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LIABILITY FOR INJURIES DONE BY BLASTING WITHOUT PROOF OF NEGLIGENCE.

The case of *Turner* v. *The Degnon McLean Contracting Company,* reported in 90 N. Y. Sup. 948 and decided December 9, 1904, presents not only one of the latest decisions on this subject but one of the broadest. The facts of the case were that the plaintiff, while lawfully walking along Forty-second Street in the City of New York, was struck by a piece of rock and injured. The rock was thrown out of the New York Subway excavations by the blasting of defendants, who were employed on the work as subcontractors. The plaintiff sued in trespass and on the trial defendant offered to prove that all care had been used in the

blasting, but the court refused to admit the evidence, holding that it was immaterial, as the action was not for negligence but for the injuries resulting from defendants' trespass. The evidence was subsequently admitted under the general issue to show that the defendants had not caused the injury. The jury found, however, that the stone was thrown by the defendants' blast and that it caused the injury to plaintiff and brought in a verdict for the plaintiff.

On appeal the Supreme Court, Appellate Division, affirmed the lower court, holding in substance, first, that a party blasting on the public highway or on private property is liable for injury done by casting rocks or dirt on neighboring property without negligence being shown, because his entry on the property is a trespass and unlawful and he is therefore liable whether it was done negligently or not; second, that the casting of stone or dirt by blasting from a private property onto the public highway is an unlawful entry on the public property and the party is liable for the injuries that may result without negligence being shown; and third, that a party working under the authority of the city on the highway has a right in only so much of the highway as his charter allows him and any casting of rocks or dirt by blasting beyond his right in the highway into any other part of the highway in the possession of the public is an unlawful entry and he is liable for all injuries that may result. The opinion was delivered by O'Brien J. and Van Brunt P. J. and Patterson J. concurred.

Laughlin J. wrote a dissenting opinion in which Hatch J. concurred. The dissent was on the principle that the technicality of a trespass did not exist in this case, as the defendants had a right in the street under the city and the city was in possession of all the streets, wherefore the defendants could not be guilty of an unlawful entry into that which they had a right of entry granted by the proper authority, and that plaintiff's only right of action lay in negligence.

From a legal standpoint we have here a conflict of principles. On the one hand the contractor was only pursuing his lawful business as authorized by the city, and where one

in his lawful business causes without negligence and unavoidably an injury, it is *damnum absque injuria.* On the other hand, one of the oldest maxims of the law is "sic utere tuo ut alienum non laedas," and as Judge Gardiner said in *Hay* v. *Cohoes:*

"If these rights conflict, the former must yield to the latter, as the more important of the two, since upon grounds of public policy, it is better that one man should surrender a particular use of his land, than that another should be deprived of the beneficial use of his property altogether."

The leading case in New York on this subject is that of *Hay* v. *Cohoes,* 2 N. Y. 159, decided in 1849. It was a case where a girl, walking along a public highway, was a part of the Erie Canal and in doing this, they threw some dirt and stone on plaintiff's land by blasting. No negligence was shown, and the court held that it was not necessary as the action lay on defendant's injury to plaintiff's land. The court continues:

"He may excavate a canal but he cannot cast the dirt or stones upon the land of his neighbor, either by human agency or the force of gunpowder. If he cannot construct the work without the adoption of such means, he must abandon that mode of using his property or be held responsible for all damages resulting therefrom."

In 1874 the case of *St. Peter* v. *Denison,* 58 N. Y. 416, was decided. In this case the plaintiff was working in a field adjoining the Erie Canal when he was struck by a piece of frozen dirt from a blast made by the defendant and he sued in trespass for the injury. The court on appeal said:

"It follows, then, that the defendant having no right to invade the premises, which, for the purposes of this case, were in the possession of the plaintiff, it matters not whether or no he made his invasion without negligence."

This extends the rule of *Hay* v. *Cohoes* to cover personal injuries and bases the recovery on the defendant's trespass on plaintiff's property as a wrongful act.

The next extension of the rule appears in *Sullivan* v. *Dunham,* 161 N. Y. 290, decided in 1900, which was a case where a girl, walking along a public highway, was struck by a piece of a tree stump, which defendant was blasting out of his land. The court held as follows:

"We think the courts below were right in holding the defendants liable as trespassers, regardless of the care they may have used in doing the work. Their action was a direct invasion of the rights of the person injured, who was lawfully in a public highway, which was a safe place until they made it otherwise by throwing into it the section of a tree."

