Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Brabant and Company v. *Thomas Mulhall King, and on the Cross Appeal of Thomas Mulhall King* v. *Brabant and Company, from the Supreme Court of Queensland; delivered 29th June* 1895.

Present:

The LORD CHANCELLOR.
LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
LORD SHAND.
LORD DAVEY.
SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

The Queensland Navigation Act of 1876 (41 Vict. No. 3) requires that the master of every vessel arriving at a port in that Colony shall land, at the Government or other authorised store, all gunpowder exceeding twenty pounds in weight, and all other explosive substances which may be on board such vessel whether as cargo or stores. On the passing of the Act, the Government of the Colony established magazines at the port of Brisbane for the reception of explosives, and no other magazines have been authorised or erected there. These magazines are under the exclusive charge of Government officials, and storage rent is payable to them for all explosives deposited with them.

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In the event of such rent not being duly paid within a time limited, the officer in charge is authorised by the Act to sell the explosives, and with the proceeds of sale to satisfy the rent, and all other charges and expenses, accounting for the surplus, if any, to the importer or owner of the goods. Section 103 of the Queensland Customs Act of 1873 (37 Vict. No. 1) provides "that no compensation shall be made by the "Government or the Collector to any importer "proprietor or consignee of any goods by reason "of any damage or loss occasioned thereto in "the warehouse or in any examining shed by "fire or inevitable accident or by felony."

Before the month of January 1893, the Appellant Company had, in compliance with the Act of 1876, landed at the port of Brisbane 616 boxes of dynamite, 568 boxes of gelignite, 361 boxes of gelatine dynamite, and 33 cases of detonators. These goods remained in the Government stores until the month of February 1893, when the events occurred which have given rise to the present litigation. The boxes of dynamite and other explosive substances were all stored in a wooden magazine which had been previously used as a coal shed, at Eagle Farm, below Brisbane, about 20 feet from the bank of the river. The cases of detonators were stored in a paraffin oil shed a little way farther up the river.

On two occasions in the month of February 1893, the river Brisbane was in heavy flood, and its waters rose to an exceptional height. On the first occasion the flood attained its maximum in the afternoon of Sunday, February the 5th, when the water rose to a point 4 feet 7 inches above the floor of the Eagle Farm magazine. On the second occasion, the flood water, in the morning of Sunday, February the 19th, rose 9 inches higher, or 5 feet 4 inches above the floor of the

magazine. The result was that the whole of the Appellant Company's goods were rendered valueless by their immersion in water.

The present proceedings were brought by the Appellant Company, in January 1894, for recovery of the damage which they had sustained, in pursuance of "The Claims against Government Act"; and the Respondent, Thomas Mulhall King, was duly appointed to be nominal Defendant on behalf of the Government of the Colony. Shortly stated, the case made in their pleadings by the Appellant Company was, that the Government officials had failed to take reasonable precautions against the occurrence of floods, by storing their goods at a higher level, and had also failed, when the floods came, to take reasonable and proper measures for preventing or diminishing damage, by shifting some of the cases, and stacking them above the others. The Respondent, besides traversing these allegations, maintained that the Appellant Company had accepted the risk of the condition in which the premises were, and of the locality in which they were situated at the time of storage, and also that the rapid rising of the Brisbane river to an unprecedented height, on the two occasions referred to, was an "inevitable accident," for which the Government were not responsible.

The case was tried before Mr. Justice Harding and a jury, whose verdict consisted of separate answers to the following nineteen questions which were submitted to them by the learned Judge:—

1. Before January 1893 were the Plaintiffs importers into the port of Brisbane of the goods? —Yes.

2. Before said date did Plaintiffs deliver goods to Government in pursuance of Statutes to be taken care of for reward?—Yes.

3. In consideration thereof did Government

undertake and agree with Plaintiffs to (*a*) properly store and take care of goods, and (*b*) to deliver to Plaintiffs on request?—(*a*) (*b*) Yes.

