the rules of law relating to the particular type of action. The true test is (1) whether on the evidence negligence may be reasonably inferred and (2) whether, assuming it may reasonably be inferred, it is in fact inferred. *Metropolitan Ry.* v. *Jackson* (1). The trial judge makes no finding on negligence nor does the Appeal Court so far as "failure" to take reasonable precautions is concerned. The appellant has not proved his case either by direct facts or reasonable inference. A Plaintiff cannot succeed if the case is to be decided by surmise or conjecture. *Wakelin* v. *London & Southwestern Ry. Co.* (2); *Mersey Docks & Harbour Board* v. *Proctor* (3); *Montreal Rolling Mills Co.* v. *Corcoran* (4). Negligence at law can be established if the facts proved and the inferences to be drawn from them are more consistent with negligence on the part of the defendant than with other causes. *Ellor* v. *Selfridge & Co. Ltd.* (5); *McGowan* v. *Stott* (6); *Daniel* v. *Metropolitan Ry.* (7). It is necessary for the Plaintiff to establish by evidence circumstances from which it may be fairly inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendant might and ought to have resorted to. If the plaintiff's evidence is equally consistent with negligence on the part of the defendant as with other causes, there is no evidence of negligence, and judgment cannot be given against the

(1) (1877) 3 App. Cas. 193.
(2) (1886) 12 App. Cas. 41.
(3) (1923) A.C. 253.
(4) (1897) 26 Can. S.C.R. 595.
(5) (1930) 46 T.L.R. 236.
(6) 99 L.J.K.B. 357.
(7) L.R. 5 H.L. 45; 40 L.J.C.P. 121.

defendant. In *McArthur* v. *Dominion Cartridge Co.* (1) the jury expressly found negligence in the defendant. While the exact cause of the accident was not proved, yet it was established clearly that the injured person was operating a machine defective beyond doubt. The case cannot be cited as an authority here, because in the one case there was an express finding of negligence, in the other an express finding of no negligence.

The damages are too remote. *Monarch Steamship Co.* v. *A/B Karlshams Oljefabriker* (2); *Donoghue* v. *Steevenson* (3); *Longhurst* v. *Metropolitan Water Board* (4).

On the evidence it is not proper to find negligence in the respondent and the trial judge and the majority of the Court of Appeal should be confirmed in the particular finding. *Peters* v. *Prince of Wales Theater (Birmingham) Ltd.* (5); *Duncan* v. *Campbell Laird & Co.* (6).

The modern authority on "nuisance", particularly as the same applies to water or water works is to be found in *Longhurst* v. *Metropolitan Water Board (supra)*. The case deals with a public authority having statutory power but the decision of the House of Lords and particularly that of Lord Porter at page 839, who quotes with approval the principle enunciated by Rowlatt J. as follows: "A person is liable for 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." In *Noble* v. *Harrison* (7) from which the above quotation was taken, the action failed because no such knowledge was established. The general difference between the position of a statutory authority acting in the course of its duty and that of a private individual is to be found in *Green* v. *Chelsea Waterworks* (8). An example of negligence in failing to remedy a danger caused in the carrying out of authorized work, but was or should have been known to the defendants and was not remedied, is to be found in *Pope* v. *Fraser & Southern*

(1) (1905) 74 L.J.P.C. 30.
(2) [1949] 1 All E.R. 1.
(3) [1932] A.C. 562 at 580.
(4) [1948] 2 All. E.R. 834.
(5) [1942] 2 All E.R. 533.
(6) [1943] 2 All E.R. 621.
(7) [1926] 2 K.B. 332.
(8) (1894) 70 L.T. 547.

1952

CROWN DIAMOND PAINT CO. v. ACADIA HOLDING REALTY CO.

*Rolling & Wire Mills Ltd.* (1). It is suggested by Lord Porter, however, that "had the danger been unknown to the defendants and had they no reasonable ground for suspecting it, the result would have been different."

In the case of *Sedleigh-Denfield* v. *O'Callaghan* (2) it is apparent that the respondents were held liable "*because with knowledge or means of knowledge,* they suffered the nuisance to continue without taking reasonably prompt and efficient means for its abatement." At page 354 Viscount Maugham states "I will begin by saying that, in my opinion the principle laid down in *Rylands* v. *Fletcher* does not apply to the present case. That principle relates only to cases where there has been some special use of property bringing with it increased danger to others, and does not extend to damage caused to adjoining owners as the result of the ordinary use of the land." See also Lord Atkin at 361 and Lord Wright at 365-66. The case was decided on the principle that the party held responsible either knew or ought to have known. The general principles of the law are clearly stated and must, it is submitted, be resolved in favour of the respondent here.

*Charing Cross* v. *London Hydraulic Power Co.* (3) and *Midwood* v. *Manchester Corporation* (4) are both distinguishable. In the first there was a "non-natural user" of water, in the second, an obvious dangerous thing, namely electricity was used in large quantities, the mere escape of which created a nuisance without proof of negligence.

Damage caused by the ordinary domestic use of gas, water and electricity is never actionable *except on proof of negligence. Tilley* v. *Stevenson* (5).

The rule in *Rylands* v. *Fletcher* as pointed out by Lord Simon in *Read* v. *Lyons* (6) must be confined within the strict limits laid down by the House of Lords, the conditions, then declared to be necessary for the existence of absolute liability, should be strictly observed.

There can be no doubt that in the case at Bar there was no "non-natural user." *Rickards* v. *Lothian* (7); *Peters* v. *Prince of Wales Theater* (8).

(1) (1939) 55 T.L.R. 324.
(2) [1940] 3 All E.R. 349.
(3) 83 L.J.K.B. 1352.
(4) (1905) 74 L.J.K.B. 884.
(5) [1939] 4 All E.R. 207.
(6) [1946] 2 All E.R. 471.
(7) [1913] A.C. 269.
(8) [1943] K.B. 73.

