THE RULE IN RYLANDS v. FLETCHER.

III.

Mr. Justice Blackburn, in his opinion in Rylands v. Fletcher, defines the substances, which can be collected by the land owner only at his peril, as those likely to do mischief if they escape. This definition is obviously far from precise or definite. Few substances exist which may not under certain circumstances be injurious. In England the following substances have been held to fall within the rule: electricity, gas, sparks from an engine, and fumes from creosoted wood blocks used in laying a pavement upon a highway, and while no case actually brings up the point, it seems that the storing of explosives should be held to fall within the rule. It would seem that in all of these cases that if the article stored should escape, that the probability of damage to others is inherent in the very nature of the article stored.

All these substances are such as by their very nature or in accordance with the normal experience of mankind will cause

---


"Jones v. Festiniog, etc., Ry., L. R. 3 Q. B. 733 (1868).


See Clerk & Lindsell on The Law of Torts, 2d Ed. 375 (1896).
There is no need to anticipate any exceptional conjunction of circumstances, in order to foresee that if water or gas or electricity of high voltage should escape it will do harm to those within its reach. The rule in Rylands v. Fletcher applies only where the substances are such as are likely to do harm under circumstances normally to be expected. It does not apply unless the substance collected is one of its nature likely to escape in obedience to well known and universally recognized natural laws. It does not apply where the substance is stable in its nature and so is such that, in order to bring it upon another's premises, some force other than the operation of usual natural laws and forces is required. In such case he who originally collected the substance upon his land is not for that reason answerable for the harm it does. His liability depends on the nature of the act, which carries or casts it upon the other's land, and his legal responsibility therefor. He is not liable if it be carried thereon by the unauthorized act of a stranger. And while he may be answerable in trespass, if, as the direct result even of his innocent acts, a substance ordinarily stable is thrown upon another's property, he would, it seems, not be answerable, if, as the indirect consequence of his lawful operations carefully carried on, it is caused to fall thereon.

It is by no means certain whether bricks, stones or other heavy substances built into walls or supported by them should be regarded as falling within the principle of Rylands v. Fletcher.

---

81 In Berger v. Minneapolis Gas Co., 60 Minn. 297 (1895), an instruction, that "every one who for his own profit keeps on his premises anything not naturally belonging there" is liable for the damage done by its escape, irrespective of the care he has exercised, was held to be too broad, "for it is only those things the natural tendency of which is to become a nuisance or do mischief, if they escape, which the owner keeps at his peril." So limited, the rule is not open to the criticism of Doe, C. J., that, "Everything that a man can bring on his land is capable of escaping—against his will, and without his fault, with or without assistance, in some form solid, liquid, or gaseous, changed or unchanged by the transforming processes of nature or art—and doing damage after its escape."

82 In Newberry v. Wilson, L. R. 7 Q. B. 31 (1871), a declaration averring that the defendant was possessed of yew trees, and that it was his duty to prevent the clippings from being placed on land not occupied by him and that he took so little care of the clippings that they were placed on land not occupied by him, whereby the plaintiff's horse was poisoned, was held bad on demurrer, since it was consistent with the declaration that the clippings might have been carried upon the plaintiff's land by a stranger.
Logically there seems no difference between water stored in a reservoir and confined by banks and a heavy substance artificially supported on high near to anothers land. The force of gravity, which will, unless overcome by artificial means, cause the water to overflow adjacent lands, will as inevitably cause the fall of a heavy substance placed on high, unless similarly overcome by artificial means, as by supporting it by a sufficient wall beneath it or by firmly attaching it to some stable structure. No case, however, goes to the extent of holding that one who carefully erects a structure necessary to the enjoyment of his property, in the manner customary and usual in that locality, is liable without more for the fall of the material from it. There are, it is true, dicta looking in this direction in Tarry v. Ashton, but in that case the structure which fell was not a part of an ordinary wall necessary for the residential use of the defendant's property, but was a heavy projecting lamp which he had, either for his business convenience or through some personal fancy or from a, perhaps mistaken, idea of beauty, chosen to affix to his wall. Not only was it an unusual structure, not necessary to the normal enjoyment of his property; but it required altogether exceptional mechanical means to keep it securely in place, and, projecting as it did over the highway, it was evident that harm to some member of the public was highly probable unless it was effectively secured. It seems probable that if the question be squarely presented, it will be held that the building of a wall does not fall within the rule; or rather that it falls within the exception thereto, announced by Lord Cairns; the building of walls being a necessary incident to the residential and farming use of property.

---

84 L. R. 1 Q. B. D. 314 (1876). The point actually decided was that the defendant who was aware that a lamp, projecting from his premises over a highway, was in bad repair can not rid himself of his duty to put in good repair by employing even a competent person to do it for him. But Lush, J., says: "Is it his duty to maintain it in a safe state of repair, or only to employ a proper person to put it in repair? Surely the mere statement is enough to show that the duty must be in the first proposition," and Quain, J., says, "it is his duty to keep it in such a state as not to prejudice the public." Blackburn, J., doubted whether if a house fell by reason of "a latent defect in the premises or something done to them without the knowledge of the occupier" such occupier would be liable.
which themselves are "natural uses" in the strictest sense of that term.\textsuperscript{85}

It seems quite certain that recovery in cases falling within the principle of Rylands v. Fletcher is not confined to the harm directly done by the substance and while it remains in the same condition in which it left the defendant's premises. One, who lays gas mains and pipes without statutory authority and so is bound at his peril to prevent the gas from escaping, is as fully liable for the harm done by the explosion of the gas when it comes in contact with those fires, which as the ordinary incidents of civilized life are to be foreseen, as is he, who having statutory authority, is only liable at all if the gas be negligently suffered to escape.\textsuperscript{86}

Certain points seem to be definitely settled in England by the cases decided since Rylands v. Fletcher, the results of which may be summed up as follows: First: The substance which escapes must have been collected upon the land by the defendant; he must either have artificially brought it thereon, or by his operations upon his land, have caused substances, naturally upon the land, to be collected in such volume as to be dangerous to others if they escape; thus, he is no more liable for the escape from his land of substances naturally there, than he is for the escape therefrom of wild animals, such as rats, rabbits or birds,\textsuperscript{87} native thereto. And this is so where the substances have collected in abnormal quantities by natural causes without any interference by the land owner.\textsuperscript{88} So the land owner is not bound to confine at his peril substances brought upon his land by the act of God, nor is he liable, even though he has himself collected upon his land, water or other substances, if, by reason of an act of God, additional quantities thereof render the barriers which he has provided, and which are sufficient to confine the matter which he himself has brought upon the land, prove insufficient to prevent the escape of the total quantity so brought.

\textsuperscript{85} See the Massachusetts cases of Quinn v. Crimmins, and Ainsworth v. Lakin, \textit{post}.
\textsuperscript{86} See Batcheller v. Tunbridge Wells Gas Co., \textit{ante}, n. 77.
\textsuperscript{87} Warren v. Brady, 1900 2 Ir. Rep. 632.
\textsuperscript{88} Hodgson v. The Mayor of York.
THE RULE IN RYLANDS v. FLETCHER

against it. Nor is the land owner bound to care for water brought upon his land by strangers over whose conduct he has no control, nor is he bound to provide barriers for substances, which he himself collected, sufficient to withstand additional substances so added thereto.

Second: Although there is no direct authority, there are many dicta to the effect that the land owner is not liable where barriers sufficient to prevent the escape of the substance which he has collected, are broken down by the act of God, or the wrongful acts of third parties, or by any cause over which he had no control.

