Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Eastern and South African Telegraph Company, Limited, v. The Cape Town Tramway Companies, Limited, from the Supreme Court of the Colony of the Cape of Good Hope; delivered the 18th April 1902.

Present at the Hearing:

LORD MACNAGHTEN.
LORD SHAND.
LORD DAVEY.
LORD ROBERTSON.
LORD LINDLEY.

[*Delivered by Lord Robertson.*]

The question raised by this Appeal is whether the Respondents are liable in damages for certain disturbances in the working of the Appellants' sub-marine telegraph cable at Cape Town. That such disturbances did take place; that they were caused by electricity which had been stored by the Respondents and used in propelling their tramcars in Cape Town and its suburbs but from time to time had left the tramway system and found its way to the Appellants' cable in the sea near Cape Town; and that pecuniary losses resulted; are matters beyond dispute.

In order to the adequate understanding of the question thus raised it is not necessary to enter into minute or highly technical descriptions. It may conduce to clearness in the discussion of the legal questions which result if, leaving over in the meantime the mode in which the electricity left the Respondents' system, it be in the first place stated how the electricity

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injured the Appellants. At some point then in Table Bay this electricity, having escaped and being at large, was attracted by the Appellants' cable, entered the sheathing of the cable and by the sheathing, as a conductor, found its way back to the tramway central station whence it had started, and thus completed its circuit. While travelling along the sheathing of the Appellants' cable, the current varied very frequently, and at irregular intervals, in accordance with the starting and stopping of the tramway cars. It was this irregularity and jerking which did the mischief; and, but for this, the current might have used the sheathing as a conductor without any injury. As things were, the current in the sheathing induced similar irregular currents in the conducting wire of the cable, with the result that the signals were interfered with and as recorded were confused and unreadable. None of the apparatus was damaged; but the working of the apparatus was so interfered with as to take away its utility for the time of the interruption.

In order to complete the description of the nature of the injury it is necessary to add that the difficulty has now been completely got over by laying what is called a twin core cable for several miles out, the two wires rectifying one another's action. Now that this has been done, the electricity from the tramways can pass along the sheathing without any harm being done. The cost of this remedial measure forms a large part of the claim in the suit, much of the rest representing experimental and tentative measures. Into this however it is unnecessary further to enter, as the *quantum* of damage is not raised in this Appeal but only the question of liability.

Turning now to the mode of escape of the electricity from the tramways, there is again no controversy; and for present purposes a succint statement is sufficient. The Respondents' tram-

way runs along the shore of the sea, and their tramcars are run by the tolerably familiar system of overhead trolley. All that is necessary to take note of is that the electricity which is used is generated at a power station erected by the Respondents for that purpose and that the conductor which is provided for the return of the current, after driving the tramcars, consists of the tramway rails. Now, when uninsulated, (and safety requires that this should be their condition) the rails are so far from being (even comparatively speaking) a perfect conductor that necessarily and as matter of course a considerable proportion of the electricity, instead of going directly back to the station, leaves the rails; and some portion of the escaped current it was which reached the the Appellants' cable.

Upon these facts the Appellants' main contention is that on the principle of *Fletcher* v. *Rylands* L.R. 3, E.& I. App. 330 the Respondents are liable for the interruption of the Appellants' business and must recoup them for the protective measures necessarily taken to prevent a recurrence of such interruption. To this the Respondents have a twofold answer; (1) they say that they are protected as regards all but a small portion of their tramway system by certain provisions which occur in each of the series of colonial statutes incorporating their constituent companies; and (2) as regards the part of their line not so protected by statute they maintain that *Fletcher* v. *Rylands* does not apply to the facts. Two other contentions have been advanced on the latter branch of the case (the first of which received more countenance in the Supreme Court than support at their Lordships' bar), viz. (1) that the law of *Fletcher* v. *Rylands* has no place in the Roman Dutch law and, (2) that it was not established that any escape of electricity injurious to the Appellants took place from that

section of the tramway to which none of the statutes apply.