The judgment of the Chief Justice and Rand, J. was delivered by:

RAND J.:—The facts in this appeal are these. The claim is for flooding a basement and damaging goods in it. The respondent is the owner of three adjoining buildings in the City of Moncton, running east and west, and having two inside common walls. From west to east, the first was formerly used by a creamery, but had been purchased by the respondent and at the time was undergoing alterations; the next was occupied by a plumbing company and a hardware company respectively; and the third by the appellant, dealing in paints and wall papers. There was a stone basement wall between the first and second; the basements of the plumbing and hardware companies were separated by a wooden partition wall; and between the second and third a stone wall with two door openings in it. The drainage of the second and third led to a trap outlet in the southeast corner of the latter. Into the first a water service entered about two feet above the basement floor through a 4″ pipe from a 12″ street main. The end of the pipe just inside the wall was enlarged into what is known as a bell. This pipe had in 1937 been reduced to 2″ by inserting into the bell, like an inverted drinking glass, an iron reducing plug, 4″ in diameter and 5 or 6 inches in length, the closed end of which was ½″ thick. It was held in place in the bell by a packing of oakum and lead. The closed end was tapped to a diameter of 2″ and threaded, and a 2″ pipe introduced. This pipe led to a meter and from the meter to the pipe system of the creamery. The 4″ pipe was controlled by a valve at the street curb. This was the structural condition on December 17, 1947 when the creamery company vacated the premises, and the city turned off the water at the curb and removed the meter.

On January 1st the respondent took possession and commenced the work of alteration. On January 31st, at its request, the water was turned on. Some time during the month, a ½″ tap was set in the 2″ pipe, for drinking purposes.

In the course of the work, the basement floor became littered with material that probably stopped up a 4″ drainage trap. The ground floor windows were without glass and boarded up, and at least one window in the basement

1952

CROWN DIAMOND PAINT CO. v. ACADIA HOLDING REALTY CO.

Rand J.

was broken or open. During the day, portable oil stoves furnished the only heat. The temperature on March 1st ranged from 19° above zero at 3:30 p.m. to 9° below zero at midnight.

Between 10:15 and 11:00 p.m. of that day, the cellar was discovered full of water and overflowing into the street. In the course of the next half hour or so, the valve at the curb was closed and Edgar LeBlanc, president of both the respondent and the plumbing company, notified. LeBlanc thought nothing could then be done and, as he says, "went back to bed". At that time there was approximately seven feet of water in the basement.

About 8:00 o'clock in the morning, LeBlanc found the adjoining basements to have from 12″ to 18″ of water in them. In the first there remained about 4′ depth of the water which some time later in the day was pumped out.

It was then discovered that the reducing plug had been dislodged from the bell. These plugs are frequently forced out by water pressure and it was said to be difficult to remove them intact otherwise. Several suggestions seem plausible as contributory factors to the separation. Any considerable force on the 2″ pipe to which the plug was annexed and which projected about 2′ from the wall, such as a blow or wrench, would tend to loosen the plug in the packing; work done on the pipe as in the removal of the meter or the installation of the tap would have that tendency; or the pipe might have been struck by falling debris. It was sought to show that the water in the 4″ pipe might have frozen and expanded the bell, thus loosening the packing, but I find no real evidence that in the circumstance that could possibly have taken place. But undoubtedly a slight weakening or loosening of the plug in the packing would cause it to yield to the water.

The only evidence of the time of the occurrence is the recordings of pressure in the city pumping station, and they indicate a sudden drop around 5:30 o'clock p.m. As the workmen left between 4:30 and 5:00, this would seem to put it shortly after the work for the day stopped. There might, at that time, be minor pressure increases from the closing down of places of business.

It is undisputed that the water made its way through the foundation under the first wall and into the adjoining basement, from which it passed into that of the appellant. Richards C.J. takes the word "foundation" to mean wall but LeBlanc's assent to the question: "You think it seeped through the foundation. That would be the foundation where the wall meets with the basement"? rules that out. On the floor, the appellant had stored paints, wall papers and other supplies, which were damaged.

The claim is put on three grounds: negligence, nuisance, and the rule in *Rylands* v. *Fletcher* (1).

The first must depend upon the conclusion of fact that the dislodgment could occur only through some failure on the part of the respondent's employees. Possibly that was the case, but the main work was being done by a contractor. No workman was called. Negligence in the contractor's work would be collateral as there was no apparent danger to the appellant involved in what was undertaken. In these uncertain circumstances I find no ground on which to invoke either the presumption of *res ipse loquitur* or its equivalent as a warranted inference from the proof, and the case for negligence is not made out.

The remaining grounds raise the question of a stricter liability. In the conception of negligence, general conflicting interests are accommodated on the standard of the range of foreseeable risks which would influence the conduct of the ordinary man acting reasonably: that is a rule that permeates all human relations; and as Lord MacMillan in *Read* v. *Lyons* (2), says:—

> The process of evolution has been from the principle that every man acts at his peril and is liable for all the consequences of his acts to the principle that a man's freedom of action is subject only to the obligation not to infringe any duty of care which he owes to another.

Outside of that body lie the exceptional situations.

In Rylands the illustrations given by Blackburn J. included the following examples of nuisance:—

> "The mine flooded from his neighbour's user", "the cellar invaded by the filth of his neighbour's privy," "whose habitation is made unhealthy by the fumes of noisome vapours of his neighbour's alkali works".

(1) (1868) L.R. 3 H.L. 330.
(2) [1946] 2 All E.R. 471 at 476.

