of payment out of them, consequently such tolls are subject of garnishment: *Leedom* v. *Plymouth Ry. Co.*, 5 W. & S. 265.

Evidence.—As before stated when a corporation is garnished it may answer by its proper corporate officer, so the officers and employees of the corporation are competent witnesses to testify as to an indebtedness or property sought to be garnished, but such corporate officers or agents must be those whose business it is to attend to the debt, claim or property in dispute. Thus a railroad company having been summoned as a garnishee, and a jury having been empanelled to try whether it has made a full disclosure of its indebtedness to the defendant in the action, the statements of a division engineer to a third person in relation to the indebtedness of the company to the defendant are not competent evidence, it not appearing that such engineer was an agent of the company having any authority on this subject, or that at the time of making the statements he was engaged as agent about the business referred to so as to make his statements part of the transaction and explanatory of the nature thereof: *Balt. & Ohio Rd. Co.* v. *Gallahue's Adm'r*, 12 Gratt. 655. After judgment has been rendered against the garnishee interest is chargeable upon money in his hands from the time of the demand made upon him for it: *Williams* v. *Androscoggin Ry. Co.*, 36 Me. 201.

ADELBERT HAMILTON.

RECENT ENGLISH DECISIONS.

Court of Appeal.

BALLARD v. TOMLINSON.

There is no property in underground water percolating in unknown channels, but every landowner has, as incident to the ownership of the land, an unlimited right of appropriating such water in its natural state by lawful, even if artificial, means, and can maintain an action against any one interfering with that right by contaminating the water.

The plaintiff and the defendant were the owners of two wells, the water for which was drawn from the same strata. The water in the plaintiff's well rose by natural pressure, to within twenty-seven feet of the surface, whence he raised it by pumping. The water in the plaintiff's well was fouled by sewage discharged by the defendant into his well. *Held*, that the plaintiff was entitled to an injunction to restrain the defendant from using his well so as to pollute the water in the plaintiff's well, and also to damages for the injury which he had suffered by such pollution

APPEAL of the plaintiff from the judgment of PEARSON, J.

The action was for an injunction to restrain the defendant from so using his well, as to pollute water in, or coming into, the plaintiff's well, and for damages for the injury caused by such pollution.

The facts were as follows:—

Since 1849 the plaintiff, a brewer at Brentford, drew water from a well sunk to the depth of 222 feet into the London clay, and bricked round. From the bottom of the well, a pipe was carried through the Thanet sand into the chalk, to a depth of 300 feet from the surface. From the sand and chalk, which were water-bearing strata, the water found its way, by natural pressure, into the well to within twenty-seven feet of the surface, whence the plaintiff raised it by pumping. About ninety-nine yards from that well the defendant had a well of similar construction and depth, and going down through the same strata, but the surface of the ground was ten feet higher than at the plaintiff's well. The evidence was that both wells were supplied from the underground water. The defendant made a drain by which sewage was discharged into his well, whence it flowed into the underground water, and thereby fouled the water in the plaintiff's well.

On these facts PEARSON, J., gave judgment for the defendant.

The plaintiff appealed.

Cookson, Q. C., *Webster*, Q. C., and *De Castro*, for the appellant.

Sir F. Herschell, S. G., *Warmington*, Q. C., and *Vaughan Hawkins*, for the respondent.

BRETT, M. R.—In this case the defendant was possessed of a well upon his own property, and, at one time he used it merely as a well, but afterwards he used the shaft of the well in a manner inconsistent with its being a well, and allowed sewage to flow into the shaft of that which had been a well. It cannot be denied that the shaft was artificial, and, therefore, the defendant had collected a quantity of sewage in an artificial reservoir. The plaintiff, at a distance from that—the distance being wholly immaterial—sinks a well to a lower level than the bottom of the defendant's artificial shaft. The sewage which was collected in the artificial shaft on the defendant's land has, by what the plaintiff has done on his own land, gone through or been drawn through, so as to get into the

percolating water, below the defendant's land. It is said, that if the plaintiff had done nothing with regard to his well, the sewage collected in the defendant's shaft would not have got into the percolating water beneath his land; or, if it had, that the water would have remained under his land; and, further, that, if it had got into the water below the defendant's well, it would not have got into the plaintiff's well, but for the mode in which he used the well. In the result, when the plaintiff used his own well by means of a pump, he drew into it the water which then came from the percolated water beneath his own well, and came there adulterated by the sewage, which had been in the artificial shaft on the defendant's land. It was clear that the water drawn up by the plaintiff into his well, was substantially adulterated and fouled. Then arises the question whether, in such circumstances, the plaintiff can maintain an action. The question is certainly in respect of water percolating in an unknown channel under the surface of the ground, and, to my mind, the depth makes no difference. It is clear law that no one has any property in percolating water below the surface of the earth, even whilst it is under his land. But it is equally clear that everyone has a right to appropriate that percolating water, at all events whilst it is under his land. No one has any property in it—no one has any right to have it come on to his land, but everyone has an unlimited right to appropriate it whilst it is under his land, and may take it all, so as to prevent it going on to the land of others. His neighbor also below him has an equal right, before the person above has taken and appropriated it, to take it all. He has a right to take it to the extent that he may cause the water of the land above to come upon his land and to take it so as absolutely to dry the land above. Therefore no one has any property in percolating water, but everyone has a right to appropriate the whole of it.

