THE RULE IN *RYLANDS* v. *FLETCHER*, AND ITS LIMITATIONS.

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"The rule known as that in *Rylands* v. *Fletcher* is one of the most important cases of absolute liability recognized by our law—one of the chief instances in which a man acts at his peril and is responsible for accidental harm, independent of the existence of either wrongful intent or negligence."

Salmond on Torts, 5th ed., p. 200.

It is the object of this paper to state in somewhat elementary form the doctrine, scope and limitations of this leading case which, as Dean Wigmore says, has proven "epochal in its consequences" (7 Harv. L. Rev. 455) upon the development of the law of Torts. No effort has been made to discuss or analyze the true philosophical or juristic basis of the Rule; the attempt is merely to collect the English and Canadian decisions illustrating the doctrine of the principal case as well as the restrictions which have been imposed thereon.

I.

The Rule in Rylands v. *Fletcher.*

"The person who for his own purposes 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."[1]

The facts in this important leading case were as follows: The plaintiff was the lessee of certain mines.

[1] Per Blackburn, J., in *Fletcher* v. *Rylands* (1866), L. R. 1 Ex. 265 at p. 279; affirmed in the House of Lords (1868) L. R. 3 H. L. 330.

The defendant who owned a mill on the adjoining land constructed a reservoir on his land, employing competent architects and contractors. Under the defendant's land so built on were certain abandoned vertical coal-mining shafts, which unknown to the defendant communicated through other old disused passages with the adjacent and underlying mines of the plaintiff. When the reservoir was filled, water escaped down the vertical shafts, found its way through the old passages, and finally flooded the plaintiff's mine and caused damage.

It was held by the Court of Exchequer Chamber[2] that the defendants were liable for the damage, although personally guilty of no negligence, on the ground that they had collected a dangerous thing on their land and were therefore under an absolute liability to keep it from escaping and injuring their neighbours.

The duty of an occupier of land in this connection was thus stated by Lord Blackburn at page 279—

> "The question of law therefore arises, what is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escapes out of his land. It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbours, but the question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it in *at his peril* or is . . . merely a duty to take all reasonable and prudent precautions, in order to keep it in, but no more. . . . We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do

[2] (1866) L. R. 1 Ex. 265.

> 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."

This decision was affirmed in the House of Lords where the Rule was thus expressed by Lord Cranworth:[3]

> "If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage."

Historically the Rule above stated originated in the common law rule which imposed an absolute liability for damages done by trespassing animals and which had been applied in various classes of cases.[4] But it is now generally referred to as the Rule in *Rylands* v. *Fletcher,* that being the first case in which the whole duty of occupiers of land with respect to the escape of dangerous things was exhaustively considered and precisely formulated.

The duty thus imposed on occupiers is a very onerous one—it is a positive duty or strict responsibility resting on every occupier of premises to prevent at all hazards damage being done to his neighbours from the escape of deleterious or potentially dangerous things brought or collected by him upon his premises. The occupier is held practically to insure his neighbours from such damage, and therefore the absence of negligence on his part is no answer to the damage, nor are the precautions actually taken material to his liability.[5] Such a burdensome duty, if

[3] (1868) L. R. 3 H. L. 330 at p. 340.

[4] Salmond, p. 230, note (e).

[5] As to the true juristic basis and scope of the Rule, reference may be made to Pollock on Torts, 11th ed., at 494; Prof. E. R. Thayer, "Liability without Fault," 29 Harv. L. Rev. 801; Dean Wigmore, "Select Essays in Anglo-American History," Vol. 3, pp. 518-20.

interpreted literally and pushed to its logical limits, might become an intolerable incident to ownership of land, and so, as will be noted later, the courts have confined the rule strictly to its terms and have favoured the making of limitations thereto.[6]

As was said in *Rickards* v. *Lothian*[7] "It is not every use to which land is put that brings into play that principle (the principle of *Rylands* v. *Fletcher*). It must be some special use bringing with it increased danger to others." The basis of the Rule, therefore, being that a person who chooses to keep or bring on his land something which exposes his neighbour to an added danger, should be obliged to prevent its doing damage, it follows (as an analysis of the Rule will show) that the occupier is not under an absolute liability for the escape of things which he did not himself bring or accumulate on his land, or which he brought for the common benefit of himself and his neighbour, or for using his land in the ordinary and natural way.[8]

It may be noted as illustrative of the scope of the Rule that it has been applied to such various things as the storing or discharge of electricity,[9] poisonous trees,[10] falling buildings,[11] sewage,[12] gas fumes,[13] bees,[14] smells,[15] explosives,[16] damages resulting from a fire caused by an automobile brought on the pre-

[6] Pollock, p. 492.