1952

CROWN DIAMOND PAINT CO. v. ACADIA HOLDING REALTY CO.

Rand J.

In *Read* v. *Lyons, supra,* at p. 474 Lord Simon, in remarking on these illustrations says:—

> The classic judgment of Blackburn, J. besides deciding the issue before the court and laying down the principle of duty between neighbouring occupiers of land on which the decision was based, sought to group under a single and wider proposition other instances in which liability is independent of negligence, such, for example, as liability for the bite of a defendant's monkey: *May* v. *Burdett* (1). See also the case of a bear on a chain on the defendant's premises: *Besozzi* v. *Harris* (2). There are instances, no doubt, in our law in which liability for damage may be established apart from proof of negligence, but it appears to me logically unnecessary and historically incorrect to refer to all these instances as deduced from one common principle.

Viscount Maugham L.C. in *Sedleigh-Denfield* v. *O'Callaghan* (3), speaks of the "special" use called for by the rule.

In *Charing Cross* v. *London Hydraulic* (4), following *Midwood* v. *Manchester* (5), a high pressure water main in a street was in question. Through various causes it had become unsupported; it broke and a nearby electric main of the plaintiff was damaged. The Court of Appeal, consisting of Lord Sumner, Kennedy L.J. and Bray J. held the company liable equally for a nuisance and under the rule. Scrutton J. at the trial had viewed it as an ordinary use of roads to carry mains of water, gas and electricity, but he felt bound by *Midwood* v. *Manchester.* Lord Sumner, at p. 1355, says:—

> It might be sufficient to dispose of this case to say that it is indistinguishable from *Midwood & Co.* v. *Manchester Corporation* (*supra*) which is binding on this Court, but, lest there should be any misunderstanding, I think it right to express my opinion that this case is also indistinguishable from *Rylands* v. *Fletcher.*

and the reasons of Kennedy L.J. and Bray J. are to the same effect.

In the case at bar, there is, in some respects, a similar overlapping. The first question is whether the maintenance of a 4″ water pipe, a capacity much greater than the $1\frac{1}{4}$″ intended to be used by the respondent, so close to a 12″ main, held in check by the plug liable to be forced out by pressure, with an attached length of pipe exposed to being knocked about, was an ordinary or virtually necessary use of the basement or one which must be treated as

(1) (1846) 9 Q.B. 101; 16 L.J.Q.B. 64.
(2) (1858) 1 F. & F. 92.
(3) [1940] A.C. 880.
(4) 83 L.J.K.B. 1352.
(5) [1905] 2 K.B. 597.

special? However "natural" it might have been to the creamery it was not so to the requirements of the respondent: it was equally exceptional in the general use of water; and it created undoubtedly a substantial addition to the ordinary risks to neighbouring premises.

In *Blake* v. *Woolf* (1), Wright J. held the maintenance for household purposes of a water cistern on premises occupied by several tenants to be an ordinary and reasonable user of the premises as between the occupants. This case was approved in *Rickards* v. *Lothian* (2). There the water from a lavatory on the top floor of a building overflowed through the tap which had been turned on full and the waste pipe plugged by a third person. Lord Moulton, speaking for the Judicial Committee, said:—

> It is not every use to which land is put that brings into play that principle (i.e. the rule in *Fletcher* v. *Rylands*). It must be some special use bringing with it increased danger to others and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.

The benefit of the community must here be intended as direct or immediate, such as health, and not what might arise remotely from industry.

In *Musgrove* v. *Pandelis* (3), the keeping of a motor car in a garage with gasoline in the tank was held, on appeal, to be a dangerous agency within the rule from which liability arose for the destruction of the overhead premises through a fire from an unexplained cause in the starting of the engine. In *Mulholland* v. *Baker* (4), Asquith J. (now Lord Asquith) applied the same principle to the keeping of a drum containing twenty gallons of paraffin which was exploded by a fire spreading from a burning paper set to drive a rat out of a drain pipe. In *Collingwood* v. *Home Stores Limited* (5), the Court of Appeal held a fire caused by defective wiring without negligence not to be within the rule. Lord Wright, referring to the *Midwood and Charing Cross* decisions, *supra,* says:—

> But in all these cases there was nothing comparable to the ordinary domestic installation of electric wiring for the ordinary comfort and convenience of life. In all these cases these dangerous things were being handled in bulk and in large quantities; * * *

(1) (1898) 2 Q.B. 426.
(2) [1913] A.C. 263.
(3) [1913] 2 K.B. 43.
(4) [1939] 3 All E.R. 253.
(5) (1936) 155 L.T.R. 550.

1952

CROWN DIAMOND PAINT CO. v. ACADIA HOLDING REALTY CO.

Rand J.

> These * * * seem to me to be a lot different in principle and in result from the case of the ordinary domestic pipes for gas or water or for wiring electricity, * * * *

These enhanced risks are prima facie risks of the persons creating them and there is nothing before us to take the case outside the scope of the rule. This liability is not affected by the fact that the dislodgment may have been due to the negligence of the contractor. In thus placing upon the owner the risk of harm to innocent neighbours resulting from such a special feature, the ancient maxim, imprecise and fallacious however it may be, remains the presumptive guide: *sic uti suo ut non laedat alienum.*

Richards C.J. quotes a passage from Lord MacMillan's speech in *Read* v. *Lyons, supra*:—

> I have already pointed out that nothing escaped from the defendants' premises, and, were it necessary to decide the point, I should hesitate to hold that in these days and in an industrial community it was a non-natural use of land to build a factory on it and conduct there the manufacture of explosives. I could conceive it being said that to carry on the manufacture of explosives in a crowded urban area was evidence of negligence, but there is no such case here and I offer no opinion on the point.

