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## RYLANDS v. FLETCHER IN ILLINOIS

EDMUND W. BURKE\*

SINCE 1868 there has been full recognition by the courts of England of the doctrine of absolute liability which attaches, under certain circumstances, to the occupier of real estate irrespective of his wilful or negligent fault. To a large extent the courts of the United States have also recognized the general principle that any person who brings upon his premises that which is inherently dangerous will be held absolutely liable for the harm which it causes in the event that it escapes or participates in some activity which is extra-hazardous in character to others. Such doctrine springs from the celebrated English case of *Rylands v. Fletcher*.<sup>1</sup>

Perhaps it would be well, at this point, to recall the salient features of that case. It appeared there that the defendants were the occupiers of land upon which there was located an abandoned and filled-up coal mine shaft. This shaft communicated with the coal mine of the plaintiff on adjoining property. The defendants hired certain independent contractors to build, on defendants' property, a huge reservoir for the purpose of storing water. These independent contractors were negligent in that they failed to discover the presence of the shaft but placed the reservoir in such a position that when it was filled with water, in obedience to the natural law of gravity, the water escaped through the abandoned shaft flooding the mine of the plaintiff. Plaintiff sued to recover the damages which he thus sustained. The court properly held that the plaintiff could not recover upon any theory of trespass, since the flooding was not direct and

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<sup>1</sup> Sub nom. *Fletcher v. Rylands*, 1 L. R. Exch. 265 (1866).

immediate; nor could the plaintiff recover upon the theory of nuisance, because nuisance, as it was understood at that time, required continuous damage. It even held that the plaintiff could not recover upon the theory of negligence, though in this it probably acted in error. It did conclude, however, that the plaintiff was entitled to recover upon the theory of strict or absolute liability, irrespective of fault arising out of trespass, nuisance, or negligence.

Mr. Justice Blackburn, writing the opinion for the court, announced the following rule:

We think that the true rule of law is, 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. . . .<sup>2</sup>

The case was appealed to the House of Lords which affirmed the decision of the Exchequer Chamber,<sup>3</sup> but Lord Cairns qualified the rule as follows:

The Defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the Plaintiff, the Plaintiff could not have complained that that result had taken place . . .

On the other hand, if the Defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use . . . then it appears to me that that which the Defendants were doing they were doing at their own peril. . . .<sup>4</sup>

Subsequent to the announcement of this rule, certain limitations upon and extensions of the doctrine were recognized in England. In the case of *Carstairs v. Taylor*,<sup>5</sup> for example, it was held that the liability would not be imposed where the escape was due to a *vis major*. In the case of *Nichols v. Marsland*,<sup>6</sup> it was held that there would

<sup>2</sup> *Ibid.*, p. 279.

<sup>3</sup> 3 L. R. App. Cas. 330 (1868).

<sup>4</sup> *Ibid.*, p. 338-9.

<sup>5</sup> 6 L. R. Exch. 217 (1871).

<sup>6</sup> 10 L. R. Exch. 255 (1875).

be no liability for the escape if it was due to an act of God. The cases of *Anderson v. Oppenheimer*<sup>7</sup> and *Blake v. Woolf*<sup>8</sup> also held that the rule would not apply in the event of an expressed or implied assumption of the risk, i. e. where consent on the part of the plaintiff might be found. In still further cases, the courts have held that no liability would attach unless the use to which the premises are put is unusual in the sense that it is not a natural use. In other words, the doctrine is limited to the "extraordinary" use of land in the sense that the use is an unreasonable one taking into consideration, as part of the surrounding circumstances, the nature of the locality where the activity is carried on.

#### GENERAL AMERICAN TREATMENT OF THE DOCTRINE

The rule of *Rylands v. Fletcher*, at an early date, met with great opposition in the courts of this country,<sup>9</sup> and both the late eminent Professor Thayer<sup>10</sup> and Jeremiah Smith,<sup>11</sup> as well as others, condemned the doctrine for assorted reasons. Still other writers, however, notably Professor Bohlen,<sup>12</sup> have championed it on the ground that the individual who engages in a hazardous enterprise, even though that enterprise be of economic value to society as a whole, should pay his way including any damage inflicted as a consequence of the hazard inherent in the enterprise.

