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**[CHANCERY DIVISION]**

# NATIONAL TELEPHONE COMPANY v. BAKER. [1892 N. 2.]

**1892 Dec. 13, 14, 15;**

**KEKEWICH, J.**

**1893 Jan. 12, 13, 17; Feb. 4.**

*Nuisance - Electricity - Damage - Telephone Company - Tramway Company - Right of Action - Statutory Powers - Provisional Order.*

A man who creates on his land an electric current for his own purposes, and discharges is into the earth beyond his control, is on the principle of *Fletcher v. Rylands* as responsible for damage caused by that current as he would have been if, instead, he had discharged a stream of water. Where the act is done in pursuance of a provisional order of the Board of Trade, it is protected to the same extent as other nuisances under statutory authority.

A tramway company, acting under a provisional order and using the best known system of electrical traction, caused electrical disturbance in the wires of a telephone company acting under license from the Postmaster-General:-

*Held*, that the tramway company are protected from liability for nuisance.

THIS action was brought by the *National Telephone Company, Limited*, and by *Charles Lupton*, one of their telephone exchange subscribers at *Leeds*, to restrain the Defendant from so working his electric tramway as to occasion a nuisance to the Plaintiffs' telephone lines, and for damages.

The Plaintiff company carried on an extensive business throughout the *United Kingdom*, under license from the Postmaster-General for a term of years, in supplying telephonic communication, principally by what was called the "Telephone Exchange" system. The system was worked on what was known as the "single-wire" system, the electric circuit being completed by the earth - that is, each end of the wire passed into the earth, which thus acted as a return conductor.

The company's exchange at *Leeds* had been in operation since 1880, and there were now 1200 subscribers and separate wires.

By a provisional order called the *Leeds* Corporation Tramways Order, 1888, confirmed by the *Tramways Orders Confirmation (No. 1) Act*, 1888, the provisions of the *Lands Classes Acts* (except with respect to the purchase and taking of lands otherwise than by agreement, and with respect to the entry upon lands by the promoters of the undertaking), and of the *Tramways Act*, 1870, were (sect. 2) incorporated with that order, except where expressly varied. By sect. 6 the corporation of *Leeds*, therein called "the promoters," were authorized to construct certain specified tramways with all proper rails, works, and conveniences.

Sect. 16 was as follows: "The carriages used on the tramways may, subject to the provisions of this order, be moved by animal power, and, with the consent of the Board of Trade, to be signified in writing, during a period of seven years after the opening of the same for public traffic, by means of haulage with wire ropes or other appliances placed underground, or by means of electric power, pneumatic power, and steam power, or any mechanical power, and, with the like consent during such further periods of seven years as the said board may from time to time specify in any order to be signed by a secretary or assistant secretary of the said board, by means of any such motive, drawing, or propelling power as aforesaid;" with a proviso that the use of any power other than animal power should be subject to the regulations in Sched. A to the order (that schedule dealing with the break-power and fittings of engines, safety of carriages, inspection of engines and carriages, and speed), "and to any regulations which may be added thereto or substituted therefor respectively by any order which the Board of Trade may and which they are hereby empowered to make from time to time as and when they may think fit for securing to the public all reasonable protection against danger in the exercise of the powers by this order conferred with respect to the use on the tramways of any such power as aforesaid other than animal power."

Sect. 51 enacted that, in the event of any tramways of the promoters being worked by electricity, "it shall not be lawful for the promoters to lay down any line or rail, or to do any act or work for working such tramways by electricity, whereby any telegraphic line of the Postmaster-General is or may be injuriously affected;" the section going on to provide for notice being given to the Postmaster-General of any work to be done within ten yards of any telegraph line. And the section contained the following sub-section: "(5.) For the purposes of this section a telegraphic line of the Postmaster-General shall be deemed to be injuriously affected by an act or work if telegraphic communication by means of such line is, whether through induction or otherwise, in any manner affected by such act or work or by any use made of such work."

By the *Telegraph Act*, 1878, s. 2, the expression "telegraphic line" includes anything whatsoever used for maintaining telegraphic communication.