[7] [1913] A. C. 263 at p. 280; *Eastern & South African Telegraph Co.* v. *Cape Town Tramways Co.*, [1902] A. C. at p. 393.

[8] See *post.*

[9] *National Telephone Co.* v. *Baker*, [1893] 2 Ch. Div. 186; *Eastern & South African Tel. Co.* v. *Cape Town Tramway Co.*, [1902] A. C. 381; *Bell Telephone Co.* v. *City of Ottawa*, 19 O. W. N. 381; *Quebec Railway, Light, etc., Co.* v. *Vandry*, [1920] A. C. 662 (decided under Arts. 1053-54 of Quebec Civil Code).

[10] *Crowhurst* v. *Amersham Burial Ground* (1878), 3 C. P. D. 254.

[11] *McNerney* v. *Forrester*, 2 D. L. R. 718 (Manitoba C. A.).

[12] *Foster* v. *Warblington Council*, [1906] 1 K. B. 648; *Ballard* v. *Tomlinson* (1885), 29 Ch. D. 115.

[13] *Shubiniuk* v. *Hartman*, 20 D. L. R. 323 (Manitoba); *Shotts Iron Co.* v. *Inglis* (1881), L. R. 7 App. Cas. 518.

[14] *O'Gorman* v. *O'Gorman* (1903,) 2 Ir. R. 573.

[15] *Rapier* v. *London Tramways*, [1893] 2 Ch. 588.

[16] *Belvedere Fish Guano Co.* v. *Rainham*, [1920] 2 K. B. 487; [1921] 2 A. C. 465; *Miles* v. *Forest Rock Co.* (1918), 34 T. L. R. 500.

mises,[17] a landslide caused by the piling of large masses of colliery spoil on the side of a hill,[18] and the escape of steam from a drain to another's premises.[19]

The Rule in *Rylands* v. *Fletcher* casts its duty of "strict accountability" only on the *occupier* of the premises, being incidental to *possession* and not to ownership. A landlord who has leased his land to a tenant who is in occupation at the time of the damage is not usually liable therefor. The Rule applies not only between adjoining or adjacent occupiers, but also between upper and lower occupiers as e.g., tenants in an apartment house.[20] It has even been applied to damage done to electric cables by bursting of hydraulic mains laid under the same street, where both companies were maintaining their works under statutory powers, though the "site of the plaintiff's injury" was occupied only under a licence and without any right of property in the soil.[21]

It has been held in Ontario that *Rylands* v. *Fletcher* does not apply to the case of snow accumulating from natural causes on an occupier's roof and falling upon the adjoining property or highway. The occupier, it was held, is merely bound to take all reasonable care to prevent it doing damage.[22]

In Quebec, under Art. 1054 of the Civil Code, a person is absolutely liable for damage done by a person or thing under his control where he fails to establish that he was *unable to prevent* the act which caused the damage.[23] So in *Watt* v. *Watt*[24] the City of Montreal was held liable for damage caused by the flooding of a cellar through the insufficiency of a civic sewer to carry off the drainage waters.

[17] *Musgrove* v. *Pendelis*, [1919] 2 K. B. 43; *Black* v. *Christ Church Finance Co.*, [1894] A. C. 48.

[18] *Attorney-General* v. *Cory Bros. & Co., Ltd.*, [1921] 1 A. C. 521.

[19] *Andrews* v. *C. B. Electric Co.*, 37 N. S. R. 105; see also *Chandler Electric Co.* v. *Fuller*, 21 Can. S. C. R. 105.

[20] *Rickards* v. *Lothian*, [1913] A. C. 263.

[21] *Charing Cross Electric* v. *London Hydraulic Co.*, [1914] 3 K. B. 772.

[22] *Meredith* v. *Peer*, 39 O. L. R. 271.

[23] *Quebec Railway, etc., Co.* v. *Vandry*, [1920] A. C. 662.

[24] 60 Can. S. C. R. 523. Affirmed in Privy Council, 69 D. L. R. 1.

