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## THE RYLANDS VS. FLETCHER RULE IN WEST VIRGINIA.

EDMUND C. DICKINSON\*

The apparent tendency of recent legislation to recur to the early conception of liability regardless of fault<sup>1</sup> has called attention again to that much discussed subject, and particularly to that manifestation of it which we call the rule in *Rylands v. Fletcher*.<sup>2</sup> It is not the purpose of the writer to discuss the theoretical merits of that rule or to engage in any controversy as to its scope or utility. Assuming its existence and recognition in some jurisdictions, the purpose of this article is to analyze the West Virginia cases involving the doctrine with a view to ascertaining the extent of its adoption by the courts of this state. This will necessitate, however, a brief discussion of what the doctrine is understood to be and the limitations which have been placed upon it.

The following principle, enunciated by Mr. Justice Blackburn in the Exchequer Chamber in 1866 and commonly called the rule in *Rylands v. Fletcher*, was approved by the House of Lords in 1868:

“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 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 the 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>3</sup>

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<sup>1</sup> See Smith, “Sequel to Workmen's Compensation Acts,” 27 HARV. L. REV. 235, 344, 365; Thayer, “Liability Without Fault,” 29 HARV. L. REV., 801.

<sup>2</sup> L. R. 1 Exch. 265, (1866), L. R. 3 H. L. 330, (1868).

<sup>3</sup> L. R. 1 Exch. p. 279. The facts in the case of *Rylands v. Fletcher* were as follows: The defendants constructed a reservoir upon their land, and upon the site chosen for this purpose there was a disused and filled-up shaft of an old coal-mine, the passages of which communicated with the adjoining mine of the plaintiff. Through the negligence of the contractors or engineers by whom the work was done (and who were not the servants of the defendants) this fact was not discovered and the danger caused by it was not guarded against when the reservoir was filled. The water escaped down the shaft and thence into the plaintiff's mine, which it flooded. It was held that the defendants were liable although guilty of no negligence either by themselves or by their servants.

“According to the weight of modern authority, it was unnecessary in that case to decide whether the defendants could be held liable irrespective of negligence. It would seem that the same result could have been reached on the ground that the defendants were legally chargeable with negligence. True, the defendants personally were guiltless of negligence, but the engineer and contractors employed by them

This doctrine that in certain cases a man acts at his peril was not new. Scattered classes of cases had never become amenable to the test of "due care under the circumstances." "What gave the exposition on this occasion its novelty and permanent success," wrote Dean Wigmore thirty years ago, "was the broad scope of the principle announced, the strength of conviction of its expounder and the clearness of his exposition, and perhaps too, the fact that the time was ripe for its acceptance."<sup>4</sup> But however broad the scope of the principle in the thought of the judges who decided the case, it was soon settled that the rule was not to be regarded as insuring against remote consequences. Not only was the defendant allowed to set up in excuse that the escape was due to the plaintiff's default or to the Act of God,<sup>5</sup> as suggested with some hesitancy by Mr. Justice Blackburn,<sup>6</sup> but the act of a third party,<sup>7</sup> the consent by plaintiff to the condition which resulted in the injury,<sup>8</sup> and statutory authority to make such use of one's land<sup>9</sup> were also held to excuse.

"The territory within which the doctrine of *Rylands v. Fletcher* may operate," as pointed out by the late Dean Thayer, "is thus bounded on one side by that in which the defendant is excused by the intervention of some new agency which could not be foreseen, and on the other by that in which, even if *Rylands v. Fletcher* were altogether repudiated, the defendant would be held by the ordinary principles of negligence. Between these limits is left only the field where the thing which the defendant has collected escapes by its own force acting on existing conditions without negligence of the defendant. Such an intermediate ground no doubt exists; but it is a little space."<sup>10</sup>

While this rule imposing, in exceptional cases, absolute liability has undergone severe criticism at the hands of English lawyers,<sup>11</sup> the English courts have made it quite plain that they consider

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were negligent; and for the negligence of these persons the defendants were responsible. The duty resting upon the defendants in that case could not be discharged by delegating it to an independent contractor. The view that *Rylands v. Fletcher* could have been decided on the ground of negligence is supported by Bishop, Street, Bohler and Pollock." Smith, "Tort and Absolute Liability," 30 HARV. L. R. 241, 319, 409, at p. —409.