---

89 Nichols v. Marsland, L. R. 10 Exch. 255 (1875).
90 Box v. Jubb, L. R. 1 C. P. 444 (1876).
91 It is suggested in Clerk & Lindsell on the Law of Torts, second edition, pages 326, 392, note a, that there is a distinction between the escape of water where the barrier is rendered insufficient by the increased pressure of the water brought against it by the act of God or other stranger, and those cases where it is not required to withstand any additional substances so brought to bear upon it, but where, by the act of God or by the act of a stranger, it is so weakened as to be unable to withstand the pressure of the water collected by the defendant himself. At first glance there may appear to be a difference between the two; a part of the water in the first case is not the water brought by the defendant himself upon his land, but the damage is, in part if not principally, done by the water which he has collected and which is thus by superior force released. Unless one is prepared to contend that the defendant is liable only where the damage is solely attributable to his acts, there seems no real distinction between insufficiency of the barrier because of the abnormal pressure put upon it and its insufficiency because abnormally weakened. In each case the defendant's duty is to have a barrier actually sufficient to restrain the water which he collected, in each case the barrier proves insufficient and in each case the defendant is relieved because the insufficiency is due to the act of God or some other person over whose conduct, like that of God, is beyond his control.
92 Per Bramwell, B., in Nichols v. Marsland, ante.
93 Kelley, C. B., in Box v. Jubb, ante.
94 In Carstairs v. Taylor, L. R. 6 Exch. 217 (1871), Kelley, C. B., regards the act of a rat in gnawing a hole in a wooden conduit pipe as "vis major as much as if a thief had broken the hole on attempting to enter the house or a flash of lightning or a hurricane had caused the rent." In Cooley on Torts, 680, 3d Ed. p. 1186, these cases are regarded as in effect making the proprietor liable only if he fails to exercise "care proportioned to risk of injury from the escape," since they hold that he "is not liable if the water escapes from any case consistent with the observance of due and reasonable care by him." In this respect the liability of one who collects foreign substances upon his land differs from that of the keeper of a wild animal or even of a domesticated animal known by him to be vicious, in which case he is liable if the animal though sufficiently secured is set at large by the wrongful act of one for whom the custodian is not legally responsible, Vredenburg v. Behan, 33 La. Ann. 627 (1881); Laverone v. Mangianti, 41 Cal. 138 (1871); Baker v. Snell, L. R. 1908, 2 K. B. 352, 825, or by the act of God, as where lightning breaks the chain confining a tiger, per Bramwell, B., Nichols v. Marsland, L. R. 10 Exch. 255 (1875), at p. 260.
Third: The defendant must have brought the substance upon his land, or collected them there by operations done thereon, for his own purposes and of his own volition. So he is not liable, (a) if, the substance is collected or stored for the use of the plaintiff, with his knowledge and consent, as shown by his avail- ing himself of it, or for the joint uses and benefit of both the plaintiff and the defendant; (b) or if required by law or the terms of the tenure, upon which he holds his property to collect and store it, (c) or if it be collected or stored as a necessary means of carrying out some use of his premises, or of carrying on operations, directed or authorized by legislative enactment.

Fourth: Since the defendant's liability arises from the fact that he had in the course of an unnatural use of his property and

*So a landlord is not liable if a cistern, maintained for the supply of water to his tenant, bursts and injures the tenant's goods. Blake & Co. v. Woolf, L. R. 1898, 2 Q. B. 426, and cases cited therein. In Kentucky it is held that while the escape of electricity is per se evidence of negligence in its custody when it injures a person upon the highway, Owensboro v. Knox's Adm., 116 Ky. 451 (1896), it is not so when the person injured is a customer for whose use electricity is supplied, Mangan's Adm. v. Louisville Electric Co., 122 Ky. 451 (1903).

*While no case presents this precise point, this would appear to be so, for one, who as the keeper of the National Zoological Garden, was required to keep wild beasts, the liability of whose custodian is more stringent than that of a landowner who collects foreign substances upon his land (see note 93, ante), is held liable for their escape only if guilty of negligence. As to the liability of a carrier for injuries done by wild animals which it is transporting, see Malloy v. Starin, 191 N. Y. 21 (1907).

*In Madras Ry. Co. v. Zemindar of Carvatenagrum, L. R. 1 Indian App. Cases 364 (1874), the defendant, who was charged by the Indian law, by reason of his tenure as Zemindar, with the maintenance of the tanks forming part of the ancient irrigation system, was held not liable, in the absence of negligence, for the escape of the water therefrom. Where, however, a landowner is bound by prescription to receive foreign matter, he is bound at his peril to keep it from escaping, Humphries v. Cousins, L. R. 2 C. P. 243 (1877); here, however, the duty to receive it is a servitude to which the supineness of himself or of his predecessors in title has subjected him.

*In Price v. Metropolitan Gas Co., 65 L. J. Q. B. 126 (1895), Lord Russell of Killowen says, at p. 127, "it is clear that where a gas company, having statutory authority to lay pipes, does so in the exercise of its statutory powers, the "wild beast" theory referred to in the well-known case of Rylands v. Fletcher is inapplicable." So a railway having statutory power to use steam as motive power is not liable for sparks escaping from their properly constructed and carefully operated locomotive engines, Vaughan v. Taff Vale Ry. Co., 5 H. & N. 679 (1860); see also East & South African Tel. Co. v. Cape Town Tramways Co., L. R. 1902, A. C. 381. The defendant must show statutory power to do the particular thing complained of, West v. Bristol Tramways Co., L. R. 1908, 2 K. B. 14. Such power will not be implied, unless the thing done is necessary to carry out the work authorized, it is not enough that it is convenient or profitable, see McAndrews v. Collerd, 42 N. J. L. 189 (1880).
THE RULE IN RYLANDS v. FLETCHER

for purposes of his own, peculiar to himself, collected thereon substances likely to escape and injurious if they do escape, it follows that the plaintiff cannot recover where his only injury is the interference with his equally unnatural and peculiar use of his own land.\textsuperscript{90}

In the later English cases the application of the rule in Rylands v. Fletcher is not limited to cases of injury resulting from “use by a person of land belonging to him,”\textsuperscript{100} nor is any distinction made between cases of “abiding nuisances” and cases where, as in Rylands v. Fletcher itself, harm results from some conduct of the defendant or some condition created by him which was not harmful to the plaintiff until the accident occurred, it being regarded as decisive of the one class of case as fully as of the other.

The attitude of the English law is strikingly exhibited in the opinion of Fletcher Moulton, L. J., in the recent case of Wing v. The Omnibus Company;\textsuperscript{102} to him actions “of the type

\textsuperscript{90} So in East and South African Tel. Co. v. Cape Town Tramways Co., L. R. 1902, A. C. 381, it was held that a tramway company was not liable for the disturbance of the working of the plaintiff’s submarine cables by electricity escaping from its wires, see accord, the very similar case of Lake Shore & M. C. R. R. v. Chicago, etc., Ry. Co., 92 N. E. 989 (Indiana, Nov. 18, 1910).

\textsuperscript{100} In West v. Bristol Tramways Co., supra, n. 79, the defendant was a company laying the pavement on a highway upon which the plaintiff’s premises abutted, and in Batcheller v. Tunbridge Wells Gas Co., supra, n. 77, the escape of gas from pipes under the highway was held to fall within the authority of Rylands v. Fletcher.

\textsuperscript{102} In many of the cases, in which the rule has been held decisive, the injury was due to some continuously harmful condition created by the defendant or some systematic course of injurious conduct, which amounts to an enjoinable nuisance, East, etc., African Tel. Co. v. Cape Town Co., supra, n. 99; Batcheller v. Tunbridge Wells Gas Co., supra, n. 77; in the latter case the act, which authorized the defendants to lay their pipes, contained a section providing that they should remain liable for any “nuisance” caused by them. It was held that “the case was governed by what Lord Cairns had said in Rylands v. Fletcher. The laying the pipes was a non-natural use of the land and the company laid pipes at its peril.”

\textsuperscript{103} L. R. 1909, 2 K. B. 652, p. 662, et seq., especially pp. 665 to 667. The plaintiff, a passenger in one of the motor omnibuses of the defendant company, sued for injuries received by reason of the omnibus skidding into collision with an electric light standard. The trial Judge held that there was no evidence to go to the jury upon the first issue, which raised the question of negligence in the operation of the omnibus, but on the second issue, which was based on “the negligence of the defendant in placing upon the highway a vehicle likely to be uncontrollable in certain slippery conditions of the roadway and so creating a nuisance,” the jury found the defendants guilty of negligence in so doing in view of the known tendency of the best made and
usually described by reference to Rylands v. Fletcher,” are cases of nuisance which, in effect, he defines to be an “excessive use of some private right whereby a person exposes his neighbour's property or person to danger.” In such case, he says, “should accident happen therefrom even through the intervention of an event, for which he is not responsible, and without negligence on his part, he is liable for the damage.” “While the best known cases of this type are associated with the use of a person with land belonging to him, as when a man collects a large volume of water upon his land, or carries on some dangerous manufacture there,” he holds “that analogous causes to action exist,” when an excessive use is made of any other private right, as “when a member of the public makes undue and improper use of the right which he enjoys in common with all others of using the public high way for traffic.”

