[HIGH COURT OF AUSTRALIA.]

FULLARTON APPELLANT: PLAINTIFF,

AND

THE NORTH MELBOURNE ELECTRIC TRAMWAY AND LIGHTING PANY LIMITED

RESPONDENTS.

DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Practice-County Court of Victoria-New Trial-Misdirection-Amendment of H. C. of A. particulars of demand-Action for negligence-Injury caused by escape of electricity - Liability - Statutory authority - Defective appliance - Tramways Act 1890 (Vict.) (No. 1148), sec. 3; Sched. 2, regs. 4, 21.

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3, 24.

A company under statutory authority constructed an electric tramway along a highway and ran trams thereon, the wires carrying the electric current being supported by posts in the highway. Other wires, which were Barton, Isaacs, Gavan Duffy not fully insulated, ran down those posts. The plaintiff brought an action in a County Court against the company to recover damages for physical injuries sustained by her through contact with an uninsulated live wire of the company, which injuries were alleged in the plaintiff's particulars of demand to have arisen from the negligence of the company in various respects, substantially consisting of the ineffective insulation of the wire. The defences taken were a denial of negligence and contributory negligence. After the County Court Judge had directed the jury, he was asked by counsel for the plaintiff to give a further direction that if the jury were of opinion that the injuries were caused by an escape of electricity they should find a verdict for the plaintiff apart from the question of negligence. The Judge refused to give such a direction, and, a verdict having been given for the company on the question of their negligence, he subsequently dismissed a motion by the plaintiff for a new trial on the ground of misdirection, but at the same time

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gave the plaintiff leave to amend the plaint by adding a claim based on the company having wrongfully allowed the escape of electric current from the wire. An appeal by the plaintiff from the refusal to grant a new trial was dismissed by the Supreme Court.

Held, by Griffith C.J. and Barton and Isaacs JJ. (Gavan Duffy and Rich JJ. dissenting), that the point that the company were liable without negligence was open upon the plaint as it originally stood, and that the company were liable unless the escape of the electric current by which the injuries were caused to the plaintiff was the necessary consequence of the exercise by the company of their statutory powers, and that, therefore, a new trial should have been granted.

Principles governing the liability of bodies which are authorized by Statute to construct works in respect of injuries sustained by reason of defects in those works, discussed.

Decision of the Supreme Court of Victoria reversed.

APPEAL from the Supreme Court of Victoria.

An action in the County Court at Melbourne was brought by Mancle Ruby Fullarton, an infant, by her next friend, Robert Fullarton, against the North Melbourne Electric Tramways and Lighting Co. Ltd. In the particulars of the plaintiff's demand it was stated that the plaintiff claimed damages "for physical injuries received and shock sustained by reason of the negligence of the defendant its servants or agents (1) in the installation equipment maintenance management and/or control of its tramway and lighting system and the posts and wires forming part thereof and used in connection therewith, and/or (2) in the improper and ineffective installation maintenance and/or insulation of a certain post electric wire and/or pipe near the corner of Darling Street and Maribyrnong Road, Moonee Ponds, whereby a current of electricity was caused or allowed to pass into and through the hands and body of the plaintiff while she was lawfully upon the footpath of the said road and caused the aforesaid physical injuries and shock."

The action was heard with a jury. The defences stated by counsel for the defendants were no negligence and contributory negligence. After evidence had been given, the learned Judge directed the jury, and asked them two questions—(1) Was the accident caused by the negligence of the defendants or their servants? and (2) could the accident have been avoided by reasonable

care on the part of the plaintiff's mother? Counsel for the plaintiff thereupon asked the learned Judge to direct the jury that if they were of opinion that the plaintiff's injuries were Fullarton caused by an electric discharge they should find a verdict for her irrespective of negligence. This the learned Judge declined to Melbourne do. The jury answered the first question in the negative. On a subsequent day counsel for the defendants moved for judgment, and counsel for the plaintiff moved for a new trial on the ground of misdirection. After hearing argument the learned Judge, at the request of counsel for the plaintiff, ordered that the particulars of demand should be amended so as to cover a claim for damages arising from the mere escape of the electricity without negligence, but ordered judgment to be entered for the defendants. From the order refusing to grant a new trial the plaintiff appealed to the Full Court of the Supreme Court, and the appeal was dismissed.

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From the decision of the Full Court the plaintiff now, by special leave, appealed to the High Court.

Other material facts are stated in the judgments hereunder.

Eager, for the appellant. The allegations in the statement of particulars are sufficient to raise the question of the liability of the defendants apart from negligence. The allegation of negligence covers the failure to prevent the escape of electricity, for negligence means the breach of some duty imposed by law: Thomas v. Quartermaine (1); Edwards v. Melbourne and Metropolitan Board of Works (2).

[ISAACS J. referred to Membery v. Great Western Railway Co. (3).]

The fact that the County Court Judge allowed the amendment of the particulars of demand shows that he thought that the question sought to be raised by the amendment was fairly open on the case made by the plaintiff, and that the defendants were not taken by surprise. The County Court Judge should have directed the jury that if they found that the plaintiff was injured by the discharge of electricity, there being no evidence that that

^{(1) 18} Q.B.D., 685. (2) 19 V.L.R., 432; 15 A.L.T., 96. (3) 14 App. Cas., 179, at p. 190.