II.

The Rule in Rylands v. *Fletcher does not apply:*

1. Where the escape is due to "vis major" or the act of God; or,

2. Where the escape is due to the act of a stranger; or,

3. To the escape of things which were naturally present on the premises and which were not artificially dealt with by the occupier; or,

4. To the escape of things brought or kept upon the premises not solely for the defendant's purposes but also for the benefit of the person injured; or,

5. Where the occupier is authorized by statute to bring or keep the dangerous thing on his premises.

1. *Act of God or "Vis Major."*

In *Rylands* v. *Fletcher* it was recognized that the absolute duty there laid down as resting upon an occupier was not of universal application. Thus Blackburn, J., said: "The defendant 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." This dictum was converted into a decision in the case of *Nichols* v. *Marsland,*[1] and it may be said that the present tendency of the Courts is to restrict quite rigidly the application of the Rule.

This exception to the Rule, definitely established by the case of *Nichols* v. *Marsland,*[1] was that it has no application where the injury is caused by "vis major" or the "act of God" (which are interchangeable terms).

The facts in that case were that the defendant owned artificial pools formed by damming a natural stream, which flowed through his land and had an outlet, through a system of weirs, into its original course.

[1] L. R. 10 Ex. 255; 2 Ex. Div. 1.

There was no neglect in the construction or maintenance of the dams or weirs. An extraordinarily violent rainstorm caused the stream and the waters in the pools to swell, so that the pressure broke down the dams and the water escaped and flowed down the course of the stream and swept away certain bridges on the plaintiff's adjoining property. The jury having found that there was no negligence and that the damage could not have been reasonably anticipated, the Court held that the damage was caused by an "act of God" and defendant was therefore not liable. As was said by Mellish, L.J.:[2]

> "The accumulation of water in a reservoir is not in itself wrongful; but the making it and suffering it to escape, if damage ensue, constitute a wrong. But the present case is distinguished from that of *Rylands* v. *Fletcher* in this, . . . It is the supervening vis major of the water caused by the flood, which, superadded to the water in the reservoir (which of itself would have been innocuous), causes the disaster. A defendant cannot, in our opinion, be properly said to have caused or allowed the water to escape, if the act of God or the Queen's enemies was the real cause of its escaping without any fault on the part of the defendant."

Bramwell, B., at page 258 (L. R. 10 Ex.), said:

> "No doubt it (was) not an Act of God in the sense that it was *physically* impossible to resist it, but in the sense that it was *practically* impossible to do so."

The term "act of God" is used in a more or less special sense in some branches of the law. Thus the "act of God" which will relieve a common carrier of his absolute liability for the goods in carriage must be "any accident as to which he can show that it is due to natural causes directly and exclusively without human intervention, and that it could not have been

[2] 2 Ex. D. 1 at p. 5.

prevented by any amount of foresight, pains and care reasonably to have been expected from him";[3] or "something in opposition to the act of man."[4] But as used in the recent cases under this Rule it does not necessarily imply a violent operation of elemental forces, as storms, lightning or earthquakes of a rare and unusual kind (though of course all agencies of nature are properly acts of God).

The "act of God" which excludes the operation of the Rule in question means *any extraordinary occurrence or act which could not reasonably be anticipated or prevented by reasonable care,*[5] and it may be one which it is either physically or practically impossible to guard against.[6]

> "To come within the Rule of vis major it is not necessary that the act should be unique, that it should happen for the first time; it is enough that it is extraordinary and such as could not reasonably have been anticipated."[7]

And similarly the fact that the damage might have been averted by some conceivable steps will not be material; the only question being as to whether reasonable care and prudence were exercised in the circumstances.[8]

Thus it has been held in Ontario[9] that an extraordinary rainfall may properly be treated as an act of God although it is not of unprecedented severity, if there is nothing in previous experience to point to a probability of recurrence. And similarly the over-