Similarly, in praise thereof, the late Dean Wigmore said that Justice Blackburn's generalization was "epochal in its consequences." He further declared:

The practical effect of that great jurist's opinion has been to furnish us with three main categories of acts to which Responsibility is affixed with reference to specific harm, viz. (1) acts done wilfully with reference to that harm; (2) acts done at peril with reference to that harm; (3) acts done negligently with reference to that harm.<sup>13</sup>

<sup>7</sup> 5 Q. B. D. [1880] 602.

<sup>8</sup> 2 Q. B. D. [1898] 426.

<sup>9</sup> See, for example, *Brown v. Collins*, 53 N. H. 442, 16 Am. Rep. 372 (1873); *Marshall v. Welwood*, 38 N. J. L. 339, 20 Am. Rep. 394 (1876); *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623 (1873).

<sup>10</sup> See his article, *Liability Without Fault*, in 29 Harv. L. Rev. 801 (1916).

<sup>11</sup> *Tort and Absolute Liability—Suggested Changes in Classification*, 30 Harv. L. Rev. 241 (1917).

<sup>12</sup> See his article entitled "The Rule of *Ryland v. Fletcher*," 59 U. of Pa. L. Rev. 298 (1911).

<sup>13</sup> *Responsibility for Tortious Acts: Its History—III*, 7 Harv. L. Rev. 441 (1894), at 454-6.

The most recently published work on Torts, that of Professor Prosser,<sup>14</sup> also presents an interesting commentary upon the Rylands rule. He writes:

One factor which has played an important part in hindering the recognition of such strict liability has been the mushroom spread of the term "nuisance." The American courts have shown a deplorable tendency to call everything a nuisance, and let it go at that. Strictly speaking, "nuisance" has reference to the type of interest invaded, and not to any particular type of conduct from which the invasion results.<sup>15</sup> A nuisance may be created by conduct which is intended to inflict damage, by negligence, or, in many cases, by an extrahazardous activity.<sup>16</sup> Strict liability has tended to be absorbed into the broader, more undefined concept. The very courts which have rejected *Rylands v. Fletcher* by name repeatedly have imposed strict liability for nuisances, such as blasting or the storage of explosives, which were called "nuisances" only because the activity was a highly dangerous one.<sup>17</sup> Under this disguise the principle has in fact received far more general recognition than has been admitted or realized by the courts themselves.<sup>18</sup>

For these reasons, the doctrine of *Rylands v. Fletcher* still is rejected by name in the majority of the American jurisdictions.<sup>19</sup> But notwithstanding such obstacles, there is a very definite tendency in recent years to recognize and accept the doctrine.<sup>20</sup>

<sup>14</sup> Prosser, *Handbook of the Law of Torts* (West Pub. Co., St. Paul, Minn., 1941).

<sup>15</sup> The author's original footnote 75 refers to Restatement, Torts, IV, Ch. 40, p. 215.

<sup>16</sup> The author cites *Rose v. Socony-Vacuum Corp.*, 54 R. I. 411, 173 A. 627 (1934), and *Winfield, Nuisance as a Tort*, 4 Camb. L. J. 189 (1931).

<sup>17</sup> In support thereof the author cites *McAndrews v. Colliery*, 42 N. J. L. 189, 36 Am. Rep. 508 (1880), stored explosives; *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654 (1880), stored explosives; *Longtin v. Persell*, 30 Mont. 306, 76 P. 699, 65 L. R. A. 655 (1904), blasting; *Gossett v. Southern R. Co.*, 115 Tenn. 376, 89 S. W. 737, 1 L. R. A. (N.S.) 97 (1905), same; *Landau v. City of New York*, 180 N. Y. 48, 72 N. E. 631 (1904), fireworks; *Birchard v. Board of Health of City of Lansing*, 204 Mich. 284, 169 N. W. 901, 4 A. L. R. 990 (1918), pesthouse; *Whittemore v. Baxter Laundry Co.*, 181 Mich. 564, 148 N. W. 437, 52 L. R. A. (N.S.) 930 (1914), storage of gasoline.