Then arises the question as to whether, in respect of such water, any of those persons has any rights whatever as against the others. I take it that this percolating water is a common reservoir or source in which no one has any property, but from which anyone has a right to appropriate any quantity. Then the question is whether anyone who has that unlimited right of appropriation, but has no greater rights than any of the others who have it, has a right to contaminate the common reservoir, or whether he is bound not to do anything which shall prevent, not only his immediate neighbors, but

any one of those who have that unlimited right, from obtaining its true value. It is said that the defendant in polluting this common source, did not pollute that in which the plaintiff had any property. That is true. If all the plaintiff can show is that the common source was contaminated, he cannot before he has appropriated any part of it, maintain any action in respect of the contamination. I do not think that a man can, by experimenting off or on his own land, and finding that the water was contaminated before it came on to his land, maintain an action, for the water did not belong to him, and he had not appropriated it. But it does not follow that he cannot maintain an action when he has appropriated it, and finds that the water which he had a right to appropriate, has been contaminated by that which another person has done to the common source; that is, although no one has any property in that source, yet inasmuch as everyone has a right to appropriate it, he has a right to appropriate it in the natural state, and no one has a right to contaminate the common source so as to prevent his neighbor having his right of appropriation.

The next point was that, assuming that to be true, yet, if the person who has that right of appropriation can only exercise it, or has done so by artificial means, to such an extent that if he had not used those means, the water he took would not have been contaminated, then the percolated water which he got, must be said to have been polluted by his act, and, therefore, he could not maintain an action. I cannot think that that is a true proposition. The question of natural, as distinguished from unnatural user never applies to a plaintiff. A man has a right to exercise that natural user with all the skill of which he is capable. That question is applicable to a defendant. Therefore, it seems to me, that as long as a plaintiff does not use any means which, as regards his neighbor, are unlawful, but only uses lawful means, however artificial or extensive those means may be, he has a right to use them, and the right to appropriate the common source is not diminished by reason of his using those means. Therefore, however he may appropriate the water from the common source, he has a right to have that source uncontaminated by any act of any other person. The question of natural or unnatural user only goes to this, that, although a defendant does contaminate water or anything else which goes on to his neighbor's land, yet, if that act is only the natural user of the land, then, although by that act he does injure his neighbor, he is

not liable, because otherwise he cannot use his land at all. I must say, further, with regard to this common source in respect of which a right of appropriation belongs to every one, the question does not depend upon persons being contiguous neighbors, but if it can be shown that in fact the defendant has contaminated the common source, it signifies not how far the plaintiff is from him, if it is proved that he has been injured by what the defendant has done. Therefore, upon this question which is not governed by authority, I cannot agree with the decision of the judge. The nearest case to the present is *Womersley* v. *Church*, 17 L. T. (N. S.) 190, which, I think, does show that the first proposition of the defendant's counsel was wrong. But I do not think that it governs the second point, which is glanced at in *Whaley* v. *Laing*, 2 H. & N. 476, to show that the effect of the plaintiff using artificial means does not prevent him exercising his right; but I confess that the second point requires less authority, and is less difficult than the other. I am of opinion that we must disagree with the judgment of PEARSON, J., upon the ground that no one has any property in percolating water, which, as it comes from a common source, everyone has a right to appropriate, but no one has a right to injure.

COTTON and LINDLEY, L.JJ., delivered concurring opinions.

The decision of Mr. Justice PEARSON in the court below was founded upon the proposition that, "as the defendants were clearly entitled to pump every drop of water out of their well and leave the plaintiff with none, it would be no difference in principle if they deprived him of the water by rendering it unfit for use;" and similar views seem to have been entertained in *Upjohn* v. *Richland Township*, 46 Mich. 549; *Greencastle* v. *Hazelett*, 23 Ind. 186; *Brown* v. *Illius*, 27 Conn. 84.

The fallacy of this reasoning is abundantly shown by the judgments in the case on appeal. It does not follow that because I have a right to use a thing on my own land, I may lawfully send it into my neighbor's premises in a condition to work an injury to him.

