

speculations; and is hardly entitled to take rank as an axiom in the jurisprudence of this country. I believe universal observation will attest that for the last quarter of a century competition has caused more individual distress, if not more public injury, than the want of competition. Indeed, by reducing prices below, or raising them above values, competition has done more to monopolize trade or to secure exclusive advantages in it, than has been done by contract. Rivalry in trade will destroy itself; and rival trades, seeking to remove each other, rarely resort to contract, unless they find it the cheapest mode of putting an end to strife." *Kellogg v. Larkin*, 3 Pinney 124, 150.

However valuable these observations may be to the profession, they can be considered but mere *dicta*, coming from able judges, and reflecting the sentiment of a class of thinkers considerably in advance of the notions of a majority of judges who have given opinions upon this subject, as an examination of the adjudged cases will show.

EUGENE McQUILLIN.

St. Louis, Mo:

(To be concluded in May No.)

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RECENT ENGLISH DECISIONS.

*High Court of Justice. Chancery Division.*

SNOW v. WHITEHEAD.

Houses belonging to A. and B. adjoined one another. A. allowed water to collect in his cellar so that it found its way into B.'s cellar which adjoined, but was somewhat deeper. *Held*, that A. was liable to pay damages to B. for the injury so done to him. *Ballard v. Tomlinson*, 26 Ch. D. 194, differed from.

TRIAL of action.

This was an action, the main object of which was to enforce the provisions of a covenant affecting certain land, to the effect that no house should be erected upon any part of the land of a less value than 400*l*. Damages were also claimed by the plaintiff on the following grounds: In constructing one of the houses (referred to as B. in the evidence) on the land in question, the defendants excavated the ground so as to form a cellar, and put pipes to carry off the water which were not connected with any drain. The rain came down these pipes, flowed into the cellar,

and collected there in a considerable pool. The plaintiff built a house adjoining this house of the defendants. The water in the pool never touched the party-wall. The plaintiff had a cellar of his own under the house adjoining B., which was somewhat deeper than the cellar under B., and the water which the defendants allowed to collect in the cellar of the house B. found its way into the cellar of the plaintiff's adjoining house, and he was put to some expense in getting rid of this water which so came to the cellar of his house. The plaintiff made a claim in this action for damages for the injury so done to him.

The main question, as to whether the houses erected upon the land were in conformity with the covenant, turned upon the evidence.

As to the damage caused by the water, an important question arose in consequence of the recent decision in *Ballard v. Tomlinson*, 26 Ch. D. 194, by Mr. Justice PEARSON.

*Graham Hastings*, Q. C., and *Fryer*, for the plaintiffs.

*Robinson*, Q. C., and *Boome*, for the defendant.

KAY, J., in a written judgment (after reviewing the evidence), decided that the covenant as to the value of the houses had not been observed by the defendants, and then proceeded to deal with the question as to the percolation of the water. After stating the facts as above, his lordship proceeded as follows :

The question is whether that was a wrong, and on the part of defendant I was referred to the case, before PEARSON, J., of *Ballard v. Tomlinson*, 26 Ch. Div. 194, as deciding that it was not a wrong in law in respect of which an action would lie. I have read that case more than once with very great interest and attention, and, with all respect to the learned judge who decided it, I am clearly of opinion that I am bound by authorities of great weight, and not only of considerable antiquity, but also decisions of higher tribunals, which seem to me inconsistent with that decision. The law is very ancient, and is expressed in the maxim, "*Sic utere tuo ut alienum non lædas.*" In the old case of *Tenant v. Golding*, 1 Salk. 21, 360, it is stated, "the plaintiff declared that he was possessed of a cellar contiguous to the defendant's privy, and parted by a wall, part of the defendant's house, which the defendant *debut*

*et solebat reparare*; and that for want of repair the filth of the privy ran into his, cellar, &c.; and after a writ of inquiry it was moved in arrest of judgment that this being a charge laid upon the owner himself, the plaintiff should have shown a title by prescription; *sed non allocatur*, for it is a charge laid on the defendant of common right which, by law, he is subject to. As one is bound to keep his cattle from trespassing on his neighbor's ground, so he must a heap of dung, if he erects it." HOLT, C. J., gave judgment for the plaintiff, saying: "The reason he gave for his judgment in the principal case was because it was the defendant's wall and the defendant's filth, and he was bound of common right to keep his wall so as his filth might not damnify his neighbor; and that it was a trespass on his neighbor, as if his beasts should escape or one should make a great heap on the border of his ground and it should tumble and roll down upon his neighbor's. That the case might, indeed, possibly be such that the defendant might not be bound to repair, as if the plaintiff made a new cellar under the defendant's old privy or in a vacant piece of ground which lay next the old privy before, in such case the defendant must defend himself. But that cannot be the case here, for then he could not be bound to repair, and upon the words *debet reparare* he must be acquitted on the trial. But, on the other side, if A. has two houses and the house of office on the one is contiguous to the cellar of the other, but defended by a wall, and he sells this house with the house of office, the vendee must repair the wall; so if he keeps this and sells the other, he himself must repair the wall of the house of office, for he whose dirt it is must keep it that it may not trespass." That case was considered with several other decisions, which are all referred to in the judgment in *Rylands v. Fletcher*, L. R., 3 H. L. 330, which was a case of a man making a reservoir on his own land near to a neighbor's mine and the water which was introduced into the reservoir breaking through some of the shafts flooded the mine; and there Lord Chancellor CAIRNS, in giving judgment, stated the principles upon which he thought that case should be determined, and in doing so referred to the judgment delivered in the same case by Mr. Justice BLACKBURN, which, in effect, was that the neighbor who has brought something on his property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbors, "must keep it in at his peril," and should be

obliged to make good the damage which ensues if he does not succeed in confining it to his own property.