103 “The doctrine of Rylands v. Fletcher, as applied to such cases,” is in his opinion—“that if there be such a nuisance, the fact that no one has chosen to seek by legal process the complete remedy of stopping it (or that the plaintiff could not by legal process have stopped it, it being only potentially and not actually harmful to him or so dangerous as operated motor omnibuses to skid when the roads are slippery. Vaughan Williams and Buckley, L. JJ., treated the question as one of negligence, the former holding that there was no evidence of negligence in using such a vehicle, “having regard to the fact that motor omnibuses have been running in the streets of the metropolis for years,” the latter holding that the case was one for the jury. Fletcher Moulton, L. J., treated the question as one of nuisance to be determined by the application of the rule in Rylands v. Fletcher. “The so-called negligence of the defendants in allowing their omnibus to run when the roads were in a greasy state, must mean,” he says, “that they ought not to have done so because, when so run, the omnibus constituted a nuisance. All else to which it can refer must be covered by the first issue which has already been disposed of.” But he comes to the conclusion that there is nothing which points to any particular class of vehicles “as being so unsuitable for use in street traffic as to constitute a nuisance” or “call into play the doctrine of Rylands v. Fletcher” and "no jury is entitled meromotu to pronounce that a vehicle like a motor omnibus," which had become a usual means of conducting traffic and as such is duly licensed by the authorities and which, while in some ways more dangerous than horse-drawn vehicles are in other respects safer, "is a nuisance without proper evidence."

108 “If,” he says, “a man places on the streets vehicles so wholly unmanageable as necessarily to be a continuing danger to other vehicles, either at all times or under special conditions of weather, I have no doubt that he does so at his peril, and that he is responsible for injuries resulting therefrom, even though there has been no negligence in the management of the vehicle.” In view of the rapid growth of aviation this opinion is of much importance, airships seeming to fall within the precise terms of the definition of vehicles which can be operated only at the operator's risk.
to warrant its prohibition), does not interfere with the liability of the author of the nuisance occasioned thereby."

The collection by a land owner of foreign substances upon his land, or his carrying on of a dangerous business, is regarded as a species of nuisance, perhaps one might call it an incomplete nuisance, a nuisance as it were held in suspense, not of itself unlawful, and so preventable by legal process, or actionable until harm actually results from it. This conception differs radically from that prevalent in the majority of American jurisdictions; in the latter "nuisance" is defined in accordance with the procedure originally appropriate to give legal redress to a land owner for harm done him by his neighbor and so requires that there shall be created a condition existing for an appreciable time after it is seen to be injurious to an adjacent owner or to the public, for, otherwise, no assize of nuisance, the early remedy, the primary object of which was to remove the offending condition, could have lain, since, after the condition was found to be injurious, there would be nothing left to remove. In England the idea of nuisance is not restricted by these procedural limitations, but is defined by the substantive nature of the defendant's conduct and of its effect upon others.

Nuisance thus broadly defined is an excessive use by one person of some private right of his own whereby he has exposed the person or property of another to danger, the word neighbor being used in a broad sense, and including all persons brought into contact with the danger, in the exercise of their independent rights, which they enjoy irrespective of the defendant's permission or consent, such as the owners of property adjacent to that of the defendant and persons exercising, as members of the public, their right to travel upon the public highways. So stated the rule of Rylands v. Fletcher does not impose exceptional obligations upon owners of real property, but is itself an instance of the general principle that every excessive use of a private right which in its nature threatens harm to others, who are themselves

---

104 That this is so appears from his statement earlier in his opinion, that it is not necessary to decide whether a state of things entailing such consequences (constant probability of danger to others) "might not also be stopped by legal process," this he says is "generally but not universally the case."
in the enjoyment of their own independent rights, is a nuisance of cognate thereto. If harm results to such other, he has the right to compensation, whether he has or has not the right to stop by legal process the state of things which has threatened the harm, or having the right to stop it, he has not seen fit to avail himself of it. But in every case the question remains whether the defendant has or has not committed a nuisance in this broad sense of that term, that is to say, whether his use, whether of his property or of the highway, or of any other right of his, has not only threatened injury to others in the exercise of their independent rights, but has been excessive. It not merely attempts to furnish a general test by which to determine the proper line to be drawn between conflicting rights and interests, but it has the great advantage of reducing the question to be solved in each case to two; the first, whether the use of the defendant's right is one which, even if care be taken, can be foreseen as likely to imperil others; second, whether such use is improper and excessive. It cannot be expected that this rule will furnish a standard so definite and certain that by it every state of facts will be automatically settled. The question whether the particular use is to be regarded as excessive or improper is one which will undoubtedly be answered in different ways in different jurisdictions, in accordance with the differing opinion therein prevalent upon economic and social question. But within each jurisdiction the test will be the same, whether the harm for which the plaintiff complains is the continuous invasion of his property or the equally continuous interference with his enjoyment of it, or is a single sudden harm done to it once for all, or is caused by some vehicle which the defendant choses to operate upon the public highway or in a public place. However much the test may vary with the economic attitudes prevalent in the various jurisdictions, in each jurisdiction the same test will be applied to determine the liability for the harm which one does by all one's individual activities; if the activity of one which is so essential to the public good that it must be encouraged by allowing it to be prosecuted at the cost of others, one carrying it on will be as much relieved from liability for harm which it necessarily and directly does as from liability for the harm which originally was merely probable but has in
fact actually resulted. On the other hand, if the business is not so essential to the public welfare that it should be judicially licensed to injure others without compensation, it will be no more permitted to throw the risk of probable harm to others upon them than it will be allowed to throw upon them the burden of bearing the injuries necessarily incident to its operations.

Thus understood the rule of Rylands v. Fletcher marks a great advance in the rationalization of the common law. In it, and the cases which have construed and applied it, the English courts have released themselves from the bonds of the purely procedural definition of the law of torts; under it it is possible to allow to the individual freedom to enjoy his property, or to exercise his activity as he may conceive that his interests demand and at the same time to see to it, that he shall do so at his own cost and not at the cost of others who are not interested in his individual successes. The court is no longer confronted with the alternative of prohibiting the exercise of the fullest individual initiative and so retarding the advance of civilization, which can best be forwarded by such means, and on the other hand allowing the individual, because it is to the interest of the common good that his individual activities should be encouraged, to seek his own advantage at the cost and at the risk of others whose own rights bring them in reach of his acts, so long as he carries on his activities with reasonable care. It recognizes degrees in dangers, no action is prohibited unless it is immediately injurious to the person or property of another, or so dangerous as to actually affect the value of his property, but at the same time it recognizes that there are certain dangerous activities which, while the dangers incident thereto are not so great as to require their prohibition, should be carried on only at the risk of him who profits by them.

While the rule of Rylands v. Fletcher has been approved in many American jurisdictions,105 only a very small proportion

105 Ball v. Nye, 99 Mass. 582 (1888); Shipley v. Fifty Associates, 106 Mass. 194 (1871); Wilson v. New Bedford, 108 Mass. 261 (1872); Mears v. Dole, 135 Mass. 508 (1883); Cahill v. Eastman, 18 Minn. 292 (1872); Berger v. Minneapolis Gaslight Co., 60 Minn. 296 (1895); Defiance Water Co. v. Olinger, 54 Ohio St. 532 (1890). In Kinnaird v. Standard Oil Co., 89 Ky. 459 (1890), and Parker v. Larson, 86 Cal. 236 (1890), the Court uses general
of the cases has presented a state of facts requiring its application to determine the liability of the defendant. In Wiltse v. City of Red Wing, a city was held liable without proof of negligence, for the damage done by the bursting of the reservoir; in Bradford Glycerine Co. v. St. Mary's Woolen Company, one storing nitroglycerine on his land was held liable for the damage done by its explosion; in Brennan Construction Company v. Cumberland, one, for his business purposes, storing crude petroleum in a tank upon his premises was held liable for the damage done to shipping by its escape, without negligence, through a broken valve into an adjacent river, and in Overall v. Louisville Electric Light Company, the defendant was held bound to provide perfect insulation of its wires so as to insure the public from injury by the escape of its electricity. But in the great majority of cases in which the rule has been approved the facts did not require its application because the defendant in his use of his premises had created a condition continuously injurious to the plaintiff and so an "abiding nuisance," under the strictest and most technical definition of nuisance, for which he would have been liable in the majority of those jurisdictions which repudiate Rylands v. Fletcher, or because actual negligence was alleged or proved; or the rule though cited with approval was held, for a variety of reasons, to be inapplicable.

