The demurrer was allowed.

From this decision James appealed to the Privy Council. His appeal was upheld.

Mr. James therefore triumphs.

The complete text of the judgment, giving their Lordships' reasons for the decision, is not yet available, so that its full effect upon the interpretation of the Constitution is still a matter for surmise.

R. J. DAVERN WRIGHT, M.A., LL.B.

(This case will be reported in 55 C.L.R. 1.—Ed.)

THE DEFENCE OF ACT OF STRANGER TO THE RULE IN *RYLANDS* v. *FLETCHER*.

NORTH-WESTERN UTILITIES LTD. v. LONDON GUARANTEE AND ACCIDENT CO. LTD. & OTHERS [*1936*] *A.C. 108.*

The appellants in this case were a public utility company, supplying gas, under a statutory franchise, to consumers in the city of Edmonton. The Corona Hotel, owned and insured by the respondents respectively, was destroyed by fire caused by the ignition of gas, which, escaping from the defendants' main, adjacent to the hotel, had percolated through the soil into the hotel basement. The Court found that the gas escaped through a fractured joint in the main, and that the break was caused by the displacement of soil thereunder by workmen of the city of Edmonton in constructing a storm sewer. Lord Wright delivered the judgment in the case, which was heard on appeal from the Supreme Court of Alberta.

The action was brought (i) for permitting gas, a dangerous substance, to escape; (ii) for breach of a statutory duty; (iii) for negligence in that the appellants either knew, or ought to have known, what work the city was doing, and failed to take, as they could and should have done, all proper precautions to prevent the escape of the dangerous gas which they were carrying in their mains. The appellants' real defence was that the damage was caused by the act of the city, for which they were not responsible, and could not control, and that they were guilty of no negligence in the matter.

Now, the appellant was subject to a statutory duty "to locate and construct" its gasworks "so as not to endanger the public health or safety." Their Lordships held that this could not apply to acts done or omissions occurring, such as the alleged negligence in this case, in the maintenance of the said works, that although they were, therefore, disposed to give the appellants the benefit of the statutory doubt, and to hold the duty owed to the respondents, in these circumstances, one of reasonable care, yet they went on to say that the duty owed could be no higher than that fastened on them by the rule of strict liability enunciated in *Rylands* v. *Fletcher*. Thus, although the case could well have been decided on the single issue—were the appellants

negligent?—the discussion of *Rylands* v. *Fletcher* and the defence thereto was brought into direct relevance.

The appellant was *prima facie* within the rule laid down by Blackburn J.[1]: "The gas constitutes an extraordinary danger, created by the appellants for their own purposes .... they act at their peril, and must pay for damage caused by the gas if it escapes, even without any negligence on their part."[2] Ownership of the land is not a necessary element of the liability. It is sufficient if the mains are laid in the exercise of a franchise to do so.[3] The onus thus lay on the gas company to show that the case fell within one of the exceptions to the rule.

The appellant contended that it was not liable, because the real cause of the damage was the negligent construction of the storm sewer by the City of Edmonton, for which they were not responsible, and which it could not control. This contention was upheld. "The defendant is excused," said Lord Wright, "where the casualty is due to the independent or conscious volition of a third party .... and not to any negligence of the defendants."[4]

But this escape from liability under the rule in *Rylands* v. *Fletcher* availed the appellant nothing. "He may still be held liable in negligence," said Lord Wright, "if he failed in foreseeing and guarding against the consequences to his works of that third party's act."[5] The great damage done to the respondent's property is an index of the risk attendant upon the escape of the gas from the mains. The duty of care owed to adjacent occupiers is high in proportion to that risk, and in this case clearly involved a duty of inspection and the taking of precautions against possible interference with the mains by the city. The gas company had done nothing to fulfil this duty; it was, therefore, held liable in negligence, which is the breach of a duty of care.

The case raises a number of interesting questions,[6] but most important are the remarks of Lord Wright on the successful defence to *Rylands* v. *Fletcher*. Now there is no doubt that Blackburn J. in that case regarded the escape of the dangerous things, and not the omissions of the defendant as the ground of liability. The defendant could "excuse himself by showing that the escape was owing to the plaintiffs' default, or perhaps that the escape was the consequence of *vis major* or the act of God."[7]

1. It is recognized that there is a distinction between the rule laid down by Blackburn J. in the Exchequer Chamber, as to the escape of dangerous things; and the distinction made in the House of Lords by Lord Cairns between natural and non-natural uses of the land. But the remarks that follow are made solely on the basis of the doctrine enunciated by Blackburn J.

2. [1936] A.C., at p. 115.

3. *Charing Cross Electricity Supply* v. *Hydraulic Power Co.* [1914], 3 K.B., 772.

4. [1936] A.C. at 119.

5. [1936] A.C. at 125.

6. Such as: Was the duty of care imposed on the Gas Company too high in the circumstances; if the negligence of the city was a defence to *Rylands* v. *Fletcher*, surely it ought logically to have been a *novus actus interveniens*, breaking the chain of causation flowing from defendant's negligence; and finally one may well ask of what use is the rule of strict liability, in what circumstances is it any more than a high standard of care imposed on the defendant in proportion to the risk involved?