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H. C. of A. discharge of electricity was a necessary consequence of what the defendants were authorized to do, the plaintiff was entitled to a The defendants were liable either for breach of an verdict. absolute duty to keep their electricity safe (Rylands v. Fletcher MELBOURNE (1)), or for trespass in discharging their electricity, or on the ground that upon the proper construction of the Statutes and the Orders in Council which conferred authority upon them there was an absolute duty to so carry on their operations as not to injure members of the public. See Tramways Act 1890, sec. 3; Second Schedule, regs. 4, 5, 21; Order in Council of 4th May 1904; Electric Light and Power Act 1896, secs. 5, 10 (1), 11 (4), 13, 14, 19, 32, 51 (2); Electric Light and Power Act 1900, sec. 2. The statutory authority covers only what is expressly authorized, or what is the necessary consequence of the grant of power: Hammersmith Railway Co. v. Brand (2). Just as in Sadler v. South Staffordshire and Birmingham District Steam Tramways Co. (3) it was held that the defendants' statutory power to run tramcars on the highway did not authorize them to run their tramcars on rails that were not kept in proper condition, so here the defendants statutory power does not authorize them to use appliances which are not kept in proper condition. [Counsel also referred to Charing Cross Electricity Supply Co. v. Hydraulic Power Co. (4); Eastern and South African Telegraph Co. v. Capetown Trumways Co. (5); National Telephone Co. v. Baker (6); Metropolitan Asylum District v. Hill (7); Brocklehurst v. Manchester, Bury, Rochdale and Oldham Steam Tramways Co. (8); Clowes v. Staffordshire Potteries Waterworks Co. (9).

> [Isaacs J. referred to Midwood & Co. v. Manchester Corporation (10).]

> Hogan, for the respondents. The course the Supreme Court took was the proper one. The action was one for negligence only, and the particulars were directed to negligence only. The particulars limit the issues to which the parties are bound: Long

⁽¹⁾ L.R. 3 H.L., 330.

⁽²⁾ L.R. 4 H.L., 171, at p. 202.

^{(3) 23} Q.B.D., 17. (4) (1914) 3 K.B., 772, at pp. 779, 781, 785. (5) (1902) A.C., 381.

^{(6) (1893) 2} Ch., 186, at p. 201.

^{(7) 6} App. Cas., 193, at pp. 211, 212.

^{(8) 17} Q.B.D., 118.

⁽⁹⁾ L.R. 8 Ch., 125, at p. 139. (10) (1905) 2 K.B., 597, at p. 604.

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v. Millett (1); County Court Rules 1891, rules 1, 41. The H. C. of A. defence of statutory authority, which was appropriate to the claim which was afterwards made by amendment, was not taken, Fullarton showing that such a claim was not brought to the minds of the At the time when the further direction was asked Melbourne for by the plaintiff it was properly refused, and the direction which was given was the correct one. The plaintiff, having chosen to bring the action in one form, should not have been allowed to amend so as to bring it in another form: Jacobs v. Seward (2). Where statutory authority is given to do certain acts within certain prescribed limits or along certain routes all the incidental acts are protected in the absence of negligence. If the work is done with reasonable care and yet defects arise, they are incidental to the work and there is no liability. whom statutory authority is given must exercise their statutory rights in such a way as not to interfere with the common law right of others, that is, they must act without negligence: Halsbury's Laws of England, vol. XXI., p. 520. [Counsel also referred to Halsbury's Laws of England, vol. XII., pp. 563, 565; Green v. Chelsea Waterworks Co. (3); Dunn v. Birmingham Canal Co. (4); Dumphy v. Montreal Light, Heat and Power Co. (5); National Telephone Co. v. Baker (6).]

Eager, in reply, referred to Addison on Torts, 8th ed., p. 41; Pollock on Torts, 8th ed., p. 501; Will on Electric Lighting, 4th ed., p. 202; Ogston v. Aberdeen District Tramways Co. (7).

Cur. adv. vult.

The following judgments were read:-

GRIFFITH C.J. This is an action brought by a child by her next friend against the respondents to recover damages sustained by reason of the plaintiff touching an unprotected live wire belonging to them and exposed in a street in Melbourne. The plaint in the County Court alleged that the injury arose from the defendants' negligence in various respects, substantially

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^{(1) 24} V.L.R., 194.

⁽²⁾ L.R. 5 H.L., 464. (3) 70 L.T., 547.

⁽⁴⁾ L.R. 8 Q.B., 42.

^{(5) (1907)} A.C., 454.

^{(6) (1893) 2} Ch., 186.

^{(7) (1897)} A.C., 111, at p. 125.

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H. C. OF A. consisting in the ineffective insulation of the wire. After the learned County Court Judge had directed the jury, leaving to FULLARTON them the question whether the accident was caused by the negligence of the defendants or their servants, the plaintiff's MELBOURNE counsel asked him to direct the jury that if they were of opinion that the plaintiff's injuries were caused by an electric discharge they ought to find a verdict for her irrespective of the question of negligence. This he refused to do. A new trial on the ground of misdirection was asked for and refused, and an appeal to the Supreme Court was dismissed. The learned County Court Judge, while refusing the motion, allowed the plaint to be amended by adding a claim based on the defendants wrongfully allowing the escape of electricity from the wire.

