probate must leave it there. Conjecture as to whether the omission of the word would carry out the testator's intention is not within the sphere of such a court.[47]

However, it is worth noting that at the same time as Gillard J. was deciding *Re Hemburrow*, a possibly contrary result was reached by Latey J. in *In Re Morris*.[48] Here, the testatrix wanted to revoke clauses 3 and 7 (iv) of her will, both of which referred to a certain employee. However, the codicil which she actually executed read 'I revoke clauses 3 and 7 of my said will' and the testatrix signed without properly reading the codicil. The executors sought probate of the codicil with the omission of the figure '7'. Latey J. held that he could best approach the testatrix's dispositive intentions by excluding '7' from the codicil, saying that the resulting blank could be construed from the context as referring to clause 7 (iv).[49] It should be pointed out that as clause 7 of the will contained twenty separate legacies, nineteen of which now stood, the effect of the decision was to deprive the residuary beneficiaries of quite a sizeable sum. The decision excluded the figure '7' which, on a *Re Hemburrow* analysis, should have been left in, because the testatrix had intended to include it.

This discussion has tried to show that the authority on which Gillard J. based his third principle is by no means beyond question. It has been persuasively argued, elsewhere, that both *Re Horrocks*[50] and *Osborne v. Smith*[51] could have been, and in fact were, decided on other sounder grounds.[52] It is to be regretted, therefore, that His Honour laid down such a rigid rule. A rationalization of the apparently conflicting decisions or a summary of just when these omissions can be made would have been more useful. If the court is never entitled to make omissions altering the sense of the remaining words, then what is the point of applications seeking such omissions? Surely proceedings to have words omitted from probate are generally made by persons who stand to gain from the omission.[53]

The whole subject of mistaken words in wills underlines the need for conspicuous care in guarding against inadvertent errors. In the present state of the law, such errors may well have unfortunate results for the intended beneficiaries of the testator's bounty.

DAVID HABERSBERGER

BENNING v. WONG[1]

Statutory authority—Escape of gas—Personal injuries—Rylands v. Fletcher

The Australian Gas Light Company was authorized by a series of statutes[2] to lay gas mains and keep them charged with gas at a certain pressure. The plaintiff, Mrs Wong, occupied a house abutting a highway beneath which the

[47] *Cf.* the contrary result on identical facts in *Re Cogan, deceased* (1912) 31 N.Z.L.R. 1204.
[48] (1969) 113 *Solicitors Journal* 923.
[49] *Ibid.* 924.
[50] [1939] P. 198.
[51] (1960) 105 C.L.R. 153.
[52] Lee, *op. cit.* 332.
[53] *Ibid.* 331.
[1] (1969) 43 A.L.J.R. 467. High Court of Australia; Barwick C.J., McTiernan, Menzies, Windeyer and Owen JJ.
[2] Australian Gas Light Company Acts 1837-1935 (N.S.W.), Gas and Electricity Act 1935-1965 (N.S.W.).

company had laid mains. Gas entered the house from a leak in the mains and caused her physical injury. She sued Benning, the secretary of the company and the nominal defendant in the action.

The second count of the plaintiff's declaration was clearly pleaded in such a way as to indicate reliance upon the rule in *Rylands v. Fletcher*.[3] The defendant company demurred to the count and the New South Wales Court of Appeal dismissed the demurrer.[4] The company appealed to the High Court. The company's argument was based upon two grounds: first, that the strict liability imposed by the rule in *Rylands v. Fletcher* cannot apply to a body acting pursuant to statutory authority; and, second, that in any case the rule in *Rylands v. Fletcher* does not entitle a plaintiff to sue for personal injuries.

The second argument was shortly disposed of by the three judges who considered it.[5] Notwithstanding the opinion of Lord McMillan to the contrary in *Read v. Lyons*[6] it was held that *Rylands v. Fletcher* liability did extend to personal injuries.

