

THE RULE IN RYLANDS v. FLETCHER.

PART I.

It may seem a threshing out of old straw to discuss again the case of *Rylands v. Fletcher*,¹ and the rule there laid down. In America particularly the discussion may appear of only academic value in view of the very small number of jurisdictions which have definitely accepted the principle there announced and the number of courts which have definitely repudiated it or which have expressed in *dicta* their disapproval of it.

However, there are a number of comparatively recent cases, both English and American, applying and discussing the case. The precise limits of the doctrine can be more clearly seen—and so it can now be looked at calmly and not as some strange portent—some innovation tending to overturn and destroy all existing conceptions of liability and to change the whole scope of remedial law. It seems, therefore, not entirely amiss, not only to examine how far the cases in the jurisdictions following *Rylands v. Fletcher* have extended or how narrowly they have limited the principle therein laid down, but also to examine the case itself.

The facts in the case of *Rylands v. Fletcher* stated as briefly as possible were as follows: The defendants in order to provide water for their mill constructed, with the permission of the owner of the land adjacent to the mill, a reservoir. They employed a competent engineer and contractor to construct it. They themselves took no part in the construction. It appears that, while the arbitrator who passed upon the facts found that they were not guilty of any negligence in the selection of a site for the reservoir, there were in fact, under the place selected, some long abandoned mine workings and, within the space upon which the water was to be collected, several old shafts which had been filled in with soil of much the same character as that of the surrounding solid

¹ As *Fletcher v. Rylands*, in the Court of Exchequer, 3 H. & C. 774 (1865), and in the Exchequer Chamber, L. R. 1 Ex. 265 (1866), and as *Rylands v. Fletcher* in the House of Lords, L. R. 3 H. L. (E. & I. App.) 330 (1868).

ground. In excavating the bed of the reservoir, the contractors came upon these shafts, but it appears that their existence was never made known to the defendants. The arbitrator found that the contractors were guilty of negligence in the construction of the reservoir in view of their knowledge of the shafts. The plaintiffs were lessees of a mine which lay under land close to, but not adjoining, the site of the reservoir. In working their mine, they had broken into the old workings above described. After the reservoir was completed the defendants partially filled it with water and a few days later the earth, which filled one of the shafts, gave away under the pressure of the water and allowed it to flow into the abandoned workings below and so, through the opening which the plaintiff had made by his workings, into his mine. Upon these findings the case came before the Court of Exchequer.

Two points were argued. First, whether the defendants were liable irrespective of the proof of negligence on their own part, or on the part of any one engaged by them to erect the reservoir. Second, whether they, though personally guiltless of any negligence, were liable for the negligence of the contractor employed by them to construct the reservoir. The second point was decided in the Court of Exchequer against the plaintiff, and was not discussed in the subsequent appeals, it being held immaterial in view of the decision that the defendants were liable upon the first point.²

Upon the first point argued in the Court of Exchequer, Pollock, C. B., Martin and Channell, B. B., held that the defendants, not being guilty of negligence, were not liable for the harm done by the bursting of the reservoir. Bramwell, B., dissenting on the ground that the plaintiff had the right to enjoy his land free from the presence of foreign water and that, granted it

² The weight of authority since the decision of *Rylands v. Fletcher* is opposed to the view by the Court of Exchequer upon this second point. The tendency is to hold that he, who contracts for the performance of work dangerous to adjacent property, or to the public, unless carefully executed, cannot relieve himself from liability by entrusting its execution to an independent contractor, however competent and carefully selected. See *Bower v. Peate*, L. R. 1 Q. B. D. 321 (1876); *Angus v. Dalton*, L. R. 6 A. C. 740 (1881); *Hughes v. Percival*, L. R. 8 A. C. 443 (1883), and *Halliday v. Telephone Co.*, L. R. 1899, 1 Q. B. 392, and the cases collected in *Bohlen's Cases on Torts*, pp. 595 to 636.

was necessary to entitle the plaintiff to cover that the defendant should be guilty of trespass or of the commission of a nuisance, the defendants' act in this case was both.

Error having been brought to the Court of Exchequer Chamber, which consisted of Willes, Blackburn, Keating, Mellor, Montague Smith and Lush, JJ., the defendant was held liable; Mr. Justice Blackburn, who delivered the opinion of the court, laid down the broad principle now commonly called the rule in *Rylands v. Fletcher* that: "the person who for his own purpose brings on his lands and collects and keeps there anything likely to do mischief, if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues, if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stench." ³

³L. R. 1 Exch., p. 278. One of the cases upon which he relies requires some comment. The case is *Tenant v. Goldwin*, 1 Salk. 21, 360, 2 Ld. Raym.

The House of Lords on appeal affirmed the decision of the Exchequer Chamber and adopted the principle laid down by Mr. Justice Blackburn. Lord Cairns, however, draws a distinction between accumulations of water incident to what he

1089, 6 Mod. 311, in which the plaintiff's premises had been invaded by filth which flowed from the privy into the plaintiff's adjoining premises through a wall which was alleged to belong to the message of the defendant and "by the defendant of right ought to be repaired (*jure debuit reparari*). "Yet," the declaration alleged, "he did not repair it, and for want of repair filth flowed into the plaintiff's cellar." The objection taken was that there was nothing to show that the defendant was under any obligation to repair the wall, that being a charge not of common right. Lord Hall held that "the wall was the defendant's wall and the filth the defendant's filth and he was bound of common right to keep his wall so as his filth might not damnify his neighbor, and that it was a trespass on his neighbor, as if his cattle should escape," 1 Salk., p. 21. In 2 Lord Raymond 1092 he is reported as saying "as every man is bound so to look after his cattle as to keep them out of his neighbor's ground, so he is bound to keep in the filth of his house or office that it may not flow in upon and damnify his neighbor."

Beasley, C. J., regards this case as but "A slender basis for the large structure" (the rule above given in the text), put upon it. The case merely held, he says, that a land owner is bound to his neighbor to keep his privy wall in repair and that "not to repair a receptacle of this kind when it was in want of repair is in itself *prima facie* evidence of negligence." "No question was mooted as to his liability in case the privy had been constructed with care and skill * * * and had been kept in a state of repair."

Admitting that the plaintiff's sole allegation was that the defendant had not repaired the privy, as of common right he ought, whereby the damage resulted, and so his liability was alleged to be based on his breach of his duty to repair, the nature of that duty, as understood by the Court, still requires definition. The modern tendency is no doubt to regard all law imposed, as distinguished from contractual or consciously assumed, duties as satisfied by a diligent effort to perform them. There is much reason to think that the original conception of their nature was quite different. Those duties early recognized as incident to the tenure of land or the incumbency of an office were to afford a protection or give a benefit not merely to act diligently. The defendant must deny the duty or plead performance, not guilty, which merely denied fault, was not a proper plea, *Yilding v. Fay Moor*, 355 (1596), and see 56 U. of P. L. R., pp. 223-224, and note 19, p. 232, and *Bell v. Twentyman*, 1 A. & E. (N. S.) 766 (1841). The point of view was purely objection—the liability attached if the protection or benefit was not given. That this was Lord Holt's conception would appear from the fact that he likens the defendant's obligation to the duty to restrain cattle—in which even now it is immaterial how diligently the defendant has tried to prevent their escape, *Tonawanda R. R. v. Munger*, 5 Denio (N. Y.) 255 (1848), 1855, nor how apparently sufficient the fences may have been, *Erdman v. Gottshall*, 9 Pa. Sup. 295 (1899). Nor is there any allegation that the defendant knew of the bad condition of the wall, that it was obvious or that he was remiss in not discovering it. It is evident that to Lord Holt the duty of repair required the wall to be actually in good order, so that it should be in fact sufficient to keep the filth in. The defendant's conduct is important only as a means of accomplishing this required result, not as a thing in itself determining his liability. The point of view is still wholly objective, purely external to the defendant, his conduct is judged solely by its result, not by his subjective attitude, his deliberate disregard of his neighbor's safety, nor even by his omission to diligently take those steps necessary to secure it.

terms natural use of lands which by the operation of the laws of nature passed into the plaintiff's premises and accumulation caused by the owner's use of his property for any purpose which he terms non-natural use. In the first case he is of the opinion that the defendant would not be liable; in the latter, which he takes to be the case in hand, he holds that the defendant is liable.