The defendants are a joint stock company having statutory authority to run electric trams in the streets, the system authorized and adopted being that by which the electric current is conveyed by an overhead trolly wire. The danger of the current escaping from the wire and causing damage to passengers in the street is matter of common knowledge, and the defendants took certain precautions against it. The part of their apparatus from which the electric current escaped was in the nature of a safety valve, and was designed in order to carry off safely any current which might be diverted from its proper course by the accidental crossing of any of the various wires used in connection with the system. It consisted of two wires carried down the inside of metal tubes fixed to a post and connected underground with the tram-rails. The wires were not insulated, and were liable to come into contact with the tubes, which were so placed that they could be touched by any passer-by who put his hands upon them. An accidental crossing of wires had occurred in the locality, and at the time of the accident the safety apparatus had come into play. But it happened that one of the wires had become electrically corroded underground, the result being that the free passage of the current through them was impeded, and the current escaped into the metal of the tubes. When in that condition the child put her hands upon the tubes and was injured. The defendants under such circumstances are liable unless they can excuse themselves, and the burden of excuse lies upon them. They rely upon their statutory authority as justifying them in H. C. of A. placing and keeping wires in the position and in the condition in which they were at the time of the accident, and in particular FULLARTON upon the doctrine laid down in the leading case of Hammersmith Railway Co. v. Brand (1), that, when the Legislature authorizes Melbourne a thing to be done which if not authorized by the Legislature would be unlawful, no action will lie for damages sustained by an act done in pursuance of the authority so given. The extent and limitation of that doctrine were expounded in the case of Metropolitan Asylum District v. Hill (2). Lord Watson said (3):- "I see no reason to doubt that, wherever it can be shown to be matter of plain and necessary implication from the language of a Statute, that the Legislature did intend to confer the specific powers . . . referred to, the result in law will be precisely the same as if these powers had been given in express terms. And I am disposed to hold that if the Legislature, without specifying either plan or site, were to prescribe by Statute that a public body shall, within certain defined limits, provide hospital accommodation for a class or classes of persons labouring under infectious disease, no injunction could issue against the use of an hospital established in pursuance of the Act, provided that it were either apparent or proved to the satisfaction of the Court that the directions of the Act could not be complied with at all, without creating a nuisance. In that case, the necessary result of that which they have directed to be done must presumably have been in the view of the Legislature at the time when the Act was passed."

He proceeded to point out that the Legislature cannot be held to have sanctioned that which is a nuisance at common law except in the case when it has authorized a certain course of action which cannot be carried out without creating a nuisance. In that case, he said, "the onus of proving that the creation of a nuisance will be the inevitable result of carrying out the directions of the Legislature, lies upon the persons seeking to justify the nuisance. Their justification depends upon their making good these two propositions—in the first place, that such

(1) L.R. 4 H.L., 171. (2) 6 App. Cas., 193. (3) 6 App. Cas., at p. 212.

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H. C. of A. are the imperative orders of the Legislature; and in the second place, that they cannot possibly obey those orders without infringing private rights. If the order of the Legislature can be implemented without nuisance, they cannot, in my opinion, plead MELBOURNE the protection of the Statute; and, on the other hand, it is insufficient for their protection that what is contemplated by the Statute cannot be done without nuisance, unless they are also able to show that the Legislature has directed it to be done. Where the terms of the Statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think the fair inference is that the Legislature intended that discretion to be exercised in strict conformity with private rights."

In the case of undertakings such as railways, tramways, telegraphs or telephones, it is obvious that the authorized works cannot be carried out without doing many things that are nuisances at common law, such as the erection of posts and laying of rails on highways and stretching wires above them. nuisances must be taken to be authorized. The question whether the nuisance complained of in any particular case is authorized by the general words of the authority may often arise, and may be difficult to determine. In order to obviate this difficulty a practice arose in England of providing in the enabling Act that nothing in the Act should exempt the undertakers from liability for nuisance. See, for instance, the case of Charing Cross Electricity Supply Co. v. Hydraulic Power Co. (1). Such a clause would not, of course, apply to what may be called a necessary nuisance. Oftener the same result was obtained by inserting a provision to the same effect in the Order authorizing the construction of the works, as in Midwood & Co. v. Manchester Corporation (2). In the present case the defendants' authority does not contain any such express provision, but the Order in Council authorizing them to construct works in the streets required that every precaution necessary to secure the safety of persons passing along the streets should be taken and ordered. Their defence must, therefore, depend upon showing the necessity

^{(1) (1914) 3} K.B., 772.

for the existence of such wires in such a place and in such a condition as I have described. It may be conceded that the provision on the highway, in that place, of safety wires of the Fullarton kind described was necessary for the proper execution of their works, but I fail to see how it can be maintained that it was Melbourne necessary to have the wires uninsulated and not otherwise protected. The excuse is coextensive with the necessity.

There can be no doubt that primâ facie a person who causes the escape of an electric current upon a highway commits a nuisance. The defendants did not attempt to show that they could not carry out their authorized enterprise without creating such a nuisance, or that they were expressly authorized to create it. Their case rested on the assumption that the placing of such a wire in such a place was authorized, and that allowing it to get out of order would, at most, amount to negligence. This argument has no application to an appliance which is in its nature dangerous unless protected and which can be and is not protected.

The case may, I think, be put on either of three grounds: (1) the doctrine of Rylands v. Fletcher (1); (2) that the putting upon the highway of an unprotected wire liable at any moment to become a live wire from which electric current might escape was an actionable nuisance; (3) that the defendants have inflicted bodily injury upon the plaintiff which they are unable to justify.

For these reasons I am of opinion that the learned Judge should have directed the jury as asked. The Supreme Court dismissed the appeal, as I understand, on the ground that the point was taken too late, and they suggested that the judgment in this case might not be a bar to another action for the same cause. I confess that I cannot entertain any doubt that the judgment would be a bar to any further proceedings based on the same act or omission of the defendants. The consideration that a new ground for asserting legal liability was put forward would not alter the identity of the cause of action.