<sup>4</sup> Wigmore, "Responsibility for Tortious Acts: Its History," 7 HARV. L. R. 315, 383, 442, at p. 455.

<sup>5</sup> *Nichols v. Marsland*, L. R. 10 Exch. 255, (1875).

<sup>6</sup> See note 3, *supra*.

<sup>7</sup> *Box v. Jubb*, 4 Ex. D. 76 (1879).

<sup>8</sup> *Ross v. Fedden*, L. R. 7 Q. B. 681 (1872).

<sup>9</sup> *Madaras R. Co. v. Zemindar*, L. R. 1. Ind. App. 364. (1874).

<sup>10</sup> Thayer, "Liability Without Fault," 29 HARV. L. REV. 801, 804.

<sup>11</sup> See Preface to SALMOND ON TORTS, 4th Edition; POLLOCK, TORTS, 10th Edition, p. 510.

*Rylands v. Fletcher* good law;<sup>12</sup> and the "manifest inclination to discover something in the facts of the case to take it out of the rule"<sup>13</sup> spoken of by Sir Frederick Pollock, is no longer apparent. Electricity,<sup>14</sup> gas,<sup>15</sup> sparks from an engine,<sup>16</sup> and fumes from creosoted wood blocks used in laying a pavement<sup>17</sup> have been held to fall within the rule. Indeed the courts have refused to limit its application to adjacent freeholders, but have applied it between parties having no estate or interest in the soil but only a license to lay and use underground mains and cables.<sup>18</sup>

The doctrine has not been followed generally in this country. In New Hampshire,<sup>19</sup> New Jersey<sup>20</sup> and New York<sup>21</sup> it has been definitely repudiated. In *Brown v. Collins*<sup>22</sup> Chief Justice Doe denounced the principle as archaic, socially inexpedient and one which, if enforced, would "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." In the New Jersey case of *Marshall v. Wellwood*,<sup>23</sup> the refusal to adopt the rule is placed flatly on the ground that except in cases of technical nuisance "blame must be imputed as a ground of responsibility for damage proceeding from a lawful act." The opponents of the rule then would seem to fall into two classes—those who attack the existence of the general principle of law as laid down by Mr. Justice Blackburn, and those who regard it as economically harmful. To these might be added a third, represented by Dean Thayer, who saw in its adoption only the introduction of another "degree of extra hazard" which would result in "needless vexation and which makes the old discredited degrees of negligence almost look legally respectable by contrast"<sup>24</sup> and led him to conclude that "such a result as *Rylands v. Fletcher* produces in our system is not tolerable, and those courts have done well who have flatly refused to have anything to do with it."<sup>25</sup>

In spite of this adverse criticism the doctrine has met with ap-

<sup>12</sup> See *Belvedere Fish Guano Co., Ltd. v. Rainham Chemical Works, Ltd.* (1920, C. A.) 2 K. B. 487.

<sup>13</sup> POLLOCK, *LAW OF FRAUD IN BRITISH INDIA*, 53-54.

<sup>14</sup> *East African Tel. Co. v. Cape Town Tramways Co.*, (1902) A. C. 381.

<sup>15</sup> *Batcheller v. Tunbridge Wells Gas Co.*, 84 T. L. R. 765 (1901).

<sup>16</sup> *Jones v. Festinog*, L. R. 3, Q. B. 733 (1868).

<sup>17</sup> *West v. Bristol Tramway Co.*, L. R. 1908, 2 K. 13, 14.

<sup>18</sup> *Charing Cross Elec. Supply Co. v. London Hydraulic Power Co.*, (1913) 3 K. B. 442, *Affid. C. A.* (1914) 3 K. B. 772, 83 L. J. K. 3, 1352.

<sup>19</sup> *Brown v. Collins*, 53 N. H. 442 (1873).