Under their provisional order the corporation constructed a line of tramway from *Roundhay Park* into *Leeds*, consisting of two miles of double line along the *Roundhay Road*, and a mile and a half of single line along the *Harehills Road* and *Beckett Street* within the borough. This line of tramway was opened for traffic on the 29th of October, 1891. It was worked by the Defendant, *William Sebastian Graff Baker*, a contractor or engineer employed by the *Thomson-Houston International Electric Company*, under an agreement between himself and the corporation dated the 6th of May, 1891, by the terms of which he undertook, for a limited period and paying a certain rental, to provide the oars, rolling-stock, and plant necessary for working the tramways on the system of electrical traction adopted by the *Thomson-Houston International Electric Company*, the Defendant being responsible for all damage arising out of accidents or injuries in consequence of the working of the tramway, and the corporation undertaking to keep the tramway itself in repair. The written consent of the Board of Trade to the use of electrical power on the tramway for seven years was given on the 15th of December, 1891; but this consent did not specify the particular method to be used. The *Thomson-Houston* system of electrical motive power adopted by the Defendant was what was commonly known as the "single-trolley system," which consisted of a single overhead conducting wire connected with the tramcar by a trolley and line carrying the electric current to the car, which current operated a motor or motors on the car causing it to travel, the current returning by the rails and by an uninsulated copper conductor running under the roadway parallel to the rails and connected with each rail.

The Plaintiffs complained that the effect of the working of the tramway was to cause such an electrical disturbance to the Plaintiff company's telephone lines as to render them practically useless; and they accordingly issued the writ in this action for an injunction to restrain the Defendant from using the said tramway, or any other tramways in the borough of *Leeds*, in such a manner as to oc-

casion a nuisance to the Plaintiffs as owners or users of telephone lines and electric circuits within the borough, or as the owners or users of the telephone exchange system established in the borough, or in such a manner as to injure, disturb, or interfere with the property or business of the Plaintiffs.

In their statement of claim the Plaintiffs alleged that the effect of the working of the tramway was to interfere with and disturb the Plaintiffs' electric circuits in its neighbourhood, and the currents in such circuits, and to render the wires owned or used by the Plaintiffs in the neighbourhood of the tramway useless for telephonic communication, and so constituted an intolerable nuisance to the Plaintiffs and to the subscribers of the Plaintiff company; and that unless such nuisance was forthwith abated the business of the company in *Leeds* would be seriously damaged, and the use and enjoyment of the Plaintiff *Lupton* of the wire rented by him entirely destroyed; that the electrical disturbance caused by the Defendant's system could be readily prevented by the adoption by him of a different method of completing the electric circuit from his cars to the generating station in *Harehills Road*. The Plaintiffs further alleged that the Defendant was intending to extend the tramway through *Leeds*, and that if such intention were carried out, the Plaintiff company's exchange system in the borough would be destroyed.

In his statement of defence the Defendant alleged that the tramway had been constructed under the statutory authority above mentioned; he also pleaded the agreement and the consent of the Board of Trade, under which agreement and consent he was working the tramway, and denied the alleged electrical disturbance; and he contended that, even if there was such a disturbance, it did not infringe any right of the Plaintiffs, and could not be prevented by the adoption of a different method of completing the electric circuit from the cars to the generating station; that the Plaintiffs could easily obviate such alleged electrical disturbance by the adoption of some other method of completing their electric circuit than by the earth return adopted by them. The Defendant also denied the alleged nuisance.

In their reply, the Plaintiffs denied that the agreement of the 6th of May, 1891, authorized the Defendant to work the tramways in the manner in which they were being worked; or that such working was authorized by any provisional order or consent of the Board of Trade.

After the action had been set down for trial, his Lordship, with the consent of both parties, directed Mr. *Macrory*, Q.C., to proceed to *Leeds* to ascertain by inquiry and experiment, in the presence of representatives on each side, and to report to the Court, how far, if at all, the Plaintiffs' telephonic system had been interfered with by the Defendant's tramways, with liberty to employ an assistant.

Mr. *Macrory* accordingly visited *Leeds* in company with Mr. *Henry H. Cunynghame*, barrister-at-law, as his assistant, and conducted a series of experiments there in the presence of representatives from both sides; and he ultimately presented a written report, dated the 11th of January, **1893,** which, after detailing the experiments by means of which, he said, he had been enabled to form a decided and accurate judgment on the question, concluded thus: "I report as follows. That the Plaintiffs' telephone system is seriously interfered with by the works of the Defendant. In some cases the disturbance is so great as to render speech quite inaudible. By 'inaudible' I mean that, though the sound of the speaker's voice may be heard, the words being transmitted are entirely unintelligible. In other cases speech was to some extent audible, but an effort on the part of the listener was required to distinguish the words being transmitted; and there cannot be a doubt but that the effect produced by the working of the Defendant's tramcars and line is such as greatly to interfere with the efficiency of the telephone by creating noise which in all cases impairs, and in some cases entirely destroys, the power of transmitting speech." The disturbances were stated to consist sometimes of a buzzing or whirring noise; sometimes the noise assumed a uniform character like the rushing of water from a tap; while at other times it was similar to a musical note rising or falling, or to the sighing of the wind through trees.

