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As to *Freeman* v. *Fairlie*, much referred to in the argument, it seems to me to have no bearing upon the question, or perhaps bears the other way. The judgment of the Lord Chancellor shows that the estate of which the pattah was evidence was considered to have arisen under the Regulations of 1793, and the rent received by the pattah was considered rather to show that the estate was not of inheritance, but, on the explanation that the sum received was tax rather than rent, the estate was held freehold. The holding under the pattah did not make it so, but it was held to be so despite language apparently showing a holding as a mere tenant from year to year.

Appeal dismissed without costs.

APPELLATE JURISDICTION.

Regular Appeal No. 108 *of* 1870.

THE MADRAS RAILWAY COMPANY.....*Appellants.*

THE ZAMINDÁR of KÁVATINAGGUR.....*Respondents.*

Suit for damages sustained by plaintiffs by reasons of injuries caused to a line of Railway, the property of plaintiffs, by the bursting of defendant's tanks. Negligence, on the part of the defendant, was not alleged in the plaint. Upon the findings—(1)That the tanks were existent before living memory. (2) That they were breached by an extraordinary flood. (3) That they were tanks constructed in the ordinary manner with escapements sufficient for all ordinary floods and such as are universally employed. (4) That they were absolutely necessary to human existence, so far as it depends upon agriculture. (5) That the Railway was constructed with a full knowledge of their existence.—*Held*, that the suit was rightly dismissed.

Rylands v. *Fletcher* (L. R. 3 H. L., 330) discussed.

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THIS was a Regular Appeal against the decree of C. G. Plumer, the Acting Civil Judge of Chittur, in Original Suit No. 17 of 1868.

The suit was brought in 1868 to recover payment from the defendant of the sum of Rupees 45,000, being the amount of damage sustained and incurred by plaintiffs by reason of injuries done in 1865 and 1866 to a line of Railway and to the works connected therewith, the property of plaintiffs, by the escape of water collected and kept by defendant on his land. At the first hearing the Civil Judge (E. F. Elliott)

(a) Present: Holloway, Acting C. J. and Innes, J.

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dismissed the suit on the ground that the plaint did not disclose a cause of action. The plaintiffs appealed against this decision in R. A. No, 30 of 1869, and the High Court, holding that the case stated in the plaint called for an answer on the part of the defendant, remanded the suit for trial upon the merits. [See Vol. V. of these Reports, p. 139, where the plaint will be found set out.]

The suit came on again for settlement of issues on the 1st July 1870.

The written statement of the defendant alleged that the plaint did not disclose any sufficient cause of action ; that the injuries complained of were not attributable to any default of his ; that if the injuries complained of did take place, they were not the result of any influences subject to his control, but rather the consequence of *vis major* or the act of God ; that the tanks referred to in the plaint existed from time immemorial and were requisite and absolutely necessary for the cultivation and enjoyment of the land, which could not be otherwise irrigated ; that the practice of storing water in such tanks in India, and particularly in this district and in the zamindári of Kávatinagarum and the adjacent districts is lawful and is sanctioned by usage and custom ; that the said zamindári is a hilly district, and the ryots would be unable to carry on their cultivation without such tanks, they being the chief source of irrgation and that the omission to store quantities of water in such tanks would be attended with consequences dreadful to the inhabitants of the country : that the plaintiffs' railway is a modern construction, and that if the injuries complained of be held to have taken place they were the result of plaintiffs' own neglect and default in the construction of channels alongside of their line of railway which overflowed their banks and in not providing, as they were bound to do, proper and sufficient waterway for the escape of water, and in not constructing proper abutments, piers, embankments and other works connected with their railway : that the plaintiffs did not take proper care to prevent the occurrence of the thing complained of, and they must be held to have taken upon themselves the risk of damage happening ; that defendant could not have avaided collecting a quantity of water in the tanks during the monsoon, and that he had not

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failed to use all reasonable care : that there were several tanks and channels above his tanks belonging to Government and other people which also burst at the same time ; that under these circumstances the plaintiffs were not entitled to any damages.