In my opinion the point was not taken too late. I think, also, that it was open upon the plaint as it stood without amendment. In the recent case of South Australian Co. v. Richardson (2)

(1) L.R. 3 H.L., 330.

(2) 20 C.L.R., 181.

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H. C. OF A. I had occasion to point out that the word "negligence" in the phrase "action for negligence" is merely a convenient expression to denote a breach of a duty to take due care. If the facts alleged in a statement of claim show a duty to take care, whether MELBOURNE that duty is absolute or qualified, and a breach of that duty, it is immaterial whether the word "negligence" is used or not used, just as, under the old system of pleading, in a declaration alleging that the defendant had fraudulently done acts which, without fraud, rendered him liable to an action, the allegation of fraud might be rejected as a mere epithet.

> There must, therefore, be a new trial, upon which, if the defendants can show that the condition of the wire was a necessary result of the execution of their statutory authority, they will be entitled to succeed.

> Barton J. The defendant Company, respondents in this appeal, are the possessors of statutory authority to construct and use for their profit the tramway which runs along the street upon which the plaintiff, now appellant, was passing when she met with the injuries for which she seeks to make the Company responsible. Under the Order in Council prescribed by Statute, which regulates the conditions which the Company accepted, and under which they enjoy their concession, electricity was to be, and is, the motive power used upon the tramway. It was a condition that every precaution necessary to secure the safety of the tramway passengers, and also to secure the safety of passengers along the streets on the tramway route, should be "taken and ordered" by the holders of the concession.

> The plaintiff on the day of the accident was passing along the street with her mother when she came into contact with a pipe running down a post which stood at the street corner. The pipe enclosed one of the Company's wires, and was charged with electric current from that wire. The current passed into the plaintiff's body and injured her before she could be released from the post. The wire in the pipe was not insulated. Had it been so, there would have been no shock. The current had come from the Company's overhead system. The wire with which the plaintiff came into contact is called a guard wire. Normally

this would not have been dangerous, for the current would have run down under the earth, along a buried continuation of the guard wire, called an earth wire, to the rail, and up the rail to the power house, where it would automatically have cut off the current. But the earth wire was found on being dug up to have Melbourne become corroded. It was admitted by the Company's lighting superintendent that "insulation of the place touched"—that is to say, insulation of the wire which the Company had brought down along the post-would have avoided the accident. The same officer said that the method of bringing the wires to the ground is the usual method.

It is not now necessary to recount the plaint and other proceedings, further than to say that the amendment to the plaint allowed by the County Court Judge is undoubtedly appropriate to the plaintiff's claim, and indeed I agree with the Chief Justice that in the County Court at least the plaintiff's claim could be substantiated by appropriate evidence of an actionable wrong in the nature of nuisance without amendment of the plaint. is not necessary, either, to traverse the ground of the numerous authorities cited, but I will refer to several of them.

In Clowes v. Staffordshire Potteries Waterworks Co. (1) the defendant Company, in answer to a claim for injunction against the continuance of a nuisance alleged to arise from the construction by them of a reservoir, which was the cause of the fouling of a stream used for dyeing, defended their conduct by reference to the powers conferred on them by an Act of Parliament. In the course of his judgment, which was adverse to the Company, Mellish L.J. said (2):- "In the first place, if this reservoir had been made without the authority of an Act of Parliament, and the effect of it had been such as it is proved in this case to be, there can of course be no doubt at all that the occupier, at any rate, of the mill, would have been entitled to maintain an action at law on account of the fouling of the stream. Nor, as I understand, is that disputed by the defendants. That being so, of course the right to maintain that action at law must still continue, unless it has been taken away by the Acts of Parliament, and the burden of showing that it has been taken away by the Acts of

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H. C. of A. Parliament, beyond all question, is upon the defendants; because, if a public company or any individuals obtain an Act of Parliament which they say enables them to take away the common law rights of any person, they are bound to show that it does it MELBOURNE with sufficient clearness."

> I quote this passage for the purpose of indicating the burden which lies upon the defendants in this case and the principle on which that burden is imposed. It was a common law right of the plaintiff to pass along this street without incurring danger from any appliance set up by the Company; and when that danger caused actual injury they were bound to show clearly that this common law right, infringed by them, had been taken away as the necessary consequence of some Statute. This would have been their burden even had not the Company been expressly bound by Order in Council, issued under the Statute which they say protects them, to take every precaution to secure the safety of passengers along the street on their tramway route. But certainly the Order in Council emphasizes their duty. They are bound to show that their statutory powers could not be exercised without causing the danger complained of. It seems to me that in doing so they would have to show that those powers could not be exercised to the extent allowed by law without exposing a passenger along the street to the danger of injury from an uninsulated wire.

> It is true, as said by Lord Blackburn in Metropolitan Asylum District v. Hill (1), that the case of Hammersmith Railway Co. v. Brand (2) settles "that where the Legislature directs that a thing shall at all events be done, the doing of which, if not authorized by the Legislature, would entitle anyone to an action, the right of action is taken away." But did the Legislature, or the Governor in Council acting as its delegate, direct that the thing which was done in this case should be done at all events, or did it even authorize the doing?

