FLETCHER V. RYLANDS

A REEXAMINATION OF JURISTIC ORIGINS*

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The person who wrote that the human being lets himself be guided by self-interest alone stated a general maxim that is almost entirely devoid of practical value. . . .

—GAETANO MOSCA‡

I

THE long-continued fascination of the legal mind with attempts to determine the "law behind the law" has recently been quickened with the current general revival of interest in matters jurisprudential.¹ The sociological factors conditioning the formulation of legal doctrines, together with the personality traits that shape judicial behavior, when studied in relation to their institutional context in the general climate of opinion of the particular age, are generally recognized as the elements to be looked to for a genuine understanding of the basis of legal decision.

In view, therefore, of this consensus, a reexamination of the three celebrated decisions² arising out of the controversy between Thomas Fletcher, John Rylands, and the latter's little known co-defendant, Jehu Horrocks, may be quite in order. For although these decisions have for years been subjected to analysis from many angles, Professor Bohlen is the only writer who has seriously attempted to explain why the case was decided

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‡ Mosca, *The Ruling Class* 114 (Kahn's trans. 1939).

¹ The new jurisprudential coin is seemingly being largely struck in the form and image of its principal creator. Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 Col. L. Rev. 581 (1940); Patterson, Llewellyn, and Kennedy, *A Required Course in Jurisprudence*, 9 Am. L. Sch. Rev. 582 (1940); Llewellyn, *The Normative, the Legal, and the Law-Jobs: the Problem of Juristic Method*, 49 Yale L. J. 1355 (1940). For sheer ponderosity this latter article compares very favorably with earlier Germanic efforts in this field. [But cf. Llewellyn, *On the Good, the True, the Beautiful, in Law*, 9 Univ. Chi. L. Rev. 224 (1942).—Ed.]

² *Fletcher v. Rylands and Horrocks*, 3 H. & C. 774 (Exch. 1865), rev'd sub nom. *Fletcher v. Rylands and Another*, L. R. 1 Exch. 265 (Exch. Ch. 1866), aff'd sub nom. *Rylands and Horrocks v. Fletcher*, L. R. 3 H. L. 330 (1868).

the way it was.³ Most writers have confined their inquiry to an unimaginative⁴ and not always accurate⁵ summarizing of the holding, a retracing of the development of its historical antecedents,⁶ or a genealogical cataloging⁷ of the all too numerous progeny begot by this well-known case.

The greatest confusion still prevails over the "theory" of the case. Writers and judges differ violently over the "grounds" for decision; "trespass,"⁸ "negligence,"⁹ "nuisance,"¹⁰ and absolute liability for the keeping of "inherently dangerous substances,"¹¹ or for alleged "non-natural"¹² user of land have all been, on occasion, considered the appropriate legal label. Whatever the abstraction by which the decision has been justified or attacked, the importance of *Fletcher v. Rylands* lies in its reaffirmation of the "medieval" principle of action at peril, a concept strongly reflected in the trend of modern case law and legislation in an ever-increasing number of fields.

³ Bohlen, *The Rule in Rylands v. Fletcher*, 59 U. of Pa. L. Rev. 298, 373, 423 (1911).

⁴ 3 Cooley, *Torts* § 411 (4th ed. 1932); Addison, *Treatise on the Law of Torts* 486, 489 (8th ed. 1906); Clerk and Lindsell, *Law of Torts* 481-82 (9th ed. 1937); MacDonald, *The Rule in Rylands v. Fletcher and Its Limitations*, 1 Can. Bar Rev. 140 (1923). Some of the legal literature is painfully reminiscent of *The Three Little Peppers at Camp*, *The TLP's at the Sea-Shore*, etc. For example, see *The Rule of Rylands v. Fletcher in Iowa*, 22 Iowa L. Rev. 136 (1936); *The Rule in Rylands v. Fletcher in Ohio*, 10 U. of Cincinnati L. Rev. 98 (1936).

⁵ For a typical mouthing of legal conclusions, see 1 Street, *The Foundations of Legal Liability* 63 (1906). Chapin, *Handbook of the Law of Torts* 513-14 (1917), makes his contribution to juristic thought in the form of a suggestion that "reasonable" and "unreasonable" be substituted for Lord Cairns' classification of "natural" and "non-natural" user of land.

⁶ Wigmore, *Responsibility for Tortious Acts: Its History*.—III, 7 Harv. L. Rev. 441, 454-55 (1894).

⁷ Charlesworth, *Liability for Dangerous Things* (1922).

⁸ This was Baron Bramwell's view in the Court of Exchequer, but it is generally considered untenable since the damage was mediate rather than direct. See opinions of Bramwell and Martin, BB., *Fletcher v. Rylands and Horrocks*, 3 H. & C. 774, 788, 793 (Exch. 1865); Winfield, *Text-Book of the Law of Tort* 506 (1937).

⁹ 1 Street, *op. cit. supra* note 5, at 62.

¹⁰ Salmond, *The Law of Torts* 595 (Stallybrass' ed. 1934). The learned editor's view is that "though the rule in *Rylands v. Fletcher* was not originally conceived as a branch of the law of negligence there is now no sufficient ground for suggesting that there is any line of demarcation between it and actionable negligence." *Ibid.*, at 599.

¹¹ Underhill, *A Summary of the Law of Torts* 209-11 (Sutton's ed. 1932); Clerk and Lindsell, *op. cit. supra* note 4, at 481-82. Winfield, of course, dissents violently from the use of "absolute" liability, claiming that the adjective "strict" is the strongest term that may be accurately employed. Winfield, *op. cit. supra* note 8, at 508.

¹² Seemingly this is the view of Lord Cairns in the House of Lords, *Rylands and Horrocks v. Fletcher*, L. R. 3 H. L. 330, 338-39 (1868). Dean Thayer felt that the reasons behind the yet undeveloped doctrine of *res ipsa loquitur* were sufficient to explain *Rylands v. Fletcher*. Thayer, *Liability without Fault*, 29 Harv. L. Rev. 801 (1916). But for an English criticism of the view, see Pollock, *Torts* 391 n.(9) (Landon's ed. 1939).

The case itself held the defendants liable in damages for the flooding of the plaintiff's coal mine, despite the fact that the defendants had been guilty of no "negligence or default whatever."¹³ Water had been stored on leased land for the purpose of supplying the defendant's mill, but the task of constructing the reservoir had been delegated to competent contractors. The latter negligently failed¹⁴ to note that the bottom of the excavation contained five abandoned shafts filled with marl and soil, which gave way under pressure of the impounded water, thus leading to the flooding of the plaintiff's nearby coal workings. An arbitrator's award for £5,000, made at the Liverpool Assizes after a verdict for the plaintiff, was disallowed by a decision of the Court of Exchequer on the ground of the defendants' freedom from negligence. On appeal, this decision in its turn was reversed in the Exchequer Chamber and the reversal was affirmed in the House of Lords on the ground 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. . . ."¹⁵

The practical consequence of the decision was, in effect, to place upon the actor the risk of all loss attendant upon a changed utilization of land or its appurtenances which was not attributable to an act of God or to the plaintiff's own negligence. Such a rule of law, Professor Bohlen has argued,¹⁶ might admirably fit the statics of a medieval society where change is at a minimum, but it fails to reflect the social needs engendered by the Industrial Revolution with its dynamic development of industry, utilization of natural resources, and adaptation of both men and materials to the ends of increased production. The initiative required for such change can best be encouraged by charging the actor with the risk of loss only when such loss is directly attributable to his own negligence. Finding, then, that *Fletcher v. Rylands* seems to ignore the needs of its age, when capitalistic industry was perhaps unable to bear the social costs of the risks it created to the same extent that it can and should do so today, Professor Bohlen was induced to advance his celebrated materialistic theory of the case.

According to this thesis, English judges reflected the opinions of the dominant class—the squirearchy, emotionally and economically rooted deep in the soil of Britain—because the judges either were recruited from

¹³ Martin, B., in *Fletcher v. Rylands and Horrocks*, 3 H. & C. 774, 791 (Exch. 1865).

¹⁴ Lord Cairns considered the contractor's negligence as taken for granted. *Rylands and Horrocks v. Fletcher*, L. R. 3 H. L. 330, 338 (1868).

¹⁵ *Fletcher v. Rylands and Another*, L. R. 1 Exch. 265, 279 (Exch. Ch. 1866); *Rylands and Horrocks v. Fletcher*, L. R. 3 H. L. 330, 339 (1868).

¹⁶ Bohlen, *op. cit. supra* note 3.

the landed gentry itself or, having by their office been raised into the governing elite, desired to consolidate that position both for themselves and for their families.¹⁷ An aristocracy whose wealth and position were founded on land and the traditional method of its exploitation, namely agriculture, would scarcely view with favor a commercial development no longer largely mercantile in character but rather based on manufacturing and the extractive industries. That development not only disfigured the landscape with smoky pottery towns and the slack heaps of busy collieries but also degraded what had been, or what the landed gentry liked to think had once been, a sturdy yeomanry through long hours of labor in unhealthy surroundings conjoined with mass slum dwelling in the new mushroom towns of the Midlands.

