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Tort Liability of Suppliers of Electricity

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TORT LIABILITY OF SUPPLIERS OF ELECTRICITY*

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In an article appearing several years ago,[1] the present writer discussed a number of cases involving hazards arising in the operation of certain public and quasi-public enterprises, including municipal corporations, gas companies, and waterworks. An attempt was made to point out a noticeable tendency in a number of recent cases to extend liability in tort to situations in which the court had traditionally refused to give relief. It was suggested that this tendency may be due in part to a desire of courts to place the burden of such losses where they can be distributed as a part of the cost of the service which the defendant is in the business of supplying. In short, it was suggested that the consuming public and society should bear the cost of the hazards of these enterprises, since society enjoys the benefits of these group services. Any such tendency, if it actually does exist in the law, must be discovered not merely by reference to what judges have said in their opinions, but by observing, in general, how these cases are decided. In what types of fact situations does the plaintiff prevail? Are the decisions in which the modern court affords protection really within the traditional scope of familiar rules of law, as the limits of these rules have been recognized in the past, or do many of such decisions enlarge the limits of the protection afforded by these rules?

Electricity probably is potentially the most dangerous of the utilities in common use today. Leaking gas normally can be detected by its odor, and probably most gas leaks are discovered and repaired before serious injury results. Water escaping from confinement frequently announces itself to sight or hearing before it does substantial harm. However, as stated in a recent Missouri case:

> "Electricity is a most subtle and dangerous agency. It lurks unsuspected in the simple and harmless wire and gives

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* This article has been prepared with particular regard to Missouri cases.

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1. Feezer, Capacity to Bear Loss As a Factor in the Decision of Certain Types of Tort Cases (1930) 78 U. of Pa. L. Rev. 805; Ibid. (1931) 79 U. of Pa. L. Rev. 742.

> no warning of its dangerous presence. Wherefore, it is uniformly held that an electric company employing wires charged with this subtle and violent agency in streets, highways and other public places is in duty bound either to insulate such wires or place them beyond the range of contact with persons rightfully using such ways and to exercise the *utmost* care to keep them so."[1a]

Such then, broadly and generally stated, is the nature of the hazard and the high degree of care which is recognized judicially as present in connection with harms due to electricity.

The electric fluid has come to be one of man's chief aids in maintaining the complex civilization of the present day. If the production of electric current were to stop throughout the civilized world—even for a few days—it is hardly possible to imagine the disorganization of the whole social scheme. Indeed, it is not an exaggeration to say that we cannot do without it. At the same time, unless it is kept strictly within the boundaries set for it, electric current is capable of almost incalculable damage to life and property. There is, then, an economic and social interest in fostering and encouraging its use and further development, but unless considerations of safeguarding interests of personality are balanced against economic considerations favoring free development of the industry, intolerable risks of harms to both person and property may be created.

Innumerable statutes and ordinances prescribe standards to be observed in the construction and operation of electrical plants and in the installation of wiring and appliances. At the same time injuries continue to occur. How shall responsibility be imposed? It seems to be a settled policy that absolute liability shall not be the rule. An electric company is not an insurer against loss by reason of its structures and apparatus and their operation.[2] Liability is said to depend upon negligence. We must, therefore, come back to the old problem of negligence. Negligence here, as everywhere, must be measured by duty. That duty must be determined by the courts *ex post facto* of the harm. Are the

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1a. Geismann v. Missouri-Edison Electric Company, 173 Mo. 654, 73 S. W. 654 (1903). There are so many cases in Missouri, asserting the high degree of care which must be exercised in the control of dangerously high voltage currents, that it would be beside the point to collect them here.

2. Luehrmann v. Laclede Gas Light Co., 127 Mo. App. 213, 104 S. W. 1128 (1907); Goodwin v. Columbia Telephone Co., 157 Mo. App. 596, 138 S. W. 940 (1911).

courts determining that duty upon the basis of a formula of words, of an abstract delineation of what an electric company may or may not do and escape the judgment of negligence and the imposition of liability to respond in damages therefor? Are they, on the contrary, influenced by other factors, human and social? Are they judging electric companies in tort actions by human experience?

The social needs of electricity in the normal life of everybody are increasing. This calls for more powerful currents, but at the same time for more careful safeguards. An accident happens, someone is injured or killed. Who shall bear the loss? What conduct will shift the loss to the electric company, and what factors are employed in determining that conduct? Is the capacity to bear the loss a factor in determining duty? If so, the courts have been slow to admit it. This contrasts with the cases in the field of municipal corporations. In that field we find the law changing. An abandonment in many cases of an old and outworn formula, that of governmental immunity, is clearly apparent. In such a movement in the law there come frank articulate expressions, now and then, of the courts' recognition of such social factors as capacity to bear loss. These expressions indicate that the whole tendency to shift from the old rule in that field is probably actuated by these impulses. But in electricity we are dealing with something new. There may be factors peculiar to the economic and social utility of the electrical industry. The "mores" of the time and place, public opinion, the social sanctions, or whatsoever they may be called, may have a bearing upon allocating the risks which great utilities create by their existence. This all plays its part in judgment.

The social utility of placing the risk of loss where it can more easily be borne, because it can more easily be distributed, may be reflected in the way the judicial process applies its general fundamentals and its detailed formulas and rules to the solution of the tort problems which are peculiar to the operation of the electrical industry. For, by so doing, they will have signified their attitude as to the extent of the duty on the part of manufacturers of electric current to keep it where it can do only useful service and not harm to mankind. No new formulas are needed or desirable in order to enable the courts to extend con-

cepts of legal responsibility founded upon culpability so as to cover the new risks of harm which arise out of new conditions. The court has merely to find whether the defendant's conduct involved a risk of harm, which, under the circumstances shall be thrust upon him who engages in such conduct. Invoking the external standard of the reasonably prudent man is simply another way of saying the same thing. The court has only to find whether there is a duty; that is, whether the law recognizes an interest of the plaintiff or injured person which is entitled to protection.

If the court decides that a duty exists in the premises or if this question is brought to issue in the pleadings, there remain the usual elements of a negligence case: violation of duty, causal relation, and damage. These elements of the problem are handled by a division of labor between the court and jury, to be marked out by the court in accordance with the usual formulas employed in negligence cases.

The external standard of the reasonably prudent man can be applied to these problems as it has been in other problems of negligence, and the orthodox formulas are flexible enough to enable any court to give effect to the social policy which is behind its judgments. The consequence of this may be that almost any harm from electricity which could humanly have been avoided, will have to be paid for. On the other hand, emphasis may be given to formulas which tend to restrict liability within narrow limits.[3] Proximate cause formulas may be used to restrict liability or to enlarge it.[4] Contributory negligence may be

3. "The law in regard to the proper handling of electric currents is of comparatively recent development and is still to a great extent in its formative period. The decisions on the subject are in hopeless confusion and cases can be found supporting almost any view as to the extent of the responsibility of those engaged in dealing with such currents." Salt River Valley Waters Users Ass'n v. Compton, 39 Ariz. 491, 8 P. (2d) 249 (1932).