The action now came on for trial.

Several English and American electricians of eminence were called as witnesses on both sides. The merits of the various systems of supplying electrical power for tramway purposes were fully discussed by different witnesses, the weight of evidence being, as his Lordship held, in favour of the Defendant's system, which had stood the test of considerable experience in the United States of *America*. Upon the question of the use by the Plaintiffs of the ordinary "earth return" for their telephonic system, it clearly appeared from the evidence on both sides that the use of a "metallic return," that is, of a second wire, unconnected with earth, to carry the current back, would afford a complete cure for the disturbance complained of, though it was proved that nearly the whole,of the Plaintiff company's telephone business throughout the country was carried on by means of the single-wire system.

***Sir R. Webster, Q.C.***, ***Moulton, Q.C.***, ***Warmington, Q.C.***, ***Micklem***, and ***R. W. Wallace***, for the Plaintiffs:-

The Defendant pleads that he and the corporation are acting under statutory authority in working the tramway in the manner we complain of; but the statutory power extends merely to the making of the tramway. The consent of the Board of Trade is required only for the purpose of providing for the safety of the public; the board cannot confer a statutory right to interfere with our telephones, neither as a matter of law does the statute authorize the use of electrical motive power in any defined manner. The principle established by the authorities is this, that no statutory authority to do certain acts will justify an interference with private rights, unless the interference is a necessary consequence of that statutory authority, through the impossibility of exercising the statutory powers without causing the interference; and that, if by a reasonable exercise of the statutory powers damage can be prevented, the omission to make a reasonable exercise of such powers is "negligence": *Vaughan v. Taff Vale Railway Company*; *Gas Light and Coke Company v. Vestry of St. Mary Abbott's, Kensington*; *Metropolitan Asylum District v. Hill*; *Evans v. Manchester, Sheffield, and Lincolnshire Railway Company*; *Geddis v. Proprietors of the Bann Reservoir*; *Rex v. Pease*; *London, Brighton, and South Coast Railway Company v. Truman*; *Mersey Docks and Harbour Board v. Gibbs*; *Harrison v. Southwark and Vauxhall Water Company*. Further, we rely on the well-established principles that a man cannot bring or collect upon his own land that which will do mischief if it escapes, and that no one has a right to use his own land in such a way as to be a nuisance to his neighbour: *Fletcher v. Rylands*; *Ballard v. Tomlinson*. The principle of *Fletcher v. Rylands* seems not to have been altogether accepted in America: Pollock on Torts; but at all events it is well-established in this country. Our right to be protected against the nuisance caused by the Defendant's mode of working the tramway is a common law right which the Court will protect by injunction.

***Sir J. Rigby, S.G.***, ***Bousfield, Q.C.***, and ***Dunham,*** for the Defendant:-

We submit that the Plaintiffs cannot establish a case of what is, at common law, a "nuisance." A nuisance is an interference with an easement, or with the enjoyment of a corporeal hereditament. The definition is given in *Yool* on Waste, thus: "Injuries to easements, and such injuries to natural rights of property as do not directly interfere with the possession of the soil, are nuisances." Now, in the present case there is no ground for saying that the Plaintiffs have, in carrying on their business for the last twelve years, acquired an easement or right by prescription. They have no prescriptive or other right to use their property as a telephone exchange. Even a twenty years' user would give them no property in such an easement as they are virtually claiming. An easement or right to the uninterrupted use of an electric current passing through the earth cannot be established, any more than in the case of a current of air, or of underground water, or of water flowing in an undefined channel. No exclusive right of property can be claimed in electrical forces or phenomena, the use or enjoyment of which is common to all. There is no law saying that the use of a delicate scientific instrument, such as the telephone, upon one man's land, can in any way interfere with the *primâ facie* and lawful rights of his neighbour on his own land. In working our tramway we are not doing anything on, so to speak, the Plaintiffs' land which is in any way perceptible to the senses, or which can in fact ba ascertained or known except by means of scientific instruments of great delicacy. The effect of our working is so impalpable that no one is conscious of it until he proceeds to use these delicate instruments. The Plaintiffs are in a