<sup>20</sup> *Marshall v. Wellwood*, 38 N. J. L. 338 (1876).

<sup>21</sup> *Losee v. Buchanan*, 51 N. Y. 476 (1873).

<sup>22</sup> See note 19, *supra*.

<sup>23</sup> See note 20, *supra*.

<sup>24</sup> Thayer, "Liability Without Fault," 29 *HARV. L. R.* 801, p. 811.

<sup>25</sup> *Idem*, Page 814.

proval in a few jurisdictions,<sup>26</sup> of which West Virginia is sometimes named as one. A study of the cases in these jurisdictions will show, however, that only a very small proportion has presented a state of facts requiring its application to determine the liability of the defendant. In the great majority of the cases in which the rule has been approved the facts did not require its application because they disclosed a condition amounting to a nuisance for which the defendant would have been liable in jurisdictions which repudiate *Rylands v. Fletcher*, or because actual negligence was alleged and proved. The tendency, too, in those American jurisdictions which have approved the rule has been either to withdraw their approval or to limit its application to unusual and extraordinary uses of land.<sup>27</sup> Professor Bohlen has given us a plausible explanation for the coldness exhibited by our courts toward the Blackburn rule. "The real reason for the divergent attitude of English and American Courts," he suggests, "is inherent in the very nature of the question. 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."<sup>28</sup>

It would seem then that in spite of the narrowing of the scope of the Blackburn rule by later decisions in England, and of the tendency of our courts to restrict to as few as possible the situations to be governed by it, there remains a field, admittedly narrow,

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<sup>26</sup> *Shibley v. Fifty Associates*, 106 Mass. 194 (1871); *Cahill v. Eastman*, 18 Minn. 292 (1872); *Berger v. Gaslight Co.*, 60 Minn. 296 (1895); *Defiance Water Co. v. Olander*, 54 Ohio St. 532 (1890); *Brennan Construction Co. v. Cumberland*, 29 App. D. C. 554 (1907).

<sup>27</sup> *Ainsworth v. Lakin*, 180 Mass. 397 (1902); *City Water Power Co. v. The City of Fergus Falls*, 128 N. W. 817 (1910). "The origin of this alleged distinction between natural and non-natural user is to be found in certain observations of Lord Cairns in *Rylands v. Fletcher*, L. R. 3 H. L. at p. 338." Salmond, *Law of Torts*, p. 225, note 13. "Lord Cairns appears to describe a non-natural use as a use 'for the purpose of introducing into the close that which in its natural condition was not in or upon it.' Taking the term 'non-natural user' as interpreted by Lord Cairns, the test has been subjected to very destructive criticism." Smith, "Tort and Absolute Liability," 30 *HARV. L. R.* p. 411, note 7.

<sup>28</sup> Bohlen, "The Rule in *Rylands v. Fletcher*," 59 *U. of P. L. R.* 293, 373, 423, at page 318.

where it may be applied. Whether the West Virginia court has so applied it remains to be considered.

While our cases involving this principle have not been numerous, they have presented several situations which seem to have required its adoption or repudiation.

The first case in which an intimation of the court's attitude has been found is that of *Wilson v. Phoenix Powder Manufacturing Co.*<sup>29</sup> The defendant company was sued for damages to a dwelling house resulting from an explosion of powder stored in buildings of defendant. There was no evidence to show negligence on the part of the defendant in the operation of the powder mill or in the handling or storage of the powder. The court held that the manufacture and keeping of quantities of gunpowder in, or dangerously near to, public places, such as towns or highways, was a public nuisance, and that an injured party was entitled to compensation without proving negligence on the part of the defendant. By way of *dictum* Judge Brannon added:

"Now, if this mill were located in a secluded place—one removed from highways—being in itself a lawful business, the case would be different; it would not be a public nuisance, and to recover for injury from an explosion I apprehend the plaintiff must show negligence on the defendant's part."<sup>30</sup>

No reference was made in the court's opinion to *Rylands v. Fletcher* and, of course, no appeal to the doctrine of that case was necessary, since the unquestioned rule of liability for a nuisance applied. Cases of this kind have been held in England, however, to come within the rule of *Rylands v. Fletcher*,<sup>31</sup> which would result in liability in such a case as suggested in the *dictum* above.