<sup>18</sup> The author calls attention to the fact that in England this confusion has not resulted, because such "nuisances" have been treated as applications of *Rylands v. Fletcher*. He refers to *Miles v. Forest Rock Granite Co.*, 34 T. L. R. 500 (1918); *Hoare & Co. v. McAlpine*, 1 Ch. [1923] 167; *National Tel. Co. v. Baker*, 2 Ch. [1893] 186, 62 L. J. Ch. 699.

<sup>19</sup> Recent cases in point, referred to in the author's note 79, are *Anderson v. Rucker Bros.*, 107 Wash. 595, 183 P. 70, 8 A. L. R. 544 (1919), affirmed in 107 Wash. 595, 186 P. 293 (1919); *Fleming v. Lockwood*, 36 Mont. 384, 92 P. 962, 14 L. R. A. (N.S.) 628 (1907); *Blake-McFall Co. v. City of Portland*, 68 Ore. 126, 135 P. 873 (1913); *Philadelphia Ritz Carlton Co. v. City of Philadelphia*, 282 Pa. 301, 127 A. 843 (1925).

<sup>20</sup> Prosser, *op. cit.*, 451-2.

It is also significant to note that the doctrine has been approved by the Restatement of Torts,<sup>21</sup> and one writer says: "It seems inevitable that the next half century will find it firmly established in nearly all of our courts."<sup>22</sup>

#### APPLICATION OF THE RULE IN ILLINOIS

A great many theories have been advanced concerning the origin of the rule and how it ever came to be, but it is not the purpose of this article to discuss that point,<sup>23</sup> for the prime concern thereof, as the title would indicate, is the effect of the rule of the Rylands case in Illinois.

It is significant to note that in none of the digests purporting to analyze the law existing in Illinois is there any reference, as such, to the rule of absolute liability which the owner of land assumes by bringing upon his premises something that is inherently dangerous, or who participates in some activity upon his premises which is of extra-hazardous nature and likely to cause mischief in the event it escapes. For that matter, no reference is made to the occupier's absolute liability for participating in some activity which is extra-hazardous or inherently dangerous to others. One writer, however, has declared that the courts in half of the states have refused to follow the doctrine, and among those so listed appears the name of Illinois.<sup>24</sup> As authority for

<sup>21</sup> See Restatement, Torts, III, Ch. 21, §§ 519-20. Section 519 declares the rule to be that "one who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm." Section 520 declares an activity to be "ultrahazardous" if it "(a) necessarily involves a risk of serious harm . . . which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage."

<sup>22</sup> Prosser, op. cit., 452.

<sup>23</sup> If the reader is interested in the evolution and genesis of the doctrine, he may find excellent treatment thereof in the following articles among others: Bohlen, *The Rule in Rylands v. Fletcher*, 59 U. of Pa. L. Rev. 298 (1911); Pound, *The Economic Interpretation and the Law of Torts*, 53 Harv. L. Rev. 365 (1940); Molloy, *Fletcher v. Rylands—A Reexamination of Juristic Origins*, 9 U. of Chi. L. Rev. 266 (1942).

<sup>24</sup> See note by M. S. Lindsay in 15 Tex. L. Rev. 355, particularly p. 360, note 37.

such statement, he cites the case of *City of Chicago v. Selz, Schwab & Company*.<sup>25</sup>

An examination of that case, however, will disclose that it hardly warrants the assumption that this state has, in any sense, repudiated or refused to follow the doctrine. That case involved an action against the City of Chicago for damage done by the escape of water from a fire hydrant. The facts disclosed that there was a leak at the bottom of the hydrant from which a small amount of water entered the plaintiff's premises through certain small crevices in the floor of the basement of the building. Plaintiff's servant warned the city of that fact by telephone and also went twice that evening to the proper department endeavoring to have the leak attended to. Nothing was done, however, until the following day when plaintiff's manager succeeded in getting a city foreman to attend to the matter. The manager suggested that the foreman shut off the water before endeavoring to repair the leak, but the foreman refused and set his men at work digging out the refuse around the hydrant. In so doing, they moved the hydrant back and forth. The water pressure was then about thirty-five pounds to the square inch, and the concomitant result of the moving and the pressure produced a break in the connection. The ensuing rush of water made a hole through the side of the hydrant basin into the basement of the building, thereby damaging the plaintiff's goods.