In Massachusetts where the rule in Rylands v. Fletcher has been consistently approved and constantly cited as authority, this

expressions similar to the rule in Rylands v. Fletcher, but in neither of them is that case cited and in neither of them do the facts require its application, the damage complained of being done by the continuous percolation of oil or water from the defendant's premises.

106 99 Minn. 256 (1906).
107 60 Ohio St. 560 (1899).
108 29 App. Cases Dist. of Columbia, 554 (1907). In the very recent case of Weaver Mercantile Co. v. Thurmond, 70 S. E. 126 (W. Va., 1811), it was held that one who had accumulated a large quantity of water in a tank upon his premises was liable for the damage done by its escape. The opinion of the court leaves it doubtful whether the defendant's liability is regarded as resting upon some negligent failure to keep the tank in proper repair, of which the bursting of the tank is prima facie evidence, or upon the rule in Rylands v. Fletcher, which is cited at length and with approval. It would seem that upon the facts the defendant's liability can be supported only upon the latter theory.
109 20 Ky. L. R. 759 (1898), 47 S. W. 442.
is strikingly so. In Ball v. Nye,\(^{110}\) the walls of the defendant’s cesspool had been for a long time out of repair, and the filth had continuously invaded his neighbor’s premises; indeed he is assumed to have known of its intrusion and so to have been guilty of actual negligence. In Shipley v. The Fifty Associates,\(^{111}\) the roof and gutters upon the defendant’s premises

\(^{110}\) 99 Mass. 582 (1868). This is the first case in Massachusetts in which Rylands v. Fletcher is cited as authority. So in the case of Defiance Water Company v. Olinger, while Chief Justice Bradbury said that the rule in Rylands v. Fletcher was “in accordance with justice and sound reason,” the declaration in effect averred negligence in the construction and maintenance of the defendant’s water tank, the bursting of which caused the plaintiff’s injury; so that, as the Chief Justice himself said, there was no reason for its application.

\(^{111}\) 106 Mass. 94 (1871); Ames J., says, p. 108, “if the defendants had constructed a reservoir in their attic, to be filled by the rain, they would clearly be liable for damage occasioned to their neighbor by the breaking down of such a reservoir. In Fitzpatrick v. Welsh, 174 Mass. 486 (1899), a case in which rain water flowed from the roof of the defendant’s stable into the gutter thereon, and was discharged through a hole therein after every rain upon the plaintiff’s land, Shipley v. Fifty Associates, is cited as an instance of the general rule applicable to both cases, which is stated by Holmes, C. J., in effect as follows: One who arranges his premises in such a way that it will manifestly collect water (or snow), which, unless prevented, will be discharged upon another’s land, “has notice that he threatens harm to his neighbor” “so manifest, so constant, and so great” that the law will not permit him knowingly to inflict it and he is bound to prevent at his peril the harm from coming to pass. In Clifford v. Atlantic Cotton Mills, 146 Mass. 47 (1888), it was held, the same judge giving the opinion, that the tenant, not the landlord, of the structure, practically identical with that in Shipley’s case, was liable for the injury to a person walking along the highway by the falling of snow upon him. The reason given is that the structure, as such, was not a nuisance, but was liable to become such by the mere workings of nature alone, unless the tenant cleared the roof or took other steps to prevent it, which, by the exercise of reasonable care, he might have done. The court citing cases to the effect, that a landlord is not liable because a tenant by the wrongful use of the premises creates a nuisance, holds that “it does not matter whether the wrong on the part of the tenant is an act which makes the premises a nuisance or an omission which allows them to become so.” It may be here suggested that, even admitting that the landlord is not liable because a structure, which when turned over to the tenant threatens no harm to others, is, by reason of the tenant’s failure to keep it in repair as he is legally bound to do, allowed to become so ruinous as to be a nuisance, the case presents a different question, for, while the structure when transferred was not a nuisance, it was certain to become so by the mere working of nature alone. The tenant has not allowed the premises, turned over to him in good repair, to get into a condition where the mere operation of natural forces makes them injurious to others, he has merely failed to intervene and so avert the harm which the premises as transferred to him threatened to inflict in the ordinary course of nature.

This decision not only decides that the wrong doer is entitled to expect that others more considerate than he will avert the harm which his misconduct threatens, but it sheds a flood of light upon the Court’s conception of liability for the escape of foreign substances artificially collected upon property. The liability is, it seems, not attached to the creation of the condition, on the contrary, it is held to depend upon the breach of a duty incident to the occa-
THE RULE IN RYLANDS v. FLETCHER

were so constructed that, whenever the snow fell, which it did every winter to a greater or less extent, it collected upon the roof and, unless removed, from time to time fell upon the plaintiff's premises. Here the invasion of the plaintiff's premises was not continuous or uninterrupted, but it was practically certain to occur a number of times during the winter, though not always with the same frequency or to the same extent. In Wilson v. New Bedford\textsuperscript{112} and Mears v. Dole,\textsuperscript{113} the defendant's operations caused water to percolate continuously into the plaintiff's land;\textsuperscript{114} the difference between the two cases being that in the former, the defendant had built a reservoir for the very purpose of collecting the water, while in the latter, sea water had entered and collected in excavations made in the shore of the defendant's land, which excavations were made not for the purpose of collecting the water, but to extract gravel for sale.

The earliest case in Minnesota in which the rule in Rylands v. Fletcher was approved, is in Cahill v. Eastman;\textsuperscript{115} in it the court applied the rule therein to the following circumstances: The defendant had for his own purpose dug a tunnel under the bed of the Mississippi River, and under the site of the plaintiff's mill pond. This tunnel was dug at a depth of thirty feet below the bed of the river. In October, 1869, the water of the river burst into the tunnel and rushed through it in great volume, tearing away the earth at its top and sides to a considerable extent. The inflow of the river was finally stopped, but in April, 1870, during an ordinary spring freshet, the water again burst into the tunnel, rushing through with such violence as to undermine and wash out the bank of the river upon which the plaintiff's mill was situated. The defendants contended that

\begin{footnotes}
\item[112] 135 Mass. 261 (1871).
\item[113] 18 Minn. 292 (1872).
\item[114] So in Berger v. Minneapolis Gas Co., 60 Minn. 296 (1895), the oil from the defendant's reservoir had percolated continuously into the plaintiff's premises.
\item[115] 135 Mass. 508 (1883).
\end{footnotes}
they were not liable in the absence of proof of negligence or unskilfulness in the construction or maintenance of the tunnel. But the court held that they, having dug the tunnel under the plaintiff's land, must answer for it that it should not be the occasion of harm to the plaintiff's property.

This case does not, in fact, appear to involve the principle in Rylands v. Fletcher, which deals only with the liability of one intentionally bringing upon his land foreign substances likely to escape unless effectively restrained, or, at the most, of one whose operations obviously tend to a reasonable probability to cause such substances to collect thereon. It has no application to the above facts unless extended so as to hold a landowner liable for the escape of foreign substance which his operations on his land have, however unexpectedly, caused to accumulate thereon. In fact, the decision seems to be more properly based upon the cases, also cited as authority for the result reached, which hold that a landowner's right to lateral and surface support of his land is an absolute right of property, the infringement of which is, in itself and without more, actionable. In such case it is enough that the defendant has by his excavations undermined the plaintiff's land, it is no excuse that the excavations were carefully made or that there was no reason to expect that they would cause the subsidence which actually results. The defendant is liable for the harm actually resulting from his operations, without the intervention of the act of God or *vis major*; it is no excuse that it was unexpected or even unexpected, or that it was due to some unknown condition of the soil lying between the place where the excavation was made and that where the subsidence occurred.118

There is a distinct tendency in those American jurisdictions which have approved the rule in Rylands v. Fletcher and even those which have followed it in cases requiring its application,

---

118 It is to be noted also, that as the right of the landowner to have his soil remain in the position in which nature placed it is absolute, it is no defense that the subsidence was caused by the excavations made by the defendant in the course of his "natural" use of his land. He is as much liable where he causes his neighbor's land to subside by his farming operation, by digging a cellar or by the removal of the mineral support to surface land in the usual course of careful mining (Robertson v. The Company, 172 Pa. 566, 1896), as he would be had the excavations been made for any other purpose.
to either withdraw their approval and to repudiate it *in toto* or to limit its application. In Owensboro v. Knox's Adm.\(^{117}\) the Supreme Court of Kentucky in effect overruled Overall v. Company\(^{118}\) and held that there is no liability for the escape of electricity from wires upon a public highway unless there has been a failure to exercise that high degree of care which those dealing with so dangerous a substance are bound to observe. And in California it was held in Judson v. Giant Powder Co.\(^{119}\) that one storing explosives in a proper place, is only liable for their explosion if he fails to exercise proper care in their custody, though in both cases the explosion of the gun powder or the escape of the electricity is regarded as in itself sufficient evidence of negligence.