An opportunity to embrace or reject the doctrine definitely was presented in the case of *Veith v. Salt Co.*,<sup>32</sup> decided in 1902. The explosion of a boiler used by defendant in carrying on its business injured plaintiff's property. In reversing a judgment for the plaintiff, Judge Brannon said:

"We see at once that the case involves a conflict or clash between two plain rights vested in the parties to the suit. The right of the company is the right to use its own premises in legitimate lawful business. This is a constitutional right of liberty and of the plainest import. The right of Mrs. Veith is the right

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<sup>29</sup> 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890 (1895).

<sup>30</sup> *Idem*, page 417.

<sup>31</sup> Note 12, *supra*.

<sup>32</sup> 51 W. Va. 96, 4 S. E. 187, 57 L. R. A. 410 (1902).

to abide upon her own premises in peace and security free from hinderance, or disturbance by anyone. She received injury from defendant's act. Does that alone without more, give her the right by law to call upon the company for reparation? Upon first impression we would likely answer this question in the affirmative. The plaintiff had received damage, without fault on her part, from the act of her neighbor, and it would seem plausible to say that this neighbor must make her whole. And such is the law under some decisions very well considered in England, particularly the case of *Fletcher v. Rylands*, 1 Exchq. 265, L. R., where a party constructed a water reservoir upon his land and the water burst through into some coal shafts which had been made by another party, not known to the owner of the reservoir. The owner of the reservoir was held liable for damages upon the ground that any one who for his own purposes brings upon his own land anything that may do mischief, or does mischief, does so at his peril, and if injury results therefrom to another, he is *prima facie* answerable for all damage therefrom. But such is not the American law. That law says that the English rule detracts from the right of the owner of land to use it in legitimate business, detracts from the efficacy of that ownership, cripples a plain right of ownership and makes that owner an insurer against harm to others resulting from mere accident in the lawful use of his property. The American law does not make mere damage a *prima facie* cause of action, but requires negligence on the part of him who inflicts the injury."<sup>33</sup>

Here is no uncertainty. Both economic inexpediency and immunity from liability for harm resulting from accident are assigned as grounds for refusing to follow the English rule. No attempt is made by the court to differentiate the case of injury resulting from the explosion of a boiler from other situations in which the rule of *Rylands v. Fletcher* might apply. It is a repudiation of the rule itself, not an unwillingness to apply it to the particular facts. In *Losee v. Buchanan*<sup>34</sup> and *Marshall v. Wellwood*,<sup>35</sup> both of which involved injuries resulting from boiler explosions, the New York and New Jersey courts had refused to apply the *Rylands v. Fletcher* rule, and the West Virginia court was influenced, likely, by these decisions, both of which are referred to in the opinion.

It would seem that starting a fire on one's premises would be bringing on his land something "likely to do mischief if it escapes," and to fall, therefore, within the Blackburn test, unless the fact that its presence there is only temporary would exclude.

<sup>33</sup> *Idem*, pages 96-97.

<sup>34</sup> Note 21, *supra*.

<sup>35</sup> Note 20, *supra*.

it. Whether an occupier was held liable before the Act of Anne<sup>36</sup> for damage done by fire escaping from his premises independently of any negligence on his part is disputed.<sup>37</sup> Since that Act, there has been no liability in England except for negligence, and such has always been the law in this country. The West Virginia court was but conforming to this rule, then, when it held in *Mahaffey v. The J. R. Rumbarger Lumber Co.*<sup>38</sup> that one setting fire upon his premises is charged with the duty only of exercising ordinary care and skill in preventing it from spreading and being communicated to the property of another. In the course of that opinion, however, the court says:

“It is a well settled principle of law that one in the prosecution of a lawful act or business is not liable for an injury resulting from an inevitable or unavoidable accident, which occurs without any blame or fault upon his part.”<sup>39</sup>

The court apparently did not have in mind any distinction between accident as a defense in case of injury to person and in case of injury to adjoining property.