But in *Rainham Chemical Works Limited* v. *Belvedere Fish Company* (1), the House of Lords held the bringing of nitrate of soda and dinitrophenol together for the purposes of making munitions to be a danger, though unknown to the owners, which rendered them liable for an explosion which resulted from fire. Whether Rainham, Sussex, is a "crowded suburban area" was not considered. In any event, it does not appear that the buildings here are in an industrial area.

But taking the situation only from the moment when the basement had filled and the respondent notified and accepting the view that the negligence of the contractor could not bring the condition within the rule, did a duty to take reasonable action against the danger then arise, a duty attaching to a state of nuisance not the act of the owner? For at least nine hours the water was left by LeBlanc to work whatever mischief it might. We know that water permeates the soil; LeBlanc knew that surface water had seeped into the appellant's basement through or under the rear foundation wall: and that it will do so

(1) [1921] 2 A.C. 465.

generally seems to me to be a matter of common knowledge. Ermen, a plumber, in his evidence, takes that fact for granted although he would not speculate on its rate of progress.

In the Appeal Division, Richards C.J., Harrison J. concurring, considered that LeBlanc could not reasonably be expected to know that a nuisance had been created: this means that he was not chargeable with liability in relation to it and might, short of adoption, with impunity, have allowed it to remain or to seep out indefinitely so long as damaging results remained unknown.

The question is not whether he should have known that a nuisance had been created but whether he should have sensed a real danger of a nuisance. Essential facts were unknown: LeBlanc does not suggest that he had yet become acquainted with the condition of the floor in any part of the basement, much less that next the common wall. Risk connotes uncertain action arising from concealed or unknown factors against which experience has taught us to be on guard. There were such factors here and the condition presented to LeBlanc was one which should have signalled a dangerous possibility. A duty to act arose and, to be effective at all, it called for prompt measures.

It would have entailed some inconvenience to investigate the adjoining premises that night, but even that was unnecessary to notification. LeBlanc knew that if water reached the adjoining basement the way was open to the others, and as a minimum of precaution he should have apprised the appellant: *Sedleigh-Denfield* v. *O'Callaghan* (*supra*); *Pope* v. *Fraser* (1); *Northwestern Utilities* v. *London Guarantee Company* (2). At that time the goods that were damaged could easily and quickly have been removed from the lower levels of the basement: and it is a fair inference from the evidence that the water reached there in damaging quantity after LeBlanc learned what had happened.

Mr. Stewart argued that what is assumed to have been a negligently clogged trap and drain pipe in the appellant's basement was an answer to the claim. But that objection, I think, misconceives the situation. The trap and outlet were for the benefit of the appellant for ordinary drainage

(1) (1939) 55 L.T.R. 324. (2) [1936] A.C. 108.

1952

CROWN DIAMOND PAINT CO. v. ACADIA HOLDING REALTY CO.

Rand J.

purposes as were the trap and outlet in the respondent's basement: and even assuming the intermediate tenants to be entitled to drain through the appellant's premises, that does not give rise to a duty toward the respondent to protect it against the consequences of its own culpable action.

I would, therefore, allow the appeal with costs throughout; as the trial judge did not find the amount of damages, the case should be referred back to him to do so, with liberty to either party to adduce further evidence. The costs of the latter, however, should be in the discretion of the trial judge.

The judgment of Kerwin and Estey, JJ. was delivered by:—

ESTEY J.:—The appellant, engaged in the selling of wallpaper and paint on premises leased from the respondent, claims damages for loss suffered when, as it alleges, due to the respondent's negligence, a four-inch water pipe froze, forcing out a plug, permitting water to flow in great quantities into the appellant's premises and injuring its stock. The appellant's action was dismissed at trial and that judgment was affirmed in the Appeal Division of the Supreme Court of New Brunswick, Mr. Justice Hughes dissenting.

The premises in question, though not constructed as one building, are now owned by the respondent and throughout this litigation have been treated as one, three-story, brick building, with basement, on Main Street in the City of Moncton. It is divided into four parts and, so far as material in this litigation, the appellant occupies the ground floor and basement of the most easterly part; the next is occupied by the Eastern Hardware Limited and the third by the Moncton Plumbing & Supply Company Limited.

LeBlanc is president of both the respondent and the Moncton Plumbing & Supply Company Limited.

The most westerly part of the premises had been vacant since December 19, 1947, and respondent, as owner, had, since some time in January, 1948, been effecting renovations in preparation for another tenant. These renovations included the removal of the entire front and part of the main and second floors of the most westerly portion of the

building. These were commenced in January and, prior to March 2, 1948, when the water escaped causing the damage here claimed, the evidence suggests the front was well advanced, "the ground floor was all renewed" and the men were working upon the ceilings and other floors. On the day in question the men were working above the basement and left the premises about 5:00 p.m. In this vacant part there was no heat except that provided by portable oil heaters, which the men carried about as their work required. Once they left there was no heat upon these premises and it is conceded that the temperature inside this building would be substantially the same as that out of doors.

The water from the city system entered this westerly part through a four-inch pipe, 5 or 6 feet below street level and about $1\frac{1}{2}$ to 2 feet above the basement floor. The end of this four-inch pipe in the building was described as bell-shaped, into which a plug was inserted from 4 to 6 inches long with the outer end of solid iron about one-half inch thick. It was held in position or "lodged there with oakum and lead and corked in." It was tapped, in order to reduce the flow from 4 inches to 2 inches, and on the end of the two-inch pipe a tap was placed.

