23. And has also been recognised elsewhere: *Haynes* v. *Sledge*, 2 Porter (Ala.) 536; *State* v. *Ricketts*, 74 N. C. 187. In New Hampshire, a writ may be issued on Sunday if not done "to the disturbance of others:" *Clough* v. *Shepherd*, 11 Foster 490; and it is clear that where a statute confers authority to execute a writ upon a given date, it necessarily implies a right to issue it at that time: *Rice* v. *Commonwealth*, 3 Bush 14; *Haynes* v. *Sledge*, *supra*.

Hence, in cases of irreparable damage, it is submitted that a court possessing equitable jurisdiction, will not refuse to assert that jurisdiction, solely by reason of the date upon which absolute necessity has required the application to be made. This, of course, is apart from any express legislation to the contrary.

ANGELO T. FREEDLEY.

(*To be continued.*)

RECENT ENGLISH DECISIONS.

High Court of Justice; Exchequer Division.

BOX *v.* JUBB.

The defendants were the owners of a reservoir, which was supplied with water from a main drain, not their property, which flowed by it. There were sluice gates properly constructed between the reservoir and main drain at both the inlet and outlet. Owing to an obstruction in the main drain at a point below the defendants' reservoir, caused by a third party over whom the defendants had no control, and without their knowledge, the water in the drain forced open the sluice gates and caused the reservoir to overflow on to the plaintiff's land. *Held*, that the defendants were not liable for the damage caused by the overflow.

THIS was a special case stated in an action tried in the County Court of Bradford, by consent of both parties, to recover damages from the defendants caused by the overflowing of a reservoir belonging to them.

The following facts were admitted by both parties:

The defendants were the owners and occupiers of a cloth mill at Batley, in Yorkshire, and for the necessary supply of water to their mill there was a reservoir also belonging to them. The mill and reservoir had been built and used as such, and in the same manner, for many years.

The plaintiff was tenant of the premises adjoining the mill.

The reservoir was supplied with water from a main drain or

watercourse which passed by the reservoir. There was an inlet and also an outlet, at both of which there were proper doors or sluices, so as (when required) to close the communications between the reservoir and the main drain. The defendants had a right to use the main drain for obtaining water for their reservoir, and also for carrying off their surplus water, but had otherwise no control over the main drain, which did not belong to them.

In December 1877 the plaintiff's premises were flooded by the overflowing of the defendants' reservoir. The overflowing was caused by the emptying of a large quantity of water from a reservoir, the property of a third person, into the main drain at a point considerably above the defendants' premises, and by an obstruction at a point in the main drain below the defendants' reservoir, whereby the water was forced back through the doors or sluices of the reservoir (which were closed at the time), and caused the reservoir to overflow on to the plaintiff's premises. The obstruction was caused by circumstances over which the defendants had no control, and without their knowledge, and had it not been for such obstruction the overflowing of the reservoir would not have happened. The doors or sluices between the main drain and the reservoir were constructed and maintained in a proper manner, so as to prevent the overflowing of the reservoir under all ordinary circumstances, and no negligence or wrongful act was attributable to either party.

The County Court judge decided that the defendants were liable, and gave judgment in the plaintiff's favor for 75*l*.

The question for the opinion of the court was whether the defendants were, under these circumstances, liable.

Gully, Q. C., for the appellants, distinguished this case from *Rylands* v. *Fletcher*, Law Rep. 3 H. L. 330, on the ground that in that case there were old workings on the land which it was the duty of the defendant to protect; the defendant there also brought a mischievous thing on to his land for his own purpose. The defendants in this case did not construct the reservoir; and there was *vis major*, namely, an act of a man over whom the defendants had no control, which was primarily the cause of the damage which ensued. The case is on all fours with *Nicholls* v. *Marsland*, Law Rep. 2 Ex. Div. 1.

Bray, for the respondent.—The case is within *Rylands* v. *Fletcher*. The defendants are in possession of the reservoir and

the communications between it and the drain, and though they may not have been made by them, yet they are there for their purposes. If they have sluice-gates they must be made as strong as the channel itself. The whole question turns on whether this was occasioned by *vis major;* but nothing that can reasonably be anticipated can be *vis major.* He also cited *Carstairs* v. *Taylor,* Law Rep. 6 Ex. 217; *Fletcher* v. *Smith,* Law Rep. 2 App. Cas. 781; *Humphries* v. *Cousins,* Law Rep. 2 C. P. D. 239; *Bell* v. *Twentyman,* 1 Q. B. N. S. 766; *Ross* v. *Fedden,* Law Rep. 7 Q. B. 661.