In *Jacobs v. Baltimore and Ohio Railroad Company*,<sup>40</sup> which was an action against a railroad company for destruction of a house by fire alleged to have been started from sparks from a locomotive, the court held that the burden was on the plaintiff to prove that the fire started from the spark, but when that had been proved, a presumption arose that the company was negligent, which presumption must be repelled by disproving negligence. Such a case had been held in England<sup>41</sup> to fall within the rule of *Rylands v. Fletcher* and to impose liability regardless of negligence unless the locomotive was being operated by statutory authority, in which case it came within the recognized exception.<sup>42</sup> Our courts have not applied this rule to fires set by locomotives. In some states the plaintiff must establish negligence as in other cases.<sup>43</sup> Many more hold with the West Virginia court, that proof that the fire was due to sparks from an engine makes a *prima facie* case of negligence or even casts upon the company the burden

<sup>36</sup> 6 Anne, C. 31.

<sup>37</sup> See SALMOND, *LAW OF TORTS*, p. 247.

<sup>38</sup> 61 W. Va. 571, 56 S. E. 893, 8 L. R. A. (N. S.) 1263 (1907).

<sup>39</sup> *Idem*, page 575.

<sup>40</sup> 68 W. Va. 618, 70 S. E. 369 (1911).

<sup>41</sup> Note 16, *supra*.

<sup>42</sup> Note 9, *supra*.

<sup>43</sup> *Garrett v. Southern R. Co.*, (C. C. A.) 101 Fed. 102, (1900); *Louisville R. Co. v. Haggard*, 161 Ky. 317 (1914); *New England Box Co. v. New York R. Co.*, 210 Mass. 465 (1912); *Fero v. Buffalo R. Co.*, 22 N. Y. 209 (1860).



of disproving negligence.<sup>44</sup> In others still, a statutory absolute liability for such fires has been imposed.<sup>45</sup> In view of these conflicting positions, it could scarcely be said that the failure to apply the rule of *Rylands v. Fletcher* in the Jacobs Case was an intentional repudiation of it. No reference to the rule is to be found in the briefs of counsel and the question of its applicability does not seem to have entered the minds of the court.

A reading of these cases in which the doctrine of *Rylands v. Fletcher* was either ignored or definitely repudiated leaves one entirely unprepared for the case of *Weaver Mercantile Co. v. Thurmond*,<sup>46</sup> decided in 1911. This case was apparently under consideration by the court at the same time the Jacobs Case was before it and was decided only two weeks before the latter. The defendant Thurmond was the owner of a hotel situated at the base of a hill. It was supplied with water by means of a large wooden tank erected on the side of the hill some distance above the hotel. The plaintiff company did a mercantile business and occupied a store room situated below the tank. The tank burst and the water flowed down the hill and into the storeroom and damaged plaintiff's goods. The court says:

"As we understand the law to be, the liability of defendant does not depend on negligence in construction, but upon negligence in not keeping the water confined. No matter in what the negligence consisted of it is proved by the bursting of the tank. The rule *res ipsa loquitur* applies. If the person whose duty it was to keep the tank in good repair, had not been negligent in some respect, the tank would not have burst. The negligent act may have been the failure to keep it properly painted, but it is not material what it was. Liability, in cases like the present, rests upon the principle that a man who erects a structure upon his premises which because of neglect to take care of it, becomes a nuisance, either to the public or the property of an adjoining owner, is liable. He is bound at his peril to prevent it from injuring the property of his neighbor. In 1 Wood on Nuisances, Sec. III, the rule is thus stated: 'Every person who, for his own profit and advantage, brings upon his premises, and collects and keeps there anything which, if it escapes, will do damage to another, subject to some exceptions

<sup>44</sup> Alabama R. Co. v. Johnston, 128 Ala. 283 (1901); Osburn v. Oregon R. Co., 15 Idaho 478 (1908); American Strawboard Co., v. Chicago R. Co., 177 Ill. 513 (1898); Atkinson R. Co. v. Gerser, 68 Kan. 281 (1904); North Fork Lumber Co. v. Southern R. Co., 143 N. C. 324 (1906); Norfolk R. Co. v. Thomas, 110 Va. 622 (1910); Moore v. Chicago R. Co., 78 Wis. 120 (1890).