Much confusion has been introduced into the discussion of this case, both judicial and by text writers and legal essayists, by considering the opinions of Blackburn, J. and Lord Cairns as laying down one single and indivisible principle of law. In fact, while both opinions were essential of the decisions of the particular case, that of Mr. Justice Blackburn deals solely with the *prima facie* liability of the defendant, while that of Lord Cairns deals with the question as to how far acts, *prima facie* actionable, may be justified because done by the defendant in the course of his use of his land for his own purpose.⁴

⁴ This question may be procedurally dealt with in different ways in different jurisdictions. One court may hold that the plaintiff by showing injury done to him as a result of his neighbor's use of his land establishes a *prima facie* case which requires his neighbor to show as a defence that the use was a proper and legally permissible use, notwithstanding that it did harm. Another jurisdiction may require the plaintiff to show not only that harm has been done by the neighbor's use of his land, but also that such use was improper and legally unjustifiable.

This question of *prima facie* liability and justification is not peculiar to this particular class of case. It presents itself almost everywhere in the law of tort, in assault and battery, in trespass to persons and property, in slander and libel, and most all of any of the most modern tort-actions, and the action for interference with trade and business. The mere fact that the plaintiff must prove that the defendant's act was unjustifiable does not at all prove that the question is not one of *prima facie* liability and justification. Even in the same class of case the burden may rest, in one jurisdiction, upon the plaintiff to prove the defendant acted unjustifiable; while, in another, it may rest upon the defendant to justify his act. It is impossible in the limited space of such an article as this to even indicate the decisions upon this point of procedure in the various classes of court action even in any one jurisdiction. It may, however, be possible to suggest a few of the many considerations which may influence the court in determining upon which of the parties the burden should rest. Where the justification represents the relaxation of some originally stringent rule of liability in a particular class of wrong, the defendant is required, at least in the early stages of the process of relaxation, to show the reason why the rigor of the law should be relaxed in his favor. It may be that, in some particular class of case, the means of proof generally rests wholly in the possession of the one party or the other. If so, there is a natural and proper tendency to require such party at his peril to produce the proofs of the facts which he alone can prove. Nor is it necessary that means of proof should lie exclusively in the power of one party. If his opportunity to know the facts and his ability to prove them be much greater than that of his opponent, the burden may well be

It may seem theoretical, perhaps even affected, to insist upon this division of the decision of *Fletcher v. Rylands*, but the distinction between the two opinions is fundamental. The opinion of Mr. Justice Blackburn deals purely with a question of law. The opinion of Lord Cairns deals with the question of social and economic expedience. The first has by tradition become institutional, sanctioned by long acceptance, possessing peculiar rigidity and inelasticity, and not lightly to be altered or modified. While it may have had its root in social expediency as unconsciously recognized and enforced at the very beginning of our civilization, it represents a conviction of what is right and proper so persistent as to become traditional and almost instinctive, a very part of the inner consciousness of the race. On the other hand, the second question is not governed by any hard and fast rule. It is not measured by any definite and pre-existing standard. It represents the opinion of the court, which itself reflects the sum of prejudices and the political, social and economic convictions of the dominant classes of which they themselves are a part. As such it is and necessarily should be elastic, changing with the economic and social needs of the era and locality, and being largely determined by the settled economic and social convictions prevalent at the particular time and place.⁵

placed upon him. Again, there may be some economic bias which may cause the court to regard either the plaintiff's or the defendant's interest with peculiar favor as being the more important to the common weal. If such bias exists, it is natural that it should lead the court to require one who has harmed an interest deemed by the court of preponderating importance to show his excuse for so doing and on the other hand to demand that he, who complains of the injurious effect of an activity believed to be beneficial, should show that the specific exercise of it is for some reason improper.

⁵ This, again, is not peculiar to this particular class of case. The functions of the court is not, and never has been, to administer hard and fast rules of law irrespective of their effect upon the body politic. On the contrary, it is to adapt itself to new conditions and, in dealing with the new questions constantly presented in a changing civilization, to formulate rules of conduct by which modern life can be properly regulated. It should not run counter to the settled convictions of the community and so impose the dead conceptions of the past upon the living activities of the present day. It is inevitable that the decisions of each kind of case should depend not only upon the underlying fundamental principles of justice which have crystallized into definite rules of law, but also upon a careful consideration of the social needs of the time, and upon the then settled opinion upon social and economic questions. A failure to recognize the fact that, in many lines of decision, there exists this double question has led to many defects in the administration of the law and too much confusion in the statement of it. It has led to defects in administration because the courts have too often regarded the particular application

The criticisms of the decision in *Rylands v. Fletcher* may be similarly divided into those which attack the existence of the general principle of law laid down by Blackburn and those which regard it as archaic, socially inexpedient, and as a rule which, if enforced, would, as Doe, C. J., says, "put a clog upon natural and reasonably necessary uses of matter and tend to embarrass and obstruct much of the work which it seems to be a man's duty carefully to do."⁶

While the intense antagonism of the majority of the American courts appears to be, at bottom, based on their belief that such a rule would be economically harmful, in England no important criticism has been leveled at the decision upon this score. While in America the principal attack upon the decision has been on the score of its inexpediency, the existence of any general principle requiring that one, who collects upon his land foreign

of a rule of law to a particular situation at a particular time and in a particular place as itself creating a new rule of law, as such, rigid and inflexible, when in fact the particular application of the rule to that fact has been determined solely by the necessities of the then existing civilization, which again is determined by the opinion then prevalent as to what is necessary and useful, itself a question depending upon the political, social and economic doctrines accepted at the time. Thus the rigidity naturally and properly incident to a rule of law is given to an economic theory which was perhaps beneficial and necessary under conditions then existing, or was at the least so regarded when the decision was rendered, and thus the practical application of obsolete theories is preserved long after they have been utterly repudiated by the average intelligent man and have come to be regarded as positively harmful by popular opinion. Even though the economic view has not been changed, it is often applied when the change of condition is such as to render its application repugnant to the very theory in which the practice originated. Confusion has been introduced in the statement of the law by disregarding the twofold nature of the question presented in such cases, for as both public opinion and social conditions differ in different localities and at different times, it is quite evident that, though the rule of law applied may be the same, entirely different results may be reached, thus creating an apparently hopeless conflict of authority.

It may, perhaps, be doubted whether judicial opinion itself usually represents the opinion of the precise time in which it is expressed. There are two causes operating to prevent it from doing so. An individual's opinion on such subjects are usually developed in early manhood and tend to crystallize after middle age into creeds, to question which appears almost sacrilege; and, therefore, the opinion of judges, usually persons well past middle age, would normally represent educated public opinions of a somewhat earlier period. Second, the judicial attitude of reverence for authority and precedent, naturally and, in the writer's opinion, properly cause the court to regard the decision of their predecessors, even in such questions, *prima facie* binding upon them; in fact, they are seldom disregarded until the private convictions of the court and the pressure of public opinion prove them unsound as applied to existing conditions.