> In the Metropolitan Asylum District Case Lord Watson, speaking of the execution by public bodies of duties imposed by Statute, said (3):—" If the order of the Legislature can be implemented without nuisance, they cannot, in my opinion, plead the

^{(1) 6} App. Cas., 193, at p. 203. (2) L.R. 4 H.L., 171. (3) 6 App. Cas., at p. 213.

protection of the Statute; and, on the other hand, it is insufficient for their protection that what is contemplated by the Statute cannot be done without nuisance, unless they are also able to show that the Legislature has directed it to be done. Where the terms of the Statute are not imperative, but per- Melbourne missive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think the fair inference is that the Legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer licence to commit nuisance in any place which might be selected for the purpose."

In the case of Ogston v. Aberdeen District Tramways Co. (1) the respondents, a tramway company, after a heavy fall of snow, cleared their track by means of a snow plough, and heaped up the snow upon the sides of the streets; they then scattered salt upon the rails and in the vicinity; the Town Council did not take any immediate steps to remove the briny slush so produced, and it was left upon the streets. The appellant, a manufacturer in the town (Aberdeen), sought to have the respondent Company interdicted from clearing their rails when there was snow upon the ground, in such a way as to impede and obstruct the general traffic on the thoroughfares. The right of the respondents to use the streets for tramway traffic was derived from their special Acts of Parliament, which did not confer on the respondents any right of control or use of the street other than laying down rails and using them exclusively for tramway traffic. It was held that a legal nuisance had been committed, and was not sanctioned by the special or general Tramways Acts, and even if the Town Council committed the fault of not removing the briny slush, that did not affect the primary liability of the tramway company. Lord Watson, after pointing out that neither the provisions of the Company's special Act nor those of the general Tramways Acts bore out the Company's defence that the operations complained of were within the Company's rights, passed on to the Company's next proposition, namely, that the operations complained of, if not expressly licensed by Statute, were sanctioned

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H. C. of A. by implication because they were necessary in order to the efficient carrying out of the purposes for which the respondents were incorporated by the Legislature. He said (1):- "The answer to that argument appears to me to be obvious and conclusive. In MELBOURNE the first place, the Statutes give the respondents no right to create a nuisance, and they have no such right at common law. In the second place, it is not shown that the nuisance complained of is in any sense necessary." And his Lordship proceeded to show the absence of actual necessity.

> Lord Davey said (2): - "My Lords, the only relevant defence that I can find pleaded is that the operations of the respondents in clearing and keeping clear their lines were within their statutory rights. I can only say that that argument depends on whether it was an incident necessary to the statutory rights conferred upon them. They have no statutory right to commit a nuisance; and the only attempt to make out or support that plea was by arguing that the statutory power of maintaining their tramways necessarily involved (and I say 'necessarily' deliberately) the creation of this nuisance; and that in fact the Statute has, if not expressly yet impliedly, authorized the nuisance."

> It is true, as Lord Halsbury points out in this case, that in England some doubt might be entertained whether the obstruction as proved was such that a private person could sue without further proof of peculiar damage to himself. That question did not arise according to the law of Scotland. In the present case the particular injury to the plaintiff has been amply proved, and so the authority is applicable.

> It appears to me that the real discrimen in this case is afforded by the maxim, Quando lex aliquid concedit, conceditur et illud sine quo res ipsa esse non potuit. The Company's statutory authority gave them every power that was necessary to enable them to construct this tramway and to use it with electricity as the motive force. If it was necessary to use an uninsulated wire in the position described-necessary, not for their mere occasions, but in order that the statutory power might live as an effective authority—they will stand excused. If they could exercise the authority as committed to them without leaving uninsulated

^{(1) (1897)} A.C., at p. 119.

a wire which ran down a post so as to be at times the vehicle of H. C. of A. danger to persons exercising their right of passing along the streets, then they cannot use their authority as a defence. That FULLARTON is the real question, and the jury at the trial do not appear to have had an opportunity to decide it.

I ought to add that the case of Charing Cross Electricity Supply Co. v. Hydraulic Power Co. (1) does not run counter in any way to the principles on which I rest my opinion, nor can it be regarded as an exception from them.

It seems clear that the appeal must be allowed, and a new trial ordered.

ISAACS J. I also have come to the conclusion that the appeal should be allowed, and a new trial ordered. The more I have considered the case, the more strongly have I thought that there has been a substantial miscarriage of justice which cannot be remedied without another trial of the present action.

The course suggested by the Supreme Court, even with the offer of Mr. Hogan not to raise the objection of res judicata, presents to my mind no satisfactory solution of the complicated situation now existing.

The action was brought to recover damages for severe injuries sustained by the infant plaintiff, then five and a half years of age, in consequence of a strong current of electricity being passed through her body by means of a post erected by the defendants in a public highway, and containing wires highly charged electrically.

The formal statement of the cause of action rested on the complaint of "negligence" in regard to installation, equipment, maintenance, insulation, &c. At the trial in the County Court the defences stated were (1) no negligence and (2) contributory negligence. A considerable quantity of evidence was taken. The defendants admitted by answers to interrogatories that the post was theirs, that a wire was connected with it, that the wire was charged with electricity generated by themselves and for the purpose of operating their tram-cars, and that the wire and post were not insulated anywhere. It appeared also from the evidence

(1) (1914) 3 K.B., 772.

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H. C. of A. that the wire connected underground with the rails and there corroded, the consequence being that the current did not pass freely to the rails to be conducted to the power house, as designed, so as to disconnect an automatic switch. The final result was Melbourne that the child's body, as she touched the post, took the charge and sustained injury.

The learned County Court Judge, after summing up the evidence and directing the jury, left questions to them of which only one is material, namely, "Was the accident caused by the negligence of the defendants or their servants?" The jury answered "No." But before the jury gave their verdict, and immediately after the learned Judge's charge, plaintiff's counsel submitted that the jury should be directed that the mere fact of injury by an electrical discharge "irrespective of this question of negligence" imposed liability on the defendants. The learned Judge refused to give that direction, and the verdict was rendered on the summing-up as delivered.