[3] *Nugent* v. *Smith* (1876), 1 C. P. D. per James, L. J., at p. 444.
[4] *Forward* v. *Pittard* (1785), 1 T. R. per Lord Mansfield at p. 33.
[5] *Watt & Scott, Limited* v. *City of Montreal*, 60 Can. S. C. R. 523; 69 D. L. R. 1; *Nichols* v. *Marsland*, L. R. 10 Ex. 255; *Valiquette* v. *Fraser*, 39 Can. S. C. R. 1; *Nashwaak Pulp Co.* v. *Wade* (1918), 43 D. L. R. 143 (New Brunswick, C.A.).
[6] Per Bramwell, B., in *Nichols* v. *Marsland*, L. R. 10 Ex. at 259; cf. definition of *damnum fatale* adopted in *Greenock Corporation* v. *Caledonian Ry.*, [1917] A. C. 556.
[7] Per Fry, L.J., in *Nitro-Phosphate Co.* v. *London & St. Catherine Docks Co.*, 9 Ch. D. at p. 515.
[8] Salmond on Torts, 5th ed., at p. 243.
[9] *Garfield* v. *City of Toronto*, 22 O. A. R. 128; *Bailey* v. *Gates*, 35 Can. S. C. R. 293.

flowing of a mill pond to the injury of a lower proprietor as the result of a heavy rainfall during the night, under circumstances not sufficient to suggest the need of exceptional precautions to prevent its overflow, did not render the owner of the pond liable for the injury, which was under the circumstances attributable to vis major.[10] And in *Watt & Scott, Ltd.* v. *City of Montreal*[11] it was held that a rainstorm did not constitute vis major where, though extraordinary but not unprecedented in the locality, it was not of such violence that it could not reasonably have been anticipated.

2. *Act of a Stranger.*

The severity of the duty imposed on occupiers by the Rule is further mitigated by a limitation which exempts them from liability where the escape of the dangerous thing was caused by the act of a stranger or by agencies over which the occupier had no control.

Accordingly in *Box* v. *Jubb*[12] the defendants were held not liable for damage done by an overflow from their reservoir caused by a third person emptying his own reservoir and thus sending a large quantity of water down the sluices which supplied the defendant's reservoir. Per Kelly, C.B., at page 79,—

> "The matters complained of took place through no default of or breach of duty of the defendants, but was caused by a stranger over whom and at a spot where they had no control. It seems to me to be immaterial whether this is called vis major or the unlawful act of a stranger; it is sufficient to say that the defendants had no means of preventing the occurrence . . . and could not possibly have been expected to anticipate that which happened."

Similarly in *Wilson* v. *Newberry*[13] a pleading alleging the escape of yew clippings was held bad because

[10] *McDougall* v. *Snider*, 15 D. L. R. 111 (Ontario C. A.).
[11] 60 Can. S. C. R. 523; 69 D. L. R. 1; *Faulkner* v. *City of Ottawa*, 41 Can. S. C. R. 190.
[12] (1879) L. R. 4 Ex. D. 76.
[13] (1871) L. R. 7 Q. B. 31.

"it is quite consistent with the averments of this declaration that the cutting may have been done by a stranger without the defendant's knowledge." And in the case of *Rickards* v. *Lothian*[14] the escape of water from a lavatory on the top floor of a building caused by the malicious act of an unknown person in turning on a tap, was held not to render the occupant liable for the damage done to a lower tenant.

The term "stranger" in the above rule includes trespassers and persons who, without entering on the land, cause the escape therefrom of dangerous matter;[15] or persons who collect a dangerous thing on the land for their own purposes, and not for those of the defendant;[16] but the exception does not apply to the acts of persons lawfully on the land, as licensees, or to the acts of the occupier's family or servants, or to acts of independent contractors authorized to deal with the dangerous element, for the occupier cannot get rid of his duty to prevent its escape by employing contractors.[17]

3. *Things not brought or collected on the Land by the Defendant.*

The basis of the Rule being the added danger to which the neighbouring owners are subjected by the act of the occupier in artificially bringing or keeping a potentially dangerous thing on his land, it follows that it does not apply to the escape of things which were naturally present on the land and which he did not himself bring there or accumulate in any way.[18] Thus he is not bound to prevent the escape of animals or vermin,[19] or shrubs, herbage, decayed trees or other

[14] [1913] A. C. 263; *Carstairs* v. *Taylor* (1871), L. R. 6 Ex. 217; *Nichols* v. *Marsland*, L. R. 10 Ex. at p. 259; and see *Imperial Tobacco Co.* v. *Hart*, 51 N. S. R. 379; *Stevens* v. *Woodward*, 6 Q. B. D. 318 at p. 322.