4. Vessels v. Kansas City Light & Power Co., 219 S. W. 80 (Mo., 1920), in which one of two joint defendants was not permitted to "pass the buck" by the use of proximate cause theories. But in a case where the plaintiff was injured by contact with a piece of baling wire which boys threw over the defendant's high tension line at an uninsulated spot, the act of the boys was held to be the proximate cause. Luehrmann v. Laclede Gas Light Co., 127 Mo. App. 213, 104 S. W. 1128 (1907). However, when the dangerous condition (uninsulated wires) had existed so long that defendant knew or should have known of it and this was at a place where it was known that persons frequently went, defendant was held liable, notwithstanding the intervention of a third party. Strack v. Missouri & Kansas Telephone Co., 216 Mo. 601, 116 S. W. 526 (1908).

treated with an open hand and left to juries in almost any situation, or it may be found by the court as a matter of law in certain typical situations. Such doctrines as *res ipsa loquitur* may be liberally or sparingly used.

STANDARD OF CARE

The scope of duty will contract or expand as problems arise, but "standard of care" is a generalization about which we may expect to find sufficient decisions to point the way in which the policy and inclination of the courts of a particular jurisdiction are tending.

In looking for expressions with reference to the standard of care required by the law in the handling of electricity, it is at once evident that this standard develops with reference to the type and degree of harms risked and to the setting in which they are consumated.

It would be at once recognized by an intelligent child of twelve that the risky thing about electricity is shock. The child would not need to be many years older to know that seriously harmful electric shocks result when electric currents are where they ought not to be, or when persons shocked are where they ought not to be. If the person injured is where he may rightfully be and has not assumed the risk of unconfined and dangerous electric current, what is the duty of those in the control of the electricity? Due or reasonable care under the circumstances is present as a part of the circumstances. The problem is, what does that phrase mean in the electric cases?[5]

In Missouri it seems to be clearly established that the standard of care in electricity cases is not an open field, but juries are directed more precisely. Reference has already been made to the utmost degree of care. Many cases in the Supreme Court as well as in the three Courts of Appeal have reiterated the idea that producers of electricity have the burden of a special degree of care. These references to the highest degre of care seem to be more than a phrase for emphasizing "circumstances," in ap-

5. The Missouri courts have consistently said that they do not recognize degrees of negligence, but they do recognize degrees of care; "but the failure to exercise even the highest degree of care is only negligence." Young v. St. Louis I. M. & S. Ry., 227 Mo. 307, 127 S. W. 19 (1910). As early as 1869, the Supreme Court declared that there is no such thing as gross negligence. McPheeters v. Hannibal & St. Joseph R. R. Co., 45 Mo. 22 (1869).

plying the concept of "due care under the circumstances." It is common to find references to the "highest degree of care." All of these expressions may or may not determine the duty, the alleged violation of which the jury may be asked to pass upon. The fact variations are so numerous that there may be found a mass of decisions, impossible to reduce to a satisfactory scientific classification. From these cases it seems impossible to induce any precise formulas which will fit future cases.[6]

The most typical cause of harm is shock due to current being where it should not be. The most frequent causes of electric currents being out of bounds seem to be sagging wires, broken wires, defective insulation, defective transformers, and wires located in places where they may be dangerous by reason of proximity to persons or to other objects which may carry the current where it will be dangerous.

Geismann v. Missouri-Edison Electric Co.,[7] decided in the Supreme Court of Missouri in 1902, has been cited and referred to in subsequent cases as the foundation case on negligence in connection with electricity.[8] The deceased with other workmen was on a ladder, taking down a sign from a building. A guy wire which had been used to support the sign and which the deceased was touching, came in contact with a part of the defendant's wires, from which the insulation had been worn away. The shock caused the deceased to fall, and he died as a result of the fall. There was a verdict for the plaintiff. The judgment was affirmed in an opinion, too lengthy to refer to in detail, which reviewed the several instructions given in the St. Louis County Circuit Court. Judge Burgess's opinion is interesting and significant in that it outlined more fully than had been done in any previous Missouri case the general standards which are the determinants of liability in this type of case. After holding that the defendant's demurrer to the evidence was properly overruled, the opinion, in discussing the instructions given in the trial

6. Salt River Valley Waters Users Ass'n v. Compton, 39 Ariz. 491, 8 P. (2d) 249 (1932), cited note 3, supra.

7. 173 Mo. 654, 73 S. W. 654 (1903).

8. The Geismann case is not the earliest decision in Missouri dealing with tort liability in connection with electricity, but is one of the earlier ones most frequently cited in subsequent opinions. An earlier case frequently met with is Gannon v. Laclede Gas Light Co., 145 Mo. 502, 46 S. W. 968 (1898).

court, makes the statements which have furnished the basis for the decision of many subsequent cases. The court said:

> "It follows from these authorities that it was defendant's duty in the first place to use every protection which was reasonably accessible to insulate its wires at the point of contact or injury in this case and use the utmost care to keep them so, and the fact of the death of Geismann is conclusive proof of the defect of the insulation and negligence of the defendant. As to whether he was guilty of contributory negligence or not was a question for the jury."

The case has repeatedly been taken as authority for the points stated in the sentence just quoted.[9]

It has been bought out in a number of more recent cases that insulation is impracticable and useless in lines charged with extremely high voltage carried on modern long distance transmission lines. Compliance with the high standard of care imposed means, in such a situation, that the wires must be located where persons are not likely to come into contact with them.[10] In one case it was said: "The great number of injuries inflicted by electric wires strung near buildings is enough to show that care should be taken to protect persons laboring on and about such buildings."[11] Likewise wires must be maintained at a safe height.[12]

Upon beginning one's reading of cases involving injurious electric shock, one is surprised at the frequency with which guy wires become charged by coming into contact with sagging, loose, uninsulated lines carrying heavy voltage current. The conduct of those responsible for maintaining such structures has usually been regarded as sufficient basis for responsibility, unless the injured person's contributory negligence is present to bar recovery.[13]

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9. Followed in Winkelman v. Kansas City Electric Light Co., 110 Mo. App. 184, 85 S. W. 99 (1905), and Booker v. Southwest Mo. Ry. Co., 144 Mo. App. 273, 128 S. W. 1012 (1910). Cited in Luehrmann v. Laclede Gas Light Co., 127 Mo. App. 213, 104 S. W. 1128 (1907).

10. Day v. Consolidated Light, Power & Ice Co., 136 Mo. App. 274, 117 S. W. 81 (1909); Thompson v. City of Lamar, 322 Mo. 514, 17 S. W. (2d) 960 (1929); Lofty v. Lynch McDonald Co., 215 Mo. App. 163, 256 S. W. 83 (1923).