The movement for factory inspection laws, the ten-hour day, and curbs upon the exploitation of child labor was in fact led by such representatives of the landed gentry as the Tory Earl of Shaftesbury, shocked by the human degradation and misery upon which the newly enfranchised middle class was fattening. Liberals of the Manchester school of economy fought such social amelioration, or even the legalization of trade unionism, rationalizing this opposition with all the intellectual paraphernalia of classical economic thought, chief amongst which was the "iron law of wages" or "wage fund" theory, which was utilized to such good purpose that the cognomen "dismal science" even yet clings to the systematic study of things economic. The judges of England, then,—so the story goes—being drawn from the landed gentry or identifying their own interests with and adopting the standards of the class into which they found themselves elevated, might well be slow to "find" rules of law lifting economic liability for the inevitable social costs of accident and misadventure attendant upon life in a dynamic society from the shoulders of those who had of their own volition effected the change and stood to profit therefrom.

A second portion of Professor Bohlen's theory, complementary to the first, rests upon a putative religious cleavage between the landed gentry, and therefore the judges, and important segments of the industrial bourgeoisie. The religious allegiance of the upper classes was generally given to the Church of England, with a scattering of the most distinguished fam-

¹⁷ "Nor should it be forgotten that, in England, the dominant class was the landed gentry, whose opinion the judges, who either sprang from this class or hoped to establish themselves and their families therein—naturally reflected. To such a class it was inevitable, that the right of exclusive dominion over land should appear paramount to its commercial utilization,—to them, commerce and manufacture, in which they had little or no direct interest, appeared comparatively unimportant." Bohlen, *op. cit.* supra note 3, at 318-19.

ilies remaining loyal to their pre-Reformation faith. On the other hand, various branches of Nonconformity, all tainted with Puritanical doctrines to a greater or lesser degree, found great adherence among the town-dwelling middle classes.

These Puritanical faiths produced types or accentuated traits of character peculiarly fitted to justify the ways of Mammon to God. The inculcation of thrift, sober ways, regularity of life, and frugality of living, together with an ennobling and exaltation of labor, a justification of work as a duty imposed upon man from above, produced the precise type of individual most likely to achieve success in an ever-expanding capitalistic world. Calvinistic theology was thus admirably calculated to harness the drives of religious zeal to the goal of achieving material success upon earth.

The Protestantism of Calvin and Knox, which has had such a profound effect upon English Nonconformity, was a rugged faith tarrying not to comfort the weak, the poor, or the sinful, for all too often the Puritan mind conceived of these three states of being as synonymous. All men from birth were conceived of by this supralapsarian view as damned to the eternal torments of hell's fires through the age-old taint of original sin. Salvation was possible only through the possession of God's free gift of grace vouchsafed but to the select few. No one could be sure who were among the Lord's elect, but success upon this earth became for many the living symbol of holiness within. Baldly stated, the problem thus reduced itself to determining who were possessed of grace, and chief among the criteria was material success as the result of godly ways, frugal and industrious living, and strict Sabbath keeping. It would thus appear only natural that the insurmountable conflict in point of view and way of life between an aristocratic bench drawn from the landed gentry and a hard-bitten bourgeoisie taking constant comfort in the gratifying advice to "despoil the Egyptians" and struggling to emerge from the liability imposed by a medieval concept of the law of torts should make its appearance in the law courts.¹⁸

Thus Bohlen's adumbration of Weber's brilliant analysis of *The Protestant Ethic*¹⁹ finds religious as well as economic, traditional, and social

¹⁸ "The whole Puritan movement was one long revolt against all the conceptions, social, political and religious, of the aristocracy. The personal interests of such a class would lead them to regard as obnoxious and oppressive rights and privileges in the landowner which did not benefit them nor tend to power and dignity of their class, but, on the contrary, were constantly interfering with their commercial activities." Bohlen, *op. cit. supra* note 3, at 319.

¹⁹ Weber, *The Protestant Ethic and the Spirit of Capitalism* (Parsons' trans. 1930); Tawney, *Religion and the Rise of Capitalism* (1926). For a suggestive application of the same approach to another compact religious group, see Sombart, *The Jews and Modern Capitalism* (Epstein's trans. 1913).

factors in the English judiciary to explain why a burden amounting to "insurance by reason of vicinage"²⁰ was placed upon the utilization of land at a time when the medieval doctrine of liability for any act which resulted in injury unless done "utterly without fault" had in other fields of tort liability given way almost completely to the *Stanley v. Powell*²¹ rule of no liability without positively negligent conduct.

II

This plausible theory of Bohlen, though bottomed upon a naive materialism not in accord with the elementary facts, is widely, almost universally, accepted today both at home and abroad.²² The sole voice raised in criticism has been that of Pound, whose oft-repeated denials²³ of the major premise upon which Bohlen's theory rests have been virtually without effect upon our teachers of and writers on the law of torts.²⁴

In the first place, Bohlen's thesis, in which Pound seems to acquiesce,²⁵ that the English judges were drawn from the upper landed aristocracy is not true of the judges in this particular case, nor indeed of the bar as a whole, either during the period immediately in question, namely, the 1860's, or during the entire Victorian era at the very least. English barristers as a class have not been recruited from the landed gentry but rather from the middle and lower middle classes. The biographies²⁶ and

²⁰ My Duty towards My Neighbor, 16 Sol. J. 886 (1872).

²¹ [1891] 1 Q. B. 86.

²² Harper, A Treatise on the Law of Torts § 158, at 337-38 (1933); Stallybrass, Dangerous Things and the Non-Natural User of Land, 3 Cambridge L. J. 376, 396 (1929); Winfield, op. cit. supra note 8, at 504 n. (a), 511-12. In addition, no modern treatise considers itself respectable without a bow to the materialistic theory in the form of at least a footnote citing Bohlen. For a typical example, see Burdick, The Law of Torts 13 n. 67 (4th ed. 1926).

²³ Pound, Interpretations of Legal History 105-10 (1923); Pound, The Formative Era of American Law 88-90 (1938); Pound, The Economic Interpretation and the Law of Torts, 53 Harv. L. Rev. 365, 383 (1940).

²⁴ One of the very few to give evidence of even having heard of the problem is Radin, Law as Logic and Experience 155 (1940). Bohlen is seemingly content merely to cite Pound's Interpretations of Legal History. Bohlen, Cases on the Law of Torts 635 n. 14 (3d ed. 1930).

²⁵ Pound, The Economic Interpretation and the Law of Torts, 53 Harv. L. Rev. 365, 383 (1940).

²⁶ Stephen, The Life of Sir James Fitzjames Stephen (2d ed. 1895); Nash, The Life of Richard Lord Westbury (1888); Polson, Law and Lawyers (1840); Atlay, The Victorian Chancellors (1908); Manson, Builders of Our Law during the Reign of Queen Victoria (2d ed. 1904); Foss, The Judges of England (1848-64); 2 Foss, Memories of Westminster Hall (1874) (largely gossip anecdotes); Foster, Men-at-the-Bar (2d ed. 1885); Dictionary of Nat'l Biography (1885-1901).

autobiographies²⁷ of barristers, together with novels²⁸ projected against the legal background of the last century, reveal a pattern of remarkable similarity whereby ambitious students at the Inns of Court "have eaten their way to the Woolsack."²⁹

Offices in the army, the church, and the state, particularly in the diplomatic corps, attracted members of the aristocracy. Judges, on the other hand, have traditionally been recruited from those barristers who have achieved especial success and prominence at the bar. In addition, the higher judicial posts were and are usually occupied by successful barristers who have followed a rigorous *cursus honorum*: first a seat in Parliament, then service to the government successively as solicitor-general, attorney-general, and judge, and finally the Great Seal. The long years of study, the tedium of mastering Tidd's *Practice*, Cruise's *Digest of Conveyancing*, and Peake's *Law of Evidence*, the early pinched years at the bar, and the slow growth of reputation, together with attendance on circuit (more employment entailing an ever-increasing burden of labor), might appeal to a Thomas Traddles, but scarcely to one born to an assured station and the comforts of wealth.

The life of a circuit leader required the utmost in physical endurance as well as legal astuteness. Lord Campbell, while leader of the Northern Circuit, was regularly accustomed to work eighteen to twenty hours a day for weeks on end,³⁰ and his experience was that of every other successful leader. Perhaps the most lucrative law business in an age of industrial expansion and railroad construction was to be found in heavy commercial cases, and to think that one who has passed the major portion of his active career at the bar in constantly representing corporate or business interests is likely to become suddenly hostile and totally out of sympathy with the needs and problems which have been quite literally his life's nourishment is to ignore the observations of centuries.