[15] *Box* v. *Jubb*, supra.

[16] *Whitmore's Limited* v. *Stanford*, [1909] 1 Ch. D. 427.

[17] *Black* v. *Christ Church Finance Co.*, [1894] A. C. 48.

[18] *Rickards* v. *Lothian*, [1913] A. C. 263.

[19] *Brady* v. *Warren*, [1900] 2 Ir. R. 632; *Stearn* v. *Prentice*, [1919] 1 K. B. 394.

vegetation which are naturally on the land and which he did not plant,[20] or flood water which he did not accumulate but which naturally escaped to the lower land of his neighbour.[21] There must be some kind of activity on the part of the occupier. It is not enough to allow the escape of something which naturally came upon the premises. And so it has been held in Ontario that the occupant of a building, the roof of which is so constructed that from natural causes the snow or ice which falls or collects upon it will naturally and probably slide from the roof, is not absolutely bound to prevent it doing so, but is bound merely to take all reasonable means to prevent the snow or ice from falling upon the adjoining property or highway.[22]

Though the occupier is not liable for the escape of things which are on his land from natural causes, yet he is liable under the Rule if he has accumulated, collected or artificially dealt with them while on his land so that they become a greater source of danger than they were in their natural state; for in that case the damage was really caused by his own act,[23] e.g., where he collects the natural rainfall, or erects some artificial structure, or digs a ditch, or does anything which alters the condition of the land or the things naturally upon it.

In *Hurdman* v. *North East Ry. Co.*[24] the occupier who placed mounds of earth on his land which raised it above the plaintiff's land and caused rainwater which fell on the mounds to ooze through the plaintiff's house, was held liable, on the principle, as stated by Cotton, L.J., at page 173, that:

> "If anyone by an artificial erection on his own land causes water, even though arising from

[20] *Giles* v. *Walker* (1890), 24 Q. B. D. 656; *Reed* v. *Smith*, 27 W. L. R. 190 (B. C. Sup. Ct.); *Wilson* v. *Newberry*, L. R. 7 Q. B. 31; cf. *Crowhurst* v. *Amersham Burial Ground*, 4 Ex. D. 5.

[21] *Nield* v. *London & N. W. Ry.* (1874), L. R. 10 Ex. 4.

[22] *Meredith* v. *Peer* (1917), 39 O. L. R. 271 (where the U. S. and Canadian cases are reviewed); and cf. *Dugal* v. *People's Bank*, 34 N. B. R. 581.

[23] *Fletcher* v. *Smith* (1877), 2 App. Cas. 781; *Wilson* v. *Waddell* (1876), 2 App. Cas. 95.

[24] (1878) 3 C. P. D. 168; cf. *Nashwaak Pulp Co.* v. *Wade*, 43 D. L. R. 143.

natural rainfall only, to pass into his neighbour's land and thus substantially to interfere with his enjoyment, he will be liable to an action at the suit of him who is so injured."

Similarly in *Whalley* v. *Lancaster Railway*[25] the erection of a railway embankment resulted in dangerous accumulation of flood water. The railway company, in order to allow this water to escape, cut through the embankment and so caused the water to rush through with great violence which did greater damage than if the embankment had never been erected. Here the damage was caused by the accumulation plus the discharge, and the defendant was held liable.

It is a natural right of an occupier to *prevent* his land being flooded, and so it has been held that a riparian owner has a right to erect an embankment on his own land to protect his land from being periodically flooded by a river, although the effect of such embankment is to throw the flood water on the opposite side of the river and cause his neighbour's land, which formerly escaped flooding, to be flooded. Such erections have been held not to be an extraordinary or non-natural use of one's land, the defendants not having accumulated the water or taken active steps to discharge it on the plaintiff's land.[26]

By an anomalous exception to the Rule no liability is imposed on a mine owner for the escape of water, which, by the force of gravitation and natural percolation, finds its way into the plaintiff's mines, provided its escape is merely incident to the ordinary working of the upper mine and not due to any intentional act of the defendant. Whether or not the exception is based on "natural user" is disputed.[27]

[25] (1884) 13 Q. B. D. 131; as to the right of a defendant to release a flood of water to prevent greater damage by the bursting of a dam, see *McDougall* v. *Snider*, 15 D. L. R. 111.

