observing that it was for the jury to decide where the truth lay, and continued] If you are of opinion that there was really neglect of a duty obviously incumbent on those who were immediately engaged in these practical operations for the ample safety of human life and limb; if you are of opinion that both or each of the prisoners charged or interested in the conduct of these operations neglected a duty which was incumbent on them with a view to that safety which they were bound to take every precaution in their power to preserve; and that the death of this man on the 12th April resulted from this neglect, —then I must tell you he is guilty of culpable homicide.

But I must explain again to you that if the neglect was exceptional, and occurred only on particular occasions, or otherwise than habitually, so as to have been known to the manager; if you think there was no systematic carelessness, but that this was an exceptional occurrence,—then I have to tell you they are not criminally responsible. If the neglect was systematic (which is the prosecutor's case), and the parties knew it and failed to check it,—allowing it to go on from motives of economy, or merely from not attending to what was pressed on their attention as to what they ought to have done,—then they are responsible.

The Jury returned a verdict finding each of the prisoners not guilty.

Counsel for Crown—M'Kechnie, A.-D.
Counsel for Faill—Balfour—Brand.
Counsel for Muirhead—Mackintosh.
Counsel for M'Gregor—J. P. B. Robertson.
Agents—A. & W. Boyd, Writers.

COURT OF SESSION.

Tuesday, October 16.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MOFFAT & CO. *v.* PARK.

Property—Reparation—Culpa—Damage through the bursting of a Water-pipe.

Held that, where a water-pipe had burst on premises belonging to A, and damage had been done thereby to the goods of B stored in an adjoining tenement, A was liable, *culpa* having been established against him, and that it was no defence for A to say that B might have ascertained the cause of injury sooner than he did and so prevented the loss which resulted, although that might, if proved, afford good ground for mitigation of damage.

Observations on the case of *Campbell* v. *Kennedy*, Nov. 25, 1864, 3 Macph. 121.

George Moffat & Company, commission agents, Glasgow, occupied premises close to a tenement belonging to Gavin Park, measurer in Glasgow. In February 1876 a pipe leading to a wash-house belonging to the defender burst, and the water found its way, a distance of about 17 yards, to the pursuers' premises, which were used as a store for chemical manures. They raised this action claiming—(1) £62, 14s. 1½d. in name of damage caused to the manures by the water; (2) £5, 12s., the expense incurred in removing and storing the undamaged manures; (3) £3, the expense of bringing them back again; and (4) £20, as damages.

A proof was led before the Sheriff-Substitute (GUTHRIE), the purport of which sufficiently appears from the opinions delivered. During the proof the defender admitted that the damage caused amounted to £62, but all questions as to his liability were reserved.

The Sheriff-Substitute pronounced an interlocutor in which he assoilzied the defender, on the ground that the pursuers had failed to take any means to prevent the flooding or to discover the cause of it for four days after they knew of its existence, and that therefore they were barred by their delay and negligence. He added this note:—

"*Note.*—Contributory negligence is not merely the negligence which materially contributes to that which is the efficient cause of damage, but also the negligence of one who had the power to escape from damage and has not exerted himself to do so; Dig. ix. 2, 28, 1. Here it appears to me that the pursuer had it in his power to save himself from all or part of the loss which he suffered, but he allowed three full days and a half to pass before he took any step to check the influx of water, or even to ascertain its cause, and more than two days more before he tried to save his property from its reach. It is possible that a part of the damage might have been incurred even if he had acted promptly whenever the water was discovered on the Friday night, but there is no evidence of this, and no means of ascertaining whether any portion of his loss was due to the fault of the defender alone.

"I have not thought it necessary to make a distinct finding that the defender was in fault and would therefore have been responsible for the bursting of his pipe; but thought the point is not without difficulty, I think that he would have been liable in damages but for the delay of the pursuers."

The Sheriff (CLARK) on appeal adhered on the same grounds. He added the following note:—

"*Note.*—The damage in question was being done for several days to the pursuers' knowledge, and during that time they did nothing. They therefore manifestly contributed to the damage. When at last they informed the defender of what was going on, proper measures were at once taken, and would have been taken long before if notice had been timeously given. If it were possible in a case of this kind to separate the loss accruing through the pursuers' negligence from that caused by the fault of the defender, the latter would be liable for the difference; but on the evidence adduced in the present case, I am unable to arrive at any such result. It seems impossible to say what amount of damage was directly attributable to the fault of the defender, apart from that for which the pursuers themselves are responsible, as guilty of contributory negligence. For example, it does not seem possible to determine how much of the goods required to be stored on the one ground, and how much on the other. Besides, it is worthy of observation that, if notice had been given *tempestive*, it is possible, perhaps

probable, that no storage would have been required at all. See as authorities in this case, *Weatherly* v. *Regent's Canal Company*, 12 Com. Pleas, p. 2, 15th April 1862; see also Shearman on Negligence, §§ 25 and 34. The case *Reid* v. *Baird*, 13th Dec. 1876, decided in the Court of Session, was quoted on the part of the pursuers, but it does not appear to me to proceed on the same kind of facts as those brought out in the present case."