As to the first argument the rule is clear that a statute only authorizes those acts which it expressly nominates or which are necessarily incidental to the execution of such acts. In general even these acts are only authorized if they are performed with due care although it is always of course a matter of statutory construction to find if only carefully performed acts are within the statutory authority. Here the company had laid mains pursuant to section 48 of the Australian Gas Light Company Act 1837. If it had done so carefully its work was within the statutory authorization and hence protected. Thus the question arose whether it was for the plaintiff to prove negligence or for the company to show that all due care had been taken. The majority of the court[7] held that the onus was on the plaintiff. In other words she could not rely on the rule in *Rylands v. Fletcher* and had to sue in negligence.

The point has never been at the core of any decided cases in Australia or England. However, mention has been made of the applicability of *Rylands v. Fletcher* to statutory bodies in cases where successful negligence suits were brought against such bodies. The comments are thus not central to the decisions in each case and are not of binding authority. In Australia such *dicta* in *Cox Bros. (Australia) v. Commission of Waterworks*[8] and *Thompson v. Bankstown Municipal Council*[9] have denied that *Rylands v. Fletcher* applies to statutory bodies and have confined a plaintiff who suffers damage due to the works of such a body to his action in negligence. On the other hand Lord Wright speaking for the Privy Council in *Northwestern Utilities Ltd. v. London Guarantee and Accident Co. Ltd.*[10] allowed that *Rylands v. Fletcher* could apply to a statutory body although then in favour of such a body.

> The rule of strict liability has been modified by admitting as a defence that what was being done was properly done in pursuance of statutory powers, and the mischief that has happened has not been brought about by any negligence on the part of the undertakers.[11]

[3] (1868) L.R. 3 H.L. 330.
[4] *Wong v. Benning* (1968) 88 W.N. (Pt. 2) (N.S.W.) 88. (Wallace P., Jacobs J.A.; Walsh J.A. dissenting).
[5] Barwick C.J., Menzies and Windeyer JJ.
[6] [1947] A.C. 156, 170.
[7] McTiernan, Menzies and Owen JJ.
[8] (1933) 50 C.L.R. 108, 117 (*per* Rich J.), 121 (*per* Dixon J.).
[9] (1953) 87 C.L.R. 619, 644-5 (*per* Kitto J.).
[10] [1936] A.C. 108.
[11] *Ibid.* 118.

It has always been held in England and Australia[12] in cases where sparks escape from steam engines run by statutory undertakers and cause damage that the plaintiff must prove negligence if he is to recover.

The minority[13] adopted the line of reasoning apparent in the *dicta* of the *Northwestern Utilities* case. They held that the Gas Company was subject to *Rylands v. Fletcher* liability unless it could show that its work was statutorily authorized. Since the statutory authority in this case only extended protection to works performed with technical skill and care, if the company was to prove statutory authorization it would have to prove that such skill and care had been exercised. For this reason the onus of disproof of negligence properly fell on the company. Windeyer J. explained the railway spark cases on the ground that unlike the escape of gas the escape of sparks from a steam engine is inevitable and has always been held to be so. Hence a statutory authorization to use a steam engine always displaces strict liability and the undertaker is only liable if the plaintiff proves negligence.

Of the majority[14] McTiernan J. confined his attention to the statutes. In His Honour's view section 61 of the 1837 Act[15] showed that the legislature plainly contemplated that escapes of gas would occur and hence could not have intended that the company should keep gas under pressure defined by statute in its pipes at its peril. Menzies J. found logical difficulty in having the *Rylands v. Fletcher* 'strict liability' rule subject to a defence of disproof of negligence on the part of the company for as he saw it 'the whole point of *Rylands v. Fletcher* liability is that the exercise of care is irrelevant'.[16] Both Menzies and Owen JJ. found assistance in the *dicta* from the Australian cases mentioned above and felt able to disregard Lord Wright's comments in reaching their conclusion that Mrs Wong was left to her remedy in negligence.

The result of the case has already been criticized as unsatisfactory[17] and the objections made seem compelling ones. It is interesting that the eight judges who heard the case in the Court of Appeal[18] and High Court split evenly. Walsh J.A. who upheld the demurrer in the Court of Appeal has since been elevated to the High Court.