totally different position from that of a plaintiff who has the fee simple of all the land between the exchange and a subscriber's house. In carrying their wires over the properties of other people, they do not acquire any right as against any one; to complete their electric circuit they use any property that comes in their way, but it is open to any one over whose land their wires pass to interrupt them, and not allow them to remain. They exercise their so-called right simply because no one objects, and there is no harm done; but that cannot be the basis of an action of nuisance. This is the first instance, at all events in this country, in which a telephone company has set up such a common law right as is now claimed. Cases such as *Reinhardt v. Mentasti*, where it was held that, although the defendant was, in doing the act complained of by the plaintiff, acting reasonably in the use of his house, yet the plaintiff was entitled to protection, only apply to the ordinary user of property. To establish nuisance, you must shew an interference with the ordinary enjoyment of life or the ordinary use of property: *per* Lord Justice *Cotton* in *Robinson v. Kilvert*. "A man who carries on an exceptionally delicate trade cannot complain because it is injured by his neighbour doing something lawful on his property, if it is something which would not injure anything but an exceptionally delicate trade": *per* Lord Justice *Lopes*. In that case it was held that, as the defendants were not doing anything which would injure an ordinary trade, they were not liable on the ground of nuisance. Here the Plaintiffs are not carrying on an "ordinary trade," and we are certainly not doing anything which can interfere with an ordinary trade. *Cooke v. Forbes* was a case of a noxious trade, and is dealt with by the Court of Appeal in *Robinson v. Kilvert*. Upon the question of nuisance, therefore, we submit that the Plaintiffs have no ground for maintaining this action.

But there is another and, as we say, a fatal objection to the Plaintiffs' case. The Defendant is not in the position of an ordinary owner of property; he is acting under compulsory powers conferred by Parliament to use, through the corporation of *Leeds*, these streets for the purpose of tramcars, and to use electrical power. We rely on the statutory authority of the provisional order, especially on sect. 16, and also on sect. 51, which, in providing expressly for the protection of the wires of the Postmaster-General, indicates that we have power to interfere with other wires; and we submit that, so long as we are not using our statutory powers unreasonably or negligently, we are not responsible for the consequences of our exercise of them. Upon the question of the exercise of statutory powers of working an electric tramway, there has been no case yet reported in this country; but there are reported American cases, in which it has been decided that a telephone company has no vested interest in or exclusive right to the use of the "ground circuit" or "earth return" as against an electric street railway company incorporated by statute: *Cincinnati Inclined Plane Railway Company v. City and Suburban Telegraph Association*; *Hudson River Telephone Company v. Watervliet Turnpike and Railroad Company*; *Cumberland Telephone and Telegraph Company v. United Electric Railway*, where it was also held that, in the present state of electrical science, a telephone company could not maintain an action against an electric railway company for injury sustained by the escape of electricity from the rails; and that where a person was making lawful use of his own property, or of a public franchise, in such a way as to injure another, the question of his liability depended upon the fact whether he had made use of the best means then known to science. In every case of alleged nuisance the surrounding circumstances and the considerations of time and place are all-important: *Garrett* on Nuisance, citing *Clarke v. Clark*: *Sturges v. Bridgman*. As to the effect of statutory powers in such cases as this, the law is summed up in *London, Brighton and South Coast Railway Company v. Truman*. *Gas Light and Coke Company v. Vestry of St. Mary Abbott's, Kensington*, does not apply, since there was no statutory authority to use the steam-roller there complained of. So in *Metropolitan Asylum District v. Hill* there was no express statutory authority, but only a power to build and maintain a hospital, provided it could be done without creating a nuisance. The distinction between a mere power of that kind and an express statutory authority, as in the case of a railway company, is pointed out by Lord *Halsbury* in *London, Brighton and South Coast Railway Company v. Truman*. *Vaughan v. Taff Vale Railway Company* comes really very close to the present case, because there, as here, the use of a dangerous apparatus was authorized or contemplated by statute. Here, by sect. 16 of the provisional order, the possible danger arising from the use of electric power is expressly recognised, and provisions are inserted for the protection of the public against it.