11. Williams v. City of Fulton, 177 Mo. App. 177, 164 S. W. 247 (1914).

12. Heiberger v. Mo. & Kan. Telephone Co., 133 Mo. App. 452, 113 S. W. 730 (1908).

13. Freeman v. Mo. & Kan. Telephone Co., 160 Mo. App. 271, 142 S. W. 733 (1912); Hoover v. Kansas City Elevated Ry. Co., 159 Mo. App. 416, 140 S. W. 321 (1911).

It is likewise actionable to place guy wires in a dangerous location, and doing so may result in liability through an unusual chain of circumstances, as shown in a recent Missouri case.[14] A guy wire leading from an electric light pole was broken by a truck which ran off the road. The broken guy wire came in contact with high voltage wires. The plaintiff, arriving on the scene just after the accident, went to the rescue of the truck driver. While he was thus engaged, the broken, electrically-charged guy wire fell upon him. The plaintiff alleged negligence in the way the guy wires were placed, referring to the possibility of automobile accidents at this particular dangerous point in the highway and to the lack of insulation on such high voltage wires. It was held that the case was correctly sent to the jury, there being sufficient evidence to justify a finding of negligence.[15]

There are numerous cases in which broken wires have fallen on the ground, or into trees, or have otherwise carried a dangerous current to a point where it may be encountered in streets or on private premises. Such wires or currents are encountered by people seeking to pass, sometimes unconscious, sometimes perhaps conscious of the presence of a wire, but without realization that it is "hot". The fact is recognized that electric wires do break sometimes, due to causes not the fault of the owner. What then is the nature and extent of the duty to discover and remove the danger? Among the most interesting of the Missouri electric cases are the ones bearing upon this problem.

Engineering developments in the field of electricity are so rapid that to attempt to make legal formulas as to what is reasonable care in handling electric current would be futile. New devices are constantly being produced for use in the operation of electrical machinery; new principles are being discovered. Is the law to pass upon this mechanical and scientific apparatus, piece by piece, and determine whether it shall be used, and if so, in what manner?

Within recent years devices known as automatic circuit break-

14. Thornton v. Union Electric Light & Power Co., 72 S. W. (2d) 161 (Mo. App., 1934).

15. The case was reversed and remanded because of an improper instruction to the effect that it was negligence in law to maintain an uninsulated high tension line adjacent to a highway. In short, the law recognizes the point made by the defendant that insulation is not necessarily the only or the best protection against the dangers of high voltage currents.

ers have been installed and are in regular use in electric plants, as a safeguard against the wandering of high voltage electrical energy from its intended path into places where it does not belong. Therefore, in cases of injury due to misplaced electric current, the question arises whether it is the duty of electric companies to use circuit breakers. It becomes the task of a judge to decide whether the absence of a circuit breaker, or the manner of its use, bears such relation to the plaintiff's injury in the particular case, that a jury properly may be given the opportunity to impose legal responsibility for acts or omissions in reference to such a machine. That is, the court must decide whether there is a *duty* to install and properly to maintain and operate such a device.

Another device known as a "ground detector" has apparently come into use with electric transmission lines. In *Sanders v. City of Carthage*[16] the plaintiff's decedent, an eleven year old boy, while driving with his father, came to a broken end of wire hanging over the road too low to drive under. He undertook to remove it and was electrocuted. There was evidence tending to show that the wire had been down since the previous evening. The defendant had no ground detector, but it did have a circuit breaker, which, however, does not always "kick out" unless both sides of a circuit are grounded. A ground detector on the other hand would have indicated a break in one wire of a circuit and

16. 9 S. W. (2d) 813 (1928), rev'd 330 Mo. 844, 51 S. W. (2d) 529 (1932), on the ground that plaintiff having alleged specific acts of negligence was allowed to go to the jury on the theory of *res ipsa loquitur*.

As to ground detectors, circuit breakers and similar appliances, it was said in Kentucky Utilities Co. v. Moore, 224 Ky. 33, 5 S. W. (2d) 283 (1928): "Those engaged in the business must use the highest degree of care but are not insurers. Those who deal in this deadly, unseen instrumentality must exercise the utmost care and skill which may be known. . . . all that the ingenuity of man has devised must be made use of." The opinion then quoted with approval from the testimony of an expert who had appeared in the trial of the case, as follows: "I think this, that if any company is to sacrifice safety to practical economic operation, then they should be willing to bear the burden of expense, damages or anything else resulting from their lack of care and skill in constructing their lines safely. . . . In other words my idea is, that, if the company wants to in any way run the chances, which may be one in a thousand of electrocuting somebody and not make the equipment absolutely safe so that there wouldn't be any chance of electrocuting anybody, then they run that chance for the purpose of economic gain and under that consideration they ought to be willing to pay for any damages which would occur due to their negligence to safeguard the public."

the plant could have cut off the current until the condition was repaired. This situation having been shown, the court said:

> "As we see it the question of the defendant's negligence narrows down to the question of the defendant's duty to have its switchboard equipped with ground detectors. If a ground detector would have indicated the interference caused (by the wire breaking and falling on a tree), it was the defendant's duty in the exercise of that highest degree of care required by the law to have had such an instrument."

The court also held that the whole question whether the defendant was negligent in failing to discover the broken wire for twelve hours was for the jury.[17]

In a California case[18] the court instructed the jury that the plaintiff in his complaint had sufficiently charged negligence, by his allegation that the defendant's servant had closed the circuit breaker after it had "kicked out" and had held it closed, and that the jury might find for the plaintiff if they found that this allegation was true.

In 1928, the Supreme Court of Kentucky passed on the question whether closing an automatic circuit breaker after it had "kicked out" was such negligence as to make the company responsible for the electrocution of one who touched the wire after it had been thus closed.[19] The Kentucky case calls attention to

17. The duty to act promptly upon the information afforded by a ground detector was made the basis of liability in Kidd v. Kansas City Light and Power Co., 239 S. W. 584 (1922); Pulsifer v. City of Albany, 226 Mo. App. 529, 47 S. W. (2d) 233 (1932). It was pointed out in these cases that, having no circuit breaker or ground detector, it was the duty of the defendant to check over its wires promptly after a storm.

18. Harker v. So. California Edison Co., 256 Pac. 848 (Cal. App., 1927). The case here presented the issue similarly as to improper groundings of transformers and as to the sizes of fuses to be used to afford adequate protection. In this case an "overload" caused a fire which damaged the plaintiff's plant. (Hearing denied by Supreme Court).