⁶ *Brown v. Collins*, 53 N. H. 442 (1873), p. 448.

substances likely to escape, must confine them at his peril is strenuously denied. The opinions denying the existence of such a principle add no new argument to those urged by Martin, B., in the Court of Exchequer.⁷ They merely elaborate one or more of his arguments.

These are briefly as follows: First, the defendant's act is not a trespass, for the damage is consequential and not direct; nor is it a nuisance, for there is no continuous condition created, which, while it exists, is offensive to the senses or injurious to the plaintiffs' property or his enjoyment of it; second, the action on the case on "the custom of the realm" for the spread of fire, in which liability does not depend on fault, is an anomalous exception, as such proving the general rule; third, "there is no reason why damage to real property should be governed by a different rule and principle than damage to personal property where proof of negligence is essential to recovery."

In determining whether these objections are well taken, it is necessary first, to ascertain, if possible, upon what basis legal liability for harm done was regarded as resting when the common law was first administered in the King's courts and so became visible in the reports of decided cases and in the form of the early writs; second, to see whether such conception has persisted unchanged or how far, if at all, it has been modified; and third, how far its persistence, if any, is due to the rigidity incident to the nature of the action by which redress must be obtained.

One must not expect to find any general legal principle definitely formulated and declared in the early cases or indeed, save in very exceptional instance, in any ancient treatise. The common law, at least as enforced by the King's courts, originated in a series of specific actions, rigid in form, which gave redress in certain situations, undoubtedly those of the most frequent occurrence where the need of a legal remedy was most pressing. It was not till the Statute of Westminster II, "*in consimili casu*," created the action of trespass on the case that the law began to expand, and even then it expanded slowly and by application

⁷ 3 H. & C. 791.

of principles, deduced from the early formed actions, to facts closely analogous to those covered thereby.

The statement that there is no wrong without a remedy, no right without a legal means to protect it, would no doubt have been accepted as correct by the early lawyer or judge, but he would have accepted it only because he would have taken it in a sense directly contrary to that in which a modern lawyer understands it. To the one, it would mean that if there were no procedure in existence which punished an act, it was not legally a wrong; that unless some remedy existed to redress an infringement of ones "rights," it would be idle to speak of them as rights at all. To the other, it has come to mean that wherever public opinion recognizes that one ought to have a thing, there exists a reasonable claim which the law ought to enforce; that, given a sufficiently settled public conviction of the necessity of securing the enjoyment of that thing, it will be enforced by law as a right.

We must, therefore, look to the earliest actions which gave a remedy to land owners whose land was injuriously affected by an act done or condition created by an adjacent owner on his own land, or as a consequence of the use to which the latter put it. There were several such actions. First, there was the action of trespass, where the plaintiff's land was directly invaded as a direct result of the defendant's act. Second, there was the assize of nuisance in which the object of the remedy was specific relief, the removal of the offending condition or structure, the abatement by legal process of the "nuisance" and in which, while damages were given for the harm done by the condition or structure before its removal, the recovery of such damages was not the primary object of the action, but merely an incident to the specific relief. Third, there was the action of trespass for the escape of cattle; and, fourth, there was the action on the case upon "the custom of the realm" for harm done by the spread of fire, started on the defendant's premises by himself or one of his household. In none of these actions was it necessary for the plaintiff to show that the defendant had intended to injure him, nor was it a defense that he had exercised the greatest possible care to avoid the invasion of the plaintiff's land, or the

interference of his enjoyment of it; and it may be noted that this is as true to-day as appears in the first decisions in such actions in the reports. While, therefore, the defendant, in every one of these actions, was liable quite irrespective of any fault in him, and even where he was using his land in a lawful manner and exercising the most exact care, it is of course possible that the liability might in each action be due to some cause peculiar to such action, something in the nature of the facts upon which it lay or some procedural peculiarity of the action itself. In trespass for injury to real property resulting directly from the defendant's conduct, it might be due to a persistence, even after directly injurious acts came to be considered as legally equivalent to actual violence or breach of the peace, of the original full liability for all the direct consequences of a breach of the peace of the realm. In nuisance, it might well be that when a condition had proved injurious, it ought to be abated, however innocently created; and this again may have survived after compensation and not abatement became the object of the action, which had changed from "the assize" to "case." So, too, it is suggested that "the rules of liability for damage done by brutes or by fire, found in the early English cases, were introduced by sacerdotal influence from the Roman or the civil law."⁸ But, when it is remembered that these various actions cover all the situations in which harm would be apt to result to one man's land by reason of another's use of his adjacent land in the then existing primitive and simple state of society, the conclusion is well nigh irresistible that these are all but applications to the various situations of some underlying general principle imposing liability for harm to real property without regard to the guilt or innocence of its author. It is practically impossible to imagine that a variety of causes, each peculiar to a particular class of case, could have such a unity of result, nor is direct authority lacking in the well-known case in V. B. 6 Ed. 1, 7 pl. 18, 1461, chiefly known to the profession as very inadequately reported in the case of *Lambert v. Bissey*, T. Raym. 421. In it we find a very ani-

⁸ Doe, C. J., in *Brown v. Collins*, 53 N. H., p. 449—the explanation given by Beasley, C. J., in *Marshall v. Wellwood*, 38 N. J. L. 339 (1876), p. 341, is even less satisfactory.

mated argument upon this very point. The question was whether a man had the right to enter the land of another to retake thorns which had fallen upon his neighbor's land when he clipped his hedge. The defendant insisted that he could not be liable because his cutting was lawful, and because he did not intentionally cast them upon his neighbor's land. The defendant's counsel insisted that there could be no liability without some fault on his part; that in such case the harm done is *damnum absque injuria*.⁹ But those two stout old English judges, Brian and Littleton, strongly assert the older conception that "where any man does a thing, he is held to do it in such a way that through his act no prejudice, or damage, shall happen to others" (per Brian, J.), "and that if a man has been damaged, he ought to be recompensed" (per Littleton, J.). While this particular case is one of trespass to real property, the principle is stated broadly and is not limited in its application to such cases. On the contrary, it is stated as a general principle of liability for all acts doing any sort of harm. The illustrations given are, many of them, cases of personal injury, even personal injury done on the highway where both parties having an equal right to be.¹⁰ Choke, J., it is true, shows a tendency to the modern view that fault is required. That his view prevailed in cases of injury to the person and to personal property is well known. The cases in which inevitable accident, lawfulness of the act and carefulness of the actor come to be regarded as a justification or excuse for an act technically a trespass are known to all students of the law.¹¹ This tendency had become so marked by the time

* It should be noted that this is the formula constantly used in the Roman Law.

¹⁰ "And so if a man make an assault upon me and I am not able to avoid him, but he wishes to beat and I in defense of myself raise my stick to strike him and one is at my back, and in raising my stick I hurt him, in this case he will have an action against, and yet my raising was lawful in defense of myself and so I hurt him against my will (*me invito*).” Per Brian, J.

Compare with this, *Brown v. Kendall*, 6 Cush. (Mass.) 292 (1850), in which in accordance with the modern view that liability depends upon fault, it was held that a defendant, who, in raising his stick to separate his dog from another with whom it was fighting (an act legal but in no sense necessary or obligatory), accidentally struck the plaintiff, a bystander, was not liable unless he were negligent.