[KEKEWICH, J.:- I had to consider this point, as to the effect of the statutory powers of a tramway, in the recent case of *Rapier v. London Tramways Company*; and also, as to the effect of the statutory powers of an electric railway company, in the *Stockwell Orphanage case, Allison v. City and South London Railway Company*, where I held that the company were, by reason of their statutory powers, absolved from any liability for

nuisance for injury by vibration to the plaintiff's premises, but that such absolution did not operate until they had done their very best to abate the nuisance.]

In that case your Lordship practically followed the decision in *London, Brighton and South Coast Railway Company v. Truman*, upon which we rely. Then the only remaining question is whether we have been guilty of negligence in the use of our statutory powers. Upon that the evidence shews that our system of electrical traction is the best and most approved system at present known to science, though the experience of it has hitherto been confined mainly to *America*. The disturbances caused by our tramway are, at the present day, necessarily incidental to every large town, and they are disturbances which the Plaintiffs themselves can and should, from the very nature of their business, protect themselves against.

If it should be held that we have in fact infringed any legal right of the Plaintiffs, the case is rather one for damages than injunction: *Holland v. Worley*.

[KEKEWICH, J.:- That case has not commanded the approbation of the profession.]

At all events, *Lord Cairns' Act* (21 & 22 Vict. c. 27) was passed for the purpose of enabling the Court to grant damages in lieu of an injunction.

***Sir R. Webster***, in reply:-

There is no analogy between this case and a case of underground water, such as *Chasemore v. Richards* (4). This is not a case of both Plaintiffs and Defendant drawing a natural supply from the reservoir of the earth. Each party is bringing about a non-natural state of things upon their or his own property - that is to say, for their own purposes they are lawfully producing, by the necessary machinery, currents of electricity, the Plaintiffs producing small currents which do harm to nobody, and the Defendant producing violent currents. I submit that the Defendant, in allowing these violent currents of electricity, produced by himself, to escape from his own property, and cause damage to his neighbours or their trades, renders himself liable to an action, just as much as if the disturbance had been caused by the vibration of the steam-engine driving the dynamos by which the currents are generated. A person who lawfully, for his own purpose, creates a non-natural state of things which may cause injury to his neighbours, does so at his peril. I say that our right of speech through these telephones is a property which gives us a right of action, and that we are entitled to protection under the doctrine, "*Sic utere tuo ut alienum non lædas*," which is the foundation of *Fletcher v. Rylands* and that class of cases. But the Plaintiffs have more than a mere right; they have property to which that right is attached, for they possess buildings and plant for carrying on their business. Upon the question of novelty of trade, there is no law that a man may interfere with his neighbour's trade because it is a new one, or that one particular trade, still newer (as the traction of tramcars by electricity is), should be allowed to interfere with the earlier trade because that earlier trade is of a delicate nature. Upon the question of statutory authority, sect. 16 of the provisional order is permissive, not compulsory; it merely says that electrical power "may" be used as an alternative mode of traction. That distinguishes the case from *London, Brighton and South Coast Railway Company v. Truman*, where the purpose there in question was expressly authorized by statute as incidental and necessary to the use of the railway. The object of the section was to protect the promoters from being liable for consequences such as those in *Metropolitan Asylum District v. Hill*, *Fletcher v. Rylands*, and similar cases. *Holland v. Worley*, as your Lordship has pointed out, has never been followed. As to *Cumberland Telephone and Telegraph Company v. United Electric Railway*, that was decided only on the same principles as were applied in *Vaughan v. Taff Vale Railway Company* and *Rex v. Pease*; and, moreover, there the Court declined to adopt the principles of *Fletcher v. Rylands*, which, however, is the law here. *Hudson River Telephone Company v. Watervliet Turnpike and Railroad Company*, when examined, is really in our favour.

[ *Dunham*:- In that case, there was a subsequent decision of the Court of Appeal, dated the 11th of October, 1892, in favour of the tramway company.]

Turning to the English cases, the law laid down by the Court of Exchequer in *Fletcher v. Rylands* and recognised by the House of Lords is as follows: "We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. ... And upon authority, this we think is established to be the law whether the things so brought be beasts, or water, or filth, or stenches" - to which, for the same reason, may be added, at the present day, "or electricity." The principle is further recognised in *Hurdman v. North Eastern Railway Company*, *Grump v. Lambert*, and *Fleming v. Hislop*.