4. Before said date did Nobel's Company cause to be delivered by Plaintiffs the goods to Government in pursuance of Statutes to be stored and taken care of for reward?—Yes.

5. Were Plaintiffs the duly constituted agents of Company in that behalf?—Yes.

6. In consideration thereof did Government undertake and agree with Company to (*a*) properly store and take care of goods, (*b*) re-deliver to Company on order or request?—(*a*) (*b*) Yes.

7. Did the Government not regard its duty in that behalf?—They did not.

8. Did it not take proper care of the goods?—They did not.

9. By its negligence in not providing (*a*) proper storehouses, (*b*) a proper locality, (*c*) in not taking proper care, were the goods after that date destroyed?—(*a*) (*b*) (*c*) Yes.

10. Is the indenture of 6th November 1893 proved?—Yes.

11. If loss arose was it caused by inevitable accident through the rapid rising to an unprecedented height of the flood?—No.

12. Was such rising such that the Government could not by any amount of ability have foreseen or guarded against it? The rising was not such that the Government could not by any amount of ability have foreseen or guarded against it.

13. Was it known at all times to Plaintiffs (*a*) that such storehouses, (*b*) that such locality were unfit or improper?—Yes.

14. Did Plaintiffs with full knowledge of question 13, and of the risks attending the storage of explosives in such locality for many years prior and up to grievance continue to

deliver explosives to the Government for storage by them in the said storehouse and locality?—Yes.

15. Did Plaintiffs undertake and continue to undertake such risks?—Yes.

16. Thereafter and with full knowledge of questions 13, 14, 15, did Plaintiffs deliver the explosives to Government for storage in its storehouses in locality?—Yes.

17. What was the value of goods destroyed?—7,680*l.* 8*s.* 4*d.*

18. Was that the market value? If not what was?—Yes.

19. What damages?—7,680*l.* 8*s.* 4*d.*

Upon these findings the learned Judge directed judgment to be entered for the Plaintiffs for the full amount found by the jury.

Against that judgment the present Respondent appealed, and gave notice of motion, (1) to have the judgment set aside, and to have judgment entered for him upon the findings as they stood; or (2) to have the judgment set aside and judgment of non-suit entered; or (3) to have the findings of the jury in answer to questions 7, 8, 9, 11, 12, 17, 18, and 19, set aside, and a new trial had; or (4) to have the findings of the jury in answer to questions 17, 18, and 19 set aside, and the amount of damages re-assessed. The Appellant Company lodged a counter-motion, to have the findings of the jury in answer to questions 13, 14, 15, and 16 set aside.

The appeal and cross-motion were heard before three Judges of the Supreme Court who, by a majority, ordered that the judgment entered be set aside; that the findings of the jury in answer to questions 9 (*a*) (*b*), 17, 18, and 19 be set aside, and that a new trial be had between the parties to re-assess the damage. The Appellant Company were ordered to pay to the Respondent his costs of the appeal, the payment

of costs of the trial and of all other costs being reserved. The effect of that order was in substance to strike out of the verdict one finding of the jury which affirmed that the Government had been negligent in not providing a proper storehouse in a proper locality, and in not taking proper care of the goods, and also the three findings relating to the amount of damages.

Mr. Justice Cooper, the dissentient Judge, thought that judgment ought at once to be entered for the Defendant, being of opinion that the Government was under no liability to the Appellant Company, upon the principle recognised by this Board in *Sanitary Commissioners of Gibraltar* v. *Orfila*, (15 Ap. Ca. 400.) and more recently in *Municipality of Pictou* v. *Geldert* (L.R., Ap. Ca. 1893 p. 524) and in *The Municipal Council of Sydney* v. *Bourke* (L.R., Ap. Ca. 1895). That principle has, in certain instances, been held to afford protection to Commissioners or Trustees representing public interests from the consequences of mere non-feasance; but it has, in the opinion of their Lordships, no application to a case like the present, in which the parties charged with non-feasance are under obligation to an individual member of the public to perform the duty which they have neglected to his prejudice, in consideration of their being remunerated by him for its performance.

