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Torts--Liability of Electric Company for Current Escaping from Power Line

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acquirer had no notice of it.[13] It would, therefore, appear that the doctrine of equitable servitudes operates as an equitable appendix to the law of real property

It is believed, however, that it is not advisable to place equitable servitudes unequivocally in either of the aforementioned categories, since they possess certain characteristics inherent in both contract and property rights. It must be admitted that as between the covenantor and covenantee the restriction is contractual, and that all equitable servitudes have their origin in contracts. However, by no stretch of the imagination could it be said that the relation between the remote grantee of the covenantee and one who takes by adverse possession from the covenantor is contractual. Nevertheless, the equitable servitude can be enforced against one who takes by adverse possession since he is not a purchaser for value.[14]

It may be concluded, then, that equitable servitudes are both contractual and real (pertaining to realty) in their nature. The result in a particular case may be influenced, or even determined, by whether the court is more persuaded by the contract phase of the servitude than by the property phase, or vice versa, at the time the decision is made.

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TORTS—LIABILITY OF ELECTRIC COMPANY FOR CURRENT ESCAPING FROM POWER LINE

In *Chase v. Washington Power Company*,[1] two chicken hawks became engaged in an aerial battle in the course of which their talons interlocked, and they fell, so attached, between the defendant's power line and guy wire. One touched the highly charged power line and the other touched the guy wire, thereby establishing a connection. From the connection thus made, the current ran down the guy wire and escaped into a wire fence which had been allowed to sag against the guy wire. The current was transmitted through the wire fence to the plaintiff's barn, to which the fence was attached. As a result, the plaintiff's barn was destroyed by fire and some other buildings were damaged. The Supreme Court of Idaho, in affirming a judgment for the plaintiff, found that there was sufficient evidence for the jury to find negligence on the part of the defendant and reasoned that since birds had, at other times, caused disturbances on the power line, it was foreseeable that they might make such a connection as the one made here.

This case raises some interesting problems, as it may be questioned whether there was really any negligence on the part of the power

[13] In re Nisbet and Potts Contract, 1 Ch. 386 (1906).
[14] See note 12, supra.
[1] 111 P (2d) 872 (Idaho, 1941)

company and, if there was negligence, whether it was the proximate cause of the plaintiff's injury In order to hold the defendant liable, not only must its negligence have been the proximate cause of the injury but there must have been a duty owing by the plaintiff to the defendant. These problems, together with the problem of foreseeability, present difficult questions to be decided in determining the merits of this case.

To say that the power company should have foreseen that two birds might lock their talons and fall in the manner in which they did or that birds might in any way establish such a connection seems far-fetched. This view is taken in a concurring opinion by one of the judges, who adds, however, that it should have been foreseen that such a connection might be established in some manner. No explanation was given concerning any other manner by which such a connection might possibly be made.

We shall leave the problem of forseeability for the present, and turn our attention to causation. For the purpose of discussion, negligence on the part of the defendant will be assumed.

There are several theories of causation under which some of the authorities have held that once negligence on the part of the defendant is shown, he is liable for its consequences, as long as his act is the proximate cause, whether or not he could have foreseen their extent or the manner of their occurrence. Professor Beale, in his discussion of proximate cause, cites a number of cases in support of this principle.[3] Two of the situations in which it sometimes occurs, according to him, are (a) where there is direct causation and (b) where there is causation through dependent intervening forces. He would say that where the defendant's conduct created or caused the final active force which brought about the result, there is direct causation or causation by a dependent intervening force. Then the defendant is liable if the force he set in motion had not come to rest in a position of apparent safety

Professor Carpenter, in a discussion of proximate cause, agrees that foreseeability as to the extent of the injury and the manner of its occurrence is not required in this type of causation.[4] But Carpenter emphasizes the necessity of first finding a duty owing to the plaintiff by the defendant. Once this duty is found, he concludes, it does not matter that the exact chain of causation is unforeseeable.

The courts, he believes, have sometimes confused the question

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See Bohlen, *The Probable or the Natural Consequence as the Test of Liability in Negligence* (1901) 49 Pa. L. Rev 148 at 158-162; McLaughlin, *Proximate Cause* (1925) 39 Harv L. Rev 149, 163; Smith, *Legal Cause in Actions of Tort* (1911) 25 Harv L. Rev 223 at 245-252; RESTATEMENT, TORTS (1934) sec. 435.

[3] Beale, *The Proximate Consequences of an Act* (1920) 33 Harv L. Rev 633.

[4] Note (1924) 16 So. Cal. L. Rev 1, 7, 16 et seq.

of duty with proximate cause. So where the defendant shot the plaintiff's dog and the dog ran into the plaintiff's house and knocked him down, the defendant's act was held to be the proximate cause, although he could not have foreseen that the dog would act in such a way.[5] Here there is no doubt that the defendant's act was the proximate cause of the injury, but it is questionable whether there was any duty owing to the plaintiff by the defendant.

This case may be distinguished from the present case, however, by the fact that it was not foreseeable that the dog would cause such an injury, while it was reasonably foreseeable that if the defendant negligently maintained its power line some injury might result to the property of the plaintiff.

If, then, we are able to include the present case in either of the two types of causation where concrete foreseeability is not required, the fact that the defendant could not foresee that leaving the fence and the guy wire in such close proximity would cause the precise injury in this precise manner would seem to be immaterial. There would be a duty of care owing to the plaintiff by the defendant.