The proposition that we must alter our system in order that the Defendant may let loose his electricity with impunity cannot be seriously maintained. We ask your Lordship to lay down no harder rule than that the Defendant is not so to conduct his business as to interfere with the business of the Plaintiff company lawfully carried on.

**1893. Feb. 4. KEKEWICH, J. :-**

As between the *National Telephone Company*, whom I shall treat as the sole Plaintiffs, although another is associated with them, and the *Leeds* Corporation, whom I shall treat as the real Defendants, although not appearing on the record, there is no question of title, and no question but that each is lawfully exercising undoubted rights; nor is there any question but that the acts of the Defendants interfere with the exercise by the Plaintiffs of their lawful rights. This would, I think, have been undoubtedly true if the case had been threshed out on evidence without the advantage of Mr. *Macrory's* report; but that report renders it unnecessary to deal with the evidence on this point; and the interference is of a serious character, so that, if actionable, the remedy would properly be by injunction rather than by damages. The real and only question in the case is whether the interference is actionable. It was practically admitted by the Plaintiffs, and my own view certainly is, that if they can maintain the action against the Defendants at all, it must be on the application of the principle now well known as that of *Fletcher v. Rylands*. That principle, for the purpose of application to the case in hand, may conveniently be stated by reference to the second of four propositions set out in the 5th chapter of Mr. *Garrett's* book on the Law of Nuisance, which I have consulted in connection with more than one point in this case, and gladly take this opportunity of mentioning as a work of uncommon merit. I will read the proposition in the author's own words, but think it capable of improvement by the substitution for "non-natural" of "extraordinary," which is the term employed by Lord *Kingsdown* in defining somewhat analogous water rights in his well-known judgment in *Miner v. Gilmour*. The proposition is thus stated by Mr. *Garrett*: "If the owner of land uses it for any purpose which from its character may be called non-natural user, such as for example the introduction on to the land of something which in the natural condition of the land is not upon it, he does so at his peril, and is liable if sensible damage results to his neighbour's land, or if the latter's legitimate enjoyment of his land is thereby materially curtailed."

The land into which the Plaintiffs and Defendants alike discharge their electric current does not belong to either of them; but, for the reasons above indicated, there cannot, as between them, be any question that the principle ought to be applied, if it be applicable at all, on the basis of their being absolute owners. That principle has never yet been applied in English law to such a matter as is now under consideration; and perhaps it would not be too much to say that those who enunciated the law in *Fletcher v. Rylands*, and have commented on and followed it in other cases, never had present to their minds the application of the doctrine to an electric current and the possible consequences of its discharge into the earth.

The question has been carefully considered in America, and I have studied with deep interest the case of Cumberland Telephone and *Telegraph Company v. United Electric Railway*. The judgment of the Court in that case, though in no wise binding on me, has commanded my earnest attention and respect, and, but for one circumstance, I should not hesitate to allow my own conclusion to be guided by the powerful arguments there set forth. That one circumstance is the want of full adoption of the principle of *Fletcher v. Rylands*. American law apparently holds the owner of land used for a non-natural or extraordinary purpose responsible for the consequences of such user to his neighbour only when they result from that owner's negligence; and if he can satisfy the Court that he has not been guilty of negligence, the resulting damage to his neighbour is

not actionable. It seems to me that if the principle of *Fletcher v. Rylands* had been fully adopted in *America*, the conclusion of the Court in the case just cited must have been different. I believe that in Scotland, too, the principle of *Fletcher v. Rylands* has not been accepted, and is not regarded as consistent with justice between man and man. It does not fall to me to consider so large a proposition. The principle is thoroughly well settled here, and my duty is merely to consider whether it is applicable. It would be easy, of course, to point out differences between all the cases to which it has hitherto been applied and the present; and I have already said that injury arising from such a case as the discharge of electric current can scarcely have been contemplated by any Judge in previous cases. But after reflecting much on the novelty of the case, on the argument addressed to me, and on the peculiarity of an electric current as distinguished from every other power, I fail to see any reason why the principle should not be applied to it. I cannot see my way to hold that a man who has created, or, if that be inaccurate, called into special existence, an electric current for his own purposes, and who discharges it into the earth beyond his control, is not as responsible for damage which that current does to his neighbour, as he would have been if, instead, he had discharged a stream of water. The electric current may be more erratic than water, and it may be more difficult to calculate or to control its direction or force; but when once it is established that the particular current is the creation of or owes its special existence to the defendant, and is discharged by him, I hold that if it finds its way on to a neighbour's land, and there damages the neighbour, the latter has a cause of action. At any rate, I think that if a distinction is to be taken between this and other forces for this purpose, that distinction must be made by a higher tribunal, and not by a Judge of first instance. It was endeavoured to be argued on behalf of the Defendants, that the current injuring the Plaintiffs was only part of the general body of electricity which may be now said to exist everywhere and to be proceeding in every direction; but the effect of the Defendants' operation is to collect a particular portion of this body and to discharge it into the earth at a particular spot, and there can be no doubt that the disturbance of the Plaintiffs' telephone system is caused by the particular quantity thus discharged.