²⁷ Brougham, *The Life and Times of Henry Lord Brougham* (1871-72); Campbell, *The Life of John Lord Campbell* (Hardcastle's ed. 1881); Ballantine, *Some Experiences of a Barrister's Life* (1882); Ballantine, *The Old World and the New* (1884); Pollock, *Personal Remembrances* (1887); Pollock, *For My Grandson* (1933).

²⁸ There is scarcely a novel from the pen of Charles Dickens that does not in some fashion deal with the legal profession, "Bleakhouse" and "David Copperfield" being worthy of particular attention. See also Holdsworth, *Charles Dickens as a Legal Historian* (1929). Trollope, *The Eustace Diamonds*, 16-18 *Fortnightly Rev.* (1871-72), and, of course, the indispensable Warren, *Ten Thousand a Year* (1842), are both helpful in this regard.

²⁹ The phrase, slightly adapted, is from a contemporary's description of Lord Cranworth's own early years at Lincoln's Inn. Lord Cranworth, 45 *Law Times* 260 (1868); *The Builders of Our Law during Queen Victoria's Reign*: VII.—Lord Cranworth, 96 *Law Times* 415 (1894).

³⁰ 1 Campbell, *op. cit.* supra note 27, at 439.

A further factor conditioning the outlook of English judges lies in their selection from the proved leaders of the bar, a position generally not attained until middle age. Promotion to the bench at such an age, even with a corresponding elevation into the aristocracy, was scarcely calculated completely to turn judicial heads. Of the judges who sat on *Fletcher v. Rylands*, Willes was raised to the bench at forty-one, Pollock at sixty-one, while five of the remaining judges were created in their late forties,³¹ and four in their fifties.³²

The task still remains to determine whether the Bohlen theory of an aristocratic bench of judges holds good for the particular judges, eleven in number, who took part in the three decisions in *Fletcher v. Rylands* and *Rylands v. Fletcher*. Further, the religious connections of those judges who held for the defendants and thus represented the middle-class, mercantile point of view according to the Bohlen thesis, as contrasted with the majority, who placed a duty upon the defendant to act at his peril and so represented the alleged viewpoint of the landed gentry, must be examined in the light of the Protestant Ethic doctrine espoused by Bohlen.

The two judges whose judgments in *Fletcher v. Rylands* represented what to Bohlen seems the Puritan middle-class interest and philosophy were Chief Baron Jonathan Frederick Pollock and his son-in-law, Baron Samuel Martin. Pollock's own origins in many ways lend support to the Bohlen thesis, for the Chief Baron was the third son of David Pollock of Charing Cross, King George III's saddler and a strict Presbyterian, who long refused on religious grounds even to allow the inoculation of his children against smallpox.³³ Pollock's poverty would have prevented him from finishing his university education but for the generous assistance of his tutor, the Rev. George Tavel, and Pollock's own efforts in tutoring other students. The future Lord Chief Baron's first work at the bar was in bankruptcy where his knowledge of accounting and mercantile usages was of particular value. He joined the Northern Circuit, which included the great mercantile towns of the North, and of which, in the due course of time, he became leader, thanks to his energy and deserved reputation as "a very sound lawyer."

At this point, however, all coincidence between the Bohlen theory and

³¹ Blackburn (46), Cairns (47), Bramwell (48), Martin and Rolfe (49).

³² Mellor (52), Keating (55), Montagu Smith (56), Lush (58).

³³ Hanworth, Lord Chief Baron Pollock 6 (1929). For the facts of Pollock's life in outline form, see Foss, *Judges of England, 1066-1870*, at 523-25 (1870); 46 *Dictionary of Nat'l Biography* 68-69 (1896); *The Late Chief Baron Pollock*, 49 *Law Times* 319-20 (1870); *London Times*, p. 10, col. 5 (Aug. 24, 1870).

the facts of Sir Frederick's life ceases. Though son of a saddler, he was brother of Sir David Pollock, a judge in India, and of Field Marshal Sir George Pollock, a military hero of Indian fame. His education, however financed, was acquired at St. Paul's and Trinity College, Cambridge. Though son of a blue-nosed Presbyterian, the Chief Baron himself was a member of the Church of England and possessed of moderate views tending almost entirely toward the ethical and social rather than the ecclesiastical or sectarian, believing principally in the divinity of Christ and the Holy Trinity! "But beyond this there is nothing revealed on these subjects."³⁴ Fond of Wesley's sermons, he was nevertheless a lifelong friend of Monk, Bishop of Gloucester; Blomfield, Bishop of London; and Musgrave, Bishop of Hereford and later Archbishop of York, having been a schoolfellow of the first two.³⁵

In politics, Pollock was a lifelong Tory sitting throughout his entire parliamentary career for the little rotten borough of Huntingdon, where in 1831 a total of 74 votes was sufficient to insure his election³⁶ and where even after the Reform Bill the electors totalled only 284. Nor was Pollock a young Disraeli of a Tory-Socialist turn of mind, for this son of a poor saddler, supposed by some to have nurtured deep in his subconscious the necessity of freeing the industrial bourgeoisie from the rigors of a tort liability adapted only to the static feudalism of the Middle Ages, was, in fact, horrified by the Reform Bill of 1832. Lord Grey, he feared, was ruining the country, for such a man cared "not a boodle for the known opinion of the King" and set at naught that awe-inspiring fact, "a recorded decision of a majority of the Peers."³⁷ Deeply disturbed by these efforts to reform the electoral franchise, Pollock wrote on May 22, 1832, to his son Fred that "I consider the Constitution at an end. The Revolution has begun and practically we are a Republic." His hopes for the country's salvation lay in the next Parliament, which he devoutly trusted would be "composed of men more intelligent, more wealthy, more *conservative* than the present."³⁸

Yet in his views on legal education, Pollock anticipated Ames' use of the case method by a full half century. The common law, which "is really nothing more than 'summa Ratio'—*the highest good sense*," could best be

³⁴ Hanworth, *op. cit.* supra note 33, at 51.

³⁵ Hanworth, Lord Chief Baron Pollock 88, 151 (1929).

³⁶ *Ibid.*, at 71-72. For a contemporary portrait, see also the comments in 2 Grant, Bench and Bar 56-62 (1838).

³⁷ Hanworth, Lord Chief Baron Pollock 70 (1929).

³⁸ *Ibid.*, at 71. The italics are Pollock's.

learned "by *reading the reports and attending the Courts* and thinking and talking of what"³⁹ one reads and hears. As for the study of law from treatises, Pollock wrote, "I myself *had no treatises*; I referred to them as collecting the authorities."⁴⁰ The old Chief Baron's advice to his grandson, the great legal historian Sir Frederick Pollock, can hardly be improved upon today by the most advanced of legal educational theory or practice. "In my opinion the best method of studying law, *for a man who is to practice it*, is to read cases, making notes at the end of the column, and, if a common lawyer, *nisi prius* cases, especially reading all the cases cited and making himself Master of the Point argued and determined. I never read any Law Book through except Blackstone and I read that before I went to the University. Treatises lead you to any part of a subject and to all the cases that belong to it, but my advice would be, *Read reports* and make your own *System*. . . ."⁴¹

Pollock's vigorous opinions on the role previous judicial views of public policy—"incrusted precedent"—should play in the process of decision are equally noteworthy and quite at variance with those of Baron Surbutter, as Parke was dubbed by a wit of the time and a man whom the Chief Baron considered "the greatest legal pedant that I believe ever existed."⁴² Baron Parke maintained "that the Judges had no right to legislate" though admitting they had once done so, as in the rule against perpetuities. To Pollock, on the other hand, it always seemed crystal clear that "whatever was against the public good or welfare could not be law."⁴³

How, then, can one say that on the day he delivered his opinion in *Fletcher v. Rylands*, Pollock's notions of "public good or welfare" reflected either his humble origin, or his classical training in the University, or his sturdy Toryism, or what Pound has called the "strongest single influence both in determining single decisions and in guiding a course of decision . . . a taught tradition of logically interdependent precepts and of referring cases to principles"?⁴⁴ Surely if a theorist adopts materialism as a canon of intellectual and historical elucidation it would at least appear incumbent upon him to show concretely just how such factors controlled the given decision. Otherwise, nebulous generalizations with attendant looseness of thought and vagueness of criteria of judgment continue to engender misdescriptions of the judicial process. Sight must not be lost

³⁹ *Ibid.*, at 198.

⁴² *Ibid.*, at 198.

⁴⁰ *Ibid.*

⁴³ *Ibid.*, at 177.

⁴¹ *Ibid.*, at 207-8.

⁴⁴ Pound, *op. cit.* *supra* note 25, at 367.

of the fact that the problem is never whether a general social or intellectual background affects judicial decision but rather how and in what degree their effect is revealed.