After the men left, and probably about 5:30 p.m., as determined by the change in pressure at the city pumping station, this plug came out of the four-inch pipe, with the result that the water poured into the basement and continued to do so until about 10:30 at night, when a policeman discovered water flowing from that part of the building into the street. He communicated with Coleman, a service man in the Water and Light Department of the City of Moncton, who proceeded to the premises where he found "water flowing at quite a rate on Main Street," which came out of this westerly part through a cellar window. He immediately telephoned LeBlanc, describing the condition as he found it and stating that he would turn off the water at the city main. A few minutes later he telephoned that he had, in fact, turned off the water. In the course of these conversations he asked LeBlanc to come down, to which the latter replied that "there was not much he could do at that time of the night, he didn't have the

1952

CROWN DIAMOND PAINT CO. v. ACADIA HOLDING REALTY CO.

Estey J.

key." Neither did Mr. LeBlanc, nor anyone else, communicate with the other tenants, who, therefore, knew nothing of the presence of the water until the next morning.

The basement into which the water flowed has a wall between it and the next tenant, the Moncton Plumbing & Supply Company Limited. This wall, about 2 feet in thickness, extends from the basement floor to the ceiling. LeBlanc described it as "a stone wall with mortar in the joints and it looks to be a very well built wall." Upon the westerly side it has a concrete face. Between the Moncton Plumbing & Supply Company Limited and the next tenant, Eastern Hardware Limited, is a wooden partition, and that between the Eastern Hardware Limited and respondent is again a stone wall, 2 feet in thickness, with mortar in the joints, but with two wooden doors permitting passage through it. The water flowed out of the four-inch pipe and filled the basement until it flowed out of the window. It also seeped through the stone and mortar wall with the concrete face and, once through that, it passed through the wooden partition and the doors of the other stone wall into the premises of the appellant. Apart from turning the water off at the city main, nothing was done that night. LeBlanc arrived at the building about 8:00 o'clock the next morning. He says he then found about 4 feet of water in that part of the basement into which the water flowed from the pipe, about a foot in the part occupied by the Moncton Plumbing & Supply Company Limited and a foot to a foot and a half in that portion occupied by the appellant. Others deposed to larger quantities in the respective parts, but it is not questioned but that sufficient water entered the appellant's premises to do the damage here claimed.

The tenants moved out of the most westerly part and the water was turned off at the city main on December 19, 1947. It was turned on again on January 28, 1948, and remained so until March 1, 1948. The plug at the end of the four-inch pipe was placed there in 1937, according to the usual and accepted practice. In the intervening period it served its purpose without any suggestion of weakness or defect.

That the water from this four-inch pipe caused the damage is conceded. The appellant claims that the plug was forced out when the water in the pipe froze because the respondent had "failed in sub-zero weather to heat the premises or to take reasonable or any precautions to avoid such freezing." Bingham, the Water Department foreman and Plumbing Inspector for the City of Moncton, stated that it might have been forced out by frost or because of old age, defective joint, or pressure. The plug itself was not produced. LeBlanc, himself a plumber, deposed that he had this plug in his "possession for a long time and the men dismantled it," and suggested it may have been sold for junk. It is fair to assume that, if the condition of the plug had been such as to support a conclusion that it came out either because of old age or defective joint, it would have been carefully preserved and evidence adduced in regard thereto. Not only was the plug not preserved, but no evidence was adduced to support either of these possible causes.

LeBlanc, while he did not think it was forced out by frost, suggested, at his examination for discovery, that there must have been "a high pressure of water in water main on Main Street to cause that reducer to burst." At the trial, however, he deposed that he had "no idea" what forced the plug out. The suggestion that pressure may have caused it appears to be conclusively answered by the evidence. At the pumping station the pressure varied from 51 to 58 pounds between 5:00 and 10:45 o'clock that night. On Main Street the pressure would be approximately 15 pounds less. The evidence also establishes that the average pressure at the pumping station is some 60 to 65 pounds and that at this period they were conserving water and had reduced the pressure to the point where they often received complaints. Upon this evidence there is not only no support for, but it, in effect, refutes the possibility of the water pressure expelling this plug.

Bingham thought that the frost was the most likely cause. Keiver, the engineer at the city pumping station, deposed that on March 1 the temperature at 8:00 a.m. was 2 degrees below zero; 12:00 noon 11 degrees above zero; 3:20 p.m. 19 degrees above zero; 12:00 midnight 9 degrees

1952

CROWN DIAMOND PAINT CO. v. ACADIA HOLDING REALTY CO.

Estey J.

below zero. He was of the opinion that the temperatures in this basement were such that the pipes might have frozen at any time between 3:00 p.m. and 12:00 midnight.

The accepted method of removing these plugs is by a blow torch. They may also be expelled by great pressure, but an attempt to do so by pounding or other force results in a breaking of the plug. In the course of the trial one witness was asked if the two-inch pipe "were hit with lumber, people or other things," would it break the pipe or dislodge the plug. His reply was that it would dislodge the plug before breaking the pipe. Such an opinion, apart from evidence that on or about the day in question such was a reasonable probability, is not sufficient to offset the evidence in this record, as found by all the learned judges in the Appeal Division, that the plug was expelled by frost.

While the water was turned on on January 28 and provided a place for the men to obtain drinking water, there is no evidence that it was so used on or about the day in question, or, if so, when. In fact there is no evidence that the workmen or anyone else was in this basement on or about the day in question.

LeBlanc, himself a plumber, expressed the opinion that if a building were unoccupied and unheated during the winter the water should be turned off at the city main and the tap in the cellar opened in order to let the water in the pipe drain out. These premises, from the point of view of temperature, were, in effect, unoccupied and unheated. If it was desirable to have water available from this tap for the workmen, it would seem, having regard to probable temperatures, but ordinary prudence to provide for the turning off of the water, or some other reasonable precautions, to prevent the freezing thereof and consequent damage.