On a new trial motion the learned Judge refused to grant a new trial, but acceded to the application of the plaintiff's counsel to amend the claim, so as to cover a claim for damages arising from the mere escape of the electricity without negligence. His Honor who presided at the trial obviously did this because he considered the case had been sufficiently fought on the two grounds-negligence and absolute duty. This was quite open to the plaintiff on the pleading as it stood without amendment: Thom v. Bigland (1); Swinfen v. Lord Chelmsford (2); Nocton v. Ashburton (3).

On the appeal to the Supreme Court the learned Judges said "the only course which we can properly take is to dismiss the appeal with costs." No reasons were given. Thus their Honors held that the law as applied to the facts before them left them no choice.

Then, as to another possible phase which had been suggested,. namely, liability under the Electric Lighting and Power Act, they expressed no opinion, except that it could not be dealt with in the appeal then before the Court but might not be precluded

^{(1) 8} Ex., 725. (2) 5 H. & N., 890, at p. 920. (3) (1914) A.C., 932, at pp. 968, 977.

by the dismissal of the appeal from forming the ground of H. C. of A. another action.

The written materials, take alone, would leave me in some FULLARTON difficulty as to the course that should be adopted here. But even on them alone it would be a serious question whether the Melbourne verdict would stand in the face of the evidence so far given as to insulation of the wires inside the post. The written evidence, however, does not stand alone.

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Taking the statements made at the Bar as to the course pursued in the County Court and the Supreme Court, in conjunction with the statements in the appeal case itself, I am satisfied there has been a mutual misunderstanding of the real issues to such an extent as to render it necessary, in the interests of justice, to clear the matter up by a second trial; and this can be fairly adjusted by an appropriate order as to costs. It is clear that, in contending for liability on the alternative grounds of negligence or no negligence, the plaintiff's counsel at the trial meant to cover the whole ground, and to include liability for defective apparatus. He may have placed that branch of the case under the wrong head, and apparently he did. And from what was said at the Bar I gather that by "negligence," as it was understood at the trial, was meant merely the want of such reasonable care as ought to be taken in the construction and management of those appliances which a man is entitled at common law to use on a public highway, without any special statutory authority; and that the question really submitted to the jury was whether the defendants could reasonably have anticipated the corrosion of the wire underground at the time it occurred and were negligent in not replacing it when so corroded.

The application for the further direction to the jury necessarily had in view the non-insulated condition of the post and wires above ground, without which the escape could not have taken place, Mr. Webb, an electrical engineer called for the plaintiff, said :- "Had the wire been insulated from the pipe, there would have been no shock." Mr Johnson, defendants' lighting superintendent, said "insulation of the places touched would have avoided the accident."

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I refer to these passages, not as expressing any view whatever as to the facts, but only to show that certain vital evidentiary facts were fully dealt with on both sides, and were not deliberately left aside by the plaintiff. When, however, the matter came to MELBOURNE be put to the jury, they were apparently lost sight of from the restricted view taken of negligence, and from the ruling that all considerations outside that restricted view were irrelevant.

Thus, as I conclude, circumstances most material not merely to this particular plaintiff but also indirectly to the safety of the public, and of great general importance, have up to the present inadvertently escaped consideration; but I hold that it is not too late to give them due consideration.

The defendants' undertaking is not carried on at common law. If it were, the defendants' liability would, in the circumstances, be undeniable even on the extreme ground urged. There would be a nuisance causing damage, and, as admitted at the Bar, without what is called contributory negligence.

The business is carried on under statutory permission, and the terms of that permission are all important (see East Fremantle Corporation v. Annois (1)).

The foundation of that authority is the Tramways Act 1890 and the Orders made under it.

Sec. 3 provides that tramways may be constructed in certain parts of Victoria-including North Melbourne-"when authorized as provided in the Second Schedule, and all the regulations in such Schedule shall take effect as if contained in this Act." The Second Schedule in Part I., referring to Orders authorizing the construction, contains reg. 4. That regulation enables the Governor in Council to make an order "subject or not to any restriction or condition."

In the Order made by the Governor in Council the following condition was made :- "That every precaution necessary to secure the safety of the passengers upon the said tramway and also to secure the safety of passengers passing along the streets upon the route of such tramway shall be taken and ordered by the said Councils of the said Municipalities."

The delegation of the authority conferred by the Order passed (1) (1902) A.C., 213, at p. 218.

the liability for observance of this condition and all other rele- H. C. of A. vant provisions of the law to the defendants, who thereby became " promoters."

Reg. 21 of the Second Schedule to the Act is as follows:-"The promoters or lessees of any tramway shall be answerable Melbourne for all accidents damages and injuries happening through their act or default or through the act or default of any person in their employment by reason or in consequence of any of their works or carriages, and shall save harmless all authorities companies or bodies collectively and individually and their officers and servants from all damages and costs in respect of such accidents damages and injuries."

The works constructed appear, according to the evidence so far given, to have been authorized works; and, as said by Lord Dunedin in Sharpness New Docks &c. Co. v. Attorney-General (1), "authorization by Statute to do a particular thing makes that thing, when done, a legal act, and imposes no liability."