[26] *Gerrard* v. *Crowe* (1920), 90 L. J. P. C. 42; [1921] 1 A. C. 395; *Nield* v. *London & N. W. Ry.*, L. R. 10 Ex. 4; *Maxey Drainage Board* v. *G. N. Ry.*, 106 L. T. 429; *Greyvensteyn* v. *Hattingh*, [1911] A. C. 355 (driving back swarm of locusts).

[27] *Smith* v. *Kendrick* (1849), 7 C. B. 515; *Baird* v. *Williamson*, 15 C. B. (N.S.) 376; *Wilson* v. *Waddell* (1876), 2 App. Cas. 95; *Westminster, etc., Coal Co.* v. *Clayton* (1866), 35 L. J. Ch. 476; Salmond on Torts, p. 236.

4. *Escape of Things maintained with the Consent and for the Common Benefit of the Plaintiff and Defendant.*

The Rule only applies where the dangerous agency is brought or collected by the defendant *for his own purposes,* and therefore, in the absence of negligence, the occupier is not liable for the consequence of escape from his premises of things which were maintained by him not for his own purposes only but for the common benefit and convenience of himself and the plaintiff.

Thus, in the absence of negligence, neither the owner of the house nor the occupier of the upper part is liable for damage done to a lower occupant or tenant by the escape of water from a rain cistern used to supply the plaintiff and the defendant, or the escape of water from a lavatory basin or bathtub, or the bursting of a water supply pipe. For the installation of water systems is a natural user of the premises and a necessary feature of modern life for the convenience and mutual use of the plaintiff and defendant with the express or implied consent of each.[28]

In *Hess* v. *Greenway*[29] the authorities were examined and it was held that a lessee was not liable to his sublessee, apart from negligence, for damage caused by the freezing and bursting of a pipe connected with the heating system of the building. After dealing with certain American decisions Meredith, C.J.O., remarks that

> "It is satisfactory to know that . . . the doctrine of *Rylands* v. *Fletcher* . . . is not to be applied to such a case at this, where the

[28] *Richards* v. *Lothian,* [1913] A. C. 263; *Tennant* v. *Hall,* 27 N. B. R.; *Carstairs* v. *Taylor* (1871), L. R. 6 Ex. 217; *Ross* v. *Fedden* (1872), L. R. 7 Q. B. 661; *Anderson* v. *Oppenheimer* (1880), 5 Q. B. D. 602; *Blake* v. *Woolf* (1898), 2 Q. B. 426; and cf. *Madras Ry.* v. *Zemindar of Carvatenagaram Ry.,* L. R., 1 Ind. App. 364; *Hess* v. *Greenway,* 48 D. L. R. 630 (Ont. C. A.); *Gill* v. *Edouin,* 71 L. T. R. 762; 72 L. T. R. 579; *Powley* v. *Mickleborough* (1910), 21 O. L. R. 556; *Childs* v. *Lissaman* (1904), 23 N. Z. L. R. 945.

[29] *Ubi supra.*

thing which caused the injury is not operated solely for the benefit of the owner of it, but for the benefit of the person who suffers the injury as well as of the owner."

This exception is sometimes put on the ground of "natural user" as in *Gill* v. *Edouin*,[30] where Wright, J. points out that one of the qualifications to which the Rule in *Rylands* v. *Fletcher* is subject is that "where a man uses his land in the ordinary and reasonable manner of use, and damage happens to his neighbour without wilfulness or negligence, no action lies." But it would seem probable that "mutual benefit" is the true ground.[31]

5. *Statutory Authority.*

The Rule does not apply where the dangerous agency which escapes is brought or accumulated by the defendant on his premises under a special statutory authority. In such a case the defendant escapes the absolute liability imposed by the Rule, and is only held responsible for actual negligence in the doing of the thing authorized.[32] "Where the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence, that if damage results from the use of such things independently of negligence, the party using it is not responsible."[33]

The protection of statutory authority extends not only to the damage resulting from acts *directly* authorized, but also to damage from acts impliedly author-

[30] *Ubi supra.*

[31] Salmond on Torts, at p. 231; see also *Rickards* v. *Lothian*, supra, at p. 280.

[32] *Dumphy* v. *Montreal Light Co.*, [1907] A. C. 455; *Johnson* v. *Clarke*, 7 D. L. R. 361; *Green* v. *Chelsea Waterworks Co.* (1894), 70 L. T. 547; *Roberts* v. *Bell Telephone Co.*, 10 D. L. R. 459; *Canadian Pacific Ry.* v. *Roy*, [1902] A. C. 220.