It does not appear at first, however, that this case is one involving direct causation, for although the result would not have occurred without the defendant's negligence, the act of the birds concurred with the defendant's act or failure to act in producing the injury In fact, the injury might not have occurred except for the act of the birds which made the result possible. However, it is possible to argue that the falling of the birds between the wires furnished only a condition which made the result possible, while the negligence of the defendant remained the direct cause.[6]

Whether or not there is direct causation, it is clear that this is not a case involving a dependent intervening act. The human being or animal whose act constitutes a dependent intervening force must be stimulated in some manner by the act of the defendant, or its act must grow out of the act of the defendant. In this case the battle of the hawks and its result was in no way dependent on the act or negligence of the defendant. For the birds were acting from their own impulse and such action could not be said to constitute a dependent intervening force.

A third type of causation would exist, according to Professor Beale, where the defendant created a condition on which the final force directly acted. The final active force, in this case, would be an independent intervening cause. In regard to such cases, he believes the rule actually followed to be that there is liability only where the risk of the new force was created or increased by the defendant's

[5] Isham v Dow, 70 Vt. 588, 41 Atl. 585 (1898)
[6] Smithwick v Hall &.Upson Co., 59 Conn. 261, 21 Atl. 924 (1890)
Beale, *The Proximate Consequences of an Act* (1920) 33 Harv. L. Rev 633, 643.

act. However, it seems that in order to hold the defendant liable, it is necessary that there be some measure of foreseeability

Returning to the problem of foreseeability, it is necessary to determine whether it was reasonably foreseeable that something might happen to establish a connection such as the one made by the birds in this case. One of the defendant's contentions was that the guy wire was separated from the power line by a space of twenty-eight inches in compliance with a rule of the industry The court stated that the defendant company could not excuse itself by compliance with this rule, and in effect said that the standard of care in the entire industry might not have been that of a reasonably prudent person under the circumstances. Since the jury had found that the defendant was negligent as a matter of fact, the court could not say that the facts did not warrant a finding of negligence.

In *Stark v. Lancaster Electric Light, Heat and Power Co.*,[8] the court said, in regard to the finding of negligence on the part of the defendant in not providing a screen to prevent contact between its wires and those of another:

> "While companies using electricity are held to the highest degree of care practicable and are required to take every reasonable precaution suggested by experience and known dangers, it is not for a jury without evidence to set up a standard of care as to a matter not within the range of common knowledge."[9]

On the other hand, in a case involving an injury caused by a charged guy wire, an electrical engineer testified that there were methods of guying poles so as to protect persons and property at the foot of the guy wire, and that the methods of properly insulating the wires were generally known to persons skilled in the business; that if a circuit breaker or insulator were put on the wire, it would obviate the danger, if contact between the guy wire and the circuit were to occur from any cause whatever.[10] In *Faris v. Lawrence County Water Light and Cold Storage Co.*,[11] it was held that an electric power company was prima facie negligent in having a current escape into a guy wire which had no circuit breaker or insulator. It seems that in spite of the expense which insulating guy wires would entail, the law, in most instances, imposes such a duty on the electric companies. An electric company was held liable in a Canadian case,[12] when a tree limb coated with ice was blown by the wind for a distance of thirty-three feet to the defendant's power line, where it established a connection between the primary and secondary wires of a transformer and resulted in a fire at the plaintiff's house. The court said in this case that the defendant was negligent in not grounding the

[8] 218 Pa. 575, 67 Atl. 909 (1907)

[9] Stark v Lancaster Electric Light, Heat & Power Co., ibid.

[10] Royal Indemnity Co. v Midland Counties Public Service Corporation, 42 Cal. App. 628, 183 Pac. 960 (1919)

[11] 198 S. W 449 (Mo., 1917)

[12] Vandry v Quebec Light & Power Co., 53 Can. S. Ct. 72 (1915).

secondary wires of the transformer, a practice almost never followed in the industry

From these cases it appears that although the defendant was not bound to foresee that the birds might make a connection, it should have foreseen that the current might escape to the guy wire in some manner. Those who deal with an instrumentality so dangerous as electricity are bound to foresee that it might escape and cause injuries unless all practical safeguards are employed to keep it within bounds.

Having established negligence on the part of the defendant, it appears that this case is not primarily a question of causation but one of negligence, as the causal connection between the defendant's act and the resulting injury is clear. The defendant will be held liable for the result of intervening forces which he should have foreseen or for forces which are within the risk created even though such forces are abnormal and unforeseeable.[13]

Here the defendant created a risk of having the current escape into the guy wire and injure the plaintiff's property The failure to insulate the guy wire to prevent such an occurrence, or the failure to remove the fence from the guy wire was negligence and the plaintiff was allowed a recovery

To sum up the results of this case, it appears that: (1) The defendant, in maintaining such a dangerous instrumentality as a highly charged power-line, was bound to foresee that unless all practical safeguards were employed the current might escape and injure the plaintiff's property. (2) The manner in which the current escaped, even if by extraordinary and unforeseeable means, would not relieve the defendant from liability if he failed to use reasonable safeguards to keep the current within bounds.

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[13] Johnson v Kosmos Portland Cement Co., 64 F (2d) 193 (1933), PROSSER, TORTS, at 373.