In Langabaugh v. Anderson,\(^{120}\) a defendant, who had, as lessee of oil wells, stored crude petroleum in a tank, which, without negligence, burst, discharging the petroleum upon the plaintiff's land, from which it spread to the adjacent land of a third party, where, coming in contact with fire thereon, it was ignited, was held not to be liable for the burning of the plaintiff's buildings in consequence of the fire spreading back along the track of the petroleum.

The opinion is by no means clear. On one page the court, in an effort to distinguish the case in hand from Bradford Co. v. St. Mary's Co., appears to draw a distinction between substances which are "in all places and under all circumstances dangerous," which "are made for their dangerous qualities and are bought and sold and used as explosives," and whose owners therefore "assume at once the liability of their accomplishing natural and probable results" and substances such as crude petroleum. Yet, on the next page, Rylands v. Fletcher is held to be good authority for holding the defendant liable had the plaintiff complained only of the damage directly done him by the flooding of his premises by the petroleum. But it is said to be no authority for holding the defendant liable for any consequential injuries,

\(^{117}\) 116 Ky. 451 (1903).
\(^{118}\) *Ante*, n. 104.
\(^{119}\) 107 Cal. 549 (1895).
\(^{120}\) 68 Ohio St. 131 (1903).
for any indirect results of the invasion no matter how natural or even probable. One might therefore regard the distinction, tentatively drawn between substances whose dangerous qualities give them commercial value and those whose value is not so determined, as being as unimportant as it is unsound, were it not for the fact that in the case of Marsh v. Lake Shore Electric Railway, one of the Circuit Courts of Ohio held that the electricity being, like steam, a substance valuable not because of its danger, but because of its usefulness, those using it are not insurers of the safety of others coming into contact with it, but should only be "held to the exercise of care commensurate with its deadly qualities."

In practically all the American jurisdictions which have approved Rylands v. Fletcher, there is, as might perhaps be expected in view of the prevalent economic attitude of the courts

---

121 The distinction between articles whose commercial value depends upon their dangerous qualities and those whose value is not so determined is based upon a merely superficial difference. The important fact is whether they are dangerous if they escape and whether, unless artificially confined, they are likely to escape in obedience to ordinary natural laws. What they will accomplish when removed from the defendant's premises and carefully used by others is quite beside the question. The distinction is of the same vicious sort as that drawn by Sanborn, J., in Huset v. Case Machine Co., 120 Fed. 865 (1903), between "articles intended to preserve or affect human life" and articles which unless carefully made will be dangerous for the use for which they are sold as suitable, in determining the liability of the maker for injury to one not his immediate vendee, as to this see 53 American Law Register, pp. 357 to 364.

122 It is noted that the defendant, who was the lessee of the oil well, had covenanted with his lessor to replace the latter's house if it was destroyed by fire caused by his negligent operation of the well. While, as the Court points out, this only covers the destruction of the house by negligence, it shows clearly that the defendant's attention was called to the danger from fire if his operations should miscarry and the oil should escape. And while the covenant to which the plaintiff was not a party could not create rights in him or obligations to him, the existence of a contract, to which the defendant is a party though the plaintiff is not, may be a very important evidential fact, as showing whether the defendant or some third party is bound to repair a structure, Payne v. Rogers, 2 Hy. Blackstone 349 (1749); Quinn v. Crimmins, 171 Mass. 255 (1898), or as here that a particular consequence of the miscarriage of his business was foreseen by him.

123 5 Ohio Circuit Court Rep. N. S. 405 (1905). The case might well have been decided on the ground that the use of electricity was a necessary incident to operations authorized by legislative sanction, see Price v. Metropolitan Gas Co., ante, n. 98. The whole decision also shows that the great value of electricity in the service of civilized mankind was regarded as a reason for holding one, who employed it, answerable only upon proof of negligence; as to which see The City Water Power Co. v. Fergus Falls, post, n. 126, and Quinn v. Crimmins, post, n. 129.
as exhibited in the cases, already given, which deal with the right of a riparian owner to utilize the water of the stream flowing by his land, a distinct tendency to repudiate the limitation of the uses which may be made of land without liability for the escape of foreign matter incidentally collected thereon to "natural" uses in the sense in which Lord Cairns used that term in Rylands v. Fletcher, and to hold that the rule announced by Mr. Justice Blackburn should only apply to unusual and extraordinary uses which are fraught with exceptional peril to others. It is said that no liability attaches, unless negligence be proved, where the defendant's use of his property "brings about new conditions which involve risks to the person or property of others, but which are ordinary and usual and in a sense natural, as incident to the ownership of the land."\(^{124}\) So it has been held in Massachusetts that "the rule is not applicable to the construction and maintenance of the walls of an ordinary building" (or of a fence) "near the land of an adjacent owner."\(^{125}\)

In Ohio it was held, even before the court showed a disposition to recede from their full approval of Rylands v. Fletcher, that one who used steam on his premises was not responsible for the bursting of a carefully selected and properly operated boiler,\(^{126}\) and in a very recent case in Minnesota it was held that the building of a dam across a stream to obtain power for a mill was not "an unnatural or unusual use, but the contrary."\(^{127}\) So, too, it was held in Missouri that, even if the

---


\(^{125}\) Ainsworth v. Lakin, ante, n. 123.

\(^{126}\) Huff v. Austin, 46 Ohio St. 386 (1889). It is to be noted, that the boiler was, like that in Losee v. Buchanan, ante, operated on the defendant's private premises and not under statutory authority, as is the boiler of a railroad locomotive engine. The case of Campbell v. Spencer, 9 W. & S. (Pa.) 32 (1845), cited in the opinion, does not fall within the doctrine of Rylands v. Fletcher, since the plaintiff was injured upon the defendant's land, upon which he had come as a business guest.

\(^{127}\) City Water Power Co. v. The City of Fergus Falls, 128 N. W. 817 (Dec. 16, 1910). In Gould v. Winona-Gas Company, 100 Minn. 259 (1907), it was held that a gas company was liable for escape of gas from its pipes only upon proof of negligence. The Court rejects the argument that "the gas company is a public service corporation engaged in furnishing an essential of modern city life which it may be compelled to do on terms, inasmuch as this is a voluntary undertaking for profit." In fact the company was operating under legislative authority which even in England would have protected it from liability, see Price v. Gas Co., ante, n. 98.
rule in Rylands v. Fletcher were the rule in that state, the bringing of water "into a house through pipes in the way usual in all cities, for the ordinary use of the occupants," was widely different from the collection of a great volume of water in a reservoir, and while it could not perhaps be properly said to have come on the premises in what Lord Cairns called "natural uses" of the premises, yet it is "brought in by the method universally in use in cities and is not to be treated as an unnatural gathering of a dangerous agent." 128

Two elements are often regarded either separately or together as of importance in determining whether the use is one which is at the owner's risk or one for the consequences of which he is liable only if guilty of personal negligence, or whether, in some jurisdictions, in cases falling between the two extremes, it is one, as to which he is bound to answer for it that care shall be taken to prevent harm to others, whether he attend to the matter personally or by others, such as his servants, for whose acts he is legally responsible or by an independent contractor over whose actions he retains no control and who possesses the special skill which he himself lacks and which is requisite for the proper performance of the work.

