cessors in title for the insertion of cupboards. Thus, where a latent defect was concerned, the Court of Appeal was prepared to follow the orthodox line, and say that there was no liability. Where a nuisance was caused by the act of a trespasser, the occupier (or owner) was liable only if he knew or ought to have known of the nuisance. This was the doctrine laid down in *Barker v. Herbert.*[8]

An interesting minor point in the case is the support the Lord Justices thought they could draw from *Pollock on Torts* for their view of *Tarry v. Ashton.*[9] What was presumed to be one of Pollock's footnotes in the last edition says that " the decision in *Tarry v. Ashton* is correct because there was no evidence that defendant knew of the danger." Actually Pollock meant this note to refer to *Pritchard v. Peto*[10] and the learned editor inserted the reference to *Tarry v. Ashton* by mistake.

The conclusion to be derived from *Wringe v. Cohen* is clearly stated in the headnote: if, owing to want of repair, premises on a highway become dangerous and therefore a nuisance, and a passer-by or adjoining owner suffers damage by their collapse, the occupier or owner, if he has undertaken the duty to repair, is answerable whether or not he knew or ought to have known of the nuisance.

What is the precise effect of the reference to premises upon a highway? Has an adjoining owner greater rights in private nuisance because the house of which he complains is on the highway than if it is set a hundred feet back? If we once blur the distinction between public and private nuisance, are we to have two standards of liability for private nuisance according to the location of the house? This seems opposed to the whole tendency of the case to regard public and private nuisance as covered by the same principle where lack of repair is concerned.

—W. O. HARRIS.

8. [1911] 2 K.B. 633.
9. at pp. 239-40.
10. [1917] 2 K.B. 173. See 56 L.Q.R. (1940) p. 140.

NUISANCE—RYLANDS *v.* FLETCHER—NEGLIGENCE—LIABILITY FOR ACT OF INDEPENDENT CONTRACTOR.

Torette House Pty. Ltd. v. Berkman,[1] is an interesting case, if only for the number of points that were discussed. The facts were that the defendant, who was the owner of certain premises numbered 113, 115 and 117, employed an independent contractor to make some changes in the water supply to number 113. Failing to find the necessary stop-cock, the plumber tampered with those belonging to the other houses and carelessly turned on a stop-cock which had previously been turned off, and to which was attached a disused and unplugged pipe which ran under number 115. The water escaped from this pipe during the week-end and caused damage to plaintiff's goods in his adjoining premises at number 119.

The law of torts has been developed by extending the narrow forms of action until each covers now a fairly broad scope; but the natural result of the extension of each remedy is that there is now much overlapping and the boundaries of the specific torts are rather confused. Within each particular tort, there has been much rationalisation, but

1. (1940) 62 C.L.R. 637; (1939) 39 S.R. (N.S.W.) 156.

confusion still exists in the territory which is claimed by one or more of the specific torts.[2] If we turn to the books, we find implied in the chapter on nuisance a somewhat strict view which suggests that an occupier is responsible for a nuisance created either by his own act, or by that of his servant or independent contractor. This seems to be the result of emphasising a separate rule for "act of stranger," since a stranger is usually so defined as to exclude an independent contractor (on the analogy of the rule in *Rylands v. Fletcher*[3]). In the chapter on independent contractors, we find a general principle (subject to fairly narrow exceptions) that an employer is not liable for the acts of an independent contractor. If the decision of the Court of Appeal in *Wringe v. Cohen*[4] is not to be confined to cases of disrepair where houses on the highway are concerned (and it is submitted elsewhere in this issue[5] that this interpretation is too narrow), then it may be that the tendency to make stricter the liability for nuisance may yet affect the chapter on independent contractors—at least where liability for nuisance is concerned.