19. Kentucky Utilities Co. v. Woodrum's Adm., 224 Ky. 33, 5 S. W. (2d) 283 (1928). Four men were cutting down a tree. It broke a wire in falling, although they apparently used all reasonable precautions. One of them moved the wire, without harm, due to the kicking out of the circuit breaker. In moving about the tree the father touched this wire and was killed. The sons endeavored to pull him away from the wire. One of them was killed and the other injured. As indicated in supra, note 16, the court stated a very high degree of duty of care as applicable to these cases, but finally held that the defendant was not the cause of the disaster, because it could not foresee that anyone would be hurt. The court has here fallen into the all too common fault of applying the "foreseeability of harm" test for the *existence* of negligence to the question of the limitation of responsibility

the various interests involved in a situation of this sort. Suppose that, after dark, a breaker "kicks out" on a line supplying light and power to many people. Shall the breaker be closed at once, thus restoring service at least up to the point of the break, or shall a town or part of a town be left in darkness until the exact location of the break is discovered and such precautions taken as will preclude anyone's being injured by a broken wire? In the instant case it was held not negligent to close the circuit at once. Three dissenting judges subscribed to the result but put it on the ground of contributory negligence. They protested their outraged sense of justice that an electric company should leave lives imperilled by a broken wire, but were willing to deny recovery in the name of contributory negligence, and seemed to think that anyone who attempts to remove a fallen wire is guilty thereof.[20]

It is hard to say which opinion is the more unsatisfactory. If the dissent wished to bring in causation, as a means of rationalizing its result, that line of argument might have been continued a further step and have dealt with the case in terms of "last clear chance." It might then have been said that the defendant had

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for negligence and has thus taken the whole issue of *fact* into its own hands. Toney v. Interstate Power Co. 180 Iowa 1362, 163 N. W. 394 (1917), where it was held correctly left to the jury whether it was negligent to reclose the circuit breaker.

20. As to whether it is contributory negligence to move a live wire which is broken and endangering traffic on the streets, or other activities of persons rightfully in its vicinity, see Murphy v. Iowa Elec. Co. 206 Iowa 567, 220 N. W. 360 (1928). A highway contractor's employee was attempting to get a fallen telephone wire out of the way, when it made contact with high voltage wires on the same poles. A verdict was directed for the defendant on ground of contributory negligence. But see Abilene Gas & Elec. Co. v. Thomas, 211 S. W. 600 (Tex., 1919), in which a wire was down and touched a barn. Plaintiff's decedent attempted to strike it away with a stick in order to save a horse. The end flew around and struck him. A judgment for plaintiff was affirmed, on the ground that it was negligent not to have ground detectors and circuit breakers, in which case the wire would have been dead. In Sprinkles v. Mo. Public Utilities Co., 183 S. W. 1072 (1916), a power wire sagged and made contact with a light wire. It sagged in turn, touched a guy wire, burned in two, and its ends fell. The town marshal attempted to move the ends out of the way of a pedestrian and was killed. A verdict for the plaintiff was affirmed. See 61 A. L. R., 1028 Anno., on injury to firemen, policemen or other public officials coming in contact with live wires in their effort to protect others. In Workman v. Lincoln Tel. and Tel. Co., 102 Neb. 191, 166 N. W. 550 (1918), a telephone wire broke and made contact with high voltage light wire. Plaintiff's decedent, an experienced electrical worker, attempted to move it with pliers wrapped with insulating tape; the end of wire touched a lantern held in his other hand. Judgment for the plaintiff was affirmed.

the last chance to prevent the accident when its employee decided whether or not to close the circuit. This reasoning, however, would not be valid in those states which recognize the doctrine of last clear chance only where the defendant has discovered the plaintiff's peril. But, after all, why go around Robin Hood's barn to capture the simple point? Was there a duty to leave the circuit open? Was it negligence to close the circuit? In spite of all that has been said to confuse the question, courts determine the duty upon which to predicate negligence cases, by asking whether an ordinarily prudent man *would have foreseen harm* as likely to result from closing the breaker. If these breakers are not to be used to protect against just such contingencies as arose in the Kentucky case, may not one wonder what their use is? As shown in the California case, reclosing a breaker not only creates a potential danger to anyone who may touch the wire, but continues the short circuit at the risk of starting a fire. The operation of a circuit breaker or a ground detector is notice to the electric plant operator that something is wrong and is at least significant in determining the duty of the electric company until the irregularity is located and remedied.

Notice of an untoward situation may likewise come to the company in the form of a direct oral communication, as in the case of *Osborne v. Tennessee Electric Power Co.*[21] In this case a building was on fire very near the defendant's high voltage wires, and flames were reaching the wires. The defendant was notified twice. Instead of turning off the current, the defendant sent a truck with line men, from a distance. They did not reach the scene for an hour. In the meantime a wire burned through and electrocuted a fireman. The court said that it should have been left to the jury to decide whether this was negligence.

> "We do not undertake to announce any hard and fast rule; each case must depend upon its own facts. We do not mean to say that in every instance the defendant should shut off its current upon being advised that its line was being endangered. It is also proper for the jury to take into consideration the means and methods by which the current is shut off, the necessary time it takes and the territory and electrically run plants that would be affected thereby."

21. 158 Tenn. 278, 12 S. W. (2d) 947 (1929); accord, Lutolf v. United Electric Light Co., 184 Mass. 53, 67 N. E. 1025 (1903).

It is submitted that this case involves considerations similar to those in the Kentucky case and that the Tennessee decision is preferable. Indeed, the Kentucky case offers the clearer situation for presenting this issue to the jury.[22]

All too frequently someone using an electric light or appliance in his home or place of work receives a violent charge of electricity and is injured or killed. In cases of this sort the question arises whether an ordinary domestic current of 110 volts is dangerous. If not, as is usually found to be the case, how did a stronger current happen to be in such a place, and whose is the blame?[23] There are few states in which questions of this sort have not reached the appellate courts, and Missouri has its share.

The electric company will not be liable without negligence. In what way is it at fault? Leaving out the possibility of lightning for the moment, how does a high voltage current get into a 110 volt circuit? In the first place, was it due to the negligence of the electric company that the high voltage got beyond the transformer which is supposed to turn out a current of approximately 110 volts? This may be due to a defective transformer, and if so, the company will ordinarily be liable.[24] More frequently it will be due to some accidental contact which permits the current from a high voltage feed line to flow into a house circuit. The problem of discovery of such conditions through inspections, circuit breakers, ground detectors and the like is the same as in connection with other cases already discussed. The generally recognized

22. Illinois Power and Light Corp. v. Hurley, 49 F. (2d) 681 (C. C. A. 8, 1931), indicates that an electric company cannot exonerate itself merely by providing the various mechanical safety devices. To the defendant's argument that the circuit breaker did not show anything wrong, the court states that this merely shows that in this instance the leakage of current, although it started a $250,000 fire, was not sufficient to cause the device to work.

23. If it is clear that the voltage doing the harm is not excessive, the electric company ordinarily will not be liable. Its duty is to deliver 110 volts at the meter. Installations on the customer's side of the meter are not under its control. Solomon v. Moberly Light & Power Co., 303 Mo. 622, 262 S. W. 367 (1924). "But if the defendant negligently permitted 2300 volts to pass into the drop cord it can make no difference in its liability that the laundry company (deceased's employer) assisted by furnishing an improperly insulated drop cord." If both were negligent, both are responsible. Vessels v. Kansas Light and Power Co., 219 S. W. 80 (Mo., 1920).