¹¹ *Weaver v. Ward*, Hobart, 134 (1616); *Dickenson v. Watson*, T. Jones, 205 (1862), and *Stanley v. Powell*, L. R. 1891; 1 Q. B. 860, are the English cases usually cited.

that the conception of legal causation as a requisite to liability had sufficiently broadened to regard harm indirectly done as worthy of redress, that no action on the case for harms to the person and personal property suffered as an indirect consequence of the defendant's conduct was allowed save where some fault on his part was made to appear. It is, however, worthy of notice that so late as 1890 the Court of Queen's Bench regarded any injury directly due to the defendant's voluntary act as a *prima facie* trespass requiring him to show his freedom from fault as an excuse.¹²

There is every reason to believe that the original conception was that legal liability for injury of all kinds depended not upon the actor's fault, but upon the fact that his act had directly caused harm to the plaintiff.¹³

In trespass to real property, in nuisance, in case for the harm done by the spread of fire, except where modified by statute, the defendant who is innocent of any intention to do harm is as liable to-day, no matter how lawful his use of his land or however carefully he acts, as he was in 1461. Nor is the persistence of this conception attributable to any special rigidity peculiar to the actions in which redress was had. It was in the action of trespass that the extreme rigor of the early law was first relaxed when the injury was to the person. Not only was the action on the case, the most flexible of all actions, the earliest remedy for the spread of fire, but, at a very early date this action came in also as the remedy for nuisance, in lieu of the assize of nuisance abandoned because of its procedural and other disadvantages. Now, while no action of the case for personal injuries appears to have lain for harm to the person indirectly done, unless the defendant was shown to be in fault, the action on the case for the spread of fire lay against a perfectly innocent defendant and when it superseded the assize of

¹² Stanley v. Powell, L. R. 1891; 1 Q. B. 86.

¹³ That the damage was required to be direct, merely exhibits the natural tendency of the primitive mind to look only at immediate causes. It represents an early view of legal causation which no longer obtains, for such a requirement deals only with the liability as dependent upon the causal connection between the plaintiff's harm and the defendant's act; it has no relation to the guilt or innocence of the act as a basis of liability.

nuisance there was no tendency to alter or modify the principles of liability applied in the earlier action.

It seems clear that every man was originally considered liable for the harm, whether to another person, personal property or real estate, which his acts had directly caused, quite irrespective of moral fault, and that while the rigor of the early rule was relaxed at an early date when the harm was done to the person or personal property, it persisted unchanged where real estate was injured or invaded, or the owner's occupation and enjoyment of and dominion over it was interfered with. So at present, or at least until very recently, the basis of liability in the two classes of cases is, or has been, so entirely different that no proper analogy can be drawn from the one to the other. That this difference in result was not due to the form of action appropriate to the two classes is evident, for the same actions, or mere variants of the same, procedurally similar, are appropriate to both; and it has been seen that, even in the rigid action of trespass, the original stringent rule has been entirely abandoned where injury is done to the person, while it has survived in the flexible action of case when real estate is invaded or harmed, or the owner's or occupant's dominion and enjoyment injuriously affected. This difference in the attitude of the courts must be due, not to any merely procedural cause, but to some difference of conception as to the fundamental nature of the respective rights invaded. It is impossible, at this point, to discuss the reasons for this difference of judicial attitude. The fact remains that, the tendency, in the one class of case, has been more and more to insist upon fault as the basis of liability; and, in the other, to adhere strictly to the original conception that harm, even innocently done, must be paid for.

It is clear, then, that Mr. Justice Blackburn did not make new law but merely applied to a novel situation, closely analogous to those redressed in existing actions, a principle plainly deducible from the decisions therein¹⁴—and in so doing was fol-

¹⁴ The only criticism of his opinion which seems at all valid is, that he stated the general principle too narrowly rather than too broadly,—that he did not include the actions of trespass for harm directly done by one land owner to another. Such cases, together with those cited by him as the basis of his rule, seem to be based upon the general principle that an owner, as the

lowing the time-honored course pursued by English courts from the time when the action on the case was first introduced, of extending by such action a new remedy upon facts closely cognate to those covered by the former writs.

While the analogy between the collection of substances likely to escape, unless effectively restrained, without the assistance of a new force other than the usual operation of normal natural forces, *i. e.*, the force of gravity, the tendency of water to spread, of gas to expand, and the keeping of animals likely to stray in response to the promptings of their brute natures, is very close, a very small change in the facts in *Rylands v. Fletcher* would also have brought them well within the category of technical trespass or nuisance and have caused even Martin, B., to admit the defendant's liability.

It is surprising how very narrow the point at issue on the facts between Martin, B., and Blackburn, J., really is. Had the earth in the shaft given way as soon as the water was poured into the reservoir, instead of resisting the pressure for a few days, the injury would have been direct and the defendant admittedly liable in trespass. Had the water, instead of bursting all at once into the plaintiff's mine, gradually seeped or percolated therein, there would have been a continuously injurious condition, an abiding nuisance, for which an action on the case for nuisance would have lain. In neither case would his ignorance of the condition of the site of the reservoir or the utmost diligence and care in its construction have afforded him protection.

Trespass does not lie in *Rylands v. Fletcher* simply because there is a rest in the course of events, a pause, but not a break, in the chain of causation. Case for nuisance does not lie only because the reservoir as such, till it burst, caused no injury to the plaintiff's mine nor did it so seriously threaten harm as to interfere with the reasonable enjoyment thereof and the very catastrophe which caused the damage by destroying the reservoir removed all danger of any further harm.

These differences are of undoubted procedural importance,

correlative of his right of exclusion, occupation, enjoyment and dominion over his land, was under an absolute duty of inclusive use, and was bound, at his peril, to confine within the boundaries of his land the effects of his use of it.

for trespass only lies for direct damage, and in the action of nuisance the influence of the original object of the assize, the abatement of an offending condition, defined a technical nuisance as a condition capable of abatement after it is known to be injurious—which involves, of course, the idea that it must not be a merely momentary condition nor a condition only harmful at one instant; but that it must be not only continuous but continuously harmful. Since the object of the remedy in case for nuisance, the action now always brought, is compensation and not specific relief—to obtain which the aid of equity must be sought—the conception of actionable nuisance has been so far modified as to admit of recovery for harm done by a continuous “nuisance,” though abated or removed before suit brought; but a technical “nuisance” still remains a condition having an injurious existence, not necessarily permanent, but at least lasting some appreciable time. But however procedurally important these differences, they are purely external to the defendant’s conduct and do not affect the fundamental nature of it, nor can they in any way determine its innocence or guilt. This must depend on the quality and character of his act when done, his conduct cannot be held in suspense and pronounced guilty or innocent, as it does or does not do harm or as harm follows in one way or another, or of one or another kind. Given equal ignorance of the existence of the abandoned shafts, equal care taken to have a safe reservoir constructed, and it is obvious that he is guilty of no greater actual fault, when the water directly flows into the mine than when it breaks into it a day or so later; that he is no more culpable in any true sense of the term where the harm done consists of a series of individually slight but collectively serious invasions of the plaintiff’s mine than he is where the loss is suffered once for all unless, of course, the originator of a nuisance be not liable till he has notice that it is doing damage,¹⁵ for he would be in fault in not removing a condition which he had learned harmful, however innocently he had created it, but notice is not necessary to charge one who originates the condition and does not merely continue the one

¹⁵ As was held in *Griffith v. Lewis*, 17 Mo. App. 605 (1885).

created by his grantor.¹⁶ To be of any service as a test of liability, fault must be used in its actual, its subjective meaning of some conduct repugnant to accepted moral or ethical ideals or some act or omission falling below the standard of conduct required by society of its members. It is possible to state all liabilities in terms of fault, to say that one is legally, if not morally or socially, in fault, wherever the law holds him liable. But this is reasoning in a vicious circle. It involves as the premise, the assumption of the very point in dispute, that legal liability cannot exist without fault. The reasoning is this, there can be no legal liability without fault, the defendant is liable, therefore he is at fault, if not actually at least legally. Not only is such reasoning vicious as reasoning, but, by confounding liability and fault, it destroys all value of fault as an element determinative of liability.