Before proceeding to discuss the interesting and important questions thus raised, a few facts and dates may conveniently be noted. The Appellants' cable had been in operation for years before the Respondents' tramways were made. The tramcars began to be worked in August 1896, and the disturbances on the Appellants' apparatus were felt at once and continuously thereafter during the days and hours when the tramcars were running. Communications took place between the parties, and both seem to have frankly co-operated in ascertaining the cause of injury and devising remedies. After this had been done, with the result already stated, the present suit was instituted, on 15th April 1899, in order to determine the question of liability. On 13th March 1900, the Supreme Court of the Colony gave judgment for the Respondents and the present appeal is against that judgment.

In considering the merits of the Appeal, it is best first to take the question of common law. That the facts about the section of tramway line not constructed under statutory authority, viz. that from the City Boundary to Mowbray, do raise this question is in their Lordships' judgment sufficiently clear. It is true that the crucial test of this particular section being worked alone is awanting; although at one time during the disturbances of the cable this section and the short section home to the station house were worked alone. But no effective answer was made to the record of journeys which was commented on by Mr. Bousfield; and this record attests that the disturbances on this section were at least as great as on any other. Now Mr. Jacob, the Respondents' principal witness, is very emphatic in stating (and indeed this is of the essence of the Respondents' case), that the disturbances on the cable are not

dependent on the quantity of the current escaping, but on the rate of alteration and the rate of variation, and Mr. Jacob's evidence, when directly applied to the separate influence of one section entirely supports the Appellants' case. The question of common law is thus raised directly, (as well as indirectly in relation to the just construction of the statutory provisions).

Now if regard be had solely to the action of the Respondents in storing electricity on their lands, it must be allowed that the analogy is very close to the illustrations given in *Fletcher* v. *Rylands* of the kind of things which a proprietor can only do at his own peril. Electricity (in the quantity which we are now dealing with) is capable when uncontrolled of producing injury to life and limb and to property; and in the present instance it was artificially generated in such quantity and it escaped from the Respondents' premises and control. So far as the Respondents are concerned, it appears to their Lordships that, given resulting injury such as is postulated in *Fletcher* v. *Rylands*, and the principle would apply.

But this is only one half of the question, and it remains to be seen if the injury postulated is present. Was there such resulting injury as to found a claim on the principle of *Fletcher* v. *Rylands?* Now in the present case neither person nor property was injured (unless the ingenious suggestion of Mr. Bousfield could be entertained, that physical injury was done to the paper which was smudged by the eccentric action of the recording apparatus). Certainly there is here no injury of the same genus or species with the tangible and sensible injuries which have hitherto founded liability on the principle in question, and which have always constituted some interference with the ordinary

use of property. Now the kind and degree of interference with the Respondents' property is pretty well illustrated by the fact that it can only take place if the cable is constructed without certain precautions, for, given the cable as it now is, there is no injury. This is referred to not because their Lordships consider that the Respondents have made out that the twin cable had the general use and recognition which they ascribed to it, but as showing that it cannot be predicated of the electric escape in question that it is destructive of telegraphic communication generally, but only that it affects instruments made in a certain way. Now if the instrument be taken as it was when the injury occurred, its nature is such that to insure its immunity from disturbance is a somewhat serious liability to cast on neighbours. To describe this as a delicate instrument might be inaccurate if the term were used in relation to other electrical instruments of extreme sensibility. But in the present discussion this is not the true comparison at all.

The true comparison is with things used in the ordinary enjoyment of property, and this instrument differs from such things in its peculiar liability to be affected by even minute currents of electricity. Now, having regard to the assumptions of the Appellants' argument, it seems necessary to point out that the Appellants, as licensees to lay their cable in the sea and as owners of the premises in Cape Town where the signals are received, cannot claim higher privileges than other owners of land and cannot create for themselves, by reason of the peculiarity of their trade apparatus, a higher right to limit the operations of their neighbours than belongs to ordinary owners of land who do not trade with telegraphic cables. If the apparatus of such concerns requires special

protection against the operations of their neighbours, that must be found in legislation; the remedy at present invoked is an appeal to a common law principle which applies to much more usual and less special conditions. A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure. The principle of *Fletcher* v. *Rylands*, which subjects to a high liability the owner who uses his property for purposes other than those which are natural, would become doubly penal if it implied a liability created and measured by the non-natural uses of his neighbour's property. Nor need the law be regarded as showing any want of adaptability to modern circumstances if this be the true view, for the liability thus limited is of insurance and not for negligence, and all the remedies for negligence remain.