The court held that the plaintiff was entitled to recover against the City of Chicago on these facts, inasmuch as it was acting in a proprietary rather than a governmental capacity in furnishing the water, predicated its decision upon the negligence of the defendant's servants. The court made no reference to the doctrine of *Rylands v. Fletcher*, and an examination of the case would not indicate that any suggestion was made of absolute liability. The negligence on the part of the defendant's foreman was apparent, and there was no need for the court to decide the case on any other basis than that which it did, namely: negligence.

Another case in Illinois which might be suggested as authority against the doctrine of the *Rylands* case, is that of *Jones v. Robertson*.<sup>26</sup> The facts there disclosed that the

<sup>25</sup> 202 Ill. 545, 67 N. E. 386 (1903).

<sup>26</sup> 116 Ill. 543, 6 N. E. 890 (1886).

plaintiffs and the defendant were engaged in mining coal from their respective lands which lay contiguous to each other, the mine of the plaintiffs being upon a descending grade so that any accumulated water would naturally flow into it. The usual method then prevailing of getting rid of mine water was to collect the same in a basin excavated near the mouth of the pit and hoist it to the top of the shaft in barrels. If the accumulation became too great, it was then the custom and usage for the owner of the mine to protect himself from the aggressions of the water as best he could by the erection of a dam. The defendant had been compelled to use this latter method in order to work his mines. Four years after the building of the dam, it finally broke by reason of a constantly increasing pressure and the pent-up waters poured through the defendant's mine into that of the plaintiff. Upon this state of facts, the plaintiff asked the court to give the following instruction:

If the jury believe, from the evidence, that there was a dam erected in one of the main leads or ways of the coal mine of the defendant, either by the defendant, or his lessee, by and with his knowledge and consent, and that by reason of such dam being erected the natural and ordinary flow of the water percolating and flowing through said mine was checked, and thereby accumulated in the mine of said defendant in a large and unusual quantity back of and behind said dam, whereby said dam broke and gave away, and precipitated with an irresistible force a large and unusual quantity of water in and upon the mine of the plaintiffs, and drowned out and destroyed the same, then the jury must find for the plaintiffs.<sup>27</sup>

The trial court refused so to instruct, and plaintiffs excepted thereto. A decision in the lower court for defendant was appealed.

Plaintiffs cited, among other cases as authority for the instruction in question, the case of *Rylands v. Fletcher*. The court, when affirming the decision, declared that to give the instruction would have been error. It did not, though, deny the rule of the *Rylands* case but rather predicated its decision upon the fact that the defendant had the legal right as the upper proprietor to profitably work his mine, and that if he could not do so without building a dam to protect him-

<sup>27</sup> 116 Ill. 543 at 550, 6 N. E. 890 at 893.



self from surface waters flowing over his premises he had the right to build such a dam, particularly since it was the custom and usage among mine owners in the vicinity so to do. The court further held, and it would seem properly so, that if defendant had the right to build the dam in the first instance and exercised ordinary care and skill in doing so, he would not be, and should not be, held liable for the consequences if it subsequently gave way without any negligence or fault on his part.

Again, it might be suggested that such case is far from authoritative on the point of repudiating the doctrine of the *Rylands* case. One significant thing about the Illinois case should be noted: the problem dealt with surface waters, a substance which comes *naturally* upon the land. The doctrine of *Rylands v. Fletcher* has been, from the outset, limited to things which are non-natural, a fact expressly noted by Professor Bohlen in his comment upon this very Illinois case when he wrote:

So in *Jones v. Robertson*, it was held that a mine owner, who, by artificial banks, had diverted into a new channel a stream, which threatened to inundate his mine, was not liable because he had not collected on his land any water not naturally there, but had merely protected himself, as he lawfully might, against a natural enemy already on his premises.<sup>28</sup>

It would seem well, therefore, to look at the other side and note wherein Illinois has followed the principle of the doctrine of *Rylands v. Fletcher*. First of all, it would be wise for those who have classified Illinois as being among the states which have repudiated or refused to follow the doctrine, to examine the case of *Chicago and Northwestern Railway Co. v. Hunerberg*.<sup>29</sup> In that case, the plaintiff was the owner of and resided in a house adjacent to the right of way of defendant, near where defendant had laid a side-track. The defendant's servants backed a freight train down this side-track. Certain of the cars left the rails by reason of some defect thereof. Notwithstanding this, the engineer kept backing the train until the end car went beyond defendant's right of way, through the fence in front of plaintiff's house, and finally struck and demolished the porch. Plaintiff, preg-

<sup>28</sup> 59 U. of Pa. L. Rev. 298 at 443.