KELLY, C. B.—The defendant in this case, it appears, had been in possession of this reservoir, and the communications between it and the main drain, for a number of years; there was no defect in their construction; moreover the case finds that the inlet and outlet were furnished with proper doors. The question is, "What was the cause of the overflow; was it any thing for which the defendants are responsible; was there any act or default of theirs?" Now it is found by the case that the obstruction was caused by circumstances over which the defendant had no control, namely, by the act of a third party. I care not whether it is called *vis major* or a wrongful act of a third party. Then it is contended that the defendants ought to have anticipated the possibility of such a vast quantity of water pressing on their gates; but the case does not find that any amount of strengthening in the gates could have resisted the great pressure suddenly brought to bear on them. I am of opinion, for these reasons, that the defendants are entitled to our judgment.

POLLOCK, B.—This is a case deserving of great consideration, and I should, perhaps, have liked further consideration of it if all the authorities bearing on the subject had not been cited for the plaintiff. What wrong has the defendant in this case done? If a man builds his mill-dam of good materials, and constructs it properly, as was here the case, for what is he to be liable? *Rylands* v. *Fletcher,* if read carefully, has no analogy to the present case; in that case the House of Lords, in the judgment of Lord Chancellor CAIRNS, adopted the accurate language of Mr. Justice BLACKBURN in the court below. This case bears no analogy to the case of a common carrier, who is only excused by the act of God or the

Queen's enemies. The case of *Ross* v. *Fedden* is, to a certain extent, applicable, but I do not rest my judgment on that case.

Judgment for the appellants.

In America, the rule is well settled that if a mill-dam, properly built and kept in proper repair, breaks away without any negligence of the owner, the latter is not responsible to persons below, injured by the escape of water. Negligence is the gist of liability: *Livingston* v. *Adams*, 8 Cow. 175; *Hoffman* v. *Toulumne County Water Co.*, 10 Cal. 413; *Everett* v. *Hydraulic Co.*, 23 Id. 225; *Lapham* v. *Curtis*, 5 Vt. 371; *Shrewsbury* v. *Smith*, 12 Cush. 177.

The degree of care required of the owner of the dam being of course in pro portion to the extent of the injury likely to result to others if the dam should give way. It may not be enough that the dam be capable of resisting the ordinary spring freshets, for if that particular stream is known to be occasionally subject to extraordinary freshets, these likewise must be guarded against: *Mayor of New York* v. *Bailey*, 2 Denio 433, where the dam across the Croton river gave way. And this is so, although such extraordinary freshets occur only once in several years and with no regular intervals between: *Gray* v. *Harris*, 107 Mass. 493.

Conversely, too, the owner of a mill-dam is liable to the landowner *above*, whose land is overflowed by the pond, only for such damage as may ordinarily and naturally be expected, and not for damage caused only by great and extraordinary floods, out of the ordinary course of nature. See *Young* v. *Leedom*, 67 Penn. St. 351; *Bell* v. *McClintock*, 9 Watts 119; *McCoy* v. *Danley*, 20 Penn. St. 89; *China* v. *Southwick*, 12 Me. 238; *Smith* v. *Agawam Canal Co.*, 2 Allen 358; *Lehigh Bridge Co.* v. *Lehigh Coal & Nav. Co.*, 4 Rawle 9; *Monongahela Nav. Co.* v. *Coon*, 6 Barr 379.

It is doubtful whether the case of *Rylands* v. *Fletcher* intended to lay down any rules inconsistent with these principles. But so far as it did, it has not been approved in this country. *Swett* v. *Cutts*, 50 N. H. 439; *Brown* v. *Collins*, 53 Id. 442; *Losee* v. *Buchanan*, 51 N. Y. 476. See *Simonton* v. *Loring*, 68 Me. 164.

On the other hand the case itself was apparently approved in *Wilson* v. *New Bedford*, 108 Mass. 261. There the city of New Bedford built a reservoir to supply the city with water, on land sold them by the plaintiff, but water from their pond percolated through the soil and damaged the cellar and adjacent lands of the plaintiff. And the company was held liable under a statutory process for all damages so caused, and without direct proof of negligence. See also *Pixley* v. *Clark*, 35 N. Y. 520. It was also followed in the very elaborate and carefully considered case of *Cahill* v. *Eastman*, 18 Minn. 324, where the defendant had excavated a tunnel in his own land extending under a stream, and the pressure of the water broke in the tunnel, and the water rushing through injured the plaintiff's land adjoining the defendants, and he was held liable, without any other proof of negligence on his part.

So if a person has a vault or privy on his own land near the line, and a neighbor's premises are injured by percolations therefrom, he has a remedy without any other proof of negligence than the bare fact of maintaining the nuisance in such a place: *Ball* v. *Nye*, 99 Mass. 582. Precisely similar is *Womersley* v. *Church*, 17 Law T. Rep. 190, a valuable case apparently not elsewhere reported.

So far as *Harwood* v. *Benton*, 32 Vt. 724, contains anything inconsistent with these principles, it may arise from not distinguishing between injuries resulting from natural or artificial causes, and is