<sup>45</sup> St. Louis R. Co. v. Cooper, 120 Ark. 595 (1915); Martin v. New York R. Co., 62 Conn. 331 (1892); Pittsburgh R. Co. v. Chappell, 183 Ind. 141 (1915); Stewart v. Iowa R. Co., 136 Ia. 182 (1907); Murphy v. St. Louis R. Co., 248 Mo. 28 (1913); MacDonald v. New York R. Co., 23 R. I. 558 (1902).

<sup>46</sup> 68 W. Va. 530, 70 S. E. 126, 33 L. R. A. (N. S.) 1061 (1911).

rendered necessary for the protection of industrial interests, is liable for all the consequences of his acts, and is bound at his peril to confine it and keep it in upon his own premises. If he does not, he is answerable for all the damages that result therefrom without any reference to the degree of care or skill exercised by him in reference thereto. Therefore, if a man brings water upon his premises by artificial means, and collects and keeps it there, either in reservoirs or in pipes, he is bound at his peril to see that the water does not escape, to the damage of an adjoining owner.' This principle has few exceptions and has been applied in a large number of cases, both in England and in this country. A few of such cases will serve to illustrate the correctness of applying the principle in this case.'<sup>47</sup>

The court then cites indiscriminately, cases of nuisance, cases involving the doctrine of *res ipsa loquitur*, and others, including *Rylands v. Fletcher*, which depend for their solution upon the doctrine of that case.<sup>48</sup>

To extract from such an opinion the *ratio decidendi* is no light task. Nothing is clear except the court's determination to fix liability upon the defendant. In one short paragraph, three distinct grounds of liability are named, i.e. negligence, established by means of the rule *res ipsa loquitur*; nuisance; and, apparently, the principle of *Rylands v. Fletcher*. Although these wrongs are not mutually exclusive as are trespass and nuisance, they nevertheless occupy different fields. Between those situations where liability is based on negligence and those in which the wrongful act amounts to a technical nuisance is the only proper field for the application of the rule of *Rylands v. Fletcher*. With due deference we must conclude that the court did not have clearly in mind the distinctions between these several grounds of liability. This conclusion is strengthened by the decisions cited to illustrate the "principle" of the case.

An examination of the record and briefs filed in the case shows that plaintiff relied upon negligence as his ground of recovery. The declaration charges negligence in the construction of the water tank and negligence in failing to keep it in repair. The only reference in the briefs on appeal to any other ground of liability is a short quotation from *CYC* which states substantially the rule in *Rylands v. Fletcher* and then concludes:

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"The English rule has been followed to some extent in this

<sup>47</sup> *Idem*, page 532.

<sup>48</sup> *Idem*, pages 532-535.

country, but in general the American courts base the liability on negligence."<sup>49</sup>

In the latter part of its opinion, also, in discussing the cause of the bursting of the tank, the court says:

"We are compelled to say that, as a question of law, proof of the bursting of the hoops was also proof of defendant's negligence."<sup>50</sup>

And again:

"The cases which we have cited in the first part of this opinion are authority for holding that this is a case where the happening of the accident, of itself, is sufficient to establish negligence, there being no evidence that it was caused by an Act of God, or that it was clandestinely destroyed by an enemy. It is a case in which the familiar rule of evidence *res ipsa loquitur*, applies."<sup>51</sup>

The opinion makes it evident that the defendant failed to explain the bursting of the tank satisfactorily or to show that proper care had been used in its maintenance and that the rule *res ipsa loquitur* properly applied. There would seem to be ample justification then for the view that the court decided against the defendant on that ground and not because of any doctrine imposing absolute liability on a land owner. The syllabus, however, states the following rules:

"A land owner who brings water upon his premises by artificial means, and stores it in tanks or reservoirs for his use, is liable if the water escape and injure the property of an adjoining owner."