[33] Per Cockburn, C.J., in *Vaughan* v. *Taff Vale Ry. Co.*, 5 H. & N. at 685; and see *Geddes* v. *Props. Bann Reservoir* (1878), 3 App. Cas. at p. 455.

ized or contemplated by the legislature as being the inevitable or natural consequence of, or necessarily incidental to, the proper exercise of the powers conferred.[34] Thus, a railway company authorized to run locomotives is not liable for nuisance caused by the vibration or noise from the necessary operation of the railway,[35] or damage done by sparks from the engines, where it has taken every reasonable precaution and employed the best appliances to prevent such injury, and has not been negligent in the operation of the engine.[36] But if the railway has no authority to use steam engines it would be liable, on the principle of *Rylands* v. *Fletcher*, notwithstanding that it took all proper precautions.[37]

The above observations apply only to statutes which direct or authorize the doing of some work which will almost inevitably cause incidental damage to others, in which case the legislature is deemed to have impliedly contemplated and authorized the damage which ensues without negligence, and from the inherent nature of the thing authorized.

The authority thus given by a statute is often restricted by an express term or by implication. Thus, a statute may not absolutely authorize or direct the doing of the act in question, but merely *permit* the act to be done provided it can be done without creating a nuisance or prejudicing the rights of others, in which case if a nuisance results the statutory authority is no defence.[38]

[34] *Quebec Ry., etc., Co.* v. *Vandry*, [1920] A. C. 662 at p. 680.

[35] *A.-G.* v. *Metropolitan Ry.*, [1894] 1 Q. B. 4; *Eastern & South African Tel. Co.* v. *Cape Town Tram*, [1902] A. C. 381; *R.* v. *Pease*, 4 B. & Ad. 30; *Hammersmith Ry.* v. *Brand* (1869), L. R. 4 H. L. 171.

[36] *Vaughan* v. *Taff Vale Ry. Co.* (1860), 5 H. & N. 679; *C. P. Ry.* v. *Roy*, [1902] A. C. 220; *Canada Southern Railway* v. *Phelps*, 14 Can. S. C. R. at 162; *Freemantle* v. *London & N. W. Ry.*, 10 C. B. (N.S.) 90.

[37] *Jones* v. *Festiniog Ry. Co.* (1868), L. R. 3 Q. B. 733; for further examples see 21 Halsbury's Laws of England, 519, 520.

[38] *Powell* v. *Fall* (1880), 5 Q. B. D. 597; *Wing* v. *London General Omnibus Co.*, [1909] 2 K. B. 652; *C. P. R.* v. *Parke*, [1899] A. C. 535; *Midwood Co.* v. *Corp'n of Manchester*, [1905] 2 K. B. 597; *Charing Cross Electric Co.* v. *Hydraulic Power Co.*, [1914] 3 K. B. 772; *Shelfer* v. *City of London Elec. Co.*, [1895] 1 Ch. 287; *Niles* v. *G. T. R.*, 9 D. L. R. 379.

Thus it has been said:

> "Where the legislature has authorized a proprietor to make a particular use of his land, and the authority is in the strict sense of the law, permissive merely, and not imperative, the legislature must be held to have intended that the use sanctioned is not to be in prejudice to the common law rights of others."[39]

And, so, where a statute provided that a municipality should construct certain gas pipes "so as not to endanger the public health," it was *held* that the statute was no defence in an action for damages suffered by one of the public. Here the statutory authority was limited, and the municipality had gone beyond such limits in constructing the work so as to endanger the public health. It was therefore without statutory authority or exemption with respect to the work so constructed and consequently liable under the rule in *Rylands* v. *Fletcher*.[40] Similarly a statutory authority to erect a small-pox hospital was held conditional upon the hospital being erected on some site where it would not become a nuisance.[41]

* * * *

In the earlier stages of English legal history the general rule of the common law in the sphere of torts was that a man acted at his peril, that is, he was under an absolute responsibility for his voluntary acts, irrespective of the existence of any negligence or wrongful intention. Speaking generally we may say that this rule has been reversed, and that the prevailing modern theory is that liability depends on the existence of some degree of fault on the part of the defendant or his servants. To this modern theory of liability the Rule of *Rylands* v. *Fletcher* constitutes an anomalous

[39] *C. P. Ry.* v. *Parke*, *supra*, at p. 544.