Respondent submits that this evidence is not sufficient to support a conclusion of negligence and that any statement that the freezing of the pipes caused the expulsion of the plug was but a surmise or a conjecture. The respondent cited, in support of his contention, certain cases, including *The Montreal Rolling Mills Company* v. *Corcoran* (1), where Wilson, an experienced engineer, had been in charge of the engine and machinery in the appel-

(1) (1896) 26 Can. S.C.R. 595.

lant's mill for about two years. One day the employees of the mill heard a strange noise and, upon rushing to the engine room, "the engine and machinery were found running in perfect order, but poor Wilson was dead, his body being scattered around the room, frightfully mutilated." Wilson had been alone. Everything was found in order and there were no facts from which a conclusion or inference might be drawn as to what had taken place to cause this unfortunate death.

The case at bar, however, is quite distinguishable upon its facts. Certain causes were here suggested, but, upon the evidence, all of these were eliminated except frost. On the night in question there was sufficient frost, having regard to the state of the building, to cause just what happened and the evidence justifies the conclusion that the plug was forced out because of the freezing of the water. It is, therefore, a case more like that of *McArthur* v. *Dominion Cartridge Company* (1), where a young man employed at the respondent's works was injured when an explosion originated in an automatic machine at which the injured boy was employed. The explosion was instantaneous and the jury found it was due to negligence on the part of the company to supply suitable machinery and to take proper precautions to prevent an explosion. Their Lordships of the Privy Council pointed out that, upon the evidence, cartridges were now and then presented in a wrong posture, which would prevent the machine functioning properly, and then stated at p. 76:

> It seems to be not an unreasonable inference from the facts proved that in one of these blows that failed a percussion cap was ignited and so caused the explosion. There was no other reasonable explanation of the mishap when once it was established to the satisfaction of the jury that the injury was not owing to any negligence or carelessness on the part of the operator. The wonder really is, not that the explosion happened as and when it did, but that things went on so long without an explosion.

Though the frost was sufficient to cause the freezing of the pipes, it is not suggested it was unusual at that time of the year in the City of Moncton. Indeed, the wonder is that these pipes had not frozen in the period intervening since January 28, 1948. The evidence makes it clear that the expansion consequent upon the freezing of this water would force the plug out.

(1) [1905] A.C. 72.

1952

CROWN DIAMOND PAINT CO. v. ACADIA HOLDING REALTY CO.

Estey J.

The evidence, in my opinion, points directly to the low temperature in the building as the cause of the water freezing and forcing the plug out of the pipe. This was a possibility that, in the circumstances, would have been foreseen by a reasonable man, who would have taken steps to provide against it and, therefore, failure to take such precautions constitutes negligence on the part of the respondent.

> The root of this liability is negligence, and what is negligence depends on the facts with which you have to deal. If the possibility of the danger emerging is reasonably apparent, then to take no preccautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions." *Fardon* v. *Harcourt-Rivington* (1).

I am, therefore, in agreement with the conclusions arrived at by the learned judges in the Appellate Court that the plug was forced out by the freezing of the pipes and that the respondent was negligent in not taking proper precautions to prevent such an occurrence.

The majority of the learned judges in the Appeal Division were, however, of the opinion that the respondent was not liable because

> LeBlanc had reasonable ground for believing that the water would not escape through that wall into the adjoining premises.

LeBlanc himself does not depose that he entertained such a belief. Indeed, when asked if he had, in his 25 years' experience, "ever known water to seep through two foot stone and concrete wall," he went no further than to reply: "Well, I never had much experience in that, but I was surprised when it did." He did not suggest that at any time he made a careful examination of that wall and contented himself with the statement already quoted: "a stone wall with mortar in the joints and it looks to be a very well built wall."

The evidence does not disclose the age of this building more than that it had been occupied by the Farmers' Co-Operative Creamery Company since prior to 1922. There is no evidence, apart from the cement facing already mentioned being placed on the western side of this wall, that it had been repaired or altered since the building was constructed. A conclusion is justified, however, that it was

(1) (1932) 48 T.L.R. 215 at 216.

a rather large basement with a sufficient quantity of water therein, when LeBlanc was communicated with, to exert a substantial pressure. LeBlanc knew the drain or outlet for water in that basement was covered with 18 inches of concrete and sand and, therefore, that it would either not function or, if so, only at a reduced capacity. Further, LeBlanc knew that in 1947 water had seeped through the outside wall in that part of the building occupied by the appellant and had, in fact, warned them, because of this, to keep the drain clear.

Water in such a volume exercises very great pressure and will find the smallest passages of escape and, wherever possible, will wear away the sides of those small passages and increase the flow. This is common knowledge and more particularly would be known to a plumber in the position of LeBlanc.

With the greatest possible respect for those learned judges who hold a contrary opinion, I think the finding that LeBlanc had reasonable ground for believing that the water would not escape through that wall into the adjoining premises cannot be supported. It rather seems that a reasonable man, having regard to the location of the wall and the fact that it had been there for at least 25 years, and probably a much longer time, would have appreciated the possibility of such cracks, or other openings, having developed in the wall as to make seepage a probability. Moreover, the quantity of water there impounded to permit of it flowing through the window into the street would indicate a very substantial force being exerted upon that wall, which, upon the evidence, it was never constructed to withstand.

The foregoing disposes of this appeal. It does, however, appear desirable to point out that event if, as found by the majority of the learned judges in the Appeal Division, LeBlanc had reasonable grounds for believing that the water would not seep through the wall and, therefore, the damage, as claimed, was not foreseeable to a reasonable man, nevertheless the damage might be recovered. While the point has not been finally determined, there is authority that foreseeability, while relevant in deciding the issue of

1952

CROWN DIAMOND PAINT CO. v. ACADIA HOLDING REALTY CO.