"If a land owner have on his premises a water tank which supplies water to several houses occupied by several tenants he is bound at his peril to prevent the water from escaping and injuring the property of an adjoining proprietor."<sup>52</sup>

The prevalent belief that West Virginia has adopted the rule of *Rylands v. Fletcher* is attributable no doubt to these syllabus paragraphs. It is to be noted, however, that the rule is not stated in general terms, but is confined to the bringing of water upon one's premises by artificial means and storing it there; and while the

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<sup>49</sup> Supreme Court Records and Briefs, 68 Q., Brief of Defendant in Error, page 17.

<sup>50</sup> 68 W. Va. 537.

<sup>51</sup> *Idem*, page 540.

<sup>52</sup> *Idem*, pages 530-531.

<sup>53</sup> *Idem*, page 531.

principle of acting at peril in certain cases is undoubtedly recognized, the lack of need for invoking any such doctrine in the particular case appears in the following paragraph of the syllabus:

“If the tank bursts and the escaping water does injury to the property of an adjoining proprietor, negligence will be presumed. In such case the rule of *res ipsa loquitur* applies.”

The case of *Veith v. Salt Co.*<sup>54</sup> in which the doctrine of *Rylands v. Fletcher* was definitely repudiated is nowhere referred to, although Judge Brannon who wrote the opinion in that case was still a member of the court. The scant consideration which was given, apparently, to this principle as a ground of liability, its confusion with nuisance and *res ipsa loquitur*, and the absence of need for invoking it, all argue strongly against its being the real reason for the decision.

The uncertainty which the Weaver Case has created and the unfortunate results which have been reached in the attempt to follow it are clearly shown in the cases of *Wigal, Adm'x. v. City of Parkersburg*.<sup>55</sup> Two large iron water tanks having a capacity of a million gallons each, constructed and maintained by the city as a part of its waterworks system, burst and the water flowed down hill in such volume and with such velocity as to demolish a dwelling house and kill plaintiff's intestate. Separate actions under the same name were brought for the death of plaintiff's intestate and for the property damage. A third action, *Jackson v. City of Parkersburg*,<sup>56</sup> grew out of the same circumstances, the plaintiff seeking to recover for the partial destruction of her dwelling by the escaping water.

It appears that at the trial the city offered to prove that it had used the utmost care and diligence in constructing and maintaining its tanks. The trial court sustained plaintiff's objection to this evidence, because “the court understands from the decision of the Supreme Court of Appeals of this State in the Weaver Case recently decided that such evidence in a case of this character is absolutely immaterial, irrelevant and improper.” In sustaining this ruling the Supreme Court says:

“In view of the law making it the absolute duty of a person who collects water upon his premises for his own use, in such

<sup>54</sup> Note 32, *supra*.

<sup>55</sup> 74 W. Va. 25, 81 S. E. 554, 52 L. R. A. (N. S.) 465 (1914) and 74 W. Va. 36, 81 S. E. 558 (1914).

<sup>56</sup> 74 W. Va. 37, 81 S. E. 559 (1914).

quantity as to become a nuisance to others, to so confine it that it will not escape and do injury, proof of any amount of care would not relieve defendant of liability. It was the positive duty to prevent the water from escaping. Apparently the only defense in such a case is proof of a *vis major* as the cause, and as we have before said, there is no such proof in this case. Care in construction, inspection and maintenance of the tanks does not relieve."<sup>57</sup>

While the court uses the term "nuisance" it is not believed that it regarded the water tank as a technical nuisance. Nowhere else in the opinion is the expression used or the principles pertaining to a nuisance applied. This language, then, taken in connection with the action of the trial court, would go far toward satisfying one that the court regarded the Weaver Case as having been decided on the principle of *Rylands v. Fletcher* and was deciding the case before it on the same principle. But elsewhere in the opinion we find the court saying with reference to that case:

"Invoking the rule of *res ipsa loquitur* counsel for plaintiff insists that the bursting of the tanks proves negligence. That rule is certainly applicable to this case. In *Weaver Mercantile Co. v. Thurmond*, 68 W. Va. 530, decided three years ago, we had occasion to decide this point. The rule being applicable in that case, it must also be applicable in this. That the bursting tank was there owned by a private individual while here the tanks were the property of a municipality, can make no difference in applying the rule. The basis for the rule in such cases is, that one who brings water upon his premises and stores it there for his use is liable if it escapes and does injury to the property of another. He is bound at his peril to prevent its escaping and injuring another. Having decided that the City of Parkersburg is liable in this case on the same ground as a waterworks company, there is no reason to apply a different rule respecting proof of negligence."<sup>58</sup>

It must be noted also that the syllabus contains no reference whatever to the doctrine of *Rylands v. Fletcher*. Negligence is the only ground of liability named. Paragraph 3 of the court's syllabus is as follows:

"In the absence of proof that the breaking of the tank was caused by some superior force, such as an unusual and violent disturbance of the elements or an explosion clandestinely caused, negligence will be inferred from the breaking."<sup>59</sup>

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<sup>57</sup> 74 W. Va. 34.

<sup>58</sup> *Idem*, page 31.

<sup>59</sup> *Idem*, page 26.

But it is in the second of the cases entitled *Wigal Adm'x. v. City of Parkersburg*<sup>60</sup> that we find what appears to be the solution of our problem. Referring to the opinion in the first case, the court says:

“It was also therein decided that negligence could be inferred from the bursting of the tanks, in the absence of evidence tending to prove that it was caused by an act of God or the hand of an enemy, and that such was the only defense and the burden was upon defendant to establish it.”<sup>61</sup>

In other words, “an Act of God or the hand of an enemy” are the only defences available against the inference of negligence under the rule *res ipsa loquitur*. This is not, and never has been, the law. It is a result of confusing two entirely separate and distinct rules, one a rule of evidence, the other a rule of law. The maxim *res ipsa loquitur* is invoked when negligence can not otherwise be proved. It applies only in the absence of explanation.<sup>62</sup> The inference of negligence may be met by showing the real cause of the accident,<sup>63</sup> or by showing that reasonable care was employed.<sup>64</sup> The rule in *Rylands v. Fletcher*, on the other hand, applies in the absence of negligence, and proof of the utmost care will not relieve the defendant. If the Supreme Court of Appeals decided the *Wigal Case* on the principle of *Rylands v. Fletcher*, it is difficult to understand why that was not disclosed in the syllabus written by the court. In such case, too, a finding of negligence would have been entirely unnecessary. If negligence was the ground of liability, and the syllabus mentions no other, then the court plainly erred in sustaining the trial court in its refusal to admit defendant's evidence of due care.

Has the West Virginia court, then adopted the rule in *Rylands v. Fletcher*? As that rule is understood and applied in England, it certainly has not. The approval of the principle, however, expressed by the court in the *Weaver Case* and the seeming belief that it was applying it, cannot be ignored. It is true that it was probably unnecessary to the decision of the court in that case; that the court entirely overlooked its previous repudiation of the doctrine in the *Veith Case*; and that it confused this rule with another; nevertheless the case discloses a very different attitude

<sup>60</sup> 74 W. Va. 36.

<sup>61</sup> *Idem*.

<sup>62</sup> *Cook v. Newhall*, 213 Mass. 392 (1913).

<sup>63</sup> *Parsons v. Hecla Iron Works*, 186 Mass. 221 (1905).

<sup>64</sup> *Thompson v. St. Louis R. Co.*, 243 Mo. 336, 355. (1912).

toward the idea of acting at peril from that which the court formerly exhibited.

It is possible that other cases involving this doctrine have escaped the attention of the writer. The lack of a comprehensive index heading for cases of this type has made the search unusually difficult. A sufficient number have been discussed, perhaps, to make apparent the uncertainty that exists and the difficulty under which our trial courts must labor until a definite stand is taken on this question by the Supreme Court of Appeals.