The first of these is the public interest, as shown by the fact that the use is recognized by legislation as worthy of encouragement and protection, or as in each particular case judicially determined "by the benefits to be derived from it and the dangers or losses to which others are exposed." The fact that dams were legislatively favored by the Mill Acts, appears to have been regarded as important, if not decisive, in City Water Power Co. v. Fergus Falls,129 and Holmes, J., says, in Quinn v. Crimmins,130 that, "as it is desirable that buildings and fences should be put up, the law does not throw the risk of that act

128 Valliant, J., in McCord Rubber Co. v. St. Joseph Water Co., 181 Mo. 678 (1904), p. 694. See also, Sutton and Ash v. Card, W. N. 1886 (Eng.), 120, in which it is said that "there is a wide difference between permitting water which a man has fouled himself to flow into his neighbor's premises, and the leakage of fair water from a supply pipe without any negligence on his part, such a mode of supply being the ordinary way of using a man's own property."

129 Ante, n. 127.

any more than of other necessary conduct upon the actor, or make every owner of a structure, insure against all that may happen, however little to be foreseen." It would seem that on principle the opinion of the legislature that mills ought to be encouraged, or that of the court that buildings should be built, should not be decisive that the risk thereof should be borne by the neighbors rather than by him who owns the dam or building. There can be no doubt that it may well decide the question as to whether a structure threatening some danger, should or should not be held to be unlawful and so removable by abatement or injunction, but it is to be noted, that the very mill acts alluded to, as showing the recognition of the public benefit of mill dams, provide that the harm done by the flowing necessary to their erection is to be borne not by the upper owners whose land is flooded, but by the mill owner. Their object is not to enable mills to be run at the cost of other riparian owners, but simply to prevent them from being legally stopped by them.181

The second element sometimes considered is the fact that the defendant has not brought on the land any substance not coming naturally thereon, but has merely utilized in a lawful way (or even in a way not only sanctioned, but favored by the law), a beneficial natural advantage incident to his land, or has protected himself lawfully from a natural enemy.182 On this

181 It may perhaps be suggested that, the encouragement of industry or civic development at the cost of those unfortunate enough to own property near to the proposed improvement would appear less just had the public sense of equal justice not become dulled by long continued contemplation of the spectacle of the public, taxed upon practically every article it purchases in order that domestic manufactures may be profitably carried on.

182 The same distinction is found in many cases dealing with the liability for continuous nuisance; so in Evans v. The Fertilizer Company, 160 Pa. 209 (1894) the fact that the interference with the plaintiff’s enjoyment of her property arose from substances artificially brought upon the defendant’s land, and employed in his business is regarded as of great importance; see also, Robb v. Carnegie, 145 Pa. 324 (1891). In Parker v. Larson, 86 Cal. 236, (1890) it was held that one who brought water by artificial means (by artesian wells) upon his land must take care of it and not permit it to injure his neighbor. The Court emphasizes the fact that the water that did injury to his neighbor, was not a natural stream flowing across his land, thus distinguishing the case from those cases in California and neighboring States, which hold that one, who is utilizing the water naturally flowing upon or by his property for the purpose of irrigating his land, is not liable, in the absence of negligence, for the damage done to his neighbors by percolations through the banks of the ditches required therefor.
ground the Supreme Court of Minnesota distinguished The City Water Power Co. v. Fergus Falls\textsuperscript{133} from Wiltse v. Red Wing\textsuperscript{134}—holding that in the latter case the defendant had artificially created the danger, as it were out of the whole cloth, having brought the water by artificial means upon his premises where it did not naturally belong, and that in the former it had merely "impounded in a natural and usual way, for a public as well as private use, the waters of a natural water course." So in Jones v. Robertson,\textsuperscript{135} it was held that a mine owner, who, by artificial banks, had diverted into a new channel a stream, which threatened to inundate his mine, was not liable because he had not collected on his land any water not naturally there, but had merely protected himself, as he lawfully might, against a natural enemy already on his premises. Once accept the view that the use of a riparian stream for the supply of mill power is as natural and proper as is its use for farming or the view that an owner is entitled to protect himself against a stream by diverting it within his own boundaries and it would seem to follow that the mill dam cases do not conflict, save to the above extent, with Rylands v. Fletcher.

It will be noted that with the exception of the mill dam, every one of these uses is not merely of benefit to the public generally, it is a use usual to all the land in the neighborhood; so it is a benefit to all the neighbors that land may be so utilized without fear of legal liability. In a city practically every one maintains on his property ordinary walls and fences, in every house there are water pipes; the very plaintiff whose house is flooded by the escape of water from the bursting pipes on his neighbor's premises, himself is using similar pipes to supply his own house with water. In a word, such things as buildings, walls, and fences, and the laying down of water pipes for domestic uses, are inseparable incidents to the residential use of all such property. The value of every city lot is enhanced by the right to so use it without liability so long as care is exercised. There is not, therefore, merely the benefit to

\textsuperscript{133}\textit{Ante} n. 127.  
\textsuperscript{134}\textit{Ante} n. 106.  
\textsuperscript{135}116 Ill. 543 (1886).
the public generally in permitting the utmost freedom in such uses, it is a distinct advantage to the very neighbors who themselves run the risk incident to the exercise of the defendant's similar right. Such uses, therefore, while not "strictly natural" in the sense in which Lord Cairns uses that term, are cognate thereto and fall within the reason which have led the English courts from time immemorial, to treat "natural uses" with favor. These uses do not represent merely the owner's personal choice of a use which he regards as best serving his interest; on the contrary, they are the uses which all persons agree make city land valuable. Perhaps, even in the ordinary case of damage done by bursting mill dams, there is a practically similar situation, for, while this is not invariably the case, it usually happens that the very person who suffers is himself a mill owner whose dam is carried away.

Perhaps it may not be obvious at first glance why all this should make a difference, but it seems fair that one, who personally profits by the privilege to use his land in a particular way, may not complain of the result of the exercise of another's similar right; while if the defendant's use be merely for the benefit of the public generally, in which the adjacent owner shares merely as one of the public, it seems that the latter should bear no greater part of the damage done by that use than any other member of the public, who, as such, share equally the benefits derived from permitting it. To throw the whole of the loss upon one member of the public, simply because it is his misfortune that his property should be situated near to the place which the defendant selects to carry on the business, tending to increase the general prosperity, is, it seems to the writer, to throw upon him a loss altogether out of proportion to his share in the benefit derived from the encouragement of the industry.

If the public be interested, let the public as such bear the loss, but if the neighbors have such profit by the business by

\[\text{186 As a matter of abstract fairness it would seem, if the business is one which is essential to the good of the State as a community and yet is of a sort that would not attract private enterprise, if it were forced to bear, as part of its operating expense, the cost not only of repairing the damage which it does to its own plant and property but also of making good the harm which it causes to others, that the State itself should relieve} \]
reason of the fact that the right to carry on such business adds value to their land, or because the value of their land is enhanced by the character of the locality due to the presence of

the business of this burden, either by paying for the loss itself or by reimbursing the business which itself is to make the payment. In either event the payment would finally be made out of the public funds raised by taxation, and as taxes are laid upon the wealth of the country, each citizen would pay in proportion to his share in the general prosperity. So his share of the payment necessary to encourage the operation of the business would correspond to the benefit which he as a member of the public has derived from its operations.

Every burden which an individual is forced to bear for the benefit of the State is, in the last analysis, a species of taxation, and it is a fundamental principle that taxation shall be laid equally upon all benefited by the expenditure of the fund realized thereby. If the fund is to be expended to increase the general prosperity of all citizens, it must be borne by all in proportion to their share in that prosperity as shown by their wealth. If any particular class is to be peculiarly benefited by its expenditure, the whole or the greater part of it may well be laid upon that class, so long as the burden is borne equally by all of that class. If an individual derives peculiar benefit from it he may be required to bear the entire burden. But it violates every canon of taxation that the whole burden should be laid upon some individual, having no peculiar interest in the object secured by its expenditure, simply because of some accidental circumstance, such as the location of his property. To throw the risk of a business essential to the public interests upon a particular individual who derives no special benefit therefrom, simply because the exercise of his rights brings him within reach of its injurious effects, is not substantially different from the conduct of a Sultan of Morocco, who in order to raise funds for the carrying on of a war, confiscates the property of the nearest rich man.