The remaining judge representing the middle class interest according to the Bohlen theory was Baron Samuel Martin, born in Londonderry in 1801 and educated at Trinity College, Dublin. He studied the common law art of special pleading for two years before being called to the bar in 1830. Joining the Northern Circuit, Martin rapidly acquired an extensive practice in mercantile cases and took silk in 1843.⁴⁵ Four years later, Martin, "a vehement Liberal,"⁴⁶ was returned to Parliament, which he quitted in 1850 to take his place on the bench. In addition to his good nature and vast command of legal business, Martin's chief characteristic was a passionate fondness for the turf.⁴⁷ When in France, his attendance at the Bois de Boulogne was assiduous, much to the scandal of his friends who could not overlook the fact that the racing was commonly conducted on Sunday.⁴⁸ Whatever Baron Martin's objection to imposing liability without fault upon Rylands, he had not hesitated in the years previous to hold a railroad absolutely liable for fire caused by sparks emitted from locomotives.⁴⁹ All things considered, this race-track-frequenting Irishman fits none too snugly into his theoretical place in the Bohlen picture or the Protestant Ethic.

Yet if difficulty has been encountered heretofore in making the facts and the theory jibe, the career and opinions of Baron Bramwell⁵⁰ will prove insuperable. Eldest son of George Bramwell, a partner in the banking firm of Dorriens, Magens, Dorriens, and Melo, the future Baron at the age of sixteen entered his father's bank as a clerk where he remained for a period of two years. Having passed through various early vicissitudes, Bramwell, headstrong, forceful, poor, and without connection, yet having seemingly "inherited business instincts," achieved an outstanding reputation in commercial litigation in the years following his call to the bar in

⁴⁵ On Martin generally, see Foss, *op. cit. supra* note 33, at 436; 36 Dictionary of Nat'l Biography 295 (1893); 2 Campbell, *op. cit. supra* note 27, at 330; London Times, p. 6, cols. 1-2 (Jan. 10, 1883).

⁴⁶ Ballantine, *op. cit. supra* note 27, at 210.

⁴⁷ London Times, p. 6, cols. 1-2 (Jan. 10, 1883).

⁴⁸ Robinson, Bench and Bar 109 (1889).

⁴⁹ See statement of Martin, B., made during argument in *Blyth v. Birmingham Waterworks*, 11 Exch. 781, 783 (1856), quoted at length by Wigmore, *op. cit. supra* note 6, at 554 n. 4.

⁵⁰ The general facts of Bramwell's life may be found in 1 Dictionary of Nat'l Biography 256-57 (Supp. 1901) or in 4 Encyc. Brit. 27 (14th ed. 1929).

1838. Like so many of his contemporaries, he took an active part, even before his elevation to the bench, on various law revision committees, especially on those leading to the Common Law Procedure Acts and the Judicature Acts uniting law and equity. He also sat on the royal commission to inquire into the assimilation of the mercantile laws of England and Scotland and the law of partnership which resulted in the Companies Act of 1862. Throughout his life Bramwell was always proud of having invented the expression "Ltd." which was required in the title of all companies seeking to limit the liability of the participating shares.

In religious matters Bramwell took but little interest, and the traditional attendance at church required of the judges on circuit never ceased to vex him.⁵¹ But in mode of life and in social outlook Bramwell was the living embodiment of the Protestant Ethic and the judicial personification of Herbert Spencer's *Social Statics*. He gloried in work as an end in itself and, having transferred his Puritanical zeal from the meeting house to the market place, he felt that "the greatest punishment I could be doomed to would be to be perfectly idle."⁵² Dress must be sober, people prudent, thrift encouraged, and industry enjoined upon all. *Diligenter* remained for him not only a watchword but a way of life.⁵³

A Whig by innermost conviction and a lifelong communicant of the Manchester faith, Bramwell was a blind follower of those apostles Adam Smith, J. B. Say, Bastiat, Ricardo, and McCulloch—"the gods I have worshipped from my youth."⁵⁴ It is this man, George William Bramwell, who considered Herbert Spencer "the profoundest thinker of the age,"⁵⁵ whom the Bohlen theory assumes to be imbued with the aristocratic prejudices and view of the good life common to the English landed gentry.

A man of strong opinions who not infrequently commanded the columns of the *Times* for his epistolary outpourings, Bramwell has left a wealth of material from which his views may be ascertained. As a judge, Bramwell was found by counsel practicing before him to be firmly convinced that railroads needed judicial protection from juries,⁵⁶ and, as a

⁵¹ Fairfield, *Some Account of George Baron Bramwell* 102 (1898). A reading of this admirable biography in its entirety is essential for the understanding of a not uninteresting judicial personality.

⁵² *Ibid.*, at 55-56.

⁵³ *Ibid.*, at 17.

⁵⁴ From Bramwell's pamphlet, *Laissez-Faire*, reprinted in Fairfield, *Some Account of George Baron Bramwell* 140 (1898).

⁵⁵ *Ibid.*

⁵⁶ Pollock, *For My Grandson* 176-77 (1933).

legislator, he viewed early employers' liability acts as both "uncalled for and mischievous" for cannot the workingmen see that "if the master gives more in one way he must give less in others?"⁵⁷ For the rest of his life the employers' liability acts remained the *bête noir* of Bramwell, who continued to feel that of "anything more outrageous than this I cannot conceive."⁵⁸ As is so frequently the case with the expounders of all systems founded on "self-evident" principles, the exasperated note of a sorely tried but patient school teacher often obtrudes itself into Bramwell's exposition of the simple tenets of his economic faith in his innumerable polemics against archdeacons on the subject of drink, against Henry George on the taxation of ground rents, or against Home Rule for Ireland.

The government, felt Bramwell, should "govern as little as possible" and should "mainly concern themselves with keeping order at home and defending us abroad,"⁵⁹ enforcing contracts strictly, and above all else being careful to "meddle not, interfere not, any more than you can help."⁶⁰ At all cost, "grandmotherly legislation" must be avoided for it undermines character and will bring the country ultimately to ruin. "To tell the weak, the lazy, and the improvident that they should not suffer for their faults and infirmities would but encourage them to indulge in those faults and infirmities."⁶¹

Although personally a man of great kindness, Bramwell remained consistently impervious to the economic needs of a changing social order. In a letter to Lord Elcho accepting membership in the "Liberty and Property Defense League," Bramwell declared, "My opinions of half a century standing are as strong as ever,"⁶² but, contrary to the requirements of the Bohlen thesis, those opinions formed in his youth were not those held by the landed aristocracy. Just what those changeless early opinions were is perhaps best summed up by Bramwell's able biographer, Charles Fairfield, as an unshakable belief "that Nassau Senior could talk wisely about everything, that Henry Reeve was familiar with all those

⁵⁷ From Bramwell, reprinted in Fairfield, op. cit. supra note 54, at 146.

⁵⁸ From a speech of Bramwell delivered Nov. 29, 1882, reprinted in Fairfield, op. cit. supra note 51, at 137.

⁵⁹ From a speech of Bramwell at the first meeting of the "Liberty and Property Defense League," Fairfield, op. cit. supra note 51, at 134.

⁶⁰ From a speech of Bramwell in 1886 before the British Association, Fairfield, op. cit. supra note 51, at 164-65.

⁶¹ From an address of Bramwell in 1888 before the British Association, Fairfield, op. cit. supra note 51, at 179.

⁶² Reprinted in Fairfield, op. cit. supra note 51, at 133.

subjects which Nassau Senior overlooked, and that H. T. Buckle's 'History of Civilization' was at once the Bible, Talmud, Koran, and Rig Veda of enlightened 'Liberalism.'⁶³

Upon the plaintiff's appeal to the Exchequer Chamber, the Pollock-Martin decision for the defendants was unanimously reversed by a bench of six judges composed of Willes, Keating, Mellor, Montagu Smith, and Lush, JJ., with Mr. Justice Blackburn writing the decision for the court. Colin Baron Blackburn was the second son of John Blackburn of Killearn, Stirlingshire, by Rebecca, daughter of the Rev. Colin Gilles. Educated at Eton and Trinity College, Cambridge, he was called to the bar in 1838 and joined the Northern Circuit attending the Liverpool Sessions.⁶⁴ The financial depression customarily attendant upon young barristers after their call seemed never to lift from Blackburn so far as getting into business was concerned, for he was destined to pass all his days at the bar in a stuff gown and in an almost briefless condition.⁶⁵

The future judge showed no interest in or aptitude for politics, although his brother was returned for Stirlingshire in 1859-1865 in the Conservative interest. Nor did he acquire any important professional connections, since he possessed "none of the advantages of person and address which make for success in advocacy."⁶⁶ Altogether, Blackburn, despite his twenty-one years at the bar, remained so obscure that, when his appointment to the Queen's Bench was announced by Lord Chancellor Campbell, his selection was denounced as a "job" illustrating the well-known sight of one Scotsman promoting another however obscure his name or humble his talents.⁶⁷

But the new judge had not been idle, though rarely engaged in the

⁶³ Fairfield, *op. cit.* supra note 51, at 125-26.