<sup>29</sup> 16 Ill. App. 387 (1885).

nant at the time, was upstairs in the house with two young children and suffered a miscarriage from the shock and fright but was not otherwise injured. Defendant contended that the only possible cause of action would be one for negligence but that plaintiff would not be entitled to recover for her personal injuries, since the same were caused by mere fright and the resultant shock to her nerves. Defendant's theory proceeded on the basis that there was no proximate causal connection between its carelessness and the injury, relying upon the fact that where there is no physical impact and the injuries result merely from emotional disturbance recovery will be denied.<sup>30</sup> Despite this, plaintiff received verdict and judgment in the lower court and defendant appealed.

The opinion in the appellate tribunal, written by Justice McAllister, affirmed the decision of the lower court, pointing out that defendant's liability was absolute and not predicated upon negligence. The court cited with approval the case of *Rylands v. Fletcher*, saying:

But it was not necessary for the plaintiff to introduce evidence in the first instance that the escape of these cars from the defendant's right of way, and upon the premises where plaintiff resided, was the result of negligence. It is a well settled rule of the common law, "that 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 . . .

We can perceive nothing in reason or in the circumstances of this case to derogate from the application of that doctrine in this case. Every element involved in the rule is present.<sup>31</sup>

No clearer application of the doctrine should be needed, but other illustrations exist.

In the case of *Indiana, I. & I. R. R. Co. v. Hawkins*,<sup>32</sup> for example, the court applied the effect of the doctrine of the *Rylands* case to damage caused by fire although not

<sup>30</sup> See, for example, *Braun v. Craven*, 175 Ill. 401, 51 N. E. 657 (1898).

<sup>31</sup> 16 Ill. App. 387 at 390.

<sup>32</sup> 81 Ill. App. 570 (1899).

specifically mentioning it. The plaintiff there was injured by reason of a fire set out by the servants of the defendant, upon the defendant's right of way, which escaped to the adjoining land of the plaintiff. At the time the fire was started, the wind was blowing in a favorable direction for burning the dry grass along the right of way without any danger of communicating the fire to adjacent property. While so burning, however, a sudden gust of wind sprang up from the opposite direction, carried the blaze across the track, ignited the grass on the plaintiff's land, and burned over about three acres thereof. Neither counsel for the plaintiff nor for the defendant appear to have cited any authorities, but the court pointed out that the only defense available was that of an act of God, or of inevitable accident. Concluding that the defendant was liable, it stated:

Fire is a dangerous element, and one who sets it out upon the open prairie must be prepared to take care of it and prevent its escaping and doing damage to others or be liable for the consequences.<sup>33</sup>

There can be no question but that such statement is an application of the doctrine of absolute liability here under consideration. It must be conceded that fire, under certain circumstances, is an inherently dangerous element, so that one who starts it would seem to do so at his peril. The rationale of the case might be a throwback to an early English doctrine which imposed strict liability for the escape of fire,<sup>34</sup> a doctrine so absolute in character as to require an act of Parliament to alter it.<sup>35</sup> It is not suggested that such is the true basis for the decision. The case might, rather, serve to support the proposition that, following the Rylands rule, one lighting a fire on his own premises is accumulating an *unnatural* substance there which will entail strict responsibility so far as keeping it within bounds is concerned.

There is still another group of Illinois cases which fall within the ambit of the rule in *Rylands v. Fletcher*, those which involve the use of explosives for some lawful purpose, such as blasting, but from the use of which injury or dam-

<sup>33</sup> 81 Ill. App. 570 at 572.

<sup>34</sup> *Burton v. McClellan*, 3 Ill. (2 Scam.) 434 (1840); *Johnson v. Barber*, 10 Ill. 425 (1849).