In delivering judgment, the majority of the Court, consisting of Chubb and Real, J.J., mainly directed their observations, in the first place, to the answer returned by the jury to question 9 (*a*) (*b*) (*c*), and, in the second place, to the answer given to question 16. They differed from the learned Judge who tried the case, as to the proper legal inference to be derived from the findings implied in the answer given to question 16, taken in connection with

the answers of the jury to the three preceding questions. They held that these findings necessitated the conclusion in law that the Appellant Company had accepted the burden of all risks, so far as arising from the condition in which the Government storehouses were at the time when their goods were landed, and from the locality in which these storehouses were situated. It is obvious that, if the Appellant Company had agreed to undertake such risk, the Government would have been, to that extent, relieved of the duty of taking precautions for the safe custody of the goods. Accordingly when the learned Judges of the majority came to deal with the findings of the jury in answer to (*a*) and (*b*) of question 9, which affirm respectively the negligence of the Government in not providing proper storehouses, and in not placing these in a proper locality, they held that the findings were in direct conflict with the answer given by the jury to question 16. Both of the learned Judges indicated their opinion that the answer to (*c*), the third branch of question 9, which affirms, in general terms, that the goods perished through neglect of the Government to take proper care of them, might cover the failure of their officials to take proper measures, when the floods came or were imminent, to prevent loss by re-stacking the boxes. And they held that, while the Appellant Company were precluded from charging the Government with negligence in respect of any alleged failure to alter the condition or site of the storehouses before the advent of the floods of February 1893, it was still open to them to show that proper precautions had not thereafter been taken for the purpose of salving part at least of the goods stored, and to recover damages for the goods destroyed through the want of these precautions.

When the judgment of the Supreme Court is read, in the light of the opinions expressed by

the majority, it becomes clear that the sole object of the Court in remitting the case for new trial was to give the Appellant Company an opportunity of satisfying a jury that, on the arrival of the floods in question, the Government officials failed to adopt reasonable and proper means to place part, if not the whole of their goods, beyond the reach of flood-water; and, in the event of the jury finding to that effect, to have the amount of damage resulting from such failure assessed by them. Both parties have appealed against the judgment, the original appeal being at the instance of the Appellant Company, and the cross-appeal, which has been consolidated with it, at the instance of the Respondent as representing the Government of the Colony. The arguments addressed to their Lordships have been on the same lines with those indicated by the parties in their motions before the Supreme Court, which have already been noticed.

The real issues involved in the pleadings of the parties, and in the evidence which was led by them before the jury, appear to their Lordships to be exceedingly simple; although they were complicated, if not obscured, by the pleas of inevitable accident, and of acceptance of risk by the Company, which were advanced by the Respondent, as well as by the shape in which the case for the Appellant Company was presented for the consideration of the jury.

Their Lordships can see no reason to doubt that the relation in which the Government stood to the Appellant Company was simply that of bailees for hire. They were therefore under a legal obligation to exercise the same degree of care, towards the preservation of the goods entrusted to them from injury, which might reasonably be expected from a skilled store-keeper, acquainted with the risks to be apprehended either from the character of the storehouse itself or of its locality; and that obligation

included, not only the duty of taking all reasonable precautions to obviate these risks, but the duty of taking all proper measures for the protection of the goods when such risks were imminent or had actually occurred.

Their Lordships think it right to indicate that, in their opinion, the locality of the Government stores to which the present case relates was not a matter of which reasonable complaint could be made, and that it bulked too largely in some of the questions put to the jury. It is not only convenient, but it may be highly expedient that stores for the reception of explosive substances landed from vessels before they enter the harbour should be placed near to the water-edge. But the selection of such a site, however justifiable in itself, imposes upon the storekeeper the plain duty of making arrangements within the store by which the goods are placed at such a level as will, in all probability, ensure their absolute immunity from the incursion of flood-water.