Assuming the action to be maintainable on the principle of *Fletcher v. Rylands*, the Defendants rely on two answers to the Plaintiffs' claim. First, they say that the Plaintiffs might by an alteration of their system; that is by the adoption of what is known as the metallic return, prevent the disturbance complained of; and, secondly, they say that they the Defendants are acting under statutory powers, and that if in the proper exercise of those powers they injure the Plaintiffs they are free from blame. The first answer is, to my mind, without foundation. The man who complains of his land being thrown out of cultivation by the incursion of water escaping from his neighbour's reservoir, must not be told that he has no right of action because if he had interposed a wall, or otherwise taken care to protect himself, the water would not have reached his land. He is using his land in a natural way, and is not bound to take extraordinary precautions, and is entitled to rely on his neighbour also using his land in a natural way, or, if he uses it otherwise, taking extraordinary precautions to prevent damage to others therefrom. There is, no doubt, a body of evidence to shew that a system different from that adopted by the Plaintiffs has been adopted elsewhere with advantage, and may, possibly, prove to be the most convenient though more expensive for them; but the evidence also proves that their present system has been largely adopted and is received with favour by many competent to form an opinion. It also has the merits of economy. They are carrying on their own business lawfully and in the mode which they deem best, and I cannot oblige them to change their system, because they might thereby, possibly, enable the Defendants to conduct their business without the mischievous consequences now ensuing. True it is, that the analogy introduced above fails to this extent, that the Plaintiffs are using the land for an extraordinary purpose; but, admittedly, it is a lawful purpose, and, though under an obligation to obviate mischief from their own operations to their neighbours, they are under none, in my judgment, to protect themselves from the Defendants or others. The outflow from one reservoir might easily destroy another; but, so far as I am aware, there is no principle or authority in English law for rejecting a claim for damage by the owner of the latter on the ground that his user, as well as that of the neighbouring owner, is extraordinary.

The second answer of the Defendants to the Plaintiffs' claim has required more examination. Having recently had occasion in *Allison v. City and South London Railway Company*, and again in *Rapier v. London Tramways Company*, to consider such a plea as is here put forward, and to consider many authorities, and in particular the cases of *Metropolitan Asylum District v. Hill*, and *London, Brighton and South Coast Railway Company v. Truman*, and their application to different provisions and circumstances, I do not find it neces-

sary again to state my view of the law or of the lines by which I ought to be guided in applying it to a particular case. Therefore, I shall but briefly explain the reasons for my conclusion that the Defendants' plea is good in law, and that they are not responsible to the Plaintiffs for the mischief caused by their works. The Defendants' authority is derived under a provisional order confirmed by Act of Parliament. Such provisional orders in connection with tramways and many other undertakings of a public character are now common, and, I think, must be treated as "a well-known and recognised class of legislation" equally as much as the *Railway Acts*, which were referred to in those terms by the Lord Chancellor in *London, Brighton and South Coast Railway Company v. Truman*. The *Railway Acts* (again using the language of the Lord Chancellor in the same case) were assumed to establish the proposition that the railway might be made and used whether a nuisance were created or not; and, in my judgment, a like proposition must be assumed to be established by the provisional orders, one of which is here under consideration.

The Defendants are expressly authorized to use electrical power, and the Legislature must be taken to have contemplated it, and to have condoned by anticipation any mischief arising from the reasonable use of such power. A distinction was endeavoured to be made between cases where extraordinary powers are directly sanctioned by the Legislature, and those where it is left to some other authority (in this instance the Board of Trade) to determine whether, if at all, they may be brought into operation. It is within the competence of the Legislature to delegate its authority; and, when once that delegated authority has been properly exercised by the agent to whom it is entrusted, the sanction is that of the Legislature itself, just as much as if it had been expressed in the first instance in an Act of Parliament. The Defendants relied on the 51st section of the provisional order. They argue that the exception there made in favour of the telegraphic - which would include telephonic - lines of the Postmaster-General, indicates that interference with any other like lines was intended to be permitted. The reference supports the more general argument, and I have, therefore, mentioned it; but I rest my decision more on the established principle laid down in many of the cases, and ultimately ratified by the House of Lords in *London, Brighton and South Coast Railway Company v. Truman*.