While agreeing in the result with the Supreme Court on the common law branch of this case, their Lordships are not prepared to accede to some of the comments made on *Fletcher* v. *Rylands*.

The learned judges of the Supreme Court have indicated considerable reluctance to accept the doctrine of that case and seem to regard it as more or less inconsistent with the principles of the Roman law, upon which the law of the Colony is based. Their Lordships are unable to find adequate grounds for this view, and it was not maintained at the bar. It is not supported by the texts or decisions which illustrate the full recognition of the right of an owner freely to use his property for natural purposes even although loss to his neighbour may result. Nor on the other hand does the prominence given to *culpa* in Roman law preclude the reception of the doctrine now under consideration into legal systems founded on the civil law.

The learned judges, and also Mr. Justice Kekewich in the National Telephone Companies, seem to have been inaccurately informed on this point; for as matter of fact not only is the principle of *Fletcher* v. *Rylands* fully accepted in Scotland, but it had formed part of the law of Scotland before *Fletcher* v. *Rylands* was decided, and *Fletcher* v. *Rylands* has been treated by the Scotch Courts as an authoritative exposition of law common to both countries.

So far then, as the Respondents' liability is governed by the common law, their Lordships, on the grounds already stated, do not consider the Appellants' claim to be maintainable. It remains to consider the liabilities of the Respondents for the escape of electricity on those sections of their line which have been constructed under statutes.

The provisions of the several statutes authorising the several sections are identical; and Section 4 subsection D of Act 22 of 1895 has been taken as the text of the argument. The statutes have of course direct and express relation to electricity as the motive power. The Company under those statutes have right to maintain and work all necessary power and stations, subject to the approval and in accordance with any resolution or standing order of the Council of the City of Cape Town "Provided that . . . the Com-
" pany specially undertakes that in the event of
" any electric leak taking place and damage
" being thereby caused at any time by electro-
" lysis or otherwise, it will reimburse and make
" good to the Council or other body or person all
" costs, damages and expenses to which the
" Council or other body or person may be put by
" reason thereof; and provided further that
" nothing in this Act contained shall entitle
" the Company to use the rails of any of the said
" lines of tramway as a part of its system of

" conductors for the return electrical current " without the consent of the Council first had " and obtained." The consent of the Council to the use of the rails for the return current was had and obtained under certain conditions of which the 4th is as follows :—

" 4. If at any time and at any place a test be " made by connecting a galvanometer or other " current indicator to the insulated return and to " any pipes in the vicinity, it shall always be " possible to reverse the direction of any current " indicated by interposing a battery of three " Leclanche cells, connected in series if the " direction of the current is from the return to " the pipe, and by interposing one Leclanche cell " if the direction of the current is from the pipe " to the return. If at any time a greater leakage " is discovered than would render it possible for " the current to be reversed in the manner above " indicated, the same shall be localised and re- " moved as soon as practicable, and the running " of the cars shall be stopped unless the leak is so " localised and removed within twenty-four hours.

The first question, then, is was it a leak, either in the sense of the statutory undertaking or of this condition, that sent out this electricity which reached the cable? For if so the stipulated liability has been incurred. Their Lordships are unable to think that it was. The language of both the statutory undertaking and of the condition seems to point to some defect in apparatus, not contemplated as a condition of the working of the system. But the departure of the electricity from the rails arose from no defect but from the necessary condition of things, if the tramcars were to run and the rails to be used as a return. The evidence shows clearly that, if uninsulated (as was the case here,) the rails of necessity conduct home to the central station only some of the electricity, the rest leaving the rails and going

afield. Giving to the word "leak" whatever expansion may be appropriate to its extension to electricity, their Lordships do not consider the event which has occurred to fall within the undertaking and condition. The escape was, on the contrary, a natural incident of the operations legalised under the statutes.

The argument of the Respondents on the words "or otherwise," as limited by the preceding word "electrolysis," did not command their Lordships' assent; but it is superseded by the other grounds of judgment.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed and the judgment of the Supreme Court affirmed. The Appellants will pay the costs of the appeal.