The Civil Judge found that the plaintiffs had undoubtedly sustained damage by the bursting of the defendant's tanks. That such injury was not the result of default or neglect of the plaintiffs : but that the defendant was not liable for the loss sustained by the plaintiffs as he had used reasonable and proper precautions to guard against all ordinary accidents. That the bursting of the tanks in question was an extraordinary accident, and that the defendant was not bound to provide against such. The suit was, accordingly, dismissed with costs.

The plaintiffs appealed.

The *Advocate General* and *Mayne*, for the appellants, the plaintiffs.

Miller, *Rama Râu* and *Subramanyam Ayyar*, for the respondent, the defendant.

The Court delivered the following judgments :—

HOLLOWAY, Acting C. J.—This case was very little argued. It was pretty clearly intimated to us that the attempt is to be made by an appeal to Her Majesty in Council to apply the doctrine of storing water contained in *Fletcher* v. *Rylands* (*a*) to landholders in this country The case was framed with that view, the refusal to allege negligence and the former appeal, because the plaint had been rejected for not alleging it, show this. It was not attempted to impeach the conclusions of the Civil Judge upon the evidence, and the question of negligence of construction does not really arise. These conclusions are :—

1. That the tanks were existent beyond living memory

2. That they were breached by an extraordinary flood.

3. That they were tanks constructed in the ordinary manner with escapements sufficient for all ordinary floods, and are such as are universally employed.

(*a*) L. R., 7 Ex., 265 ; L. R., 3 H. L., 330.

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4. That these tanks are absolutely necessary to human existence, so far as it depends upon agriculture.

5. And, if there is anything in the point, that the railway was constructed with a full knowledge of their existence. If it had been a case of nuisance there would have been a coming to the nuisance.

If the Court on the first hearing of the case had intended to apply the doctrine of *Fletcher* v. *Rylands*, nothing would have remained but to assess the damages, and this was manifestly not the intention. Coming to the case, therefore, for the first time, I feel at full liberty to consider and decide upon the whole matter involved.

A rule of English law is not a rule for us, unless it is a correct rule, and it is quite possible that a rule excellent there may be wholly inapplicable here. It is impossible not to agree with Baron Bramwell that it is important to ascertain the principle on which a case should be decided, and in every case in which it is a question of a right, the nature of that right and its grounds of origin demand careful scrutiny. When a law made up by cases determines that there is in a particular case a liability, it in fact decides that there has been an infraction of right. When the House of Lords and the Exchequer Chamber in the present case decided that there was a liability to compensate, they, in fact, decided that a man has a right to store water only when he has taken complete precautions against its escape; that the escape is irrebuttable evidence of the culpable hurting of the right of another, of the commission of an injury, and that he is bound to compensate for the damage caused. The rights of demand which we are here discussing, are in English law called torts; and by modern writers on Roman law they are commonly termed obligations arising from unpermitted acts. It has been objected to this classification that all independent rights of demand are to be included in this group which have for their object the preserving unimpaired the jural condition of a person and restoring it where it has been injured without legal ground, and indifferently, in the first place whether the hurtful act was an unpermitted one or not. (Forster *Preuss. Priv R.*, 523). The point to which the attention of

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this eminent practical lawyer is here directed is the fact that an act apparently innocent, and not, therefore, unpermitted, becomes the basis of the claim when damage actually results. The English case is an example of this. The truth, however, is that the act is decided to be an unpermitted one when it creates the damage, and this not because damage without injury is or can be a cause of action, but because the right of the neighbour is not a right to prevent the building of a reservoir, but a right to prevent his mine from being invaded by water artificially collected. The right is not one to collect any water at his pleasure, but only such as he can restrain within his own bounds. When he fails to restrain it (this being the compass of his right), he exceeds that right, infringes the right of his neighbour and commits an injury. In the present case in the House of Lords, the Lord Chancellor says, page 338 :—