24. Yarnell v. Mo. Utilities Co., 23 S. W. (2d) 225 (Mo. App., 1929).

high degree of care is imposed on electric companies with respect to this hazard.

In *Vessels v. Kansas City Light & Power Co.*,[25] the Supreme Court said, "The negligent act of defendant was complete when the fatal current was permitted to escape to the secondary wire entering the laundry. There was evidence that these wires were knowingly permitted by defendant to rub against each other from the action of the wind, during a period of at least 10 months."

In *Marrow v. Missouri Gas & Electric Service Co.*,[26] the deceased went to the shower bath in the basement of his home, and was found lying dead on the floor the next morning. He had perhaps taken hold of a drop cord while standing barefoot on a damp concrete floor in such a way that his body would furnish a ground from the drop cord. Evidence was admitted to the effect that a normal house current would not normally be fatal. There was, however, evidence of contact between the secondary or house line and a primary circuit, carrying a dangerously high voltage. This is one of the few cases which discusses the problem raised by fuses. The average person knows that in his home there is a fuse box and that occasionally one of these fuses will burn out and have to be replaced. As is usual in such cases, a part of the defense evidence tended to suggest that a fatal current would have burned out meter, fuses and lights, whereas no such condition could be shown to have happened. This defendant also was equipped with automatic circuit breakers and with ground detectors, recording ammeters, and volt meters, none of which showed any electric disturbance on the night in question. It was shown by the plaintiff that an excessive current will not cause instantaneous melting of fuses, but requires about a half minute, whereas, "in case of an excessive current passing through a human body serving as a contact between a secondary wire and the ground, the surge of electricity would be almost instantaneous, and could or might result in the death of the person serving as the contact without blowing out or injuring the fuses, lamps or meter in the house."[27] The Supreme Court of Missouri, affirming a judgment for the plaintiff, said, "We believe the evidence is sufficiently substantial to establish defen-

25. 219 S. W. 80 (Mo., 1920), cited supra, note 23.
26. 315 Mo. 367, 286 S. W. 106 (1926).
27. Ibid. at 379.

dant's negligence, or at least to justify the submission of that issue to the jury, as one of fact."[28]

INJURIES NOT DUE TO ELECTRIC SHOCK

Not only does the electric light and power business involve duties and liabilities for injuries from electric current, but these companies, in common with telephone and telegraph companies, have responsibilities as to injuries caused by defective structures, such as falling or tipping poles, sagging wires or wires so placed as to cause injuries due to contact not including electric shock, guy wires, and holes prepared to receive poles and not yet filled. All these may, under certain circumstances, create risks which involve harm to others, calling for the decision of courts. There are also harms due to falling light wires or fixtures. Through all this range of fact situations there runs a stream of reference to *res ipsa loquitur,* that ready work-helper of a court which sees a potentially dangerous situation, an injured plaintiff and no clear showing of conduct on the part of the defendant reprehensible enough by other tests or formulas to give the court a basis for sending the case to the jury.

A falling insulator injured the plaintiff in *Hoover v. Ry. Co.,*[29] and it was pointed out that the reasonable time that is allowed an electric company for repair after a storm is of no avail as a defense where the accident is not due to a storm, but to an appliance which negligently has been allowed to fall into disrepair.[30]

28. Union Light, Heat & Power Co. v. Arnston, 157 Fed. 540 (1907), held that an electric light company is under a duty to prevent a dangerous current of electricity from entering a dwelling, it being the *current* which was generated under the exclusive control of defendant which caused the injury and not the lamps and wires, which, disconnected from the live current, would be harmless. McAllister v. Pryor, 187 N. C. 832, 123 S. E. 92 (1924), it was held that evidence, showing that one had used an electric iron and received a severe shock, indicating an excessive voltage, is enough to take to the jury the question of the negligence of the defendant, as one engaged in distributing electric current.

29. 159 Mo. App. 416, 140 S. W. 321 (1911).

30. In Gibbs v. Poplar Bluff Light & Power Co., 142 Mo. App. 19, 125 S. W. 840 (1910), the plaintiff was injured by a falling reflector from an arc light which was shaken loose by the vibration of the pole when defendant's employee started to climb. Plaintiff was allowed to go to the jury without showing what caused the reflector to fall. The falling object may be a "hot wire," in which case the scope of the duty and the nature of its violation presents no different problem than that of any other falling body. The probability is, of course, that through grounding there may be greater harm. Bloom v. Union Elec. Light and Power Co., 251 S. W. 411 (Mo. App., 1923).

So clearly recognized is the danger of wires sagging over passageways, whether charged with high voltage currents or not, that statutes or ordinances usually exist regulating the heights at which they must be placed. If one walking or driving along a highway is caught under the chin by a sagging wire, injury is almost inevitable, and, as might be expected, the defendant usually is made responsible.[31] The defendant's lack of actual notice that the wire has sagged is met by the courts with a "duty of frequent inspection."[32]

Contributory negligence in encountering the wire will go to the jury with the rest of the circumstances. In such a case it has been held not an act of contributory negligence to cross the street where there is no cross walk.[33] This formula, as applied to one who encounters a wire at such a point, means that even though one does cross the street there, he is nevertheless entitled to do so without being subjected to this particular risk.

The defensive argument that the plaintiff is a tresspasser, which is so often resorted to by electric companies, has been invoked even in the case of a sagging wire over a public roadway. In a Missouri case,[34] the defendant's high voltage wire was strung across the roadway among a number of other wires of similar appearance. The plaintiff was moving a house without a permit, and was injured in attempting to raise the wires for the passage of the house. The court recognized that one has a right to be free from such a risk and, finding that houses were sometimes moved and that this general practice was known to the defendants, was able to satisfy itself that the conventional foreseeability test of negligence was met, and, using the foreseeability test again to answer the defendant's proximate cause argument, permitted a recovery. This application of the proximate cause formula was also made to take care of the argument that the plaintiff had failed to secure a house moving permit. The

31. Sinclair v. Columbia Telephone Co. 195 S. W. 558 (Mo. App., 1917). A wire crossing over public road hung so low that it caught the top of the buggy. This frightened the horse; the buggy was overturned and the plaintiff thrown out.

32. Burr v. Limestone Tel. Co., 97 W. Va. 508, 125 S. E. 335 (1924); Weaver v. Dawson County Tel. Co., 82 Neb. 696, 118 N. W. 650 (1908); Interstate Power Co. v. Thomas, 51 F. (2d) 964 (C. C. A. 8, 1931).