Estey J.

negligence, is not relevant in determining what damage may be recovered arising out of, or consequent upon, that negligence.

The appellant also based its claim upon nuisance and the principles underlying *Rylands* v. *Fletcher* (1). In view, however, of the conclusions arrived at, it is unnecessary to discuss these.

The appeal should be allowed with costs throughout and judgment entered that the appellant is entitled to recover from the respondent such damages as may be fixed by the trial judge. The case should be sent back to him for that purpose with leave to both parties to call such further evidence as they may be advised. The costs of this reference should be left to the discretion of the trial judge.

LOCKE J. (dissenting):—In so far as the appellant's claim is based upon negligence in permitting the escape of the water into the cellar of the premises formerly occupied by the Farmers' Co-Operative Creamery Company, the case pleaded is that in consequence of the failure of the respondent to heat the premises the water pipe burst and thereafter, due to the drainage from the cellar being inadequate, the water escaped into the premises of the appellant causing damage.

There is no evidence that the water pipe burst, the only evidence as to the means by which the water escaped being that of Leblanc, president of the respondent company, that the plug or sleeve inserted into the four-inch water pipe inside the cellar by the former tenant had been forced out in some manner. Leblanc had been examined for discovery in advance of the trial and then said that the plug was in the respondent's possession if the other side wanted it as an exhibit but, unfortunately, it was not produced or identified and thereafter it had apparently been dismantled for junk and was not available at the trial. In view of what took place at the examination for discovery, I think no inference unfavourable to the respondent is to be drawn from the fact that the plug, an examination of which might have indicated how it had been forced from the four-inch pipe, was not produced.

(1) (1868) L.R. 3 H.L. 330.

I agree with the learned trial judge that there were no facts proven from which he could properly draw any inference as to the manner in which the plug was dislodged. It had been inserted into the four-inch water pipe some years previously at the instance of the Farmers' Co-Operative Creamery Company, being secured by molten lead and oakum in accordance with what was shown to be standard practice. It was the appellant's contention that the water freezing had forced out the plug. Presumably (though this is not made clear) this means freezing in the four-inch pipe since freezing in the two-inch pipe could not dislodge the plug. There was no direct evidence of any freezing in either pipe and it was the undisputed evidence that more than four weeks prior to the date the water escaped, the water, which had been shut off at the main in the street, was turned on and that during the intervening period the employees of the contractor employed by the respondent company to make extensive alterations to the building had drawn water every day for drinking purposes from the tap in the two-inch pipe screwed in to the base of the plug. The water apparently escaped into the cellar at some time on March 1, 1948, and evidence was given that on that day, in the very early morning, the temperature had been 4 degrees below zero, that at 8.00 a.m. it was 2 below, at noon 11 above zero and at 3.30 p.m. 19 above zero, which was the highest temperature of the day. Later that day the temperature dropped again and it was 9 below at midnight. From the fact that, as shown by the plaintiff's witness Keiver, the engineer in charge of the city pumping station, the water pressure dropped suddenly between 4.15 and 5.45 p.m. it might properly be inferred that it was at about this time the plug became detached or was forced from the pipe and the water commenced to escape.

The evidence tendered by the appellant in an endeavour to prove that freezing was responsible for the plug being dislodged was that of Keiver and Wesley Bingham, the Water Department foreman and plumbing inspector for the City of Moncton. The former, a stationary engineer, said that if there was no fire in the building it took very little frost to freeze a pipe and that, assuming there was no heat in the building, the pipes would have been liable to freeze on March 1st. Bingham, who had been in the city's

1952

CROWN DIAMOND PAINT CO. v. ACADIA HOLDING REALTY CO.

Locke J.

employ for over 30 years, said that frost was the most common factor in causing breaks and leaks in water pipes. While he had not in giving evidence in chief hazarded the opinion that the plug had been forced out by the water in the pipe freezing, on redirect examination, in answer to a leading question asked by counsel for the appellant, he said that if the water in the pipe (without specifying whether he meant the four-inch or the two-inch pipe) froze solid enough, the expansion would be sufficient to loosen the plug which would be forced out and that this was one of the things he suggested might have happened in this case. LeBlanc, for the respondent, a plumber with 25 years' experience, said that he had never heard of a four-inch plug being dislodged by frost. His company had purchased the building and taken possession on January 1, 1948, and the contractor employed in renovating the building had used portable oil heaters on the ground floor of the premises to keep them sufficiently warm for the workmen to carry on the work. It was on January 28th that the water was turned on and while no evidence was given as to the temperatures which had prevailed in Moncton between that date and March 1st, LeBlanc said that January and February were generally the coldest months of the year, and the learned trial judge might properly infer, as he did, that on many occasions during this period the temperature had been below freezing. There had been, according to LeBlanc, no trouble with freezing in the building during this period. This being the state of the record, Anglin J. was, in my opinion, right in declining to draw the inference that frost had caused the plug to be dislodged. There were, as was indicated in the evidence, other possible causes such as the plug being struck a heavy blow in the course of the work of reconstruction being carried on in the building or by reason of some latent weakness or defect in the connection, but whether it was one of these or some other cause appears to me to be simply a matter of conjecture.

As to the claim that there was negligence on the part of the respondent in failing to provide the cellar with drains adequate to carry off the volume of water which would escape from the four-inch pipe if the plug were dislodged, or alternatively in seeing that the existing drain should be kept clear, I agree with the conclusion of the learned

trial judge. It is clear upon the evidence that even had the existing drain been kept clear of debris, it could not have carried off promptly the volume of water which would escape if the plug were dislodged. I am further of the opinion that there was no duty resting upon the respondent as the owner of the building to provide a drain of such size as to immediately carry off water admitted into the basement without fault on its part.