Upon the Respondent's plea of inevitable accident, their Lordships have only this observation to make, that it does not appear to them to be appropriate to the circumstances of the present case; and that, when stated in the form in which it was submitted to the jury by questions 11 and 12, it does not afford the true test for determining the liability or non-liability of the Government.

It admits of serious doubt, whether questions 13, 14, 15, and 16, upon the answers to which the decision of the Supreme Court is based, ought to have been sent to the jury. The answer returned to question 15 does not deal with fact; it is in reality an inference in law from the facts affirmed by the other replies to these questions; and it was, in their Lordships' opinion rightly, disregarded by Mr. Justice Harding when he

proceeded to apply the verdict. It would be very dangerous doctrine, for which there is not a vestige of authority, to hold that a depositor of goods for safe custody, who, by himself or his servants, has had an opportunity of observing certain defects in the storehouse, must be taken to have agreed that any risk of injury to his goods which might possibly be occasioned by these defects should be borne by him, and not by his paid bailee. The authorities relating to the vexed maxim, *volenti non fit injuria*, have no bearing whatever upon the point. From the very nature of the transaction, the depositor is entitled to rely upon the care and skill of his bailee. The duty is incumbent upon the latter, in the due fulfilment of his contract, of considering whether his premises can be safely used for the storage of explosives or other goods, and, if they cannot, to take immediate steps for placing the goods in a position of safety. If the defects of these Government magazines were as apparent to the servants of the Appellant Company as the jury have found they were, they ought to have been equally patent to the official storekeeper with whom the duty of safe custody rested.

Their Lordships are accordingly of opinion that the judgment of the Supreme Court must be set aside; and they have come, not without regret, to the conclusion that no course is open to them for terminating the litigation, except sending back the case for new trial. Besides the assessment of damages, if any are found to be due, there are, in their opinion, only two questions which, in some shape or other, ought to be submitted to the jury. The first of these questions is, whether the Government officials failed to exercise due care and skill, in storing the Appellant Company's goods, seeing that they stored them at so low a level that they

were destroyed by the floods of February 1893; and the second, whether on the advent of the floods, these officials failed to take reasonable and proper measures for saving the whole or any, and if so what part of the goods from destruction. These issues are, in this sense, alternative, that, in the event of the jury affirming the first, it will be unnecessary for them to take the second into consideration.

Seeing that there must be a new trial, it is unfortunate that an opinion should have been expressed by one of the learned Judges of the majority of the Supreme Court, tending to the inference that the first of these issues is only susceptible of one answer. Mr. Justice Chubb said:—"I see nothing in the evidence to show that "the abnormal flood of 1893 could have been or "was foreseen by anybody." In the view of the case which was taken by the learned Judge those observations might be legitimate, and it is obvious that they were not meant to trench upon the province of the jury at the second trial. Mr. Justice Real, with commendable caution, observed that he felt "bound to hold that the "evidence given entitled the jury to find that a "reasonable man ought to have anticipated a "flood higher than that of 1890, and as high as "that of 1893; ought to have known that goods "placed in a magazine or store at a height less "than the level of the floods of 1893 were in "danger of being injured by flood waters." The evidence, shortly stated, shows that about the year 1886 there was a flood higher than any of its predecessors; that, in 1890, there was another flood still higher; and that, after its occurrence, the platform upon which explosives were stored was raised by about an inch. Whether, in view of the possibility of natural causes, and of the probability of artificial causes tending to raise still higher the level of the river floods, an

increase in the elevation of the platform to that limited extent was consistent with either skill or prudence, appears to their Lordships to be a substantial question, well fitted for the consideration of a jury.

Their Lordships will humbly advise Her Majesty to reverse the judgment of the Supreme Court, except in so far as it directs that the judgment entered for the Plaintiffs be set aside; to set aside the findings of the jury in answer to questions 7 to 19 inclusive submitted to them at the trial; to direct that a new trial be had; and to reserve for the decision of the Judge who tries the cause all questions of costs incurred in both Courts below, until the result of such new trial. The Respondent must pay to the Appellant firm their costs of these appeals.