33. So. Bell Tel. & Tel. Co. v. Howell, 124 Ga. 1050, 53 S. E. 577 (1906).

34. Blackburn v. Southwest Mo. Ry. Co., 180 Mo. App. 548, 167 S. W. 457 (1914). This case is noted in (1927) 15 Cal. L. Rev. 455.

absence of the permit was not the proximate cause of the injury. The court added that if the plaintiff was a trespasser in using the streets for house moving, he was only technically so.

Poles not infrequently fall, and in most instances it would seem not unreasonable that the owner should be responsible for resulting injuries.[35]

The dangers of the foreseeability formula as a test of causation are illustrated in a North Carolina case[36] involving a falling pole. This case, it is submitted, reached an incorrect result. The defendant's negligence, about which there seems to be no question, resulted in one of its poles falling across a road. A traveller passing along attempted to prop it up with a stick. As the plaintiff's intestate was passing that point the pole fell from its temporary support and struck her upon the head. A verdict for the plaintiff was set aside on the theory that the injury was due, as a matter of law, to an independent intervening cause which was not foreseeable. A long opinion dealing with proximate cause may mean that, due to factors not frankly discussed, this court was not of the opinion that this loss should be shifted to the defendant telephone company, or it may mean that the court's attention was diverted from its function of determining the duty issue by the causation argument.

INDUCTION AND ELECTROLYSIS

Another harm which may arise in the operation of electrical power transmission is that of inductive interference with other devices using lower tension currents. A telephone line, radio apparatus, or other delicate electrical device may be in operation in a particular place. A high power transmission line is set up nearby, and inductive interference and the escape of grounded current interfere with the more delicate adjustments of the telephone, radio or other device. It seems to be settled that the power

35. Meehan v. Union Electric Light and Power Co., 252 Mo. 609, 161 S. W. 825 (1913). A rope was strung on recently set poles to keep back a large crowd of people who were watching a parade. A pole gave way because the cement in which it was set had not hardened. The decision was for the defendant on the ground that there was no negligence as a matter of law. This is probably an acceptable judgment, but the case is hard to reconcile with many generalizations that indicate that, by the foreseeability of harm test for the existence of negligence, the defendant need not foresee the particular kind of harm which resulted. See, for example, Hudson v. Union Electric Light and Power Co., 234 S. W. 869 (Mo. App., 1921).

36. Harton v. Forest City Tel. Co., 146 N. C. 429, 59 S. E. 1022 (1907).

company is not liable. Although the doctrine of *Fletcher v. Rylands*[37] was at once invoked when this problem first arose in England, it was not applied. The leading English case gave as the reason for not applying *Fletcher v. Rylands* to escaping electricity, that the plaintiff could not, by reason of the special requirements, of his business, impose upon the defendant the burden of so-called "liability without fault."[38]

Relief was denied against the same type of injury in a recent American case[39] in which the plaintiff urged the idea of nuisance as justifying the court finding for him. There is no question

37. L. R. 1 Ex. (1866), L. R. 3 H. L. 330 (1868). This famous doctrine as stated by Blackburn, J. 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 at his peril . . . etc." The doctrine has been recognized in Missouri and was applied to explosives in French v. Manufacturing Co., 173 Mo. App. 220, 158 S. W. 723 (1913). In addition to quoting with approval from Fletcher v. Rylands the court said: "We hold that where plaintiff alleges and proves that defendant stored a large quantity of nitroglycerine on its premises the very act of keeping it there in dangerous quantities is a nuisance per se so far as it effects or damages those within the danger zone." Earlier Missouri cases accepting the doctrine are referred to.

38. Eastern and South African Telegraph Co. v. Cape Town Tramway Co., L. R. App. C. 381 (1902); and in America, the Cincinnati Ry. v. City and Suburban Tel. Ass'n, 48 Ohio St. 390, 27 N. E. 890 (1891). In both cases it was found that the telephone company could protect itself by a return metallic circuit (instead of a grounded circuit) against interference complained of.

39. Postal Telegraph-Cable Co. v. Pac. Gas and Electric Co., 202 Cal. 382, 260 Pac. 1101 (1927). Two dissents consider this a nuisance within the statutory definition, sec. 3479 of Cal. Civil Code. A note (1928) 16 Cal. L. Rev. 331, approves the dissent on the nuisance theory and suggests priority in time as determining priority in right, and also suggests the operation of other factors than legalistic doctrines as pertinent: "Perhaps the relative importance of power service and telegraph service influences a court to protect the power company, because it feels that it serves more people and satisfies greater economic needs." It is submitted this hypothesis will not do. The interests are too nearly balanced to be the subject of choice upon such considerations in a judicial act. The court will be driven to resort to some of the traditional formulas for a rationale for its decision. In any event the disposition of the case under the circumstances involved was probably as satisfactory as could well be made in point of conflicting social interests or of justice as between the parties. The court affirmed an order of the State Railroad Commission for the relocation of the plaintiff's line at a distance outside the range of inductive lines of force from defendant's wires, the costs of which was to borne jointly by the two companies. Yamhill Co. Mutual Telephone Co. v. Yamhill Elec. Co., 111 Or. 57, 224 Pac. 1081 (1924), held that defendant electric company was liable for interference with the plaintiff's telephone caused by ground conduction, but it was said that there would be liability without negligence in cases where the power current escaped by induction. See 23 A. L. R. 1257 and 33 A. L. R. 380 for a collection of the few authorities available.

of negligence in the ordinary sense, as there is no element of fault or culpability in carrying on a legitimate business for a justifiable purpose. Thus, the result of these cases would seem to be satisfactory.

Electric companies have also been sued for harms resulting from the electrolysis of underground water and gas pipes because of grounded currents. The relief usually asked for and allowed in such cases is in equity, chiefly by way of injunction.[40]

RES IPSA LOQUITUR

As might be expected, the victim of the activities of an electric light and power company, whether he suffers shock or is struck by something falling from a pole, seldom knows or can obtain information as to just what conditions or possible acts or omissions by the electric company caused the injury. The usual circumstances being such, it is to be expected, as the Missouri Supreme Court said in *Glasco Electric Co. v. Union Electric Co.*[41] that:

> "The *res ipsa loquitur* doctrine finds frequent application in cases against electric companies, and when in such cases the petition charges general negligence only and the facts and circumstances show that, without fault on the part of the plaintiff, the injury or damage complained of was caused by the escape of electricity from wires under the exclusive control and managament of such company and the occurrence is such as does not ordinarily happen if those having such control and management use proper care, a presumption or inference of negligence or want of proper care on the part of defendant electric company arises and the weight of the inference as well as the weight of such explanation, if any, which the defendant makes, is for the jury."[42]

The appropriateness of *res ipsa loquitur* in electricity cases is recognized in most jurisdiction and is, indeed, in a very consider-

40. 20 C. J. 363, note 74a. Peoria Waterworks v. Peoria Co., 181 Fed. 990 (C. C. Ill., 1910). The writer has found no Missouri cases on harms due to either induction or electrolysis.