"My Lords, the principles on which this case must be "determined appear to me to be extremely simple. The de- "fendants, treating them as the owners or occupiers of the "close on which the reservoir was constructed, might law- "fully have used that close for any purpose for which it "might in the ordinary course of the enjoyment of land be "used; and if, in what I may term the natural user of that "land, there had been any accumulation of water, either on "the surface or underground, and if, by the operation of the "laws of nature, that accumulation of water had passed off "into the close occupied by the plaintiff, the plaintiff could "not have complained that that the result had taken place. "If he had desired to guard himself against it, it would "have lain upon him to have done so, by leaving, or by in- "terposing, some barrier between his close and the close of "the defendants in order to have prevented that operation "of the laws of nature."

The test here proposed is whether the accumulation took place in the course of the natural user of the close. Now it is very obvious that the most natural user of land is for the purposes of agriculture, and that in England, until the summer of 1868, it never entered into the head of any Englishman that the storing up of large quantities of water could be essential to agriculture. How does the case stand here? Such

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storing is absolutely essential to the simple agriculture of the people. This cannot be put more forcibly or more truly than it has been put by the Civil Judge. Laws, older than the Muhammadan domination, as old as authentic history, have recognized the primary necessity of such tanks and declared the destruction of them the greatest of crimes, and for the obvious reason that they are the well spring of a people's life. Surely the storing up of water is no mere artificial user of Indian land, but the only possible mode of natural user. Looking, therefore, at the principal of this case and not merely at its form, I am clearly of opinion that there is no right to compensation simply because of damage from an escape. The rule upon which the relative rights of men are to be determined is no mere unbending formula. The existence of men in society requires that each should sacrifice a portion of his abstract rights to permit of the co-existence of others. This has, of course, been constantly recognized. In this, as in so many other cases, the formal rule of law is to be drawn from the matter of which it is the regulating principle. In *Tipping* v. *St. Helen's Smelting Co.*(*a*) (at p. 650, 11 H.L.C.) the necessities of commerce are admitted as a ground for compelling persons in a populous town to put up with poisonous vapours, although the superior sanctity of property, always in England better considered than life or limb is duly asserted at page 651. In *Cory* v. *Lidbetter*, 13 C. B. N. S., 476, the Chief Justice points out the influence of time, place and circumstance upon the question of nuisance. In *Bamford* v. *Turnley*, 3 B. & S., 66, all the Judges recognize the doctrine. At the close of the judgment in the Exchequer Chamber in this very case, the necessities of traffic upon the highway, and of trade and commerce, are recognized as grounds for the more limited duty imposed upon carriers and people throwing down packages from wharves. Whether *volenti non fit injuria* can be regarded as an explanation of the diversity where people are not fed by ravens, and where it is scarcely a matter of choice with a London clerk, or laborer, whether he will go into the St. Katherine's Docks or not, is another question. The true reason of the rule is that although not an immediate, national economy, wealth and prosperity, with all

(*a*) 11 H. L. C., 642.

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other objects of man's ethical interests, are mediate sources of law. This has had, always will have, and always ought to have an important influence upon the construction of legal propositions. In the present case I say—Agricultural is the oldest of arts. It is still the one of the greatest primary importance. Human life cannot subsist without it, and, despite the Lord Chancellor, human life is more important than property. This art, in the country from which this case comes, is impossible without tanks by which water is to be stored to meet the terrible drought which, in their absence, would wither every blade of grass, destroy the cattle and render future culture impossible. This paramount human interest requires that a certain amount of risk should be incurred by those who, for the purposes, of gain or otherwise, resort to a country of which this is the normal condition. They must put up with the inconveniences. They have a perfect right to require that they shall not be injured by the negligence of other people, but they have no right to be secured, at all events, against consequences resulting from the natural user of the land and the changeable character of the climate. To impose such a duty upon a landlord here, because it has been imposed elsewhere upon men who store up matter which may be dangerous and is not necessary, is to disregard the very principle upon which that duty was imposed. These observations are sufficient for the disposal of the only question put in issue against the appellants, and I only remark upon the question of negligence because the Civil Judge has done so. My remarks shall be very few.