While the appellant had further pleaded that after the escaping water had filled the cellar of the respondent's premises, to its knowledge no steps had been taken to prevent it escaping into the premises occupied by the appellant, this point does not appear to have been considered by Anglin J. On appeal, Richards C.J., with whom Harrison J. agreed, was of the opinion that in view of the nature of the existing stone wall between the appellant's cellar and the premises lying to the east, a reasonable person would assume (as LeBlanc said that he did in fact assume) that the water would not escape during the night and cause damage. I respectfully agree with the conclusion of the learned Chief Justice that the failure of the respondent to take steps to rid the basement of the water until the following morning at 8 o'clock was not actionable negligence.

There are two branches of the claim in so far as it is based upon nuisance. Contending that the cellar filled with water was in law a nuisance, it is said firstly that it was created through the negligence of the respondent in permitting the escape of water from the four-inch pipe, and secondly that even if the escape of the water from the pipe was not due to the respondent's negligence, the latter is liable on the ground that after LeBlanc learned that the cellar had become filled with water he took no immediate steps to abate the nuisance. For the reasons which I have stated, I am of the opinion that the presence of the water in the basement was not due to the negligence of the respondent, but of course negligence is not a necessary condition of a claim for nuisance. In *Noble* v. *Harrison* (1), Rowlatt J. said that 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

(1) [1926] 2 K.B. 332 at 338.

1952

CROWN DIAMOND PAINT CO. v. ACADIA HOLDING REALTY CO.

Locke J.

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. In *Sedleigh-Denfield* v. *O'Callaghan* (1), Viscount Maugham approved the following statement of the law as to the liability for the continuation of a nuisance, taken from the 5th edition of Salmond on Torts: (p. 260)

> When a nuisance has been created by the act of a trespasser, or otherwise without the act, authority, or permission of the occupier, the occupier is not responsible for that nuisance unless, with knowledge or means of knowledge of its existence, he suffers it to continue without taking reasonably prompt and efficient means for its abatement.

Lord Wright said (p. 904) that if the nuisance were due to a latent defect or the act of a trespasser or stranger, the occupier was not liable unless he did not without undue delay remedy it when he became aware of it, or with ordinary and reasonable care should have become aware of it. In my opinion, if it be assumed that the condition existing in the cellar of the respondent's premises at the time LeBlanc was notified in the late evening of March 1st constituted a nuisance, the condition not having been brought about by any voluntary or negligent act of the appellant his failure to take steps to abate it until 8 o'clock on the following morning was not undue delay imposing liability upon the respondent.

There remains the contention of the appellant that upon the application of the principle in *Rylands* v. *Fletcher* (2), the respondent is liable. In *Blake* v. *Woolf* (3), water had escaped from a cistern maintained on the defendant's premises causing damage. Wright J. stated that the general rule as laid down in Rylands' case is that prima facie a person occupying land has an absolute right not to have his premises invaded by injurious matter such as large quantities of water which his neighbour keeps upon his land, but that the general rule is qualified by some exceptions, one of which is that where a person is using his land in the ordinary way and damage happens to the adjoining property without any default or negligence on his part no liability attached to him. In *Rickards* v. *Lothian* (4), Lord Moulton, in delivering the judgment of the Judicial Committee, referring to the principle laid down in *Rylands*

(1) [1940] 2 A.C. 880.
(2) (1868) L.R. 3 H.L. 330.
(3) [1898] 2 Q.B. 426.
(4) [1913] A.C. 263.

v. *Fletcher,* said that it is not every use to which land is put that brings that principle into play, but that it must be some special use bringing with it increased danger to others and not merely the ordinary use of the land. Lord Moulton further adopted a passage from the judgment of Lord Robertson in *Eastern and South African Telegraph Company* v. *Capetown Tramways Companies* (1), where, referring to the principle, he said that it:—

> subjects to a high liability the owner who uses his property for purposes other than those which are natural.

and expressly approved the passage from the judgment of Wright J. in *Blake* v. *Woolf* above referred to.

Since the respondent in the present matter did not, of his own motion or by reason of his negligence, cause the basement to be filled with water or maintain it in that state for an unreasonable time after learning of the existence of the condition, the only possible ground for the application of the principle in *Rylands'* case appears to me to be that maintaining a four-inch pipe connecting with the principal water main of the city, capable of discharging a volume of water into the premises which would endanger the property of adjoining owners, involved liability upon this principle. Apart from the evidence of a witness, Coleman, a service man in the employ of the Water Department of the City of Moncton, that the flow of water from a four-inch pipe is more than the ordinary user, there was no suggestion that water for industrial purposes is not commonly brought upon such premises through the medium of such a pipe. In *Rylands* v. *Fletcher,* Cairns, L.C., after saying that the owners or occupiers of the close on which the reservoir was constructed might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used, said that if, not stopping at the natural use of their close, they had desired to use it for any purpose which might be termed a non-natural use, they were doing so at their own peril. In *Sedleigh-Denfield's* case *supra,* Lord Maugham said that the principle in *Rylands* v. *Fletcher* related only to cases where there had been some special use of property bringing with it increased danger to others and that it did not extend to damage caused to adjoining owners, as the result of

(1) [1902] A.C. 393.

1952

CROWN DIAMOND PAINT CO. v. ACADIA HOLDING REALTY CO.

Locke J.

ordinary use of the land. I find no evidence in the present matter upon which to base a conclusion that to bring water for commercial use into business premises in a four-inch pipe is a non-natural, and not merely an ordinary, use of them. In my opinion, the principle does not apply to a case such as this.

I would dismiss the appeal with costs.

*Appeal allowed with costs.*

Solicitors for the appellant: *Friel & Friel.*

Solicitors for the respondent: *Stewart & Savage.*