In summing up the benefits of this rule, Judge Vann says:

"It renders the enjoyment of all property more secure by preventing such a use of one piece by one man as may injure all his neighbors. It makes human life safer by tending to prevent a land-owner from casting, either with or without negligence, a part of his land upon the person of one who is where he has a right to be. It so applies the maxim of *sic utere tuo* as to protect persons and property from direct physical invasion, which, though accidental, has the same effect as if it were intentional. It lessens the hardship by placing absolute liability upon the one who causes the injury."

In view of this extension of the rule made by *Sullivan* v. *Dunham* the majority opinion in the principal case seems justified in holding that defendants' right to excavate in part of the street was no defence in trespass for his casting stone into another part of the street which was not within his occupation, as was argued by the dissenting judges. If such a technicality were allowed as a defence, he might escape liability even if he cast a stone a mile, so long as it landed in the city's street, for the public has no greater right in a street a mile distant, than in the one defendants were excavating. The defendants undoubtedly had no more right in the part of the street open to the public than any other citizen or than if the subway they were digging was their own private property, situate next the public highway.

Although the case of *Hay* v. *Cohoes* seems to apply the rule of *sic utere tuo,* generally, yet the N. Y. rule is in truth limited to where there has been an invasion of property or technical trespass. Thus in *Benner* v. *Atlantic Dredging Co.,* 134 N. Y. 156, and in *Booth* v. *R. R.,* 140 N. Y. 267, it was held that the rule of *Hay* v. *Cohoes* did not apply to cases where the injury was not the result of any entry or trespass on the land of another but was caused by shock and concussion resulting from defendant's blasting.

Recovery may be had for injuries also where the blasting is a nuisance, but the courts will not recognize it as a nuisance where it is done in a reasonably safe place, or is authorized by the municipality, and therefore cases like the principal case will not be covered by that rule. The Supreme Court of Alabama in the case of *Kinney* v. *Koopman,* decided in 1897 and reported in 37 L. Rep. A., suggests a rather interesting theory in this respect. The court said the keeping of a powder magazine is not *ipso facto* a nuisance (unless made so by law), for magazines exist in the thousands and yet there is scarcely a well-authenticated instance of spontaneous combustion. It is likewise not *ipso facto* a nuisance to keep a vicious dog well chained or a wild beast well caged, as in the zoölogical institutions, but if they escape the owner is undoubtedly liable. It is not the keeping, therefore, but the escape that constitutes the nuisance. In this case the court did not have to apply the theory, as the magazine in question was forbidden by law and a nuisance *ipso facto.*

The rule of liability for injury done by vicious or wild animals may be explained as suggested by the Alabama Court on the grounds of a nuisance or on the rule as laid down in *Rylands* v. *Fletcher,* L. R. 3 H. of L. 330, which holds that where one for his own purposes brings upon his land, collects and keeps there, anything likely to do mischief if it escapes, such a person becomes an insurer and is *prima facie* answerable for all the damage which is the natural consequence of an escape. This rule laid down in *Rylands* v. *Fletcher* was applied to a case where the defendant purchased a property and built a reservoir on it, employing the most intelligent and skilful engineers, but the water escaped and injured the plaintiff. The escape of the water was due to certain old mine-shafts and tunnels which had been filled up long before defendant purchased the property and of the existence of which he was ignorant. The same principle of insurance against all damage is applied to cases where the owner brings filth on his land. The American & English Encyclopedia of Law, Vol. 2L, p. 699, classes these cases among the nuisances and says:

"One who collects filthy or offensive matter upon his premises, which by being carried by rain along the surface of the ground, or by percolation through the soil, injures an adjoining owner by polluting a well, is liable for the maintenance of a nuisance. . . This liability has been held to attach apart from any question of negligence."

We have, therefore, three distinct theories on which a person blasting is liable without proof of negligence: First, That the defendant in blasting is conducting a nuisance, but this only applies under the circumstances previously mentioned; second, that the throwing of dirt and stones as a result of blasting on the land of another or on the highway is a technical trespass; this is the New York rule; third, that a person blasting becomes an insurer against any injury which may result because of the intrinsic danger in all blasting.

The first or nuisance rule gives a remedy in all cases to which it may be applied, but is limited in its application. The second or New York rule gives a remedy only where there has been an entry or trespass. The third rule, however, is both general in its remedy and its application.