Why then, did the decision in *Rylands v. Fletcher* meet, in America, with such a storm of opposition? First, it is necessary to see how the cases stood in regard to the liability for injuries done to land owners. It was generally held that where a foreign substance was brought upon the plaintiff's land as the direct result of the defendant's willed act, the latter was liable in trespass no matter how lawful his act or how carefully done.¹⁷ In that class of nuisance most nearly analogous to

¹⁶ In an action on the case for nuisance damages are recoverable as well for the damage which is done before as that done after the defendant knows that harm is being done, *Bell v. Twentyman*, 1 A. & E. (N. S.) 766 (1841), and see per *Willis, J.*, in the course of argument in *Fletcher v. Rylands*, L. R. 1 Ex., p. 274.

¹⁷ *Hay v. Cohoes Co.*, 2 N. Y. 159 (1849), rocks thrown on plaintiff's land by blasting carefully done by defendants on their own land for purposes authorized by their charter; *accord*, *Bay v. Scott*, 3 Md. 431 (1853); *R. R. v. Eagles*, 9 Colo. 544 (1886); in *Klepsech v. Donald*, 4 Wash. 436 (1892), the defendant is held absolutely liable only for injury to nearby property, where matter is thrown an abnormal distance, liability depends on negligence, but that property is in fact invaded makes out a *prima facie* case.

In *Hay v. Cohoes*, the language used is very broad.—*Gardner, J.*, saying that, "The plaintiff was in the lawful possession and use of his own property. The land was his, and, as against the defendant, by an absolute right. The defendants could directly infringe that right by any means or for any purpose. They could not pollute the air upon the plaintiff's premises, nor abstract any part of the soil, nor cast anything upon the land, by any act of their agents, neglect, or otherwise, for this would violate the right of dominion." Language equally broad is used by *Mason, J.*, in *Bay v. Scott*, and *Alvey, J.*, in *Lawson v. Price*, 45 Md. 123 (1876).

The later New York cases do not require that the plaintiff directly

Rylands v. Fletcher, the continuous invasion of the plaintiff's premises as the result of the defendant's use of his adjacent land, the defendant, however innocent, was liable for all the damage occurring before as well as after knowledge of the harm done.¹⁸ So far the American decisions were identical with the English; but the American courts, following a mistaken conclusion by Blackstone¹⁹ as to the effect of the Statute of 6 Anne c. 31, sec. 6, had with practical unanimity held that there was no liability for the spread of a fire unless improperly set or negligently guarded,²⁰ and, in many jurisdictions, the full

injured in person or property by the defendant's blasting shall be the owner or in possession of the property invaded and as such entitled to bring trespass *quare clausum fregit*. It is enough that he is lawfully in the place when he is directly injured, *St. Peter v. Denison*, 58 N. Y. 416 (1874), a farm laborer struck on his master's premises, *Dunham v. Sullivan*, 161 N. Y. 290 (1900), a traveler on a city street injured by blasting done in the construction of an underground railway, "a public improvement authorized and directed by the legislature," so that the contractor had a right to use the street for such purposes at least equal to that of the plaintiff, see *Turner v. Degron McLean Co.*, 90 N. Y. Supp. 948 (1904). The result of the cases is, that one doing blasting, however lawful and however carefully done, is liable for all damage directly caused thereby.

But some tangible matter must be directly cast upon the plaintiff's person or property. Recovery is consistently denied when the damage is in the least degree consequential, as where the plaintiff or his property is injured by the force of an atmospheric disturbance created by the blasting, whether incident to work legislatively authorized, *Booth v. R. R.*, 140 N. Y. 267 (1893), or not; *French v. Vix*, 143 N. Y. 90 (1894). *Accord*: *Simon v. Henry*, 62 N. J. L. 486 (1898); *Fox v. Borkey*, 126 Pa. 164 (1889), *semble*. But see *Wheeler v. Norton*, 86 N. Y. 1095 (1904), where a contractor, the force of whose blasting had broken a water main, was held liable for the flooding of a neighboring house; *contra*, *The Fitz Simons & Conwell Co. v. Braun & Fitts*, 199 Ill. 390.

¹⁸ In *Pottstown Gas Co. v. Murphy*, 39 Pa. 257 (1861), it was held that, where ammonia and other offensive substances had percolated into the plaintiff's premises and well from the defendant's gas works, the following instruction, p. 260, was correct: "If the defendants have so constructed or carried on their works so as to create an abiding nuisance to the particular injury of the plaintiff's property, they are liable whether there was negligence or not." See also *Ottawa Gas Co. v. Graham*, 28 Ill. 74 (1862). In *Kinnaird v. Standard Oil Co.*, 89 Ky. 468 (1890), it was held that the defendant, who had stored the oil on its premises so that it percolated into and polluted the well on the plaintiff's nearby property, was liable though it was ignorant that its oil was so injuring the well. In *Pixley v. Clark*, 35 N. Y. 520 (1866), citing *Hay v. Cohoes*, *supra*, note 17, it was held that, one who built a dam to utilize the water power of a stream flowing through his land was liable to nearby owners upon whose land, the waters collected by the dam, percolated and seeped through the natural banks of the stream, though they had the right to dam the stream and though the dam was carefully constructed.

¹⁹ 1 Bl. Com. 431. See *contra*, *Filliter v. Phippard*, 11 Q. B. (A. & E., N. S.) 347.

²⁰ *Clark v. Foot*, 8 John (N. Y.), 421 (1811); *Lehigh Bridge Co. v.*

common law liability for the escape of cattle had been declared unfitted to the prevailing conditions; and the owner of agricultural lands was held bound to fence out cattle allowed to range at large.²¹ But more important than all, in a class of case on the surface practically indistinguishable from *Rylands v. Fletcher*, those dealing with dams built across streams necessary for their utilization for manufacturing and other purposes, it had been held without dissent that, if lawfully and carefully constructed, their bursting brought upon him who built them no liability for the ensuing harm.²²

The whole attitude of legal thought in America was at that time dominated by Blackstonian optimism. The common law was regarded as a complete, symmetrical and perfect system. Little, if any, attention was paid to historical research—the important thing was to find what the law was, not its origin or its tendencies. It was regarded as perfect, and as such, almost sacred even from inquiry or criticism, not only as a system but as habitually classified into groups or categories, each separate and distinct. Each category was self-sustaining, its existence was its justification. However closely allied any two or more of these groups might be, however superficial the differences in the situations with which they dealt, there appeared to the legal mind of the era no need but rather something approaching impiety in seeking to find some general principle as their common basis. There was no effort toward generalization, save in those fields where novel situations were of such constant occurrence that the search for general principles had been

Lehigh Nav. Co., 4 Rawle, 9 (1833); *semble*, per Gibson, C. J., pp. 24-25; *Bachelder v. Heagan*, 18 Me. 32 (1840); *Tourtellot v. Rosebrook*, 11 Met. (52 Mass.) 460 (1846); *Lahn v. Roberts*, 8 Wis. 255 (1859); *P. C. & St. L. R. R. v. Culver*, 60 Ind. 469; *Johnson v. Veneman*, 75 Kans. 278 (1907).