⁶⁴ 1 Dictionary of Nat'l Biography 203-4 (Supp. 1901); Foss, *op. cit.* supra note 33, at 96-97.

⁶⁵ "Mr. Blackburn does not appear at any time to have commanded a large practice." London Times, p. 6, cols. 1-2 (Jan. 10, 1896); Ballantine, *Some Experiences of a Barrister's Life* 429-30 (1882); 1 Dictionary of Nat'l Biography 203 (Supp. 1901).

⁶⁶ 1 Dictionary of Nat'l Biography 203 (Supp. 1901).

⁶⁷ "I have already got into great disgrace by disposing of my judicial patronage on the principle *detur digniori*. Having occasion for a new judge, to succeed Erle made Chief Justice of the Common Pleas, I appointed Blackburn, the fittest man in Westminster Hall, although wearing a stuff gown; . . . They got me well abused in the 'Times' and other newspapers, but Lyndhurst has defended me gallantly in the House of Lords." 2 Campbell, *op. cit.* supra note 27, at 372-73. Pollock's private opinion of the new, but little known, justice was not unfavorable. In a letter to Bramwell in December, 1859, the Chief Baron wrote, "What accounts do you hear of the dark horse Colin [Blackburn] who lately won the race and astonished the natives. I expect he will turn out to be 'a clever hock' and 'a good roadster.'" 2 Fairfield, *op. cit.* supra note 51, at 24.

ordinary work of the barrister. He was the author of the standard treatise on the law of sales,⁶⁸ which remained the authoritative work for many years, being at last supplanted only by Benjamin's great work. Several volumes of well-edited law reports also stood to his credit.⁶⁹ Of a deeply scholarly nature, Blackburn, who never married, studied human nature, it is said, in the pages of *Coke on Littleton*.⁷⁰

The senior concurring justice, Sir James Shaw Willes, was considered together with Blackburn "the soundest and most useful lawyers among the judges."⁷¹ The son of an Irish physician by the daughter of Cork's Lord Mayor, Willes was, like Baron Martin, educated at Trinity College, Dublin. In Ireland he studied law at the chambers of Mr. Collins, working regularly from six in the morning to twelve at night before coming to London to study in the office of the celebrated Mr. Chitty. Although possessed of no social, political, or professional connections, Willes by dint of his own exertions and native talents rapidly acquired a handsome practice and an outstanding reputation.⁷² Considered to have the greatest mastery of case law possessed by any member of the bar, Willes was co-author with Mr. Justice Keating of the third and fourth editions of Smith's *Leading Cases*. Though a master of the intricacies both of real property and of common law pleading, having committed to memory all the forms used in common law proceedings, Willes was most highly regarded for his decisions in mercantile cases.

Although married, Willes had no children, and being of a very emotional⁷³ and sentimental nature, fond of Wordsworth, he committed suicide after an especially trying series of criminal cases in 1872.⁷⁴ His death was particularly regretted in mercantile circles, which had the

⁶⁸ Blackburn, *A Treatise on the Effect of the Contract of Sale, on the Legal Rights in Property and Possession of Goods, Wares, and Merchandise* (1845). An edition with Canadian notes by Mr. Justice Russell was published as late as 1910.

⁶⁹ Ellis and Blackburn published some nine volumes of Queen's Bench and Exchequer Chamber reports.

⁷⁰ "His great patron, Lord Campbell, was once met at Cremorne Gardens, studying, as he said, human nature. Lord Blackburn preferred seeking it in Coke upon Littleton, without assistance from the haunts of revelry." Ballantine, *op. cit. supra* note 65, at 429.

⁷¹ Such was the opinion confided to his diary by the mordant Bethell. 2 Nash, *The Life of Richard Lord Westbury* 152 (1888).

⁷² 61 *Dictionary of Nat'l Biography* 286-87 (1900); Foss, *op. cit. supra* note 33, at 739; Obituary: Mr. Justice Willes, 16 *Sol. J.* 885 (1872); *London Times*, p. 8, cols. 1-2 (Oct. 4, 1872).

⁷³ Ballantine, *op. cit. supra* note 65, at 322.

⁷⁴ Obituary: The Right Hon. Sir J. S. Willes, 16 *Sol. J.* 902-4 (1872). The details of the inquest are reported in full in *London Times*, p. 8, cols. 1-2 (Oct. 4, 1872).

greatest confidence in him, for "they knew that he was thoroughly acquainted with commercial law and would apply it in a wise and liberal spirit"⁷⁵ and that "amid the complicated questions and relations arising out of modern commerce . . . his strong sense rendered him preeminently successful in striking out paths of decision where old rules of law exist side by side with modern practices and usages of trade never contemplated when the old rules were laid down."⁷⁶

A man of parts who had traveled widely in Europe, Asia, and America, master of the principal European languages with some acquaintance with several of the Eastern tongues,⁷⁷ Willes' was too complex a personality to be explained on sheerly materialistic lines.

The second concurring justice was Sir Henry Singer Keating, born in Dublin in 1804, the third son of Lieutenant-general Sir Henry S. Keating, K.C.B. He was called to the bar at the Inner Temple in 1832, took silk in 1849, and entered Parliament as a Liberal three years later. A man of capacity and ability to handle legal business, he was made solicitor-general by Palmerston and, in 1859, a judge of the Common Pleas.⁷⁸

Mr. Justice Mellor was born in 1809, the son of John Mellor, mayor of Leicester, justice of the peace, manufacturer, merchant and partner in the old south Lancashire mercantile firm of Gee, Mellor, Kenshaw and Co. Young John was educated at the Leicester Grammar School and later was tutored by a Unitarian minister.⁷⁹ Because of his inability conscientiously to subscribe to the Thirty-nine Articles, Mellor was unable to attend Oxford and so transferred his studies to the chambers of Mr. Thomas Chitty, the younger, and University College, London, where he attended the lectures of Austin.⁸⁰ Called to the bar in 1833, he joined the Midland Circuit and rapidly acquired an extensive practice in criminal and civil cases at Leicester borough and Warwick sessions.⁸¹ Taking silk in 1851, he obtained a sizeable part of the leading business on his circuit. Standing for Parliament in 1857, he was returned in the Liberal interest. A loyal supporter of Palmerston and "an unflinching advocate of the liberal

⁷⁵ The Late Mr. Justice Willes, 1 *Law Mag. and Rev.* 889, 895 (1872); see also *Law Times*, quoted in extenso in *London Times*, p. 8, cols. 1-2 (Oct. 4, 1872).

⁷⁶ Obituary: Mr. Justice Willes, 16 *Sol. J.* 885 (1872).

⁷⁷ Pollock, *op. cit. supra* note 56, at 166.

⁷⁸ 30 *Dictionary of Nat'l Biography* 275 (1892); Foss, *op. cit. supra* note 33, at 380; *London Times*, p. 3, col. 5 (May 8, 1891).

⁷⁹ 37 *Dictionary of Nat'l Biography* 224 (1894); 9 Foss, *The Judges of England* 228 (1864).

⁸⁰ Ballantine, *op. cit. supra* note 46, at 202; 37 *Dictionary of Nat'l Biography* 224 (1894).

⁸¹ Obituary: The Right Hon. Sir John Mellor, 31 *Sol. J.* 429 (1887).

opinions to which he had all along been attached,"⁸² Mellor was made a judge in 1861. As a judge he was considered an especial authority on all subjects connected with railway legislation.⁸³ As a father he was the parent of eight sons, most of whom became connected with law in one capacity or another.⁸⁴

Sir Montagu Edward Smith, eldest son of a solicitor and town clerk of Bideford, Devonshire, by the daughter of a naval commander, was educated at the local grammar school of his native town. Starting life, like Lord St. Leonards, as a solicitor, he later was called to the bar from Gray's Inn in 1835.⁸⁵ His professional career taking the usual course, Smith took silk in 1852.⁸⁶ Returned to Parliament in 1859 as a Conservative, he was raised to a place on the Common Pleas six years later.⁸⁷ He remained a bachelor throughout life.

The junior justice in the Exchequer Chamber was Sir Robert Lush, born in 1807 and educated in Shaftesbury. After passing some years in a solicitor's office he studied for the bar and was called in 1840.⁸⁸ A strict Baptist, often in later years preaching in the Regent's Park Chapel, Lush is said to have found this connection of assistance in acquiring practice in his early days at the bar.⁸⁹ Joining the Home Circuit, he forged ahead to a commanding place at the bar through his legal aptitude and vast command of mercantile practice.⁹⁰ In addition to appearing in all the heavy railway and mercantile cases at Westminster, he was for many years retained in almost every important shipping case at Guildhall.⁹¹

Lush's elevation to the Queen's Bench in 1865 was due neither to social nor to political connections but solely to his professional merits.⁹² The

⁸² Foss, *op. cit.* supra note 33, at 442-43.