Those authorities, which are of the highest possible kind, have recognised, and again and again affirmed, the rule that any one who brings on his land that which, in a natural state of the land, would not be there—whether it be filth, or water, or anything else—is bound to keep it there, and answerable if it escapes in any way and injures the land of a neighbor, unless it be owing to the neighbor's default. It would be very easy, perhaps, to draw some kind of distinction between *Ballard v. Tomlinson* and those authorities, but I am entirely unable to see any distinction in principle. The short facts of that case were that the plaintiff and the defendant were the owners of adjoining lands, and each having on his land a well of a depth of three hundred feet. The distance between the wells was ninety-nine yards, the plaintiff's land being at a lower level than the defendant's. The defendant turned sewage from his house into his well, and it polluted the water in the plaintiff's well. The defendant did not observe the rule that having brought upon his land filth he was bound to keep it there, and to see that it did not get in any way whatever on to his neighbor's land. The argument in that case seemed to be that the defendant's polluted water would not have got to the other well if his neighbor had not taken water out of his own well, and that by taking water out of his well he drew the water from his neighbor's well on to his own land through his neighbor's land; but he had a right to pump as much water as he liked from his own well. It has been decided that if a man pumps water from his own land, and by so doing drains his neighbor's well dry, there is no wrong or harm in respect of which his neighbor can maintain an action. But if one neighbor poisons his own land so that anybody in the natural use of his well on adjoining land has that poison coming into the water in his well, can it be said that the man who so poisons his land to the injury of his neighbor is keeping in the filth which he is bound to keep in, so that it does not escape? I am not able to draw any material distinction between the case of *Ballard v. Tomlinson* and the other authorities to which I have referred, and I therefore prefer to follow the well-known case of *Tenant v. Golding*, and the series of cases down to *Rylands v. Fletcher*, which affirm very distinctly the proposition that, as an application of the maxim, "*sic utere tuo ut alienum non lædas,*" any one who collects upon his own land water

or anything else which would not in the natural condition of the land be collected there, ought to keep it in at his peril; and that, if it escapes, he is liable for the consequences. This case seems to me to come within that principle. The matter is no doubt a trifling one, and if the plaintiff had not been right upon the other point, I should not have encouraged him in maintaining an action in this division of the High Court for so slight an amount of damage, stated to be between three pounds and four pounds. I assess the damages at three pounds. It seems to me that the water which collected in the cellar of the house erected by the defendants was not kept there by them as it ought to have been, but that it percolated and got into the cellar of the plaintiff's house adjoining thereto, and that seems to me to be a wrong within the decision in *Rylands v. Fletcher*. I accordingly order that the defendants do pay to the plaintiff three pounds as damages.

The foregoing case apparently decides that the defendant was liable for the escape of the water, without any proof of negligence on his part, and the language of *Rylands v. Fletcher*, quoted in the opinion of KAY, J., seems to support that proposition. If so, it is not universally agreed to in America, and *Rylands v. Fletcher* has not been always approved, to its whole extent, at least. For many very respectable courts hold that a person who lawfully collects water on his own premises for his own legitimate use, as the mill-owner who raises a pond on a running stream, is not liable to an owner below, if the dam breaks away and floods his premises, unless the owner of the dam has been guilty of negligence, either in the original erection or subsequent reservation of such dam, and that such negligence must be affirmatively shown by the plaintiff, in order to create such liability. Such seems to be the view held in *Livingston v. Adams*, 8 Cow. 175; *Losee v. Buchanan*, 51 N. Y. 476; *Marshall v. Wellwood*, 38 N. J. (Law) 339; *Hoffman v. Toulumne Co. Water Co.*, 10 Cal. 413; *Garland v. Towne*, 55 N. H. 55; *Todd v. Cochell*, 17 Cal. 97; *Everett v. Hydraulic Flume*

*Co.*, 23 Cal. 225; *Lapham v. Curtis*, 5 Verm. 371, and some other cases.

But of course, where such rule prevails, the degree of care and prudence required of the millowner must be proportioned to the circumstances of each case, and his dam must be properly constructed and maintained for that particular stream, and if the latter is known to be subject to extraordinary and severe freshets, he must construct his dam in a manner naturally calculated to withstand such extraordinary freshets as well as others, even though they may occur at very irregular intervals and only once in several years: *Gray v. Harris*, 107 Mass. 492. And see *Mayor of New York v. Bailey*, 2 Denio 433. Or, as stated in *Shrewsbury v. Smith*, 12 Cush. 177, the owners of a dam are responsible for that degree of care, skill and diligence in the construction and maintenance of their dam which men of common and ordinary prudence would exercise in their own affairs in reference to similar subjects, or such as a man would use if he owned the dam and also the property below.

On the other hand a more stringent rule has been sometimes applied in such