²¹ *Delaney v. Erickson*, 10 Neb. 492 (1880); *Studwell v. Ritch*, 14 Conn. 292 (1841); *Wagner v. Bissell*, 3 Iowa, 396 (1856); *Seeley v. Peters*, 5 Gilm. (Ill.) 130 (1848); *Little Rock, etc., R. R. v. Finley*, 37 Ark. 562 (1881); *Morris v. Foraker*, 5 Colo. 425 (1880); *Sprague v. R. R.*, 6 Dak. 86 (1886); *R. R. v. Geiger*, 21 Fla. 669 (1886); *Buford v. Houtz*, 133 U. S. 320 (1890), *semble*.

²² *Livingston v. Adams*, 8 Cowen (N. Y.), 175 (1828); *Lapham v. Curtis*, 5 Vt. 371 (1833); *Shrewsbury v. Smith*, 12 Cush. (66 Mass.) 177 (1853); *Todd v. Cockhill*, 17 Cal. 97 (1860); *Everett v. Hydraulic Flume Co.*, 23 Cal. 225 (1863); *Kug v. Miles City Irrigating Co.*, 16 Mont. 463 (1895), and see note to *Brennan Co. v. Cumberland Co.*, 15 L. R. A. (N. S.) 545.

early forced on the courts and bar and had become sanctioned by long continued usage. That in a number of different actions, involving substantially similar situations, identical results were reached did not suggest the existence of a general principle common to them all nor did the fact that radically different decisions were rendered in actions upon facts fundamentally closely similar, lead to any real inquiry as to the reason for this divergence. If any explanation was offered it was that the less frequent and important actions were mere sporadic exceptions, having each perhaps some obscure reason for its existence, to be followed if the facts fell clearly within them, but not to be extended.

Injuries to the person, to personal property and to business interests had come to occupy an altogether preponderant part of the field overed by the law of torts. As civilization advanced and society became more complex, the points of contact between man and man multiplied rapidly and an almost infinite number of novel situations arose in which the activities of one person might injuriously affect the personal interests of others. On the other hand, there was, at least till the introduction of steam and electricity, no corresponding increase in the points of contact between landowner and landowner, there was little change in the uses to which land was put. There was, of course, some slight modification in specific actions, such as that of nuisance; but, as compared to the various actions for injuries to personal interests, the actions of trespass, nuisance and case for damage by fire and cattle remained stationary without any appreciable expansion or growth. So the attention of the courts was concentrated in the field of tort law on solving the new problems of liability for personal injuries constantly arising. In this new field, they were forced to generalize, to discover general principles of liability to govern novel cases. On the other hand, the actions for injuries to land remaining stationary; there was no similar impetus to the investigation of their basis and they naturally came to be regarded as mere anomalies, governed by rules peculiar to themselves. Thus it naturally followed that courts came to regard the principle that liability depended upon fault, which as has

been seen had come to supplant the older conception in cases of personal injury, as the general principle of the law of tort liability and to regard the cases of injury to land in which the older conception had persisted as exceptions, to be followed if the facts were clearly within their authority, but on no account to be extended by analogy. When, therefore, land was put to a new use, when streams were dammed to provide water power, the courts, whose minds had become habituated to the idea that the function of the law was to give the plaintiff compensation only, as a sort of punishment for some ethical or social misconduct on the part of the defendant, applied this conception to the new situation, since it did not fall exactly within any of the established actions of trespass, or nuisance or case for the spread of fire or the escape of cattle.

But it is submitted that the real reason for the divergent attitude of English and American courts lies deeper and is inherent in the very nature of the question.

In every case where, by the lawful and careful use of his land, an owner infringes his neighbor's exclusive occupation and enjoyment of and dominion over his land, there arises a conflict of antagonistic interests; and this conflict is not merely between the interests of the particular parties but involves a far wider antagonism. The ownership of land carries with it two beneficial incidents—each of which has come to be recognized as a legal right—the “right” of exclusive occupation, enjoyment and dominion, and the “right” to utilize it for the owner's social and economic purposes. When these two rights conflict which is to prevail?

The most important function of modern tort law is, not so much to formulate definite legal rules, as to apply fundamental and traditional conceptions of justice to the solution of new social and economic problems. In a hundred different fields of activity, the interests of one person or class conflict with the interests of another person or class. If one is to be allowed entire freedom of action, it must be at the cost of depriving the other of his freedom. If one is to be allowed to exercise to the full his extreme property rights, the other must surrender some part of his similar rights. The problem, in such cases,

can hardly ever be solved by any rule of law as such, each right may be a legal right or there may have been as yet no recognition of any right to do either of the particular things, as distinct from the general right of liberty of action.

The problem of drawing the line, of placing boundaries to the fields of permissible effort to accomplish mutually antagonistic objects, to realize irreconcilably conflicting desires and the determination of the proper exercise of rights whose extreme enjoyment mutually interfere the one with the other, cannot be solved by any pre-existing system of rules of law automatically applicable to each new situation. The solution must depend upon the existing social, political and economic conditions and conceptions prevailing at the particular time and in the particular place, the traditional attitude of mind and habit of thought, even the prejudices, of the class then and there dominating public thought. As such conditions, conceptions, modes of thought and prejudices naturally vary in different places and at different times, it is natural to find that the line is drawn and the boundary set, at entirely different points.

So in determining whether the right to the fullest possible beneficial user should prevail over an extreme insistence upon the exclusiveness of ownership, it is natural that different results should be reached in England and America. What may appear desirable in an ancient and highly organized society whose natural resources have been gradually and fully developed may be utterly inappropriate and harmful in a newly settled country whose natural resources still require exploitation. In the former, the natural tendency is to regard the preservation of the early recognized right, such as that of exclusive dominion over land, as of paramount importance. In the latter the pressing need is not the preservation of existing rights, not the proper distribution of wealth already in existence, but its creation, the permutation of opportunity into wealth; and so the tendency is to encourage an enterprise which tends toward the material development of the country, even at the expense of the legal rights of individuals. Nor should it be forgotten that, in England, the dominant class was the landed gentry, whose opinion the judges, who either sprang from this class or hoped to es-

tablish themselves and their families therein—naturally reflected. To such a class it was inevitable, that the right of exclusive dominion over land should appear paramount to its commercial utilization,—to them, commerce and manufacture, in which they had little or no direct interest, appeared comparatively unimportant.

9 On the other hand, the greater part of America was settled, not by offshoots from the landed gentry, but by persons of the commercial and artisan classes, impelled to emigrate largely by their antagonism to the aristocratic government of England. The whole Puritan movement was one long revolt against all the conceptions, social, political and religious, of the aristocracy. The personal interests of such a class would lead them to regard as obnoxious and oppressive rights and privileges in the landowner which did not benefit them nor tend to power and dignity of their class, but, on the contrary, were constantly interfering with their commercial activities. While even the most violent opponent of the landowning class loses much of his distaste for the extreme rights and privileges legally accorded to such class, when he himself acquires land, the inbred class instinct persists; and, even though a landowner himself, to him proprietary rights would never possess the extreme sanctity attached to it by a caste which for generations had lived and governed and thought, not as men so much as landowners. To the one class, land is primarily a private domain, an estate from which the owner derives his power and dignity, within which he must be supreme and undisturbed by intrusions; to the other, land is a possession, an asset to be utilized for the economic advantages of the possessor.