[40] *Raffan* v. *Can. Western Gas Co.*, 18 D. L. R. 13 (affirmed in Supreme Court of Canada (1915) 8 W. W. R. 676); *Town of Cardston* v. *Salt*, 49 D. L. R. 229 (Alta. C. A.).

[41] *Metropolitan Asylum* v. *Hill*, 6 App. Cas. 193; *Rapier* v. *London Tram Co.*, [1893] 2 Ch. 588.

exception and perpetuates (in an age of ethical standards of conduct) what Professor Ames has called "the unmoral standard of acting at one's peril."[42]

> "No decision in the law of Torts has done more to prevent the establishment of a simple and uniform system of civil responsibility."[43]

The decision was in line with some of the then accepted doctrines of liability in tort, being merely a generalization of the law relating to escaping cattle and fire. It is, however, instructive to notice that at the date when Blackburn, J., formulated the Rule, the doctrine of negligence was still in its infancy, for "that law is very modern . . . so modern that even the great judges who sat in *Rylands* v. *Fletcher* can have had but an imperfect sense of its reach and power."[44]

> "If the wide scope and far-reaching effect of the law of negligence had then been fully appreciated, it is quite probable that the courts would not have thought it necessary to retain any part of the old law of absolute liability . . ."[45]

Inasmuch as the Rule is based on a theory of liability no longer consistent with the general law of torts, it is not surprising to discover that it has been rejected by the weight of American authority and that the

> "tendency of the later (English) decisions has been rather to encourage the discovery of exceptions than otherwise."[46]

In a very interesting and suggestive essay, Professor Jeremiah Smith of the Harvard Law School has argued that " at the present time it is generally unnecessary, in order to do justice to a plaintiff (in this class of cases) to adopt the doctrine of acting at peril;"[47] that the same result may be reached by apply-

[42] 22 Harv. L. Rev. 99.
[43] Salmond on Torts, 5th ed., Preface, p. viii.
[44] Prof. E. R. Thayer, 29 Harv. L. Rev. 814.
[45] Prof. J. Smith, 30 Harv. L. Rev. 409.
[46] Pollock on Torts, 11th ed., at p. 493.
[47] 30 Harv. L. Rev. 415.

ing the ordinary doctrine of negligence with its standard of care proportioned to risk.[48] There is, indeed, high authority for the view that *Rylands* v. *Fletcher* itself could have been decided on the ground of negligence, in that the defendants, though not personally negligent, were responsible for the negligence of the contractors employed by them. In attempting to prove negligence for permitting the escape of the dangerous agency it has been suggested that the principle *"res ipsa loquitur"* is available to the plaintiff.[49] For, as Sir Frederick Pollock observes,[50]

> "one does not see why the policy of the law might not have been satisfied by requiring the defendant to insure diligence in proportion to the manifest risk . . ., and throwing the burden of proof on him in cases where the matter is peculiarly within his knowledge."

It is submitted that, without in any way impeaching the authority of the case of *Rylands* v. *Fletcher*, such a course is still open to the Courts; it is still possible to dispose of this class of case by applying the general doctrine of liability based on the absence of due care and invoking, where necessary, the suplementary principle of *"res ipsa loquitur."* The adoption of such a course by the courts would render unnecessary the application of an irrational and out of date standard, and the extension of the general theory of liability to instances hitherto regarded as exceptional would result in the removal of one of the chief obstacles to the development of a logical and symmetrical doctrine of responsibility for torts.

[48] Referring to *Kennard* v. *Cory*, [1922] 1 Ch. 265, 2 Ch. 1, a correspondent in the *Law Quarterly Review* for October, 1922 (38 L. Q. R. p. 405), remarks that "the combined actions . . . are an admirable illustration of the proposition, that every case decided upon the principle of *Rylands* v. *Fletcher* could have been decided upon a different ground of liability."

[49] Pollock on Torts, Preface, 143 Rev. Rep. pp. v, vi; Smith, 30 Harv. L. Rev. 410; Thayer, 29 Harv. L. Rev. 801.

[50] Pollock on Torts, 11 ed., p. 493.