By the Order in Council, electricity was declared to be the motive power. Consequently the mere fact that electricity issued from the post and wires, placed where they were in the public street, imposed no liability. If that was the necessary result of the normal use of the post and wires and electricity, the damage sustained must be borne, because it ensued from the normal use of the very thing authorized, and was not the consequence of an "act or default" of the Company within the meaning of reg. 21 (see Canadian Pacific Railway Co. v. Roy (2)). But if it was not the necessary result of the normal use of the works and could have been avoided by such precautions as are contemplated by the condition quoted, the defendants are liable. They are liable in that case both on general principles and also upon the express provisions of the 21st regulation, because they would be guilty of a default and the damage would have happened through their default by reason or in consequence of their works. default would be "negligence" in law. This is pointed out by Lord Blackburn in London and Brighton Railway Co. v. Truman (3), where he says:—"I do not think that if the

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^{(1) (1915)} A.C., 654, at p. 665. (2) (1902) A.C., 220. (3) 11 App. Cas., 45, at p. 61.

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H. C. OF A. Company failed either in the fulfilment of the common law duty of taking proper care in the management of the traffic, which is FULLARTON what is in common language called negligence, or neglected any duty that on the construction of the whole Act it appears was MELBOURNE cast upon them, which in a more technical sense is also included in the word 'negligence,' they are freed from an injunction." And see the observations of the same learned Lord in Geddis v. Bann Reservoir (1), and those of Lord Dunedin in Nocton v. Ashburton (2).

> I venture to think it was by losing sight of the full technical sense of the word "negligence" that the confusion has arisen in this case. However the matter is looked at, the question is whether the defendants neglected a duty.

> What, then, is the relevant duty which upon the construction of the defendants' legislative authority they can be said to have neglected?

> In my opinion the terms of the "necessary precaution" clause in the Order in Council and of reg. 21 bring this case within the class of decisions of which Vaughan v. Taff Vale Railway Co. (3) is the leading example. There the defendants were held free from liability because, as the Court said, they had taken every precaution that science could suggest to prevent injury. In Roy's Case (4) Lord Halsbury referred to the defendant railway Company's possible "negligence in their management of the engine or its appliances being defective," and said that no such question was before their Lordships, the only question being as to injury caused by the ordinary and normal use of the railway.

> There is a very direct and authoritative statement of the law by Herschell L.C. in a Scottish case, and because of its importance and its appositeness to the present case, mutatis mutandis, and the general inaccessibility of the report, I quote the passage in extenso. It renders unnecessary the examination of other cases, the latest of which are West v. Bristol Tramways Co. (5) and Charing Cross Electricity Supply Co. v. Hydraulic Power

^{(1) 3} App. Cas., 430, at p. 456.
(2) (1914) A.C., 932, at p. 964.
(3) 5 H. & N., 679.

^{(4) (1902)} A.C., 220, at p. 228.

^{(5) (1908) 2} K.B., 14.

Co. (1). In Port Glasgow and Newark Sailcloth Co. v. Cale- H. C. of A. donian Railway Co. (2) Lord Herschell said: - "It is now well settled law that in order to establish a case of liability against a railway company under such circumstances, it is essential for the pursuers to establish negligence. The railway Melbourne having the statutory power of running along the line with locomotive engines, which in the course of their running are apt to discharge sparks, no liability rests upon the company merely because of sparks emitted having set fire to adjoining property. But the defenders although possessing this statutory power, are undoubtedly bound to exercise it reasonably and properly, and the test whether they exercise this power reasonably and properly appears to me to be this: They are aware that locomotive engines running along the line are apt to emit sparks. Knowing this they are bound to use the best practicable means according to the then state of knowledge to avoid the emission of sparks which may be dangerous to adjoining property; and if they, knowing that the engines are thus liable to discharge sparks, do not adopt that reasonable precaution they are guilty of negligence, and cannot defend themselves by relying upon their statutory power. About the law, as I have expressed it, I do not think there is any controversy."

The best practicable means, of course, do not mean the latest experimental devices, but such precautions as known and reasonable experience has shown to be effective. The defendants were dealing with a powerful and dangerous agent-electricity. Said Lord Robertson, for the Privy Council, in Eastern and South African Telegraph Co. v. Cape Town Tramways Cos. (3):-"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." Those observations apply exactly here.

Now, when the Governor in Council empowered the promoters to make the tramway, and operate it with electricity, the condition was expressly insisted on to take all precautions necessary

(1) (1914) 3 K.B., 772. (2) (1893) 30 Sc. L.R., 587. (3) (1902) A.C., 381, at p. 392.

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H. C. OF A. for the safety of the public using the highway. In view of the test stated by Lord Herschell, which is in perfect accordance with Brocklehurst's Case (1) and Sadler's Case (2), that express condition may not have been necessary. But it is there, and MELBOURNE its effect may be to strengthen the force of reg. 21. regulation is not, in my opinion, a mere indemnity clause in favour of the Council. It would, in the absence of delegation, bind the Council itself, and I agree with the note in Brice on Tramways and Light Railways (2nd ed., p. 246), where it is said with reference to the corresponding section (55) of the English Act: "This section, no doubt, was intended for the protection of and to apply to only the general public and other outsiders." Reg. 21 and the necessary precaution clause in the Order in Council occupy the same position relatively to the respondents as sec. 17 in the Charing Cross Co.'s Case (3) did to the Company there.

As to the burden of proof in such a case as the present, it has not been specifically argued, and I decide nothing.