And the case of polluting the water and allowing it to flow in its impure state from the defendant's well itself into the plaintiff's well, is not unlike the case of drawing out the water by the defendants, using it for some purpose which contaminated it, and then discharging it on the surface, or elsewhere, where it flowed on to the plaintiff's premises and caused damage. The American cases, therefore, while recognising to its fullest extent the right of every landowner to use, detain, and even totally abstract all underground percolating water, as held in *Chase* v. *Silverstone*, 62 Me. 175; *Roath* v. *Driscoll*, 20 Conn. 533; *Wheatley* v. *Baugh*, 25 Penn. St. 528; *Frazier* v. *Brown*, 12 Ohio St. 294; and many other cases, yet quite agree with the decision in *Ballard* v. *Tomlinson*, that he is liable for corrupting it, and thus causing injury to the well of an adjoining owner.

Thus in *Ball* v. *Nye*, 99 Mass. 584, FOSTER, J., says, "To suffer filthy

water from a vault to percolate or filter through the soil into the land of a contiguous proprietor, to the injury of his well or cellar, where it is done habitually and within the knowledge of the party who maintains the vault, whether it passes above ground or below, is itself an actionable tort." See also *Wahle* v. *Reinbach*, 76 Ill. 323; *Tate* v. *Parrish*, 7 T. B. Mon. 325; *Clark* v. *Lawrence*, 6 Jones Eq. 83.

It is on this ground that recovery is often had against gas companies for so affecting underground water as to injure the adjoining wells. See *Ottawa Gas Light Co.* v. *Graham*, 28 Ill. 73; s. c. 35 Id. 346; *Pottstown Gas Co.* v. *Murphy*, 39 Penn. St. 257; *Columbus Gas Light Co.* v. *Freeland*, 12 Ohio St. 392.

The ground of liability in all such cases is obvious and simple, and if the principle be kept steadily in mind it will lead to a satisfactory conclusion in them all. That principle is, that every man is bound to keep all his dangerous things and substance on his own premises at his peril; and if he fails to do so, and they escape and injure others, he is liable. Therefore it is, if his animals stray away and injure his neighbor's crops he is responsible. At common law he must keep them at home: *Rust* v. *Low*, 6 Mass. 94; *Thayer* v. *Arnold*, 4 Met. 589; *Tewksbury* v. *Bucklin*, 7 N. H. 518; *Little* v. *Lathrop*, 5 Greenl. 356: *Keenan* v. *Cavanaugh*, 44 Vt. 268.

If his falling wall crush his neighbor's shrubbery or fruit trees, the latter, as the more innocent of the two persons, has an undoubted claim to compensation: *Gorham* v. *Gross*, 125 Mass. 232, in which a very excellent opinion was given by GRAY, C. J.

If the roots from his fruit or shade trees penetrate the neighbor's soil and undermine his walls, or affect his well, the liability is clear: *Buckingham* v. *Elliott*, Sup. Ct. Miss., Feb. 9th 1885, 20 Cent. L. J. 496.

If the owner of a deadly upas tree, or a yew, allows its limbs to extend over his division line, and the neighbor's cattle, browsing thereon, are poisoned, the owner of the tree must make the damage good: *Crowhurst* v. *Amersham Burial Board*, 4 Ex. Div. 5. And see *Lambert* v. *Bessey*, T. Raym. 421.

It is on the same ground that farmers are often liable for allowing fires to escape from their premises and consume their neighbor's fences or buildings: *Barnard* v. *Poor*, 21 Pick. 378; *Higgins* v. *Dewey*, 107 Mass. 494.

So of snow falling from one's roof: *Shipley* v. *Fifty Associates*, 106 Mass. 194.

If noxious gases, fumes or odors escape from A.'s works and pass through the air to the injury of his neighbor's health, comfort or property, the latter's remedy is perfect: *St. Helen's Smelting Co.* v. *Tipping*, 11 H. of L. Cas. 642; s. c. 4 B. & S. 608; *Fay* v. *Whitman*, 100 Mass. 76; *Cooper* v. *Randall*, 53 Ill. 24; *Walter* v. *Selfe*, 4 DeG. & Sm. 315.

If one artificially accumulates a large body of water on his own land for his own benefit, and through this artificial pressure some of it escapes on to his neighbor's premises, and injures his well or floods his cellar, the party causing the injury is undoubtedly liable, whether it escapes by percolation, as in *Wilson* v. *New Bedford*, 108 Mass. 261; *Pixley* v. *Clark*, 35 N. Y. 520; *Snow* v. *Whitehead*, 24 Am. L. Reg. 230 and note; or by overflowing the surface, as in *Cahill* v. *Eastman*, 18 Minn. 324; *Gray* v. *Harris*, 107 Mass. 492; or by underground currents, as in *Fletcher* v. *Rylands*, L. R., 1 Ex. 265; s. c. 3 H. L. Cas. 330.

If by the use of powerful or dangerous chemicals, or other substances, A. corrupts and poisons a surface watercourse he is responsible to the party below who suffers thereby: *Merrifield* v. *Lombard*, 13 Allen 16; *Richmond Mfg. Co.* v. *Atlantic De Lain Co.*, 10 R. I. 106; *Stock-*