41. 332 Mo. 1079, 61 S. W. (2d) 955 (1933).

42. For a general discussion of the scope, effect and applicability of the doctrine, see McCloskey v. Koplar, 329 Mo. 527, 46 S. W. (2d) 557 (1932). In 50 Mo. Bull. L. S. 63, the elements of *res ipsa loquitur* are started as follows: "The res ipsa loquitur doctrine applies when the following factors are present: (1) Occurences, resulting in an injury, which do not often happen if due care is used; (2) the instrumentalities are under the control of the defendant; and, (3) defendant possesses superior knowledge or means of information concerning the occurrence."

able proportion of these cases, the plaintiff's most potent weapon. It has been employed successfully in connection with practically all of the various types of injury resulting from electricity. In *Roster v. Interstate Power Company*,[43] the deceased touched an electric light switch in his home and was instantly killed. The Supreme Court of South Dakota, affirming the trial court in overruling the defendant's demurrer, said that: "Plaintiff could not be expected to know the specific acts or omissions which caused the negligence—what may have caused the passage of an excessive current over the secondary wires into the dwelling is peculiarly within the knowledge of the defendant company." The same position has been stated by the Texas courts:[44]

> "All that an average person could know and therefore all that he would be required to allege was that the injury was the result of an excessive and dangerous current, and he would know this only because experience has taught that a current such as is commonly used in lighting houses is not dangerous, and that in such case there is no danger in attaching an electric iron to a socket. When injury occurs in such use, of course, there is a defect somewhere. Where and what it is, is known only to experts in the use and management of electricity."

Illustrations might be multiplied. The Iowa Supreme Court went so far as to say that where a person is found dead in a house under circumstances which permit the inference of electric shock as a cause, the jury may find that it was due to negligence of the electric company.[45]

In Missouri the full power of this doctrine of *res ipsa loquitur* is limited by the rule that a plaintiff who alleges specific acts of negligence is not permitted to invoke the doctrine. However, the court still retains control over this question in any case, in deciding whether the petition does charge specific acts of negligence. The writer fails to find sufficient consistency or uniform-

43. 58 S. D. 521, 237 N. W. 738 (1931). The house current was supposedly 110 volts stepped down from a 2200 volt feed line. The plaintiff alleged that the defendant negligently permitted the heavier current to enter the Roster home and to cause the instant death of the plaintiff's husband.

44. Texas Power and Light Co. v. Bristow, 213 S. W. 702 (Tex. Civ. App., 1919).

45. Welsch v. Charles Frusch Light and Power Co., 197 Ia. 1012, 193 N. W. 427 (1923).

ity in the interpretation of petitions as to the application of this rule, in the reported cases, to give the pleader very substantial aid.

In *Saunders v. City of Carthage*,[46] the Supreme Court reviews a number of earlier Missouri decisions involving the point and attempts to generalize. In several cases the plaintiff had alleged that the defendant permitted high tension current to pass over certain wires. In commenting on this form of allegation, Commissioner Hyde stated:

> "The word permit implies knowledge and consent. It means to allow after notice or knowledge. Hence it means the same thing as alleging that defendant permitted the condition to exist when it knew or, by the exercise of due care required of it, could have known of it in time to have remedied it, before the plaintiff's son came in contact with it."

Res ipsa loquitur is not confined in its application to cases of shock. It is traditionally most appropriate in cases of injury due to falling objects[47] and has been applied to cases of shock against a telephone company as well as against electric light companies.[48]

The only general observation which would seem to be justified from a study of the functioning of the doctrine of *res ipsa loquitur* in the Missouri cases, would seem to be that it is to the plaintiff's advantage to keep allegations of specific acts of negligence out of his petition so far as possible.

As indicating the power of this doctrine in just such cases as those involving harm due to electricity, a commentator makes an interesting comment:[49]

> "In some cases involving extra hazardous activity, the courts, being reluctant to defy the fault rule of liability, have raised a presumption in the plaintiff's favor and required the defendant to sustain the burden of proof in the rebuttal.

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46. 330 Mo. 844, 51 S. W. (2d) 529 (1932).

47. Kuether v. Kansas City Light and Power Co., 220 Mo. App. 452, 276 S. W. 105 (1925); Bloom v. Union Electric Light and Power Co., 251 S. W. 411 (Mo. App., 1923). That *res ipsa loquitur* applies to falling objects generally, see Demun Estate Corp. v. Frankfort Ins. Co., 196 Mo. App. 17, 187 S. W. 1124 (1916); Kean v. Smith Piano Co., 206 Mo. App. 170, 227 S. W. 1091 (1921).

48. Joyce v. Mo. and Kan. Telephone Co., 211 S. W. 900 (Mo. App., 1918). But see Inman v. Home Telephone Co., 105 Wash. 234, 177 Pac. 670 (1919).

49. Note, 3 Univ. of Chicago L. Rev. 126 (1935).

> Since it is frequently impossible for the defendant to extricate himself from this situation, the courts really inflict absolute liability. Thus by a circuitous method the case is taken out of the field of evidence and into the substantive law of torts."

TRESPASSERS

It has been noted that injury from electric shock is usually due to electric currents in places where they do not belong, and that in such cases the plaintiff may well be able to show where he was and what happened to him and rely on the doctrine of *res ipsa loquitur*. On the other hand, injured persons may be where they do not belong when they encounter dangerous currents and hence be outside the sphere of any duty owed to them by the electric company. What bearing does a trespass by the injured person have upon the outcome of such a case? Who is a trespasser in this connection? These cases should be considered as belonging to at least three groups:

Adult trespassers on the electric company's own premises or structures. As to this class of persons the law is usually administered through the formulas employed in defining the duty of land owners to trespassers. Sometimes it becomes necessary to decide whether a particular person is a trespasser. For example, a telephone lineman, who must necessarily climb a pole carrying high voltage wires or carry a telephone wire over a light or power line in doing his own work, is not a trespasser, and there is a duty to anticipate his possible presence and to observe such precautions as maintaining insulation in proper condition. The injured party's status is usually a question of fact.[50]

Infant trespassers. If the trespassers happen to be children, the local developments of the turntable doctrine will be important

50. Hill v. Union Electric Light & Power Co., 260 Mo. 43, 169 S. W. 345 (1914); Downs v. Andrews, 145 Mo. App. 173, 130 S. W. 472 (1910). But where a lineman uses the poles of another company for convenience in stringing lines without the owner's knowledge, actual or constructive, this does not impose upon the owner of the poles any duty toward such lineman. Mahaney v. City of Independence, 183 S. W. 1117 (Mo. App. 1916). In Smith v. Southwest Mo. Ry. Co., 333 Mo. 314, 62 S. W. (2d) 761 (1933), the plaintiff was burned by the arcing of current from a defective apparatus in a substation where he was a licensee. The substation belonged to and was maintained by an electric railway. It was held that the power company from which current was obtained and which was joined as defendant was not liable, but the court remarked that, "knowledge of the defective and dangerous condition of a customer's appliance will charge even a supplier of current with liability where current is supplied thereafter to such dangerous and defective appliance." However, the supplier was under no duty to inspect the customer's apparatus.