The pursuers appealed, and argued (1) the defender was bound to keep his water pipes in such a condition that they would do no harm to his neighbours, and there was *culpa* on his part in not doing so. Therefore he was liable, and (2) there was no contributory negligence on the part of the pursuers to relieve the defenders of liability.

Authorities—*Cleghorn* v. *Taylor and Others*, February 1856, 18 D. 664; *Campbell* v. *Kennedy*, November 25, 1864, 3 Macph. 121; *Weston* v. *Incorporation of Tailors, &c.*, July 10, 1839 1 D. 1218, Shearman on Negligence, secs. 25, 32-35.

At advising—

Lord Ormidale—This case presents considerations of great importance, but I do not see any serious difficulty in regard to what should be done.

What both the Sheriffs proceed upon is this. They have no doubt that the water-pipe of the defender actually caused the damage, but they think there was contributory negligence on the part of the pursuers sufficient to relieve the defender from liability. But I do not see there was contributory negligence on the part of the pursuers. They had nothing to do with the laying or keeping up of the pipes; they were not even entitled to take any charge of them, and they would have been guilty of trespass if they had. All that lay upon defender. But it does not follow that the defender is liable in consequence. A great frost might make the pipes burst in spite of any reasonable precautions which the defender might have taken. In such a case as that the result would be *damnum fatale*, and the parties would require to suffer the loss without recourse. But that is not the nature of the present case, and there was here no *damnum fatale*.

It has been maintained in the first place that the defender is not liable for the bursting of the pipes, and second that the damage might have been prevented by the vigilance and carefulness of the pursuers, and that therefore they are barred from claiming from the defender.

In the first place, it appears to me that there was *culpa* on the part of the defender, and in this case and all similar cases there must be *culpa* on the part of the defender in order to found a claim. But it is not necessary that there should be direct negligence. It is sufficient that negligence may be implied from the circumstances, and I think there are such circumstances in this case as to entitle us to imply it. The pipes were thirty years old, and though it may be true that the pipes when put in were sufficient, still it is clearly proved that latterly the pipes had shown manifest signs of decay. This is quite clear on the evidence. That being the case, is there not *culpa* when we find that the defender was warned that his pipe would probably burst and cause mischief, and therefore that the pipe was in that condition in his knowledge. I think that in this respect this is a stronger case than that of *Campbell* v. *Kennedy*.

The only other question is that of contributory negligence as it was put by the Sheriffs. The defender's counsel put it thus—"If you had acted as prudent men the damages would have been saved altogether, or, at all events, it is not proved that in that event these damages would have arisen." But this is not the light in which it appears to me, looking to all the circumstances. Can it be fairly said that the pursuers had by their own reckless or negligent conduct caused this damage—that they had done anything they ought not to have done, or neglected anything they ought to have done? I cannot say that the case to my mind is of that nature at all. I cannot see what they did not do that they ought to have done. The circumstance of the delay from the Friday till the Tuesday is adequately explained by the fact that the pursuers did not know where the water was coming from, and as soon as they knew they gave notice to the defender. In these circumstances, I cannot think there was any delay or negligence on the part of the pursuers to cut them off from their claim of damages.

As to the removing of the goods, there is no presumption that the pursuers would have left their goods there to be injured if they had known the state of matters. Every presumption is the other way, and there is no evidence that they so left them. The evidence is that it was in their opinion surface water which would soon stop, and whenever they found out whence the damage was coming they took the necessary steps. So, with great deference to the Sheriffs, I think this is a clear case for holding the defender liable, and for giving judgment in favour of the pursuers.

Lord Gifford—I do not differ in the result at which Lord Ormidale has arrived, but I am sorry to say I cannot see the case in so clear a light. I have considerable difficulty on both branches of the argument, and I am anxious to explain the law of such a case as has arisen out of the facts before us.

I concur with Lord Ormidale that in all such cases the damage must be caused by *culpa*. No damage can be due because one man's property injures another man's. There is no damage *ex dominio solo*. Looking at it as a question for a jury, there must be evidence to support an issue of *culpa*. But *culpa* may be inferred. The mere fact of the bursting is not enough to substantiate it, and a proprietor is not bound to provide a pipe that wont burst under any circumstances. That would be impossible. I should, in the ordinary case, have great difficulty in holding that a proprietor is liable for the state of his pipes. But here we have sufficient proof that the pipes were old pipes, and that notice was frequently given by the pipes themselves of their insecure state, and therefore here the proprietor is to blame, and is the only person to blame, for the result which occurred.

The meaning of "contributory negligence" is that the negligence is contributory to the direct cause of the injury, not that it is contributory to the injury itself.