⁸³ Legal Obituary: The Rt. Hon. Sir John Mellor, 83 *Law Times* 15 (1887).

⁸⁴ *Ibid.*

⁸⁵ 53 *Dictionary of Nat'l Biography* 99-100 (1898).

⁸⁶ Foster, *Men-at-the-Bar* 434 (2d ed. 1885).

⁸⁷ "But the Court of Common Pleas was also in favour, especially among the mercantile men, and Montagu Smith did much to sustain its reputation." *London Times*, p. 3, col. 5 (May 8, 1891).

⁸⁸ Foss, *op. cit.* supra note 33, at 418; 34 *Dictionary of Nat'l Biography* 289-90 (1893).

⁸⁹ *London Times*, p. 7, col. 5 (Dec. 28, 1881); Ballantine, *op. cit.* supra note 46, at 202; Manson, *op. cit.* supra note 26, at 254; see also quotation from *The Daily News*, reprinted in *Lay Opinion on Legal Subjects: The Late Lord Justice Lush*, 72 *Law Times* 150 (1881).

⁹⁰ Legal Obituary: Lord Justice Lush, 72 *Law Times* 158-59 (1881).

⁹¹ Obituary: Lord Justice Lush, 26 *Sol. J.* 142 (1881); Manson, *op. cit.* supra note 26, at 252.

⁹² *London Times*, p. 7, col. 5 (Dec. 28, 1881).

author of successful legal treatises, his knowledge of the intricacies of special pleading bore fruit in his *Common Law Practice*, the practitioners' *vade mecum* in the days before the later law reforms simplifying procedure. Sir Robert sat on many law revision commissions and together with Sir George Jessel framed the court rules under the Judicature Acts. Mr. Justice Lush was married to the daughter of the Rev. Christopher Woolacott by whom he had two children, both of whom became barristers.⁹³

On appeal to the House of Lords, the decision of the Exchequer Chamber was affirmed and so Cairns, the Lord Chancellor, and Robert Monsey Rolfe, Baron Cranworth, who there heard the case, are classed by the Bohlen theory among those favoring the aristocratic principle of the traditional use of land at all costs. Rolfe, the son of the rector of Cranworth, near Thetford, counted among his ancestors who served the church, an uncle, his father, a grandfather, and a great grandfather. His father was Admiral Nelson's first cousin, while his mother was a niece of James, first Earl of Caledon.⁹⁴

Rolfe, born in 1790, was educated at the grammar school at Bury St. Edmonds (where Blomfield, Bishop of London, was his schoolfellow), and at Winchester and Trinity College, Cambridge. Called to the bar in 1816, he took silk in 1832, in which year he was also returned to Parliament as a Whig.⁹⁵ Never noted for aptitude in the arts of advocacy, he acquired a reputation for soundness and stability coupled with an infinite capacity for attention to detail. Following his assumption of a silk gown, however, he failed to gain any considerable portion of leading business, and much to everyone's surprise he was made solicitor-general in 1834.⁹⁶ So if it could be said of Mr. Justice Lush that his career illustrated the second of the three proverbial roads to success at the bar—influence, a book, or a miracle⁹⁷—Rolfe's steady progress to the Woolsack must be taken to exemplify the last of these traditional possibilities.

The future Lord Chancellor showed little more aptitude for the duties of the solicitor-general's office than he had for advocacy, and throughout his tenure of office he remained, it is said, just "as he had begun, entirely

⁹³ See notes 90 and 91 *supra*.

⁹⁴ 49 Dictionary of Nat'l Biography 158-61 (1897).

⁹⁵ Foss, *op. cit. supra* note 33, at 565.

⁹⁶ 2 Grant, *op. cit. supra* note 36, at 48-49.

⁹⁷ London Times, p. 7, col. 5 (Dec. 28, 1881). 2 Grant, *op. cit. supra* note 36, at 48-49, suggests it was the pursuit of the first method that accounts for Rolfe's success.

ineffective."⁹⁸ When in 1839 Rolfe was made a Baron of the Exchequer, it was judged that this post must mark the summit of the career of one said by a contemporary "to exemplify the beauties of resignation." Fifteen years later, Rolfe was rescued from the decent judicial obscurity into which the lapse of years had cast him by the dignified manner in which he conducted the trial of a famous murderer, one Rush, whose bold deed and whose cold and insolent manner throughout his trial caused a sensation in England at the time.⁹⁹

Having been brought into such favorable public notice, Rolfe's judicial advancement was not long deferred. First came a vice-chancellorship and then in 1851 promotion together with Sir James Lewis Knight Bruce to the first Lords Justiceships of the Court of Appeals in Chancery. In the following year he was invested with the seals under Lord Aberdeen and again in 1865 following Lord Westbury's resignation under unfortunate circumstances.

Cranworth's career in the Lords was far from one long round of triumphs. Personally a very pleasant man who made friends easily and whose social attractiveness had been enhanced by an advantageous marriage, he was seemingly lacking in both force and originality. Dry to the point of extreme dullness,¹⁰⁰ "that feeble creature Cranworth"¹⁰¹ was considered by Pollock to be "a very honest and sensible man but destitute of *vigour* and liable from weakness and ignorance, *not of law*, but of the *affairs of life* to go wrong."¹⁰²

In religious matters, his views have been described as mildly Erastian, while his career as a whole "contains little to fire the imagination of the neophyte."¹⁰³ In an age of ardent law reformers, Cranworth followed the trend of his contemporaries, who, however, seemed to feel more vexation at his somewhat bungling efforts both in initiating and in seconding the law's reformation than gratitude for his obviously well-meant efforts.¹⁰⁴ His social or political outlook is best understood in terms of his own

⁹⁸ 2 Atlay, *The Victorian Chancellors* 58 (1908).

⁹⁹ *Ibid.*, at 64-65.

¹⁰⁰ Lord Cranworth, 45 *Law Times* 260-61 (1868); 2 Grant, *op. cit. supra* note 36, at 53-56.

¹⁰¹ Hanworth, Lord Chief Baron Pollock 208 (1929).

¹⁰² *Ibid.*, at 175-76.

¹⁰³ 2 Atlay, *op. cit. supra* note 98, at 53 (1908).

¹⁰⁴ His efforts to "aid" Lord Westbury were particularly disastrous. 1 Nash, *The Life of Richard Lord Westbury* 133-34 (1888); 2 *ibid.*, at 10. "Lord Chancellor Cranworth evidently failing in quickness of apprehension, for which I generally have found him remarkable"—reveals Bethell's opinion of his successor. 2 *Ibid.*, at 152. See also Lord Westbury, 2 *Law Mag. and Rev.* 724 (1873).

career, which "had been too easy to allow him to be revolutionary, and owing nothing himself to privilege, he was never tempted to engage in a vain battle in defense of privileges."¹⁰⁵ Guided through the sentimental generalities of the inevitably praiseful obituaries by the sharper and franker comments of his judicial contemporaries, Lord Cranworth stands forth epitomized in the comment that as a judge he "had a kind heart and an ever smiling face,"¹⁰⁶ all mention of his head being omitted.

Cranworth's very antithesis is presented by the life and career of Lord Chancellor Hugh McCalmont Cairns, in whose person is exemplified the thesis that nowhere is there to be found such a collection of patently self-made men in the world as those who sat on the English bench during the nineteenth century. The future Earl Cairns was born in 1819 in County Down, Ireland, the son of a former captain in the Forty-seventh Foot. The family was of Scotch origin, having come to Ireland at the time of James I when they were of some distinction.¹⁰⁷ A child prodigy dressed in velvet and lace, he delivered a lecture on chemistry at the town hall at the age of eight. His intense religious zeal was early apparent for at 14 he was writing articles for the *Church Missionary Gleaner*, while late in life he could still repeat many of the Psalms in the original Hebrew.¹⁰⁸ Formally educated at Belfast Academy and Trinity College, Dublin, Cairns was intended by his father for the ministry but was persuaded by his tutor to enter the law instead.

Having come to London where he studied under Chitty, he was admitted to the bar in 1844, and without friends or influential connection took his place at the chancery bar.¹⁰⁹ At last over the first few years, when briefs perversely refuse to appear, Cairns' great grasp and capacity, coupled with intense powers of concentration, won him an extensive chancery practice. A conservative to his fingertips, though far removed from the Toryism of a Castlereagh or a Wellington, Cairns was returned to Parliament from Belfast in 1852 and was made solicitor-general six years later, having won a silk gown but two years before. A matchless debater and second only to Disraeli in the councils of the Conservative party, Cairns, due to constitutional weakness, was forced to abandon the

¹⁰⁵ London Times, quoted in Lord Cranworth, 45 Law Times 260, 261 (1868).