<sup>35</sup> 6 Anne, c. 31 (1707); 14 Geo. III, c. 78, § 86 (1774).

age follows as a proximate consequence thereof. Some jurisdictions have held that liability in such cases is predicated upon nuisance or negligence. Others have held that the liability exists irrespective of nuisance, negligence, or trespass for it is regarded as absolute in character. Illinois clearly follows the latter view. Thus, in the case of *City of Joliet v. Harwood*,<sup>36</sup> it was necessary to blast rock in the course of constructing a public work. The blasting took place in a public street, but the evidence disclosed that the contractor used all due care, skill and caution in the performance of the task. Nevertheless, a stone was thrown against the building of the plaintiff thereby causing the injury complained of. The lower court decision in favor of plaintiff was affirmed upon appeal, the Supreme Court basing its opinion upon the inherently dangerous character of the work and saying in part:

In this case the work which the contractor was required by the city to do was intrinsically dangerous, however carefully or skillfully done. The right of recovery in this case does not rest upon a charge of negligence on the part of the contractor; it rests upon the fact that the city caused work to be done which was intrinsically dangerous—the natural (though not the necessary) consequence of which was the injury to plaintiff's property. In such case the city is responsible.<sup>37</sup>

Even stronger is the subsequent case of *FitzSimons & Connell Company v. Braun*<sup>38</sup> in which the defendants, a contracting company and a municipality, in the course of constructing a tunnel, exploded heavy charges of dynamite. The effect of these explosions was to shake and jar the plaintiff's building, causing the floors and walls to sag, crack and separate and generally to impair the utility of the building. On appeal from a decision favoring the plaintiff, one of the principal grounds relied on was a claimed error in an instruction given by the lower court to the effect that one who makes use of an explosive on grounds near the property of another, when the natural and probable though not the inevitable result of the explosion is injury to said property, is liable for the resulting injury however high a degree of care and skill may have been exercised in making use of the explosive.

<sup>36</sup> 86 Ill. 110 (1877). Scott, J., dissented on the ground that the doctrine of *respondeat superior* could not apply.

<sup>37</sup> 86 Ill. 110 at 111-2.

<sup>38</sup> 199 Ill. 390, 65 N. E. 249 (1902).

The exception so taken by the defendants unequivocally raised the rule of the *Rylands* case. In an opinion written by Justice Boggs, the lower court action was affirmed. The opinion is an exhaustive one on the point for it comments upon the rule as applied in a number of other jurisdictions and mentions favorably the decision in the *City of Joliet* case above referred to. While the court recognized that in that case there had been an actual invasion of the property of the plaintiff, inasmuch as the explosion had precipitated rock against the building, it declared such fact should make no difference. Instead, it emphatically stated:

If one who, for his own purposes and profit, undertakes to perform a work, by means of explosives, inherently dangerous to the property of another, should be held liable for an injury occasioned by any substance cast by the explosives on the property of such other, it is only by the merest subtlety of reasoning he should be held not liable to respond for equal or greater damage caused by the concussion of the air or of the earth. There is no ground of substantial or practical distinction. The case of *Bradford Co. v. St. Mary's Co.* [60 Ohio St. 560, 54 N. E. 528] may be regarded as authority for the view that liability in such cases is not restricted to an actual invasion of the property, but damages for consequential injuries may be recovered. The doctrine of the charge to the jury we think correct.<sup>39</sup>

It might be added that while the court recognized that contrary rulings existed in some other jurisdictions, it saw no reason to take Illinois from among those states imposing strict or absolute liability. The still more recent case of *Baker v. S. A. Healy Company*<sup>40</sup> has but followed in that direction.

Yet another group of Illinois cases, if not clearly within the doctrine of *Rylands v. Fletcher*, certainly provides a close analogy thereto. Such cases involve the doing of work of a dangerous character by an independent contractor hired by the owner. In such situations it has been uniformly held in this state that, if the work contemplated is inherently

<sup>39</sup> 199 Ill. 390 at 397, 65 N. E. 249 at 251. In the *Bradford* case, referred to by the court, the action was brought to recover for injury caused by concussion and vibration and was predicated upon an indirect and consequential invasion rather than a direct one. The court there said: "Where the owner of a stone quarry, by blasting with gunpowder, destroys the buildings of an adjoining land owner, it is no defense to say that ordinary care was exercised in the manner in which the quarry was worked." See 60 Ohio St. 560 at 567, 54 N. E. 528 at 529 (1899).