7. L.R. 1 Ex. at 280.

These were necessary exceptions. A few years later, in *Nichols* v. *Marsland,* the meaning of "act of God" was considered, and Bramwell B. made some observations that are relevant here[8]: "Suppose a stranger let it [the water] loose, would the defendant be liable? If so, then if a mischievous boy bored a hole in a cistern in any London house, and the water did mischief to a neighbour, the occupier of the house would be liable. That cannot be." This defence, suggested by Blackburn J. and Bramwell B., was soon established in *Box* v. *Jubb,*[9] where the owners of a reservoir were held not liable for damage done by the escape of water from their land, when the overflow was found to be due to the emptying of a large quantity of water from the reservoir of a third party into the main watercourse leading to the defendants' reservoir.

As Winfield points out,[10] this defence introduces in effect the concept of negligence into a rule of strict liability. "If you state that John Smith is not liable for the act of William Jones, who, as a mere stranger, let loose something of John Smith's which injures Henry Brown, you are in effect stating that John Smith is, in these circumstances, free from liability, because there is neither unlawful intention nor unlawful inadvertence on his part." This is made clear by the words of Kelly C.B. in *Box* v. *Jubb.*[11] "I think the defendants could not possibly have been expected to anticipate that which happened here, and the law does not require them to construct their reservoir, and the sluice and gates leading to it, to meet any amount of pressure which the wrongful act of a third person may impose." And in *Richards* v. *Lothian,*[12] although it was not necessary for the decision, the rule in *Rylands* v. *Fletcher* being held inapplicable to the supply of water to a building, Lord Moulton said[13]: "A defendant cannot, in their Lordships' opinion, be properly said to have caused or allowed the water to escape if the malicious act of a third person (as the facts were found in that case) was the real cause of its escaping without any fault on the part of the defendant."

Stopping there, it is clear that, according to the cases, once the defendant alleges the interference of a third party, the emphasis is shifted from the escape of the dangerous things to the relation, in the light of the duty of care he owes, of the defendant's conduct to that interference. The case is taken out of the rule in *Rylands* v. *Fletcher,* and the inquiry becomes one of negligence. "The authorities already cited show that, though the act of a third party may be relied on as a defence in cases of this type, the defendant may still be held liable in negligence."[14] Thus, the underground operations of the City of Edmonton caused the break in the gas main; this took the case out

8. L.R. 10 Ex. at 259.
9. 4 Ex. D. 76.
10. *The Law of Tort,* at 244.
11. 4 Ex. D. at 79.
12 [1913] A.C. 263.
13 [1913] A.C. at 278.
14. [1936] A.C. at 125.

of *Rylands* v. *Fletcher,* but in regard to the respondents the gas company were held negligent.

As the scope of the defence has important consequences on the nature of strict liability, one may well ask what is the nature of the "act" required, and who is a stranger within the defence? It seems clear that by *vis major* Blackburn J. could have contemplated only the deliberate act, and that Bramwell B. recognized the same limitation. *Box* v. *Jubb* and *Richards* v. *Lothian* seem to support that view, in the latter case it being found that the tap was turned on by the malicious act of a stranger. But in 1926,[15] in a not very convincing judgment, Astbury J. held that the negligent act of a third party was sufficient to take the case out of the rule of strict liability. There an oil company had supplied, for the carriage of its oil by the railway company, a defective waggon, from which the oil leaked. Having taken all *reasonable* precautions for the prevention of the leakage, the railway company were held not liable for harm caused by the pollution of water into which the oil flowed. *The N.W. Utilities Ltd.* case[16] must be taken to have affirmed that finding.

What persons fall within the class of "stranger"? In *Richards* v. *Lothian* the "stranger" was an unknown third party; in *Box* v. *Jubb* he was the owner of a reservoir connected with that of the defendants; in *N.W. Utilities Ltd.* case it was the City of Edmonton, whose underground drains were adjacent to the gas company's mains; in *Smith* v. *G.W. Railway Co.* it was the oil company, whose waggons were hauled by the railway company. The earlier cases establish that a stranger is a person over whom the defendant has no control, and whose intervention he could not reasonably be expected to anticipate. But in the *N.W. Utilities Ltd.* case Lord Wright seems to have held the act of a *third party* sufficient for the defence, although the defendant may still be liable in negligence. He may still not be a "stranger" according to the cases. However, whatever the decision lacks in consistency, it gains in realism, because in effect the defence of act of stranger as it had been judicially defined, removed the case into the sphere of negligence.[17]

Such are the authorities. Establish that the harm was caused directly by the deliberate act or negligence of a third party, and that is a complete defence to *Rylands* v. *Fletcher;* but the defendant may still be held liable in negligence because he owes a duty of care to all persons in the immediate locality where he has collected the dangerous things, and such duty of care will be a high one, usually involving a duty of inspection and precaution.

S. T. FROST.

15. *Smith* v. *G.W. Railway Co.,* 42 T.L.R. 391.
16 [1936] A.C. 108.
17. See *supra.*