Another influence may perhaps be mentioned. The underlying theory upon which the Declaration of Independence and the Constitution of the United States and of the several states rest is that of the "Social Contract"—That "by becoming a member of civilized society one is compelled to give up many of his natural rights, recovering in return more than a compensation in the surrender by every other man of the same rights and the protection for the rights which remain given thereby." By this theory all rights "of property as well as of person in the social

state are not absolute but relative" and are subject to the exigencies of the social state and must be so arranged, while not unnecessarily "infringing upon natural rights, as upon the whole to promote the general welfare." Such a theory by definitely recognizing private rights as subordinate to the public good, and recognizing the state, whose mouthpiece is the court, in the absence of legislative action, as the final arbiter as to what is the public welfare and how far it requires the surrender of individual rights, naturally affords to the court the fullest scope to give effect to its economic opinions.²³

Now while in England certain uses of land had been permitted, even though they interfered with the extreme proprietary rights of neighboring owners, the field of permissible user was definite and known and, save in very exceptional cases, the neighbor's property was secure from physical invasion.^{23a} The universally permitted uses were those to which mankind at the very beginning of private ownership had put land which, thus, by tradition based on immemorial usage, had come to be regarded as the uses for which nature had designed land for human enjoyment—or uses for which the physical nature of the

²³ "So, too, the general rules that I may have the exclusive and undisturbed use and possession of my real estate and that I must so use it as not to injure my neighbor, are much modified by the exigencies of the social state. We must have factories, machinery, dams, canals and railroads. They are demanded by the manifold wants of mankind, and lay at the basis of all our civilization. If I have any of these upon my land and they are not a nuisance and not managed so as to become such, I am not responsible for any damage they accidentally and unavoidably do my neighbor. He received his compensation for such damages by the general good in which he shares and the right to which he has to place the same things upon his lands. I may not place a nuisance upon my land to the damage of my neighbor and I have my compensation for the surrender of this right to use my own as I will by the similar restriction imposed upon my neighbor for my benefit. I hold my property subject to the risk that it may unavoidably or accidentally be injured by those who live near me; and as I move about on the public highways and other places where persons may lawfully be, I take the risk of being accidentally injured in my person by them at fault on their part. Most of the rights of property, as well as of persons, in the social study are but relative and they must be so arranged and modified in unnecessarily infringing on natural rights, as upon the whole to promote the general welfare," Earl, J., in *Losee v. Buchanan*, 51 N. Y. 476 (1873), the first case to definitely repudiate *Rylands v. Fletcher*.

^{23a} Indeed, this was only where by the defendant's farming or building, the ordinary flow of surface water was diverted and cast in bulk upon the plaintiff's land. Even here the substance would have come upon the plaintiff's land in any event, and the defendant's acts merely change its flow and make its coming more harmful.

land itself marked it as peculiarly adapted to satisfy the pressing needs of a primitive society. Homesteads were the first real property segregated from communal ownership and put under the exclusive occupation and dominion of individuals. The arable land, while not set apart permanently to any individual, was assigned to the various members of the community for exclusive use. Mining was essential, not merely to trade and commerce, not only to the owner's complete realization of the value of his property, but also to the very life of the community. Without iron the weapons necessary for war could not be had; nor were the precious metals appreciably less essential to the security of the community.²⁴ Not only were these uses those which would be first recognized as giving value to land for human occupation, but they were those to which by far the greater part of all land could be put, and for which all men regarded land as available. The value of land for such use did not depend on some peculiarity of location nor upon some peculiar desire or individual choice of the owner. They were uses which must be enjoyed, if at all, wherever the land was situated; the owner had no choice as to where he would use his land for these purposes. Land must be cultivated where it lay, homes built wherever man owned land, mines developed where nature had deposited minerals.

Land, as such, was marked out by tradition and immemorial usage as primarily fitted for homes and farming, land containing minerals was equally marked out by the most pressing needs of primitive society as appropriate for mining. Such uses were, therefore, regarded as "natural" the generic name given to them by Lord Cairns in *Rylands v. Fletcher*, as uses determined not by the choice or needs of any individual owner, but by the very nature of the land, as such, or by the particular nature of the particular land.²⁵ But a landowner was protected

²⁴ Nor must it be forgotten that the crown which secured royalties upon all precious metals dug had a direct interest in the encouragement of mining.

²⁵ So, in the appropriation of the water of a stream, an upper owner might take all he needed for the natural use of his land, for the needs of his household or of his farm, for drinking, washing and watering his cattle, even though he exhausted the supply and so prevented a similar appropriation by the lower owners; but he could not take any water for other pur-

from liability only for the harm done by ordinary farming and mining operations and by normal residential use; he could not adopt new or peculiar methods, no matter how beneficial to himself, which increased the hazard of his neighbor. While he might, by his farming or other operations, change the channels through which natural forces acted, even though by the change his neighbor suffered, he could not by artificial means cast upon his neighbor's land a natural burden, such as water, resting on his own no matter how seriously it interfered with his "natural" use thereof.²⁶

Nor must it be overlooked that such uses would naturally be peculiarly sacred to all members of the landowning class great and small. To the householder, the ordinary use of his house was of primary importance; the right to till the soil was of equal importance to the yeoman holding a freehold farm and to

poses, even for manufacture, if the usual flow of the water was sensibly affected. Such cases do not strictly involve an injury to the lower owner's property right for his land is not invaded nor is anything, as yet his, taken. They deal with the distribution of a common fluid placed by nature at the successive disposal of the riparian owners; and merely apply the homely principle that he whom nature serves first may satisfy his needs, even though others after him go without; but they show that the needs which may and which alone may be satisfied to the deprivation of others are the household and farming needs, the necessities incident to the "natural use" of land.

²⁶ So mine owners were liable in *Baird v. Williamson*, 15 C. B. (N. S.) 376 (1863), mine water artificially pumped from a lower to an upper working, whence it flowed by gravity into plaintiff's mine; *Westminster Coal Co. v. Clayton*, 36 L. J., Ch. 476 (1867), artificial troughs constructed to carry mine water to perforations between plaintiff's and defendant's workings; *West Cumberland Iron Co. v. Kenyon*, L. R., 11 Ch. Div. 782 (1879), holes bored to rid mine of water; *John Young & Co. v. Bankier*, L. R. 1893, A. C. 691, water pumped from mine, flowing into and polluting a stream to the damage of a lower riparian owner.

No distinction can be made between operations on the surface in the course of its ordinary use for farming, or for the purpose of appropriating valuable surface deposits such as gravel, brick clay, etc., for mining purposes and operations underground, *Fry, J., Atty. Gen. v. Tomline*, L. R., 12 Ch. Div., p. 230 (1879). "A man so situated with regard to his neighbor that by an ordinary act in the use of his neighbors land, such as by deep ploughing, the ordinary flow of water is sent from that land onto his land, would be in the position of having his land subject to that defect, and therefore he could not recover for the injury he might so suffer." *Brett M. R. Whalley v. Ry.*, L. R., 13 Q. B. D. 131 (1884), p. 141. But his neighbor may not to relieve his land of the burden of, or his property from the danger from, an accumulation of water cut trenches so that it shall flow on his neighbor's land, *Whalley v. R. R.*, *supra*, nor probably, may he under color of farming plough deep furrows for that purpose, *Clerk and Londell on Torts*, 2nd Ed., p. 367, n. d.; nor may he in the course of his operations and for the purpose of more conveniently carrying it on divert a stream flowing through his land into hollows, so that through them it flows onto his neighbor's land, *Fry, J., Atty. Gen. v. Tomline*, *supra*, p. 230.

the owner of a great estate, whether he cultivated the land himself or derived his importance from the feudal services or rents of his tenants.