As to the sufficiency of the precautions to be used, he will not find the English cases so clear as he seems to have imagined. In *Withers* v. *North Kent R. Co*, (*a*) these was a decision to the effect stated. The Regular Reporter, however, had judiciously omitted it, and because he, as well as the Privy Council (1 Moo. P.C.N.S.,101)was unable to reconcile it with one which was decided within three weeks *Ruck* v. *Williams*, 3 H. & N, 308). The doctrine of normal and abnormal is purhed to an extraordinary length in that case,and the only inference which it seems possible to draw is that Commissioners of sewers are bound to greater foresight than Railway Com-

(*a*) 27 L. J. (Ex.), 417.

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panies. The doctrine of the Privy Council case again, not by any means going to the length of the case in the Exchequer, was disapproved of in *Czech* v. *General Steam Navigation Co.*, L. R., 3 C. P., 14-16, where Willes, J. declares that the throwing the burden of proof on the Railway Company, simply on account of the accident, was wrong in the opinion of Erle, C. J. It cannot be said, therefore, that the English doctrine is in a very settled state. It certainly seems that if a passenger injured by a Railway Company is required to prove that here was negligence, that Company being carriers for hire, the rule cannot reasonably be otherwise. Where without any contractual relation a man is to be made liable for *culpa* in the non-performance of the duty "of exercising in his habitual conduct a certain foresight and circumspection, of especially abstaining from operating hurtfully upon the property of others. He who acts in contrariety to this civic duty, without any definite design whatever is found *in culpa*." Holtzendorff. *Encyclopadie* II. 242. If, therefore, the question of negligence had been in issue, I should consider it not proved. The finding of the Civil Judge on this point was not contested at the bar. For the same reason I do not think it necessary to consider what construction ought to be put upon the passage at the close of the Lord Chancellor's Judgment in *Tipping* v. *St. Helen's Smelting Co.* (*a*) with respect to prescription, or to consider what influence the antiquity of the tanks ought to have upon this question.

My conclusions are, that, on the true understanding of the case of *Fletcher* v. *Rylands*, the Civil Judge's decree is right. That, if otherwise, the imposing of such a duty upon a landowner is forbidden by precisely the same principles as have forbidden the imposition upon Wharfingers, Railway Companies and Shipowners. That this attempt would never have been made if the final decision had rested with Judges conversant with the necessities of the country, and that it has only been made in the hope that such a rule may be imposed elsewhere by Judges not so conversant.

It is my hope and belief that that attempt will not be successful. If it is, I can imagine nothing more calamitous to the Hindu than what is called opening up the resources

(*a*) 11 H. L. C., 642.

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of the country. Either he must throw his land out of cultivation, or, without proof of any negligence on his side, be compelled to compensate for damages, resulting from natural cultivation, to works centuries in advance of his immediate social necessities and expensive beyond any which these actual necessities would have generated.

I entertain neither doubt nor hesitation in dismissing this appeal with costs.

INNES, J.—This was a suit for damages for destruction of portions of a railway, occasioned by the bursting of certain reservoirs of water belonging to defendant.

The suit was in the first instance dismissed by the Civil Judge, on the ground that there was no cause of action, as there had been no allegation of negligence.

On appeal the suit was remanded, Mr. Justice Bittleston and I, before whom the appeal came, being of opinion that, on the case stated, which was not denied by the defendant, there was a cause of action set out, as reservoirs of water are liable to burst and do mischief, and, according to the rule laid down in *Fletcher* v. *Rylands*, the keeping of what is likely if it escapes to prove dangerous to others is at the peril of the keeper, subject of course to certain defences which it is open to him to set up according to the circumstances. The Civil Judge has now, after trial, dismissed plaintiff's suit on the ground that the tanks which burst are tanks used for purposes of irrigation, that they are necessary for the existence of the surrounding population ; that the defendant is not bound at his peril to keep the water in ; that the duty cast upon him was only to use reasonable care ; that he did use reasonable care sufficient for all ordinary occasions ; and that the tanks burst by reason of an extraordinary fall of rain, such as had not been known for several years, and against which defendant could not be expected to provide. In appeal the point taken is that a person in the position of defendant in respect of these tanks, is an insurer, and is bound to prevent or answer for the damages arising from the escape of the water.