The decision aside, however, the two points on which attention will be concentrated in this note relate to the judicial method employed by the High Court. The first point is the relative ease with which Menzies and Owen JJ. dispose of the Privy Council in the *Northwestern Utilities* case. Lord Wright's comments quoted above were not finally the basis of the decision in the case but they were an initial premise of his reasoning. Both Menzies and Owen JJ. whilst finding some difficulty in coping with the case are finally able to write the comments off as *dicta* and not binding. Clearly these two judges no longer afford the same respect to Privy Council decisions as was usual in the past. Barwick C.J. too must have been conscious of his recent words in *Banks v. Transport Regulation Board (Vic.)*[19] to the effect that the High

[12] *E.g. Railways Commissioner (S.A.) v. Riggs* (1951) 84 C.L.R. 586.
[13] Barwick C.J., Windeyer J.
[14] McTiernan, Menzies and Owen JJ.
[15] S.61 reads: 'When any gas shall be found to escape from any of the pipes which shall be laid down . . . the company . . . shall immediately . . . cause the most speedy and effectual measures to be taken to stop and prevent such gas from escaping'.
[16] (1969) 43 A.L.J.R. 467, 477.
[17] (1970) 44 *Australian Law Journal* 93.
[18] Wallace P., Jacobs and Walsh JJ.A.
[19] (1968) 42 A.L.J.R. 64.

Court is no longer bound by the 'process of reasoning' used by the Judicial Committee.[20] Accordingly for him the *Northwestern Utilities* case is not conclusive of the point but is merely support for an independently reasoned conclusion. Clearly the authority of Privy Council decisions for the High Court has been largely reduced.

The second point is the method of approach of Barwick C.J. and Windeyer J. in coming to their conclusion that *Rylands v. Fletcher* liability attaches to a statutory body. The underlying assumption must have been that this is the sort of case where the difficulties of proof for a plaintiff compared with the ease with which a statutory body could adduce evidence of the precautions it has in fact taken, as well as the greater capacity of such a body to bear a loss make it only reasonable that the onus of disproof of negligence should lie with the statutory body. The assumption is, it is put, an entirely valid basis for reaching a decision in the case. But such a premise is never openly aired in the minority judgments. Instead Barwick C.J. and Windeyer J. rigorously pursue the strands of the rule in *Rylands v. Fletcher* in an attempt to demonstrate that their conclusion is a logical extension of the rule or is even, perhaps, inherent in the rule. The point of divergence of the minority from the view of Menzies J. for example can be pinpointed in their different version of the rationale of the rule.[21]

Certainly Barwick C.J. is bolder about his stance than Windeyer J. The Chief Justice states his version of the rule early in his judgment in terms wide enough to cover a statutory authority and only then sets out to substantiate his statement by quotations from the cases. Even so his method does represent a slightly more conservative one than he advocated before his appointment to the High Court. In a paper in 1958 entitled 'Courts, Lawyers and the Attainment of Justice'[22] he welcomed the opportunities which he saw available to the courts to approximate the law to the current notion of justice.

Windeyer J. is more cautions and clearly feels bound by Sir Owen Dixon's approach to judicial method.[23] He adopts a military analogy to demonstrate his approach: 'it is as sound a maxim for law as for war that operations must be from a firm base, that an advance must be from a position which has been securely established'.[24] He goes on in elaborate detail to demonstrate the pedigree of his reading of the rule in *Rylands v. Fletcher.* As a necessary corollary to such an approach he expressly disavows 'the idea hinted at in the Supreme Court that we are at liberty to decide cases according to our conceptions of "social realities". That would be to allow individual predilection to masquerade as principle'.[25] In the Court of Appeal Jacobs J.A. had sensibly confined the rule in the railway engine sparks cases as an exception depending for its evidence upon a nineteenth century railway-age need felt by the judges to protect a crucial new enterprise. And he drew upon considerations of 'social reality' in supporting his conclusion that it was for the Gas Company to excuse itself from *Rylands v. Fletcher* liability.