On the contrary, the use of land for business uses of such magnitude or character as to differentiate it in any important essential from ordinary industrial use, was a comparatively modern thing, no immemorial traditions give sanctity to it. Nor had nature or consensus of human opinion marked all land or any particular lands as peculiarly fitted to such use.²⁷ The selection of any particular piece of land for a particular business use appeared to be determined wholly by the choice of the individual, by his peculiar needs or desires, by his conception of what was to his own advantage. All land must be farmed where it lay and farmed in substantially the same way, a certain freedom of farming was a valuable incident to practically all land and every one was benefited by all being allowed such use—even the injured neighbor gained by his similar right to farm without liability.²⁸

²⁷ The modern conception of the "natural" use of land is more complex, and takes into account many elements not considered in a more simple condition of society. Obvious commercial convenience, the consensus of opinion shown by the choice by many persons of a particular locality for particular use, are taken to exhibit its applicability thereto. So, where by reason of its nearness to raw material, to shipping ports or to cities in which the product finds a ready market, a locality has been marked out as appropriate for manufacture and has been so utilized by many persons desiring to carry on such business, that locality is so far devoted to that use that its residents must suffer those interferences with their full enjoyment of their property, even for the primary purposes of farming and residence inevitable in manufacturing districts. But even here their exclusive occupation of and dominion over their premises may not be violated nor their property physically injured. See notes 30 and 31.

²⁸ So Bramwell, B., in *Bamford v. Turnley*, 3 B. & S. 66 (1862), says, p. 83: "The instances put during the argument of burning weeds, emptying cesspools, making noises during repairs, and other instances which would be nuisances if done wantonly or maliciously, nevertheless may be lawfully done. It cannot be said that such acts are not nuisances, because, by the hypothesis, they are; and it cannot be doubted that, if a person maliciously and without cause made close to a dwelling house the same offensive smells as may be made in emptying a cesspool, an action would lie. Nor can these cases be got rid of as extreme cases, because such cases properly test a principle. Nor can it be said that the jury settle such questions by finding there is no nuisance, though there is. For that is to suppose they violate their duty, and that if they discharged their duty, such matters would be actionable, which I think they could not and ought not to be. There must be, then, some principle on which such cases must be excepted. It seems to me that that principle may be deduced from the character of these cases, and is this, viz., that those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done,

The possible business uses of property were infinite, determined not by any universal consensus of opinion, but by the infinitely varying needs of particular persons, by each man's view of what would best serve his private interest, by his business judgment, sound or unsound. The effect of a particular use even if injurious to his neighbor's property may be valuable to the community as a whole. This depends on the soundness of the judgment or the good luck of the individual user. Even if the use is well chosen, while the community profits moderately, the user personally reaps a reward altogether out of all proportion to that which enures to any other individual member of the community. His neighbor who may have no desire to use his land for business purposes gains no advantage such as he would gain by his right to freely use his land for purposes for which the great majority of persons recognize land as primarily fitted. Unless it be conceded that unrestricted freedom of individual choice of means for self-advancement is essential to the proper economic growth of society, the benefit to the community by the growth of business and particularly to the individual members of it, by their being allowed the utmost liberty of choice in the business use of their land differs, not in degree only but in kind from the benefit derived from freedom of farming, of residential use or of mining^{28a}. At most it is an indi-

without subjecting those who do them to an action. This principle would comprehend all the cases I have mentioned, but would not comprehend the present, where what has been done was not the using of land in a common and ordinary way, but in an exceptional manner—not unnatural nor unusual, but not the common and ordinary use of land. There is an obvious necessity for such a principle as I have mentioned. It is as much for the advantage of one owner as of another; for the very nuisance the one complains of, as the result of the ordinary use of his neighbor's land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live."

See also the statement of Dodderidge, J., in *Jones v. Powell*, Palmer, 535 (1628), p. 537: "But for the use of sea-cole no action lies, if it is ordinary: and in these matters the Law is like 'Apparel,' which alters with the time."

^{28a} See Bramwell, B., in *Bamford v. Turney*, p. 84—who takes the extreme individualistic view that nothing is for the benefit of the public unless it is productive of good to the individuals composing the public "in the balance of gain and loss to all." "Wherever this is the case," he says, "the loss to the individual members of the public who lose will bear compensation out of the profits of him who gains." "Unless the defendant's profits are enough to compensate," the loss he causes, "I deny that it is for the public benefit that he should do what he has done."

rect advantage; a small participation in the general prosperity which business development would confer on the community. Nor was the dominant class interested in the commercial development of the country—they looked down upon the artisan and merchant, who originally had but little political power. So it was only when the business was not merely indirectly beneficial to other members of society as increasing the sum of prosperity of the community, but essential to satisfy the absolute necessities of all, that a business use of land was tolerated at the expense of proprietary rights,²⁹ and, even then, only where it did no more than interfere with the comforts and amenities of the enjoyment of other land. In such case, adjacent owners might be forced to put up with offensive smells, disagreeable sights and a certain amount of noise. When manufacturers became of immense economic importance and the commercial classes attained great if not preponderating, political power certain localities became marked out as appropriate for manufacturing use. But, even in such localities while landowners must look for less comfort in the primary and natural enjoyment of their land than in some secluded farming country,³⁰ private land could not be physically invaded by the most important business operation.³¹

(To be continued.)

Francis H. Bohlen.

Law School, University of Pennsylvania.

²⁹ In such case the mere carrying on of such a business is not a nuisance, but the carrying it on at a place not "convenient" for them; see *Jones v. Powell, Palmer*, 535 (1627), in which "Hide," C. J., says, p. 538: "The erection of a public or private brew house by itself is not a nuisance nor the burning of sea-cole therein; but if it is erected near to the messuage of another, as here, so that by it his goods are spoiled and his messuage made uninhabitable '*par le smoke*,' an action well lies;" and earlier he says: "The tan-house necessary *car tous* wear shoes but yet it can be pulled down if it is erected to the nuisance of another: and so of a glass-house; for these ought to be erected in places convenient for them."

Such businesses can be carried on in many places, though perhaps with varying profit and convenience to the owner, and he must prove not only that the business he conducts is essential to the satisfaction of the necessities of mankind, but that he is carrying it on at a place where it will do no harm, or the least possible harm to others. The "convenient" place is not one convenient and profitable to him who owns the business, but which does the least harm to others.

³⁰ *Salvin v. Brancepeth Coal Co.*, L. R., 9 Ch. App. 705 (1874), per James, L. J., pp. 709-710, *St. Helens Smelting v. Tipping*, 11 H. L. C. 642 (1865), particularly per Westbury, L. C. 750. See also *Dodderidge, J.*, in *Jones v. Powell, Palmer*, 536, p. 537: "If a man is so tender nosed that he cannot endure sea-cole, he should lease his house."

³¹ *St. Helens Smelting Co. v. Tipping*, 11 H. L. C. 641. Even in Penn-

sylvania, where the conception that the welfare of the community depends on the development and encouragement of commerce and manufacture prevails in its most extreme form, and in which, therefore, the immunity from liability for damage incident to an owner's business use of his premises is carried to its utmost limit, it was held in *Sullivan v. Jones & Loughlin*, 208 Pa. 540 (1904), that one of the greatest of industries, the use of Mesaba ore for the manufacture of steel, should be enjoined if physical harm to adjacent residences was inevitable from its operations; but see *Sullivan v. Jones & Loughlin*, 222 Pa. 76 (1908), a petition for attachment for contempt in violating the decree in the former case, in which the original decision seems to be greatly modified, in that the physical injury to the plaintiff's property is not regarded as a nuisance unless so serious (not merely appreciable, the test laid down in *Salvin v. Coal Co.*, *supra*, note 30), as to amount to its practical destruction or confiscation.