if not decisive. The infant trespasser, attractive nuisance, or turntable doctrine, as it has variously been designated, is known to Missouri jurisprudence, but, as the Supreme Court has stated, it has been conservatively applied.[51]

On the whole, the Missouri courts, in cases involving actions for the death or injury to children trespassing upon the property of electric producers and distributors, have been unwilling to shift the loss on the defendant.[52]

Trespassers upon the property of others over which the defendant's wires are strung, or upon which they fall. Where the person injured, whether child or adult, is not a trespasser as against the defendant electric company, but both the injured person and the wire are on the land of a third party, the defense of trespass may not be invoked. Missouri courts have clearly recognized and repeatedly asserted this doctrine.[53]

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51. O'Hara v. Gas Light Co., 244 Mo. 395, 148 S. W. 844 (1912).

52. See McCleary, The Liability of a Possessor of Land in Missouri to Persons Injured While on the Land (1936) 1 Mo. L. Rev. 45-50, which contains a more extended consideration of the Missouri development of the "attractive nuisance doctrine" than is apposite here and which includes a collection of the authorities. Typical among the cases involving electricity are: Blavatt v. Union Electric Light and Power Co., 335 Mo. 151, 71 S. W. (2d) 736 (1934), where a boy climbed a wall surrounding a transformer in order to retrieve a ball; Howard v. St. Joseph Transmission Co., 316 Mo. 317, 289 S. W. 597 (1926), where boy "shinned" up electric Company's pole to disentangle fish line; and State ex rel. Kansas City Light and Power Co. v. Trimble, 315 Mo. 32, 285 S. W. 455 (1926), another case in which a boy climbed company's light pole.

In a foot note in his case book, *The Judicial Process in Tort Cases*, Dean Leon Green has summarized at page 521 the scope of the duty of electric companies to children as follows: "The responsibilities of power companies for children who are injured by coming into contact with wires, etc., on the premises of the company is usually placed upon the turntable or attractive nuisance doctrine. But the doctrine is here extended in three particulars: (1) The negligence formula employed is normally expressed as requiring a "high degree or care" or "the highest degree of care," etc. (2) The "anticipation" required is easily satisfied. (3) The age at which the child will be held guilty of contributory negligence is set at a higher limit."

53. Godfrey v. Kansas City Light and Power Co., 213 Mo. App. 139, 247 S. W. 451 (1922) presented a case in which an uninsulated wire passed through the branches of a tree located on premises frequently visited by children. The court said that "assuming plaintiff's son was a trespasser . . . he was not a trespasser as to the defendant." Aff'd 299 Mo. 472, 253 S. W. 233 (1923). See, also, Shannon v. Kansas City Light & Power Co., 315 Mo. 1136, 287 S. W. 1031 (1926), where a boy contacted sagging wires in the branches of a tree. In Beckwith v. City or Malden, 212 Mo. App. 488, 253 S. W. 17 (1923), the court said: "One who stretches wires charged with electricity through the branches of a tree which children can climb, must anticipate the presence of children in such tree and is negligent in permitting its wires there to remain uninsulated after knowledge that insula-

After some vacillation the cases seem to be coming around to the conclusion that although one may be a trespasser as to the owner of the premises, that does not make him one as to an electric company which might, except for the technical trespass, be liable for his injury or death.

CONCLUSION

This paper has in no sense been intended as a digest of all the Missouri cases involving tort actions for death or personal injury due to electricity and falling wires. The object in view has been rather to select a few of them as illustrative. The cases commented upon in the text were chosen in some instances because they present typical fact-problems, representative of a large number of similar cases, and in other instances, because of striking language in the opinion which seemed particularly well to illustrate articulation of the judicial process. Many other cases dealing with different circumstances of injury involving electricity have been omitted, as has the whole matter of contributory negligence. Many of the cases reviewed herein deal with the plaintiff's conduct, and it may be remarked in passing that in very few of them did the court find contributory negligence as a matter of law, that problem usually being left to the jury.

The field is so large that not every ear of corn can be examined. It becomes necessary to attempt a determination of quality by sampling. Samples have been selected and some analysis attempted. Have we learned anything of the judicial process in these cases? Is it possible to articulate from these cases a skeleton of the process by which they are decided, and to recreate the body of social phenomena which produced them? Even though we cannot trace a pattern of decision, we have at least seen presented before the courts a slice of life in twentieth century civilization. We have seen that it is very different from life in feudal England or from that Victorian England within which the formulas of tort liability for negligence were written. The fundamental formulas were given shape in the process of deciding the cases presented to the courts of that day, as they arose out of the life of that period, industrially a much more simple era. In modern tort cases, we have civilization presented as a perilous

tion is off." There are numerous other Missouri cases to the same effect. This rule is followed almost uniformly. For an extensive collection of cases from many jurisdictions, see Note, 56 A. L. R. 1021 (1928).

condition. Accidents are of frequent occurrence: bursting water pipes, leaking gas followed by explosions or asphyxiation, electrocution, automobile collisions, et cetera. We have seen life a dangerous adventure among strange new machines: this Frankenstein man has created. Have the courts shown us that they have power to tame it? Can they hold the mechanical age accountable for the injuries it inflicts? Are they attempting to do so?

Have the courts as they move from one new problem to another bound themselves in the toils of words, definitions, and doctrines, or have they cast off the older conceptions where they hampered the free administration of justice? Are cases being decided by men who see beyond the rules and deal with human relations in society, or are the courts but countinghouses where the interests and responsibilities of men are measured by the yardstocks of legal formula? Can we not see at least here and there, the human touch of factors outside the books of the law.

If one looks for these factors, occasionally they may be discovered. If they can be found even occasionally, is it not apparent that a judgment can no more be made by the yardstick application of a mere formula of words than a sunset can be weighed or measured, or a wave cast in a mould?

To attempt to reduce the findings to a conclusion:

1. A vast number of negligence actions have been brought against utilities companies.

2. There is a tendency to find a rationale for sending the question of legal responsibility to the jury.

3. There is little real evidence for or against specific acts of negligence on the part of defendants in a great proportion of these cases.

4. The *res ipsa loquitur* formula is very extensively resorted to and approved by the courts.

5. The "reasonable probability of harm" standard is employed in such a way as to make it the duty of the operator to exercise the highest degree of care and to use the best and latest equipment in the way of safety devices.

6. All this does tend to put the risk of harm upon the defendants, who do enjoy a widespread source of revenue, and hence can distribute the loss. But a recognition of this element is very seldom, if ever, expressed in cases of this sort.