While such ideas as these inevitably inform the thinking of judges today it is apparent from the judgment of Windeyer J. that he prefers not to express them in judgments. In the case being noted it seems clear that the *Rylands*

[20] Generally see Maher, 'The Common Law—Tears in the Fabric' (1969) 7 *M.U.L.R.* 97, 115-8.
[21] (1969) 43 A.L.J.R. 467, 477 (*per* Menzies J.), 485 (*per* Windeyer J.).
[22] (1958) 1 *Tasmanian University Law Review* 1.
[23] Dixon, 'Concerning Judicial Method' *Jesting Pilate* (1965) 152.
[24] (1969) 43 A.L.J.R. 467, 488.
[25] *Ibid.*

v. Fletcher rule as originally formulated does not really fit the facts. Not only is there the logical difficulty adverted to by Menzies J. of having a defence dependent upon the disproof of negligence in a strict liability tort but a company with statutory authority cannot really be said to be making a 'non-natural user' of land or to be bringing the dangerous thing on to land for its own purposes. There may be justification for modifying the rule so that these elements are no longer considered vital in all cases but such modifications should be openly recognized as such. Not to do so leads to the rather tortuous course adopted by Windeyer J. and to a lesser extent Barwick C.J. in reaching a conclusion which may be itself desirable. Would it not be better to outline at the start the reasons why a statutory body should be subjected to strict liability and then openly re-model the well grounded legal rule of *Rylands v. Fletcher* to achieve such a result?

ROSS MACAW

SMITH v. JENKINS[1]

Negligence—Duty of care to joint participants in illegal acts—Ex turpi causa non oritur actio

The High Court in *Smith v. Jenkins* had the opportunity of deciding what should be the effect of the joint illegality of the plaintiff and the defendant upon the law of negligence. The unanimous decision of the Court was, in the words of Windeyer J., '[i]f two or more persons participate in the commission of a crime, each takes the risk of the negligence of the other or others in the actual performance of the criminal act'.[2] The question arose on appeal from a judgment of Starke J. in the Supreme Court of Victoria. Starke J. had allowed the plaintiff recovery for injuries received when, due to the negligent driving of the defendant, the car in which they were travelling crashed into a tree, which car they were both illegally using under section 81(2) of the Crimes Act 1958.

Earlier in *Henwood v. The Municipal Tramways Trust (S.A.)*[3] the High Court had decided the effect of unilateral illegality on the law of negligence but the question of joint illegality had been canvassed only in various state Supreme Courts.[4] The Supreme Court decisions and what *dicta* there were on the subject were very conflicting. In general the New South Wales decisions would not allow recovery while the Victorian would, but the approach in these decisions and that of Starke J. was very different from the approach of the High Court and had very little bearing on the High Court decision. The decision in *Jenkins v. Smith*[5] was in the tradition of the earlier decisions; Starke J. presumed the existence of a course of action and then sought to discover if there was sufficient reason for depriving the plaintiff of his 'basic right' to a course of action. Starke J. found that there was no such deprivation

[1] (1970) 44 A.L.J.R. 78. High Court of Australia; Barwick C.J., Kitto, Windeyer, Owen and Walsh JJ.

[2] *Ibid.* 88.

[3] (1938) 60 C.L.R. 438.

[4] *Godbolt v. Fittock* (1963) 63 S.R. (N.S.W.) 617, Full Court of the Supreme Court of N.S.W.; *Boeyen v. Kydd* [1963] V.R. 235, Adam J. sitting alone in the Supreme Court of Victoria; *Bondarenko v. Sommers* (1968) 69 S.R. (N.S.W.) Court of Appeal, Division of the Supreme Court of N.S.W. See also *Sullivan v. Sullivan* (1961) 79 W.N. (N.S.W.) 615; *Andrews v. Nominal Defendant* (1965) 66 S.R. (N.S.W.) 85 and *Mills v. Baitis* [1968] V.R. 583.

[5] [1969] V.R. 267.