One important question yet to be determined so far as the Tramways Act is concerned, is whether the Tramway Company in leaving the post and wire uninsulated above ground where passers-by might come in contact with the post, neglected to take the necessary precautions stipulated for in the Order in Council as a condition of the permissive authority given. If they did not they were guilty of negligence, and in the absence of any countervailing circumstances are liable. That is a matter of fact, and must be determined by the appropriate tribunal.

It is not to be taken that in the new trial I consider the appellant or the respondents shut out from relying on anything in the Electric Light and Power Act which may be thought to assist the party desiring to use it. I say nothing about that, one way or the other.

GAVAN DUFFY and RICH JJ. The plaintiff's case has been put in various ways. The particulars of claim present it as a case of negligence. The verbal defence was pointed to that issue only, and so was the evidence led by both parties. The jury has

found on that issue in favour of the defendant, and that disposes of it so far as this appeal is concerned. After the learned Judge of the County Court had completed his direction to the jury, Fullarton counsel for the plaintiff (Mr. Eager) submitted that his Honor should have directed them that if they were of opinion that the Melbourne plaintiff's injury was caused by an electric discharge, they ought to find a verdict for her, irrespective of the question of negligence. The contention for the plaintiff, as expressed in this submission, was that the defendant was responsible if an accident was occasioned by its use of electricity, though no defect existed in its apparatus and no negligence had occurred in its use of the apparatus. The learned Judge refused, and in our opinion rightly refused, to give such a direction: it was not relevant to the issue raised between the parties, and no amendment was asked for. An application was subsequently made for a new trial on the ground of misdirection. At Mr. Eager's request the Judge ordered the particulars of demand to be amended so as to cover the claim for damages arising from the mere escape of electricity without negligence, and refused the application for a new trial. The plaintiff appealed to the Supreme Court on the ground that a new trial should have been ordered inasmuch as his Honor omitted on the trial of the action to direct the jury to find a verdict for the plaintiff if, irrespective of negligence by the defendant, its electricity escaped from its post or wires and thereby caused damage to the plaintiff. Before the Supreme Court the plaintiff's case was again put as one of absolute responsibility by the defendant for damage done by the escape (as it was called) of its electricity; it being said that this liability was placed upon it by the Tramways Act 1890, or was placed upon it by the common law and not removed by the Tramways Act 1890. After argument, Cussen J. discovered that the defendant was conducting its business under the provisions of the Electric Light and Power Act 1896, and further argument was directed to its liability under that Act and an Order in Council which had been made under its provisions. The Order in Council had not been put in evidence at the trial, and the Court finally intimated that they would not express any opinion on the question of liability under

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H. C. OF A. the Electric Light and Power Act 1896, and would leave the plaintiff to test that question in another action where both FULLARTON parties might call such evidence as they chose, and they dismissed the appeal. We think the Supreme Court exercised a MELBOURNE wise discretion in doing as they did. The question formally before them was whether the learned Judge should have given the suggested direction, and that only. Had they proceeded as if the amendment made on the application for a new trial had in fact been made at the hearing, and determined whether liability, outside negligence, attached to the defendant, they must have done so on the facts and documents already proved without giving the parties an opportunity to call further evidence; and had they ordered a new trial without determining that question they might have done an injustice to the litigant who had succeeded on the only issue properly raised at the hearing. The plaintiff then appealed to this Court, and it was urged that there was an absolute liability either under the common law, or the Tramways Act 1890 and the Order in Council issued under its provisions, or the Electric Light and Power Act 1896 and the Order in Council issued under its provisions, or under some or all of them. We considered that we could not look at an Order in Council that had not been put in evidence, but it was suggested that even if there was not an absolute liability, the plaintiff had a cause of action because there was uncontradicted evidence that one of the defendant's ground wires had corroded, and that, except for the corrosion, the accident would not have occurred, and the case of Sadler v. South Staffordshire and Birmingham District Steam Tramways Co. (1) was said to be an authority for this proposition. If we were satisfied that, whatever may be in the Order in Council under which we know the defendant carried on its business, but of the contents of which we know nothing, and notwithstanding any other evidence which might be called in its behalf, the defendant has no answer in law to the plaintiff's claim, we should think that a new action would be unnecessary. In that case the Court could and should order a new trial so that damages might be assessed, but we are far from being so satisfied. We therefore think that the appeal should be dismissed and the plaintiff left to pursue her remedy, if she have one, in a new action where the question whether the defendant is liable though not guilty of negligence may be determined.

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FULLARTON v.

v.
North
Melbourne
Electric
Tramway
and
Lighting
Co. Ltd.

Appeal allowed. Order appealed from discharged. Case remitted to the Supreme Court for a new trial before a Judge of the Supreme Court. Costs of first trial and of application to the Judge of the County Court for a new trial and of appeal to the Supreme Court to abide the event of the new trial.

Solicitors for the appellant, Hodgson & Finlayson. Solicitor for the respondents, G. P. Newman.

B. L.

[HIGH COURT OF AUSTRALIA.]

G. G. CRESPIN & SON APPELLANTS;
PLAINTIFFS,

AND

RESPONDENTS.

DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE,

March 10, 13,

14, 24.

Customs Duties—Contract for sale of goods—Alteration of contract where duty altered —Purchaser to pay amount of increase of duty—Statute—Construction—Ultra vires—Power of taxation—Incidental power—Constitutional law—Interpretation of contract—Customs Act 1901-1910 (No. 6 of 1901—No. 36 of 1910), sec. 152—The Constitution (63 & 64 Vict. c. 12), secs. 51 (I.), (II.), (XXXIX.), 55.

Griffith C.J.,
Barton,
Isaacs,
Higgins and
Rich JJ.

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