¹⁰⁶ Lord Cranworth, 45 Law Times 260 (1868); 2 Grant, op. cit. supra note 36, at 55.

¹⁰⁷ 8 Dictionary of Nat'l Biography 217 (1886); Foss, op. cit. supra note 33, at 150-51.

¹⁰⁸ 2 Atlay, op. cit. supra note 98, at 292, 293 (1908), quoting from a rare volume written at the desire of Cairns' widow, Nisbet, Brief Memories of Hugh McCalmont, First Earl Cairns (1885).

¹⁰⁹ The Law and the Lawyers, 78 Law Times 419 (1885).

Commons and his lucrative practice before the House of Lords and the Privy Council for a Lord Justiceship of Appeals in 1866, two years later becoming Chancellor for the first time.¹¹⁰

A notable law reformer and a leader in the movement to establish the Torrens System of registration of title to land,¹¹¹ Cairns was likewise a leading spirit in securing the passage of the Judicature Acts merging law and equity, the Married Women's Property Act, the Conveyancing Act of 1881,¹¹² and the Settled Land Act of 1882, which in its operation has been described "as a notable solvent of the territorial interest."¹¹³

Cairns was possessed of a peculiar mastery of mercantile law and, since he was a Lord Justice or Chancellor at a time when many of the basic relationships between the corporate management, creditors, the shares, and the various members in the hierarchy of security holders were up for settlement, "he may be said to have moulded more than any other judge this branch of our law."¹¹⁴ The soundness of his insight into the field of company law is perhaps best illustrated by the fact that his opinions are still reprinted in the latest case books on corporation law.¹¹⁵ In one year while temporarily out of judicial employment, he wrote an entire volume of opinions in his capacity as arbitrator in the winding up of the intricate affairs of the Albert Life Insurance Company,¹¹⁶ which have been compared very favorably for breadth of vision and anticipation of future legal trends with a similar set of arbitration decisions written by Lord Westbury.

Lord Cairns was a devoted son of the Established Church but only to her evangelical and protestant side. Scorning her claims to catholicity, he strenuously supported all clauses of the Public Worship Registration Act of 1874 which were the most offensive to High Church susceptibilities. Throughout life he remained an ardent member and champion of the hortatory or evangelical branches of Christianity, supporting foreign missions, bible societies, and Y.M.C.A.'s, and encouraging and attending

¹¹⁰ 2 Atlay, *op. cit.* supra note 98; London Times, p. 6, cols. 1-3 (April 3, 1885).

¹¹¹ Lord Cairns, 1 L. Q. Rev. 365-67 (1885).

¹¹² Lord Cairns as a Legislator, 29 Sol. J. 382-83 (1885); Lord Cairns as a Legislator, 4 Encyc. Brit. 534 (14th ed. 1929).

¹¹³ 2 Atlay, *op. cit.* supra note 98, at 319.

¹¹⁴ Manson, *op. cit.* supra note 26, at 211-14.

¹¹⁵ Ballantine and Lattin, *Cases and Materials on the Law of Corporations* 236 (1939), reprinting Lord Cairns' opinion in *Ashbury R. Carriage and Iron Co., Ltd. v. Riche*, L. R. 7 H. L. 653 (1875).

¹¹⁶ Obituary: Earl Cairns, 29 Sol. J. 386 (1885); 2 Atlay, *op. cit.* supra note 98, at 317.

the meetings of such noted hot gospelers as the Messrs. Moody and Sankey, the sermons of the former and the hymns of the latter constituting for Cairns "the richest feast he could enjoy."¹¹⁷

As the complete embodiment of the Protestant Ethic it was only natural that Cairns even early in his professional life should refuse the heavy briefs of influential solicitors if acceptance would entail labor on the Sabbath.¹¹⁸ He regularly rose at six every morning to devote at least an hour and a half to biblical study and prayer before leading family worship at 7:45. This routine he never varied despite lack of sleep due to a late sitting of Parliament and despite a weakness of lungs that eventually caused his death. When Lord Chancellor, this "sincere professor of a gloomy creed" never attended a cabinet meeting without having spent a half hour before communing with the Lord.¹¹⁹

A Puritan more easily associated with a member of Cromwell's Barebones Parliament of Saints than with a Cabinet of Victoria Regina, Cairns was by nature cold, austere, and unbending, hating all that smacked of Popery, Ritualism, or Archbishop Laud's ill-fared "beauty of holiness." Cairns married the niece of Liverpool's eloquent Dr. Hugh McNeile, a most ardent champion of Low Church doctrine and a man of whom it may be said that while he lived and preached hell's fires seemed to burn more brightly. Cairns, when Chancellor, elevated this relative to the Deanery of Ripon.¹²⁰ Not all his connections, however, were without material advantages for Cairns, since he was financially enabled to accept a proffered peerage only through the generosity of a millionaire brother-in-law.¹²¹

The narrow evangelical creed¹²² which burned so deeply within Cairns' breast and which produced traits of character and standards of human worth which caused him to surround himself with Luke Honeythunders, Uriah Heeps, and Rev. Melchisedech Howlers, also made him condemn the stage and all connected with it. The announcement of his eldest son's engagement to a young actress playing in a Gilbert and Sullivan opera was consequently a severe blow to his parents, through whose pressure the marriage was broken off, though only at the cost of an expensive suit

¹¹⁷ Manson, *op. cit.* supra note 26, at 209; 2 Atlay, *op. cit.* supra note 98, at 321-22.

¹¹⁸ 2 Atlay, *op. cit.* supra note 98, at 295, quoting from Nisbet, *op. cit.* supra note 108, at 12.

¹¹⁹ 2 Atlay, *op. cit.* supra note 98, at 306, quoting from Nisbet, *op. cit.* supra note 108, at 17.

¹²⁰ 2 Atlay, *The Victorian Chancellors* 307 n. 1 (1908).

¹²¹ *Ibid.*, at 307.

¹²² *Ibid.*, at 323.

for breach of promise.¹²³ A strict believer in the admonitions of Deuteronomy 5:14, Lord Cairns only a few weeks before his death inveighed against efforts to open the museums and picture galleries on Sunday.¹²⁴

III

An essential part of the Bohlen theory presupposes that those judges who were not born into the landed gentry identified their own interests and social outlook with that class upon their elevation to the bench. If the judges were lacking in social ambitions for themselves, a motive for this identification of interest with the landed aristocracy is found in a father's desire to ensure the social acceptance of his children.¹²⁵ Unfortunately, however, the facts are quite at variance with this reasoning, for Pollock, who espoused the so-called middle-class or bourgeois outlook in his opinion, had twenty-five children, twenty of whom survived childhood, and proudly boasted that "I have more descendants than any *male* person in England."¹²⁶ Of those judges who represented the so-called aristocratic or landed-gentry outlook, Blackburn and Montagu Smith remained lifelong bachelors, while Willes, Keating, and Lord Cranworth, although married, had no children. As for the remaining judges who did have children, there is no evidence that Bohlen's hypothesis was true as to them, and, since the burden of proof is upon him who avers a fact to be so, the very best that can be returned is a verdict of "not proven."

From the lives of the judges who took part in the three decisions in *Fletcher v. Rylands* it seems apparent that, even if Bohlen's major premise that the ultimate decision was based on what to the judges seemed socially and economically expedient, facts or the indispensable minor premise are lacking to show just what these eleven individual judges did think constituted the good life. Cairns, Lush, and Willes were certainly as competent in commercial matters and as responsive to the needs of industry as were Pollock and Martin. Bohlen's rash generalization to the effect that the dominant class were not "interested in the commercial development of the country"¹²⁷ is certainly inapplicable to Great Britain in 1860. In point of fact neither Fletcher nor Rylands owned the land upon which the accident occurred. Both were the lessees of Lord Wilton, one utilizing

¹²³ *Ibid.*, at 331; London Times, p. 6, col. 3 (April 3, 1885).

¹²⁴ Obituary: Lord Cairns, 29 Sol. J. 386-87 (1885).

¹²⁵ See note 17 *supra*.

¹²⁶ Pollock, in a letter of February 2, 1869, reprinted in Hanworth, *op. cit. supra* note 101, at 206 (1929).

¹²⁷ Bohlen, *op. cit. supra* note 17, at 325.

his leasehold for coal mining, the other for milling, industries which had been carried on in England for centuries and were just as natural as any other user of land. In fact the landed gentry of England profited greatly by the Industrial Revolution when former pasture land was transformed into urban real estate and collieries were set up on land occupied through lease from the large landowners. And it may be remarked that classes, however stupid or ingrown, are rarely "not interested" in developments that redound to their own immediate and pecuniary benefit.