In the instant case, it was impossible in the face of *Rickards v. Lothian*[6] and *Collingwood v. The Home and Colonial Stores*[7] to suggest that an occupier who installs a domestic water supply falls under the rule of strict liability laid down by *Rylands v. Fletcher*.[8] The High Court unreservedly accepted this view—though, as was pointed out, an abnormal accumulation of water taken from the pipes may lead to strict liability, as when great quantities are used for washing films.[9] But in the instant case, there was negligence[10] on the part of the independent contractor and so these authorities are all distinguishable.

This brings us to the question of liability for the acts of an independent contractor. Here an important question of fact was involved. Dixon J. emphasised that the plumber was not employed to do work at number 115 (under which the disused pipe ran) but at number 113. "Other questions might have arisen if through his negligent plumbing water had escaped from that shop. His negligent act did not affect the premises to which he had been admitted." Ignoring this and turning to the broader question, it was admittedly a little difficult to suggest any rule from the chapter on independent contractors which could be pressed into service. It cannot yet be said that there is an absolute duty of care to prevent a nuisance arising, for "act of trespasser" is a defence, provided the occupier had no reasonable means of knowledge. *Rickards v. Lothian* shows that there is not a strict duty where domestic water-pipes are concerned. The argument that the repair of a domestic water supply is an "ultra-hazardous" act within the doctrine of *Honeywill and Stein Ltd. v. Larkin Bros. Ltd.*[11] is rather far-fetched and received short shrift at the hands of the Court. Indeed, *Blake v. Woolf*[12] was

2. See, *e.g.*, Friedmann, 1 Mod. L.R. (1937) 39.
3. (1868) L.R. 3 H.L. 330.
4. [1940] 1 K.B. 229.
5. See page 146.
6. [1913] A.C. 263.
7. [1936] 3 All E.R. 200.
8. (1868) L.R. 3 H.L. 330.
9. *Western Engraving Co. v. Film Laboratories Ltd.*, [1936] 1 All E.R. 106.
10. The report does not specifically state that the plumber was guilty of negligence, but it was assumed by the Court, *e.g.*, Latham C.J. at 645-6, Starke J. at 651, Dixon J. at 653.
11. [1934] 1 K.B. 191.
12. [1898] 2 Q.B. 426. There was, however, in this case the extra point that the plaintiff, a tenant on the ground floor, could be deemed to have consented to the installation of the water.

cited as authority for the doctrine that an employer is not liable for the negligent mending of a cistern by an independent contractor employed by him.

The Full Court in New South Wales held that the decision in *Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co. Ltd.*[13] showed the rule in *Honeywill's* case was incorrect. The argument is interesting, but with respect it is submitted that there is a material difference of fact. In *Honeywill's* case the actual decision was that where an employer engages an independent contractor to do an " ultra-hazardous act," the employer is liable for the *negligence* of the independent contractor. The Court did go further in suggesting that the duty was absolute, but this was an *obiter dictum*. In *Matania v. National Provincial Bank*[14] Slesser L.J. accepted the argument that if A engages an independent contractor to do an act which involves a special danger of creating a nuisance, the employer is responsible " if there is a failure to take the necessary precautions that the nuisance shall not arise."[15]

Thus both these cases impose on the employer a liability where the contractor has failed to take adequate precautions, whereas in *Rainham's* case the question was one of strict liability and questions of vicarious liability for fault were irrelevant, the actual decision being only that an occupier is responsible for a dangerous user of land even if there is no negligence. But although the actual decisions may be distinguished, the dicta cannot all be reconciled,[16] and the judgment of the New South Wales Supreme Court deserves serious study.