If a man causes injury to another and damage follows, he is answerable for the act from which the injury has arisen, if he could have avoided it.

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About the damage in this case there is no question. Then was there injury? Was there, by any avoidable act or omission of defendant, a breach of an obligation due to the plaintiffs?

What is the obligation of defendant as to keeping these tanks from bursting and causing mischief? The tanks are ancient. They are maintained, as they have been immemorially used, for the purposes of irrigation according to a system in use throughout this part of India. The State is the general landlord, but in some parts of the country it has made over certain of its rights as landlord to zamindárs like the defendant, who thus become vested with the duties of management which previously appertained to the State. One of the duties which the State has always recognized as appertaining to itself is the maintenance of old and the extension, wherever practicable, of new works of irrigation. The reason is obvious. Where works irrigation are in existence, a population gradually gathers in the neighbourhood, and land is taken up and brought under cultivation on the faith of the works being maintained. Water brings with it abundance in good seasons and enables provision to be made against seasons of scarcity. If the maintenance of these works is abandoned, the population dwindles with the diminution of the means of subsistence, becomes improverished, and finally disappears. The State also suffers in the loss of revenue which follows the diminution of abundance. When, therefore, irrigation works have been constituted and maintained and proved conducive to the increase of population and wealth, it seems obvious that their maintenance ought to be continued; and that the State, in recognizing its duty to maintain them, has acted upon the view that their maintenance is necessary to the prosperity and advancement of the country. The tanks of this defendant are in the same position, in this respect, as the other works under the direct management of the State. Now, it appears to me that, in this country, that which the State has, in the interests of the community, taken upon it to maintain, it has impressed with the character of lawfulness, and although the maintenance of it may be, in some particular circumstances, dangerous to the interests of private persons, it is, by the character which the

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State, acting for the community, has impressed upon it, removed from the class of dangerous and noxious things which a man brings and keeps at his peril, "whether" (as expressed by Blackburn, J. in *Fletcher* v. *Rylands*, L. R., I Ex., 280) "the things so brought be beasts, or water, or filth, or stenches," and is properly placed on a footing with the class of dangerous trades and occupations in England for which there is legislative sanction. In such cases what is authorized to be done must be done in a careful manner. This is the whole obligation. In other words, negligence causing damage gives a cause of action, but unless there be negligence there is no action for damage caused by acts within the scope of the express, or necessarily implied authority conferred by the law. See *Jones* v. *Festiniog R. Co.*, 37 L.J.Q.B., 214, (in which *Vaughan* v. *the Taff Vale R. Co.*, is quoted)and the recent case of *Smith* v. *London S. Western R. Co.*, reported in 40 L. J. C. P., 21, decided in the Exchequer Chamber. Now it is conceded that in this case the defendant had so maintained the tanks up to the date of the damage occurring, that for 20 years they had not burst, and the evidence shows that, but for the extraordinary rainfall, there was no reason for apprehension. They were of the ordinary construction of most of the Government tanks, but it is conceded that some tanks have stone weirs which offer greater security for the gradual escape of an unusual influx of water than those of these tanks. But I agree with the Judge that defendant was not bound to avail himself of the last results of science, and that there was no want on his part of proper care and precaution.

For the reasons just given, I think that the nature of these tanks, as shown in the defence, is such as to exempt defendant from responsibility for damage caused in the maintenance of them, unless there has been negligence on his part giving occasion to the damage. There has clearly been no negligence, and I agree in dismissing this appeal with costs.

Appeal dismissed.