In the words of Shearman on Negligence, sect. 35, whom I quote, not as a direct authority, but

as well expressing what I mean—"Where the plaintiff by his own fault aggravates his injury, and increases the extent of his damage, but has not actually contributed to the whole injury which he has suffered, he is entitled to recover to the extent of the damage which he has suffered without his fault, but not for that portion of the damage to which he has thus contributed." This seems to me sound sense as well as law. A man may aggravate the injury after it has been begun, as in the case of a man injured in a railway accident who goes to a bone-setter instead of to a surgeon, and it would be absurd to say that in such a case he could recover for that part of the injury inflicted. But that is not contributory negligence. The question is fairly raised under this record whether the defender might not on that ground be relieved from part of the damage occasioned, and I do not think the defence a bad one. But the defender is shut out from pleading this from the parties having agreed that the damage should be fixed at £62. Part of the loss of £62 may have been caused by the pursuers having left their goods to be injured longer than with ordinary care they should have, and if this had been maintained I should have been inclined to sustain it, but this, too, is a difficult question of fact. And even if it had been plain that there was some negligence on the part of the pursuers, it would have been a difficult question to estimate the amount.

Lord Justice-Clerk—I am of opinion that the respondent is responsible for the damage sued for. The cause of the injury was the bursting of a water-pipe in the respondent's premises, and 50 feet from those of the appellants. *Prima facie* he is liable; nor is it of any consequence whether the ground of liability be regarded as imputed negligence, or, as I rather think is the grander principle, that the power of the water-pipes to resist ordinary contingencies is at the risk of the person who placed and kept them there, and that the consequences to third parties of their not being sufficient must fall upon the proprietor. I see no reason to import into a very simple category of law a misleading element, or at least a misleading phraseology tending to the inference that it is enough to relieve the proprietor that he has no reason to know of or suspect the existence of the danger. The true only *culpa* is the failure of the proprietors to fulfil the absolute obligation to protect his neighbour against ordinary contingencies, which is nothing but a breach of implied obligation. The opinions in the case of *Campbell* v. *Kennedy* (November 25, 1864, 3 Macph. 121) mainly differ only in words, though I incline to the views of those who reserved their opinions on the general point; but whether the ground of liability be placed on the breach of implied obligation or on fault, can make no difference in this case. Lord Benholme in the case of *Campbell* says—"There is a very general understanding, founded on common sense, that it is the duty of the proprietor of the upper flat of a house to see that the water-pipes are kept in a secure state;" and what he calls the fault of the defender in that case was failure to fulfil a duty of the same kind. Now here I think it proved that the pipes were insufficient, and were substantially suspected to be so, and that they were not in the state in which the respondent was bound to maintain them. The Sheriffs in the Court below were of that opinion.

The other defence founded on, and which has been sustained by the Court below, is that the appellant is barred from recovering in respect of contributory negligence.

I think this judgment proceeds on a misapprehension of the very authorities to which the learned Sheriffs refer. Contributory negligence, to exclude a claim for reparation, must be negligence contributory to the cause of the injury. But negligence which only increases the injury caused by another is not in this sense contributory, but only affects the *quantum* of the damage; and, as Lord Gifford has observed, in Mr Shearman's work this is distinctly laid down, and many authorities are referred to that effect.

The passage in the Digest (8. 1. 28) refers to a proper case of contributory negligence—the case of one who having been warned and in the knowledge of danger chooses to expose himself to it. It is as if during operations in a street, a cordon had been drawn round a part of the pavement, and one who had been warned of his danger chose to pass and was injured. But there can be no reason on principle for saying that a man is not to be responsible for the consequences of his own wrong because these consequences have been in part the result also of negligence by the party injured. No man can recover damage caused by his own act: but the plea can reach no further. But I am quite clear that in this case no negligence has been established against the pursuer. It is not alleged that until the Tuesday he had any reason to suspect the water-pipes on the defender's premises as the cause of the overflow; and looking to the amount of goods in the store, I do not think the interval of two days too great for preparation. It was a laborious and, as it turned out, an expensive operation. In every view I think the judgment must be altered.

This interlocutor was pronounced:—

> "Find that the damage sued for was occasioned by the bursting of a water-pipe in the premises of the respondent (defender) owing to insufficiency of the said pipe: Find that the said pipe was allowed to remain in an insufficient state through the fault of the respondent: Find that the appellants (pursuers) were not guilty of any negligence by which the amount of damage was increased: Therefore sustain appeal, recal the judgment appealed against, and decern against the respondent for payment to the appellants of the sum sixty-two pounds, together with the sums of five pounds twelve shillings and three pounds, concluded for in the summons: *Quoad ultra* assoilzie the respondent and decern: Find the appellants entitled to expenses in both Cases, and remit to the Auditor to tax the same and to report."

Counsel for Pursuers (Appellants)—Kinnear—Rhind. Agent—George Begg, S.S.C.

Counsel for Defender (Respondent)—Scott—Readman. Agents—Morton, Neilson & Smart, W.S.