To this plea of statutory power the Plaintiffs have a rejoinder. They say that such power cannot avail the Defendants unless they have acted reasonably in the exercise thereof, and have done their best to avoid injury to their neighbours. The argument being sound in law, one is compelled to examine the facts. The Defendants work their tramways on what is called the "single-trolley system." There are other systems which have from time to time been used, and it seems are still in use elsewhere, and there are at least some good reasons for the conclusion that by the adoption of one or other of these systems the Defendants might wholly or partially avoid the mischief which they now occasion. There is a contest on the evidence whether any of these other systems can be regarded as good apart from comparison with that of the Defendants, and there is a further conflict of evidence whether, if good, they are comparable in merit with that of the Defendants. My conclusion from the evidence is that the Defendants' system is, on the whole, the best which practical science has yet discovered; but there is no occasion really to go as far as this. It is enough to say, and about this I entertain no doubt, that it is at least as good as any other, and has been proved by experience, especially in the *United States*, where there have been larger opportunities for experiment and consideration, to be as likely as any other to meet the requirements of traffic and the convenience of all concerned in the protection of the site of tramways for the use of legitimate purposes other than those of the tramway undertaking. It cannot be that, in the application of the law which I am now considering, the Court is bound to hold a railway or other company liable for the consequences of acts done under statutory powers, because it has not adopted the last inventions of ever-changing, ever-advancing scientific discovery. It is surely impossible, with any regard to that common sense which after all is the foundation of this and many other branches of law, to say that a railway which was not liable last year, last month, or even yesterday, because until then its undertaking was carried on according to rules acknowledged to be the best, is liable now - not because those rules have been proved to be altogether wrong in practice, or unscientific in principle, but because some diligent worker in this department has discovered what is held for the moment to be a large improvement but may to-morrow turn out to be only a step in the progress of further advance; and yet this might be the necessary conclusion in many cases, and indeed might be the necessary conclusion here if I were driven to support the Plaintiffs' claim on the ground that the single-trolley system, so largely approved where it has been largely tried, does not avail the Defendants as a proper exercise of their statutory powers, because another system is in use and apparently successfully used at *Buda Pesth* or elsewhere. I do not wish to preju-

dice the question whether a charge of negligence in the exercise of statutory powers can be supported by cogent evidence that the company exercising those powers has failed to adopt alterations or precautions which sufficient experience has shewn to be of large, indisputable, and permanent value. That question may easily arise in many of the disputes which are likely enough from time to time to occur between public companies and those whom their operations injuriously affect, and it may even arise between the parties to this litigation. Suffice it to say that it does not arise now.

Holding, on the above grounds, that the Plaintiffs cannot maintain an action either for an injunction or for damages against the Defendants, I must order them to pay the general costs. If ever there has been or can be a case to which the distinction between the two scales of costs is properly applicable, this is the one, and the costs must be taxed on the higher scale. But it remains to make an exception, and that of some extent. I have already stated that the interference with the Plaintiffs by the Defendants is beyond doubt. I do not think that this ought to have been litigated. Mr. *Macrory's* report shews that one fair experiment would have proved the facts about which there was really very little doubt independent of his report, and that much time was uselessly spent on evidence. Not only must the Plaintiffs be excused payment of the Defendants' costs' of this issue - which must be defined to be the issue whether the Plaintiffs' telephonic system was in fact interfered with by the Defendants' operations - but the costs thus excepted from the general costs of the action must be borne by the Defendants and set off. Those costs will, of course, include those incurred in the experiment conducted at *Leeds* under Mr. *Macrory's* superintendence. I am glad to think that the course pursued with the concurrence of both parties of sending him down to make experiments and report was not only successful in finally settling an issue of fact, but also shortened the trial, and saved the further costs which further dispute on this point would necessarily have involved.

There will be judgment for the Defendants with costs, modified in the manner I have expressed.

Solicitors: Waterhouse, *Winterbotham, Harrison, & Harper; C. Leighton*.

G. I. F. C.