Outside of New York the question of recovery without proof of negligence does not appear to have been raised as often as one would have expected. In Indiana the case of *Wright* v. *Compton,* 53 Ind. 337, decided in 1876, met the question squarely. The plaintiff was struck by a piece of rock from a quarry while walking on the highway. The court on appeal said:

"The question involved is not one of negligence on the part of the defendants. The act charged against them is, in itself, unlawful—not the act of blasting and quarrying rock, but the act of casting fragments of rock upon the plaintiff to his injury. When the act, in itself, is unlawful, it is immaterial whether it is done ignorantly, negligently, or purposely, except in the measure of damages. Every person must so use his property and exercise his rights as not to injure the property or restrict the rights of others. . . .The public travel must not be endangered to accommodate the private rights of an individual."

Carmen v. *R. R.,* 4 Ohio 399, decided in 1854, and *Tiffin* v. *McCormick,* 34 Ohio 642, decided in 1878, were both cases where the defendants, while lawfully blasting, injured the plaintiff's lands by casting dirt and stones upon them, and in both cases the court held that the trespass was not

justified either by the state's permit or by proof that the defendant had used all possible care.

The cases of *Whitehouse* v. *R. R.*, 52 Me. 208; *Sabin* v. *R. R.*, 25 Vt. 363; and *Brown* v. *R. R.*, 5 Gray (Mass.) 35, all held that a railroad's charter of eminent domain allowed them the right to blast, and if unavoidable to throw stones and dirt on the adjoining land, but that they were liable for all damage they might do, whether the blasting was negligent or not, for such damage was the same as the taking of the land to build the road on.

The rule as laid down in *Rylands* v. *Fletcher*, that a person bringing a dangerous thing upon his land becomes an insurer against all injury, has been criticised in both England and America. But the objection has been rather to the application of the rule to the facts, and in England its application has been restricted to cases where the "thing" is intrinsically dangerous. And this is also true of the American cases which are quoted as having refused to accept the case. Thus in *Losee* v. *Buchanan*, 51 N. Y. 476, where a boiler exploded without negligence on the defendant's part and injured the plaintiff, the court discussed and overruled the theory of *Rylands* v. *Fletcher* as bad law. Yet in that same jurisdiction the owner of a wild or dangerous animal is liable for any injury it may do if it escapes and one who deposits filth on his land is liable if some of it washes or percolates into his neighbor's well. *Swett* v. *Cutts*, 50 N. H. 439; *Marshall* v. *Wellwood*, 38 N. J. L. 339, and *Coal Co.* v. *Sanderson*, 113 Pa. 153, also refuse it, and in *Everett* v. *Tunnel Co.*, 23 Cal. 235, a contrary decision was reached on almost the same facts as in *Rylands* v. *Fletcher*, though the case was not cited.

On the other hand *Rylands* v. *Fletcher* has been cited with approval in a number of cases, but only Illinois and Ohio have expressly applied the rule to blasting cases. *The Fitz Simmons Co.* v. *Brown*, 199 Ill. 390, decided in 1902, was a case where the defendant was employed by the city to lay a water main 70 feet below the ground and while working under plaintiff's premises injured one of his buildings by shock and concussion. The court held that the rule

of *sic utere tuo* applied whether there was an entry or not for

"One who makes use of an explosive in the ground near the property of another, when the natural and probable, though not inevitable, result of the explosion is injury to such property of the other, is liable for the resulting injury, however high a degree of care or skill may have been exercised in making use of the explosive."

The same decision was given again in 1904 in the case of *The City of Chicago* v. *Murdock,* 212 Ill. 9.

In *Glycerine Co.* v. *St. Mary Mfg. Co.,* 60 Ohio 560, decided in 1899, the plaintiff was injured by the explosion of the defendant's glycerine magazine a mile distant. The magazine was built with all care, was not in violation of any law, and exploded without negligence. The court held the defendants liable as insurers, saying:

"Is one who brings upon his own premises such a dangerous agency liable for damages caused by its exploding, although such owner is not chargeable with either want of care or an unlawful act in connection with the casualty? . . . We are of the opinion that the storing of nitroglycerine should be deemed to be an extraordinary and unusual use of property, and we can see no principle upon which an exception to the general doctrine laid down in *Fletcher* v. *Rylands, supra,* can be held to exist in favor of one who stores upon his own premises that or any other dangerous explosive."