<sup>40</sup> 302 Ill. App. 634, 24 N. E. (2d) 228 (1939).

dangerous, the owner cannot avoid liability merely because he has given the performance of the task to an independent contractor. In the case of *Sherman House Hotel Company v. Gallagher*,<sup>41</sup> it is true, the court held that the contractor was not really an independent one, but it did go on to say that even if he had been the defendant would be liable upon the theory that the work was intrinsically dangerous. That view was subsequently followed in *Andronick v. Daniszewski*<sup>42</sup> in which Justice Matchett, delivering the opinion of the court, made an exhaustive survey of the cases both in Illinois as well as in other jurisdictions. The case of *Van Auken v. Barr*<sup>43</sup> also raised a similar question for there one defendant, lessee of the premises from another defendant, subsequent to the lease, employed a contractor to raze the building on the premises. While the independent contractor was so engaged, a brick fell from the wall and injured plaintiff, a pedestrian. Reliance was placed, for defense, on the fact that the work was being done by an independent contractor over whom the defendants had no control. Despite this, the court held that the plaintiff was entitled to recover from both defendants; that his remedy was not predicated upon the negligence of anyone; but was, instead, predicated upon the inherently dangerous character of the work itself. Escape of substances from the land when razing a building was regarded as sufficient to bring the defendants within the ambit of the rule.<sup>44</sup>

#### CONCLUSION

From this analysis it would certainly appear that the doctrine of absolute liability, suggested by the case of *Rylands v. Fletcher*, has at least in part been recognized by the courts of Illinois. The question remains whether the future will see it developed to include even more situations than those to which it has already been applied. The author is not unsympathetic with the early authorities which criticized the doctrine, but they came at a time when this country had nowhere nearly reached its present point of economic and commercial development. There was, per-

<sup>41</sup> 129 Ill. App. 557 (1906). <sup>42</sup> 268 Ill. App. 543 (1932). <sup>43</sup> 270 Ill. App. 150 (1933).

<sup>44</sup> It is significant that the court quoted with approval from *City of Joliet v. Harwood*, 86 Ill. 110 (1877).

haps, a reason then for encouraging industry, commerce, and manufacturing in every possible way, even if this encouragement took the form of providing immunity to the pioneers thereof from harms caused to others in the absence of wilful or negligent fault. That situation, however, no longer exists today. There is no reason now why a person who engages in an enterprise upon his own premises for his own gain should not pay for harms that he causes to others by reason of that enterprise, whether guilty of fault in the conduct of the enterprise or not.

It has been suggested that the remedies in trespass, in nuisance, and in negligence are broad enough to cover any situation that might be encompassed by the rule of the *Rylands* case. Such a suggestion seems but to beg the question. It is entirely conceivable that an area might be exclusively devoted to the manufacture of something that is inherently and intrinsically dangerous. To engage in such an enterprise within such an area would not constitute a nuisance. Damages might flow from the escape of the thing, or as an incident to its manufacture, without there being any negligence. The damages might be indirect and consequential, so no recovery might be had in trespass. Yet, if damage results to others, a recovery should be had. The basis of liability should be the rule of *Rylands v. Fletcher*. Others have expressed the view that it is inevitable that such doctrine will grow. That it should justifiably do so is also the conclusion of this author.

#### ADDENDA

Having long been of the opinion that the Illinois courts should give plain, unconcealed, and frank recognition to the doctrine of *Rylands v. Fletcher*, I have read the manuscript of the above article with great interest and with full approval. In the round-table discussion of *Green v. General Petroleum Corporation*,<sup>45</sup> at the meeting of the Association of American Law Schools in December of 1931, the late Professor Bohlen said that, in his opinion, modern industry should bear losses inflicted by it on neighbor's lands as well as those inflicted upon its own lands. This seems to be the real crux of the question. In law, as elsewhere in life, com-

<sup>45</sup> 205 Cal. 328, 270 P. 952, 60 A. L. R. 475 (1928).

plete intellectual honesty is more useful in the directing of human affairs than is circumvention or circumlocution such as we find in achieving the result of absolute liability by calling the case one of nuisance or of negligence even when there is doubt or a complete negation of both nuisance and negligence in the facts.

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