To turn to the question of nuisance, it was faintly argued for the plaintiff that the unplugged pipe was itself a nuisance—but the answer is that it was only a potential source of harm, for, as Dixon J. pointed out, an actual nuisance was created only when the water began to flow. Moreover, even if plaintiff's argument were accepted, this nuisance was one that had been created by a predecessor in title, for the pipe was in that condition when defendant acquired the premises, and in such a case an occupier is probably liable only if he knows or ought to know of the nuisance. The word " probably " is used advisedly, as the authorities are not unanimous as most of the books suppose.[17]

If the unplugged pipe was not a nuisance, then was the occupier liable for the nuisance actually created by the plumber ? The High Court answered in the negative. The exact principles on which liability for nuisance is based are not yet clear in English law, but a brief note cannot do justice to this problem. *Matania's* case certainly suggests that the employer is not liable for a nuisance created by an independent contractor, unless the task ordered involves a special danger of nuisance.

13. [1921] 2 A.C. 465.
14. [1936] 2 All E.R. 633, at p. 646.
15. It must be confessed, however, that the language of Romer L.J. at p. 648, is much broader. He agrees with the statement of Slesser L.J., but his wording is wide enough to cover strict liability for any damage occasioned. The American Restatement of the Law of Torts adopts the view of the text : see s. 416.
16. See, *e.g.*, Lord Buckmaster in *Rainham's* case at 477. If A makes a contract with B to make munitions, A is not responsible if an explosion occurs. (But would not A be responsible, if B failed to take due precaution ?)
17. See, *e.g.*, *Broder v. Saillard*, (1876) 2 Ch. D. 692, where the occupier was held liable although there was no evidence that he knew or ought to have known that a mound created by his predecessor was making the plaintiff's house damp. Potter suggests that the question is still an open one 49 L.Q.R. (1936) 166.

A dictum in which Latham C.J. summarises the decision of the learned trial judge is so wide as to mislead unless considered only in relation to the particular facts of this case: "An occupier of land is not subject to a duty to search for nuisances which may or may not exist." Many cases show that an occupier is under a duty to take reasonable steps to remedy even the dangers created by trespassers in certain cases—this obviously requires a duty to search for nuisances "which may or may not exist" in the exercise of reasonable care in controlling the premises.

—G. W. PATON.

IN RE PAINE, GRIFFITH *v.* WATERHOUSE, [1940] 1 Ch. 46.

The demands of social morality and public policy on substantive legal rules are well illustrated in the law of contract. Particularly vivid instances of their operation are found in the conflict of law rules relating to capacity to contract marriage. "The community as a social entity may be indifferent to the breach of a contract to deliver goods but it cannot ignore an open infraction of its recognized code of morals."[1] The crucial problem then arises—"which community when a marriage affects more countries than one is entitled to demand pre-eminent consideration for its code of social morality?"[2]

One aspect of this question of "capacity" to marry was raised in the case of *In re Paine*. The problem confronting the Court in that case arose from the alleged marriage of a domiciled Englishwoman A, prohibited from marrying according to English law her deceased sister's husband, to B, a domiciled German, the marriage being valid according to the *lex loci celebrationis* which was German. Under the will of her mother, A was entitled absolutely to (*inter alia*) a bequest if she should have "any child or children" living at her decease, with a gift over if she had no children. One child of the marriage survived her. The question, then, was whether in the eyes of English law the marriage between A and B was valid, the evidence accepted by the judge revealing that A was a domiciled Englishwoman before her purported marriage and that B had never lost his German domicil of origin.[3]

Bennett J. disposed of the issue in a summary judgment, holding that the marriage was invalid because B had been the husband of A's deceased sister and the marriage was therefore one which she was prohibited from making by English law.[4] In support of his view that A had not the capacity to contract the marriage, Bennett J. expressly followed *Mette v. Mette* in which Sir Cresswell Cresswell laid it down that "there could be no valid contract unless each was competent to contract with the other."[5] He also referred to the statements of the law by Dicey, Westlake and Halsbury to the effect that each party must have capacity according to the law of his or her domicil. Westlake states categorically

1. Cheshire, *Private International Law*, 2nd edn., p. 218.
2. *ibid*; p. 219.
3. See [1940] 1 Ch., at p. 47.
4. *ibid*; at p. 49.
5. (1859) 1 Sw.& Tr. 416, at p. 423.