Much of the confusion attendant upon the Bohlen theory is due to its expression in broad generalizations of vague import, an error into which Pound, Harper,¹²⁸ and Dr. Stallybrass have likewise fallen. Pound, while assuming with Bohlen "that the landowning gentry were the dominant class in England in 1868,"¹²⁹ apparently fails to realize that the expression "dominant class" is a figure of speech, not a self-explanatory formula.¹³⁰ Dr. Stallybrass, likewise used to teleological explanations, supposes that *Fletcher v. Rylands* "represents the opinion of the Court, which itself reflects the sum of prejudices, and the political, social, and economic convictions of the dominant classes of which they themselves are a part."¹³¹ To classes dominant in what spheres is reference made? The church, the state, and the army? True, to a measure, a very large measure, the landed gentry perhaps had a predominant influence in these branches of governmental activity. In the law and the judiciary, however, the landed gentry had little or no representation, the legal ranks being quite generally recruited from the lower middle classes. It thus appears that the advocates of a "realistic" jurisprudence are generalizing on the basis of insufficient evidence. As a result their search for origins has brought them little closer to the "truth" than their more naive predecessors.

Although feeling that Baron Parke's Toryism may be adequately explained by his education at Trinity College, Cambridge, and his marriage to a country gentleman's daughter,¹³² Pound, the great proponent of sociological jurisprudence, ignores Mr. Justice Blackburn's attendance at Eton and Trinity to seize upon his somewhat scanty practice in commercial cases, always as a junior, to accredit him with feelings essentially

¹²⁸ Harper, *op. cit.* supra note 22, at 337-38.

¹²⁹ Pound, *op. cit.* supra note 25, at 383.

¹³⁰ The expression is adapted from that of Lord Justice Hamilton in *Latham v. Johnson & Nephew, Ltd.*, [1913] 1 K.B. 398, 415.

¹³¹ Stallybrass, *op. cit.* supra note 22, at 396, quoting Bohlen, *Studies in the Law of Torts* 350-51 (1926).

¹³² Pound, *op. cit.* supra note 25, at 373-74.

hostile to the squirearchy.¹³³ In point of fact, Blackburn always evinced a desire to impose liability more strictly upon corporations than two such leaders of the commercial bar as Baron Bramwell and Mr. Justice Lush.¹³⁴ Indeed, with all due respect, it may be asserted that Dean Pound here exhibits a not unusual proclivity for brilliant generalization without due regard for the necessary factual basis.¹³⁵ A contribution to our understanding of *Fletcher v. Rylands* can be made only through a careful historical and biographical survey of the judges themselves and the probable reasons for decision which a consideration of those facts may adduce. And since facts are the essential factor for our further understanding, it may be remarked that a diet composed solely of the meager factual crumbs to be gleaned from Foss' *Lives of the Judges* can only result in literary and intellectual scurvy.¹³⁶

Pound, while crying aloud and quite rightly, against any monistic, particularly a materialistic or Marxian interpretation of legal history, advances a theory in opposition to Bohlen's explanation of *Fletcher v. Rylands* which is even more at variance with the facts. The man who so correctly and so alliteratively admonishes his readers not to overlook "the tenacity of a taught tradition" among the judiciary, the "instinctive tendency of lawyers to refer every case back to some general principle,"¹³⁷ and cogently counsels against ignoring "the prevailing mode of thought of the time which often reflects an economic situation of the past when the taught ideal was formative,"¹³⁸ ignores all this sage counsel to attribute the result in *Fletcher v. Rylands* to some so-called "collectivism." The duty of an insurer was placed upon Rylands, Pound, soaring into the very stratosphere of high abstraction, suggests, "in the interest of the general security."¹³⁹ Highly populated England was the first to feel this need which only much later was felt in America, "where pioneer ideas, appropriate to a less crowded and primarily agricultural country, lingered

¹³³ Pound, *Interpretations of Legal History* 107 (1923); Pound, *The Formative Era of American Law* 89 (1938).

¹³⁴ Compare the opinions of Mellor and Lush, JJ., with the dissent of Blackburn, J., in *Readhead v. Midland R. Co.*, L. R. 2 Q. B. 412 (1867). Lord Bramwell's special concurrence in *Abrath v. North Eastern R. Co.*, 55 L. T. 63, 64-66 (1886), is also revealing in this regard.

¹³⁵ See Evatt, *The Judges and the Teachers of Public Law*, 53 *Harv. L. Rev.* 1145, 1148-52 (1940).

¹³⁶ Compare Pound, *The Economic Interpretation and the Law of Torts*, 53 *Harv. L. Rev.* 365, 372-74 nn. 11-23 (1940).

¹³⁷ *Ibid.*, at 382.

¹³⁸ *Ibid.*

¹³⁹ Pound, *Interpretations of Legal History* 109 (1923).

to the end of the last century."¹⁴⁰ Now Pound himself has shown the untenability of such a thesis by clearly showing that American adoption of the English rule was dependent not on economic grounds but on cultural and traditional ones.¹⁴¹ Thus Massachusetts and Ohio adopted the rule which was rejected by New York, New Jersey, and Pennsylvania.¹⁴²

To assume that Baron Bramwell was consciously or unconsciously instrumental in establishing the doctrine that the social risks of the industry should be borne by that industry as a part of its normal cost of production is to indulge in anachronistic thought. No attempt is here made to seek out the "true" basis of decision, the aim being solely to demonstrate that from a factual basis the leading theories which have been advanced are both one-sided and inadequate. As would appear probable, however, that one explanation of *Fletcher v. Rylands* which does not run counter to the facts is to be found in Pound's own emphasis upon "the resistance of the taught tradition . . . against all manner of economically or politically powerful interests."¹⁴³

As Winfield has pointed out,¹⁴⁴ Cairns felt "the principles on which this case must be determined appear to me to be extremely simple"¹⁴⁵ and that Cranworth came "without hesitation to the conclusion that the judgment of the Exchequer Chamber was right."¹⁴⁶ Certainly Blackburn for his part had no idea that he was "making" law. Modern notions of liability only for fault had not yet crystallized,¹⁴⁷ and Blackburn's statement that the defendant "can excuse himself by shewing 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,"¹⁴⁸ is strangely reminiscent of the holding in *Weaver v. Ward*¹⁴⁹ that "no man shall be excused of a trespass except it may be judged utterly without his fault." Historical precedent to be found in actions upon the custom of the realm, such as action upon the case for the spread of fire, the action for cattle trespass,

¹⁴⁰ Ibid.

¹⁴¹ Pound, op. cit. supra note 136, at 383.

¹⁴² For a complete annotation, see Pound, op. cit. supra note 139, at 108.

¹⁴³ Pound, op. cit. supra note 136, at 366.

¹⁴⁴ Winfield, op. cit. supra note 8, at 505-6. This, of course, is not to deny that the actual decision and its later development have been much broader than any important field of strict liability theretofore.

¹⁴⁵ *Rylands and Horrocks v. Fletcher*, L. R. 3 H. L. 330, 338 (1868).

¹⁴⁶ Ibid., at 342.

¹⁴⁷ Thayer, op. cit. supra note 12, at 805.

¹⁴⁸ *Fletcher v. Rylands and Another*, L. R. 1 Exch. 265, 279-80 (Exch. Ch. 1866).

¹⁴⁹ Hob. [134] (K. B. 1616).

and the assize of nuisance, where liability without fault was imposed even at early common law, was relied upon heavily by Mr. Justice Blackburn.¹⁵⁰

American commentators should be slow to underestimate the force of *stare decisis* in England during the last century upon judges steeped in the Institutes of my Lord Coke and as familiar with the reports of Lord Raymond and Salkeld as with those of Meeson and Welsby, in particular when pertaining to legal questions touching and concerning land. Nor must it be forgotten that legal anachronisms were not swept away in England with the coronation of the Prince Regent, for as late as 1842 a railway engine involved in a fatal accident was forfeit to the Crown under the law of deodands.¹⁵¹ The early nineteenth century, during which most of these eleven judges received their legal education, had scarcely been touched by the law reforms which in fact had to await their own coming. Of a century which witnessed a revival of trial by battle,¹⁵² one should not find it too difficult to believe that the impact of Pound's "taught tradition" might yet be strong upon its pupils.

¹⁵⁰ And this despite the forceful argument of Mellish, Q. C., that common law examples of liability without fault were all illustrations of actions on the custom of the realm and that "... where the custom of the realm did not extend the rule of the common law was that negligence must be shewn." *Fletcher v. Rylands and Horrocks*, 3 H. & C. 774, 787 (Exch. 1865), and repeated in substance before the Exchequer Chamber, *Fletcher v. Rylands and Another*, L. R. 1 Exch. 265, 275 (Exch. Ch. 1866).

¹⁵¹ *Regina v. Eastern Counties R. Co.*, 10 M. & W. 58 (Exch. 1842).

¹⁵² Wallis, *Dueling*, 5 *Encyc. Soc. Sci.* 268 (1931); *Ashford v. Thornton*, 1 B. & Ald. 405 (K. B. 1818).