In the case of *Colton* v. *Onderdonk,* 69 Cal. 155, decided in 1886, the court lays down the rule of *Rylands* v. *Fletcher* as applying to blasting cases but also says that the plaintiff can recover without it, as the defendant's blasting was a nuisance *per se.* Also in the cases of *Cahill* v. *Eastman,* 18 Minn. 324, decided in 1872, and *Cork* v. *Blossom,* 162 Mass. 330, the courts have applied the rule to facts similar to those of *Rylands* v. *Fletcher.*

A good reason for upholding this rule of *Rylands* v. *Fletcher* is suggested by Bigelow in his "Leading Cases on Torts," p. 503, where he says, referring to the cases supporting the rule:

"The above view of the liabilities of parties who bring upon their lands dangerous things, makes the defendant in effect an insurer: and why should he not be? The plaintiff pays the premium of parting with something of the security to life and property which he previously enjoyed, in order that the defendant may carry on a prosperous busi-

ness. It matters not that the premium is paid under compulsion; the defendant should be required to take the risk as much as if the payment were made upon consent and as the express consideration of the assumpsit of the risk. The plaintiff's detriment is the price of the defendant's business. It is more than this: it is essential to it: and the defendant should therefore either restore the premium by removing the dangerous thing, or be required to make good the destruction done by it."

This reasoning of Judge Bigelow is unanswerable, and there is no reason why the courts which do not approve of *Rylands* v. *Fletcher* on its facts, should not simply limit its doctrine to what they deem intrinsically dangerous subjects. Some courts have done this, others have endorsed *Rylands* v. *Fletcher* outright. New York, as was said before, expressly disapproves it, but when we look at this questionable theory of trespass in blasting cases which they have developed, it is apparent that it is an attempt to accomplish the same end under the guise of a pure technicality, although as was above shown, even in New York they have refused to go any further and hold a person blasting liable for consequential damages when there was no technical trespass.

In Pennsylvania the cases on blasting accidents seem to have received little attention, and it is hard to say what rule the courts would follow if the principal case came up for decision. In *Fox* v. *Borkey*, 126 Pa. 164, decided in 1889, the court found that the plaintiff was guilty of contributory negligence, but Mr. Justice Mitchell, in delivering the opinion of the court, says:

"The plaintiff was not struck by anything. The sole cause alleged was the noise and concussion of the explosion."

From this dictum one might argue that if the question involved a physical entry, it would be a different problem. In *Tuckackinsky* v. *Coal Co.*, 199 Pa. 515, decided in 1901, the court, however, swings entirely to the other extreme. It was a case where a powder magazine at the mouth of a colliery exploded, damaging the plaintiff, who lived at a distance of 700 feet and who had lived there for 16 years. The court held that this was no nuisance because the plaintiff had lived there for so many years without complaint or injury and then continues:

"Such materials are always dangerous, but as their use is essential to the work of mining, it is impossible to protect, absolutely, persons or property in the immediate vicinity. The risk is similar to that arising from the operation of steam boilers, and other machinery and apparatus necessary to the prosperity of great communities."

The courts of Pennsylvania are greatly influenced in their decisions by what is "necessary to the prosperity of great communities," as may be seen in *Coal Co.* v. *Sanderson,* 113 Pa. 126, and in *Robb* v. *Carnegie Bos.,* 145 Pa. 345. Yet in a case of a well pollution by percolation from a neighboring privy, the court said:

"The plea of necessity fails to justify an act of this kind; for the proposition that one man should under any circumstances be permitted to deposit any part of his health-destroying filth in or upon his neighbor's premises, is simply absurd."

Haugh's App. 102 Pa. 42, and also in *Gas Co.* v. *Murphy,* 39 Pa. 257.

In the jurisdictions not cited above, blasting cases have occurred, but the question has not been brought up whether the plaintiff may recover in trespass for an injury without proof of negligence. In many of the cases the plaintiff sued and recovered in an action on the case on the ground of negligence; in others the courts have implied negligence; but whatever the method the plaintiff has been generally allowed to recover unless he was himself negligent. What these jurisdictions would decide if the question were squarely raised is difficult to say. They would be probably governed largely by what they considered the public policy of the problem. A court deciding this question for the first time has great power, and in considering what is for the benefit of the community they should remember that statute forbidding gas companies from depositing their waste in rivers. This at first appeared most unpolitic, and for a time it looked as if the gas companies would have to stop their business through their inability to dispose of their waste. The most renowned chemists were employed, and to-day that same "waste" is almost of equal value with the gas produced.

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