Twenty years ago the suggestion that the State should, as such, bear this burden, would have been regarded as a wicked socialist heresy or, what is perhaps worse, a mere academic theory. The principle that one, whose person or property had been injured for the public benefit, must himself bear the loss, has from the earliest times been a principle of the common law and has been extended to cases where the property of one man has been sacrificed to preserve the property or the life of many. This conception seems to the writer to denote a crude state of jurisprudence prevalent at a time when the State was regarded as a police officer, whose sole function was to see that individual citizens paid due regard to the rights of their fellows; it is noteworthy that in the more advanced jurisprudence of Rome, if one man's property were sacrificed to secure the safety of that of many, the burden was equally distributed, by contribution, among all those whose property was imperiled. This conception of the common law has been preserved by the extreme individualistic attitude of the English people, whose most marked political characteristic has been their intense jealousy of the power of the State and their distaste of anything savoring of State regulation or paternalism. This characteristic culminated in the doctrine by \textit{laisser faire} utilitarianism which dominated public opinion during the greater part of the last century.

The reaction from the extremes to which this doctrine was carried, has however in recent years led in England to an entirely different conception of the proper functions of the State, and to an impulse in favor of what may be called distributive justice. Much of recent English legislation is designed to transfer the loss necessarily arising under the complicated conditions of modern life to the public or to the person most benefited by the activities which causes it, who, as such, is regarded as the person who should bear it, or to distribute it through him among the public at large or least among
the defendant's enterprise, then, they being peculiarly benefited, may be properly singled out to bear the loss. Nor is it to the public interest to allow the business even though it be one which conduces to the general prosperity, to be carried on at the cost of the neighbor or of the public, unless the risks be so great that no person be expected to engage in it on any other terms. The margin of profit in a particular kind of business, which may be essential for the satisfaction of some general want, may be so small, or this sort of business so in its infancy, that certain privileges may well be accorded to it, but it is certainly not to the public interest that he who carries on any business should be relieved from bearing the burden of the damage which that business does, as part of the cost of its operation, merely that his profits may be increased.

It has been seen that the same influences which led the American courts to allow to the riparian owner a latitude of permissible business use of the water of the stream, much greater than is allowed in England, have resulted in a restricted application of the rule of Rylands v. Fletcher even by those courts which have adopted it. But, in the one case as in the other, this has been due to the economic attitude of the courts which has led them to relieve from all burdensome liabilities those, who, in a usual and ordinary manner, develop and use their property or who devote it to a use which in the opinion

that part of it, which being served by his activities, seems peculiarly interested. Of this latter class the Working Men's Compensation Acts of 1897 and 1906 are conspicuous instances. While this tendency is not apparent to anything like the same extent in America, signs of a similar case in the public opinion is not entirely lacking. A movement for the adoption of workmen's compensation acts, similar to that in force in England, has already secured the passage of such an act in New York and the introduction of like acts in the legislatures of many other States, and in the Noble State Bank v. Haskel, 31 U. S. S. C. Rep. 186 (1911), the Supreme Court of the United States has held constitutional an act imposing upon all banks of a State the burden of contribution for the purpose of guaranteeing the solvency of all such banks as a group.

187 So Bradbury, C. J., in Bradford Glycerine Co. v. St. Mary's Co. ante, n. 107, distinguishes between the storage of nitro-glycerine and the use of a steam engine, inter alia, as follows: "The existence of a manufacturing establishment, although it may employ steam as a motive power, may be and doubtless in many instances is, a positive benefit to real property in the neighborhood, while on the contrary the erection and use of a nitro-glycerine magazine can have no other than a disastrous effect on the value of all real property in the neighborhood."
of the court serves the necessities of the community or tends to increase the general prosperity. But while they require proof of negligence before one, so utilizing his property, is to be held liable for the harm done, yet there is an ever increasing tendency to hold that the fault need not be that of the defendant himself or of any one for whose general conduct he is legally responsible. In a constantly increasing number of situations, one who has caused work to be done for him by an independent contractor, over whose conduct he has no control and whose acts are nowhere regarded as his (as are the acts of his own servants), is held responsible if, because of the negligence of such contractor, the work let to him is badly done to another's harm. And this is so though the work requires special technical skill which the defendant himself cannot be expected to possess, and though he has carefully selected a contractor of the highest reputation for the possession of the requisite skill. It is evident, therefore, that the defendant is not held liable because of any supposed negligence in not doing the work himself, for nothing could be more reckless than such an attempt, nor in failing to retain the power to supervise the work, for it is evident that the supervision of an expert by one knowing nothing of the matter would not tend to secure a proper performance of the work.

The cases in which this liability has been imposed fall into certain distinct classes, in some of which the liability may well rest upon reasons peculiar to themselves but in others of which it is not susceptible of such explanation. In one class of case it is held that certain positive duties, such as that which an owner of property owes in respect to the repair of structures so situate that if ruinous they would be injurious to his neighbors, or that which one, who invites the public to frequent

---

188 It may well be that where the permission is given to break a highway or a franchise granted to operate a railroad, there is a choice of the particular grantee as the person responsible for the results of the exercise of the privilege. Again it may well be that liability of a carrier of passengers in such cases is due to the peculiar nature of the relation. A carrier of goods is well known to be an insurer against all damage except those which arise from an act of God or the public enemies; the stringent duty of the carrier of passengers may be derived from this duty and be a mere relaxation from it.

189 Tarry v. Ashton, ante, n. 84; Earl v. Reid, 21 Ont. L. R. 545 (1910); Gorham v. Gross, 125 Mass. 232 (1878); Cook v. Blossom, 162 Mass. 330 (1894); Ainsworth v. Lakin, 180 Mass. 397 (1902); McHarge v. Newcomer, 117 Tenn. 595.
his premises, owes in respect to its proper preparation for their reception, or that which one who furnishes chattels to another for use in his, the supplier's, business owes to see that they are fit for the purpose for which they are supplied, cannot be delegated even to an independent contractor so as to relieve those, on whom the duty originally lay, from liability to answer for their proper performance. Other cases hold one, who has caused work to be done by an independent contractor which necessitates the creation dangerous to others till removed or guarded, answerable for the failure of his contractors to remove or guard the danger or in the alternative to give notice of its existence so that it may be avoided. The principle is carried farthest in those cases which hold that one who lets out work, dangerous unless preventive measures be taken, liable for the independent contractor's failure to take the necessary precautions.

---


14 Mulchey v. Congregation, 125 Mass. 487 (1878); Jacobs v. Fuller & Hutsenpiller Co., 67 Ohio St. 70 (1902); Stevens v. United Gas & Electric Co., 73 N. H. 159 (1905), semble.


18 Covington Bridge Co. v. Steinbrock & Patrick, 61 Ohio St. 215; Flynn v. Butler, 189 Mass. 377 (1905); P. W. & B. R. R. v. Mitchell, 107 Md. 600 (1908); Joliet v. Harwood, 86 Ill. 110 (1877); James v. McMinimy, 93 Ky. 471 (1892); Wetherbee v. Partridge, 175 Mass. 185 (1900); Norwalk Gas Co. v. Norwalk, 63 Conn. 455 (1893); the last four cases being cases of blasting done by an independent contractor; in FitzSimons & Conwell Co. v. Braun & Fitts, 199 Ill. 396 (1902), it is held that one who uses explosives for blasting does so at his peril and is liable for damage done thereby, even though the damage is done by the concussion of the air caused thereby, no tangible substance being thrown onto the plaintiff's land so as to constitute a technical trespass as required in French v. Mix, 143 N. Y. 90 (1894), and Fox v. Borkey, 126 Pa. 164 (1889); Colton v. Onderdonk, 69 Cal. 155 (1886), accord: So one who engages a contractor to clear his waste land by fire is liable if, by the latter's negligence, it is allowed to spread, Blake v. Christ Church Dist., L. R. 1894 A. C. 48; St. Louis, etc., R. R. v. Madden, 77 Kans. 80 (1908). Its extreme expression is found in the statement of A. L. Smith,
Many of the very states which refuse to follow Rylands v. Fletcher in holding one, who erects structures or carries on operations upon his land dangerous to his neighbors or the public, answerable if harm come thereby to them, hold him bound at his peril to have the structures carefully erected and maintained and the operations carefully carried out, even though the structure or operations be such, that he can by no possibility possess the skill or knowledge requisite for their erection, maintenance or execution or for the intelligent supervision thereof.144

These cases therefore recognize a liability without fault on the part of the defendant himself, or of any one with whom he is legally identified and for whose acts by reason of the relation between them he is legally answerable as though his own. It seems quite certain that while the element of fault is present, the liability is quite incompatible with rationale of the conception that fault is essential to liability.

It is impossible to enter into the causes which led to the

L. J., in Holliday v. National Telephone Company, L. R. 1899, 2 Q. B. 392, at p. 400, that "it is very difficult for a person who is engaged in the execution of dangerous work near a highway to avoid liability by saying that he has employed an independent contractor, because it is the duty of a person who is causing such work to be executed to see that it is carefully carried out so as not to occasion any damage to persons using the highway." Nor, in such case, is the negligence regarded as collateral if it is in the very act which the contractor is employed to perform.

144 In Massachusetts the liability varies with the nature of the use and the extent of the danger involved therein to others. A certain use of property may, of course, be unlawful per se and enjoivable as a nuisance because immediately injurious to the property of an adjacent owner or his enjoyment of his premises or so imminently dangerous as to substantially interfere with the use thereof and depreciate its value. Another use may be so extraordinary and unusual and so fraught with peril to others that it should be permitted only at the owner's peril, see per Knowlton, J., in Ainsworth v. Lakin. Another use may, while dangerous, be reasonably safe if carefully carried on and may be "ordinary and usual and in a sense natural," if so he who carries it on is bound to make it "safe so far as it can be done by the exercise of ordinary care on the part of all those engaged in the work" and "he is responsible for the negligence of independent contractors as well as for that of his servants," Knowlton, J., in Ainsworth v. Lakin, ante. In this class falls the maintenance of ordinary walls and buildings, Ainsworth v. Lakin; Cork v. Blossom, ante, n. 139; Gross v. Graham, ante, n. 139; and such uses of property as the storage of explosives, Flynn v. Butler, 180 Mass. 377 (1905). On the other hand if the use be one which will ordinarily do no harm unless there is positive carelessness, the owner is only liable if he or his servant by their negligence cause it to be harmful. There is an obvious difference says Cockburn, C. J., in Bower v. Peate, ante, n. 142: "between work which is properly done no injurious consequences can arise" and "work from which mischievous consequences will arise unless preventive measures are adopted" or positive carefulness exercised.
The astounding revolution in the judicial idea of justice whereby the old conception, that one who did harm should, because he caused it, pay for it, gave place to the concept that it would be unjust to transfer the harm which had befallen one innocent party to another equally innocent, merely because the first was the passive victim which the other by his activity had caused the damage, and which therefore required as a requisite to recovery that the defendant should be proved in actual fault, moral or social. But it may be said with some confidence that legal redress for harm done was, it seems to be admitted, the result of the effort of organized society, in its earliest stages, to preserve the peace of the group or community from disturbance by those desiring to wreak their vengeance upon the author of some harm done them. This desire for vengeance, for the satisfaction of the brute instinct to make reprisal upon the cause of one's harm, innocent or guilty, animate or inanimate, a desire so strong as to lead to its satisfaction by force, if not otherwise satisfied by some substitute therefore provided by society, whether by punishment of the author of the harm or the payment of an equivalent to the person injured, naturally and inevitably determined the nature of the redress which society afforded by legal process and led to the original conception that he, who breaks, pays. When this conception first appears in the Anglo Saxon law, it has lost much of this vengeance element, such as appears in the Hebraic rule of "an eye for an eye, a tooth for a tooth." Compensation is given for harm directly though innocently done, but punishment is only meted out to the author of it when he is in some actual fault. It is impossible to accurately trace the influences which led the English courts to adopt the altogether different view that actual fault is essential to the legal liability to make compensation for harm done. The following not altogether improbable hypothesis may, however, be suggested. Were this attitude peculiar to the English law, it might be ascribed to the influence of the original criminal nature of the writ of trespass which was the remedy by which the King's Court gave redress for injury done by one subject to another; the allegations therein, of violence and breach of the peace, though soon regarded as mere surplusage, and the plea of not guilty would naturally tend to cause misconduct to be regarded as a requisite to redress. Yet the original conception, that one was fully liable for the harm done even by one's innocent acts, persisted in cases where no actual violence or breach of the King's peace existed for centuries after the King's Court took jurisdiction of harm done by one subject to another. And while there are many apparent survivals of the earlier conception in cases of the sort which naturally arise in the early stages of social development, the general principle that liability arises only from fault, was deeply rooted in the civil law at the time of Justinian and was stated as the general basis of all tort liability. Therefore, this conception seems to be one which has spontaneously sprung up, and replaced the older and fuller standard of liability, at what may be surmised to be substantially similar periods in the development of both systems of jurisprudence.

So long as society could preserve its peace only by the satisfaction of grievances which would otherwise lead to private feuds, it is evident that the conception of the limits of legal liability must coincide with the individual sense of grievance against those who in fact cause harm, and, as it could not be expected that an individual would placidly bear an injury because the act which caused it was beneficial to the general interest of the community, it follows that the extent of legal liability could not be determined by its effect upon the common good. But when the State became more powerful, it be-
that the conception concerned itself entirely with the injustice of requiring an innocent author of harm to answer for it. Looking at the matter purely from the point of view of the plaintiff, his claim to be made whole is as just, his right as valid, whether his harm is caused by accident or fault; in each case his loss is the same, in each he is an innocent and passive victim. The justice of his demand for compensation is not affected by the subjective quality of the act which causes the harm. It will not do to say that every one takes the risk of accidental harm, but not of harm caused by the fault of others. This merely states an effect or consequence of the principle that no one ought to be required to make good harm which he has innocently caused.

An entirely new system of jurisprudence might well contain, as a fundamental principle, the conception that liability to repair harm done is only to be imposed as a species of punishment for misconduct, moral or social. But this was not the original conception of the English law—on the contrary, it was an innovation, though an innovation now some four hundred years old. It came in gradually as a defense rebutting the liability attacking under the older conception that he, who breaks, must, because he breaks, pays. The defendant was allowed to escape a liability, under which he \textit{prima facie} lay, because it was considered unjust to transfer the loss from one innocent person to another equally innocent. The absence of fault, therefore,
originally served as a defense which relieved an innocent cause of harm from liability to make good the loss he had occasioned. And while in new actions fault was regarded as essential to recovery, it was still required because it was thought more just to leave the loss where it had fallen than to single out the innocent defendant as the victim simply because he was the author of the loss. The fact that the plaintiff's harm is caused by some one's fault is no good reason why one innocent thereof should pay for it. Whether the fault is important because liability is only imposed as a punishment, or because innocence is a defense to the *prima facie* liability of the author of harm, because of the injustice of the transferring the burden from the shoulders of one innocent person to those of another equally guiltless—the fault of one other than the defendant can logically make no difference to the plaintiff's right to recover. It is certainly unjust to punish one man for the fault of another, especially for that of one for whose acts he is not legally responsible, nor should the guilt of a stranger invalidate his defense of innocence when offered in bar of the liability *prima facie* answering from his authorship of the harm. That the work is ill done may show that the one injured thereby should recover against the person in fault; it does not show that he should recover against one innocent of all misconduct.

These cases show a distinct revulsion from the conception that fault is essential to liability. The defendant, himself innocent, is held liable because, by causing, for his own purposes, dangerous work to be done, he is the author of the harm caused by its performance without the precautions necessary to secure the safety of others. This is a distinct reversion to the earlier conceptions that he who causes harm, however innocently, is, as its author, bound to make it good. They seem to be the result of one of those illogical compromises between conflicting conceptions which are inevitable where the public sense of justice, having changed with a change in economic and social opinion, leads the court to feel its way to the abandonment of some long accepted conception, now felt, though perhaps only vaguely, to be no longer tenable or satisfactory. Such compromises are the usual indication of a transition period in the
development of the law, in which it is seeking to adapt itself to new conditions and to accommodate itself to a changed public sense of what is just and desirable. It cannot be expected, nor in the writer's opinion is it desirable, that the principles announced therein should find a permanent place in the law: they seem rather to be a bridge between the old conception and some new solution of the problem of the proper distribution of the loss necessarily caused by the individual activities of civilized mankind, each in pursuit of his own interests. And as no one indefinitely remains upon a bridge, but either passes over it upon his way or returns to the shore he has left, so it is to be expected that the courts, which have in these cases parted company with the idea that no person need make good the loss he innocently causes, will either return to that principle, abandoning the position they now occupy, or that they will go on in the path on which they have started and will work out some new principle for the distribution of the loss, which will satisfy the more highly socialised modern sense of justice.

Francis H. Bohlen.

University of Pennsylvania.