dence Plantations," in which a picture of Mr. Corliss appears, which is a reprint from the Heald photograph, now in controversy. His picture also was printed in Harper's Weekly of March 3, 1888, and in the Scientific American of June 2, 1888. I am aware that Mrs. Corliss says that she wrote a letter, at the request of her husband, to the Messrs. Reid, forbidding the insertion of the picture in the "Providence Plantations," and that she also declares that the publication in the Harper's Weekly and Scientific American were authorized by the family; but, whatever may be the position now taken by the plaintiffs, there is no substantial evidence that Mr. Corliss, in his lifetime, ever prohibited the reproduction and circulation of his picture.

Upon the facts as now presented, and for the reasons given, I am of opinion that the defendants have a right to insert in the biographical sketch of Mr. Corliss published by them a print of his photograph, and the motion to dissolve the injunction is granted. Motion granted

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BARBER ASPHALT PAVING CO. v. CITY OF HARRISBURG.

(Circuit Court of Appeals, Third Circuit. November 13, 1894.)

CITIES—PAVING CONTRACTS—PAYMENT IN INVALID ASSESSMENTS.

Where a city having authority to pave its streets and pay therefor from its treasury, and supposing that it had authority also to assess the cost on abutting property and transfer the assessments in payment for the work, contracts with a person, who also supposed it had such authority in regard to assessments, to do such paving, and to pay him by assigning the assessments to him, the city, not having in fact any authority to make the assessments, will be liable on the contract for the work, though it is stipulated that the assessments shall be accepted in payment, and that the city shall not be otherwise liable under the contract, whether the assessments are collectible or not. 62 Fed. 565, reversed.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Action by the Barber Asphalt Paving Company against the city of Harrisburg on a contract for street paving. Defendant had judgment (62 Fed. 565), and plaintiff brings error. Reversed.

Charles H. Bergner and A. S. Worthington, for plaintiff in error.

William H. Middleton, for defendant in error.

Before ACHESON, Circuit Judge, and BUTLER and WALES, District Judges.

BUTLER, District Judge. The plaintiff, a citizen of West Virginia, and the defendant, of Pennsylvania, entered into a contract on August 13, 1887, which contained the following provisions:

"The said The Barber Asphalt Paving Company to furnish all tools, implements, materials and labor, and complete to the satisfaction of the city engineer of the city of Harrisburg all such work as may be requisite to pave and curb Market street from the eastern curb line of Front street to the Pennsylvania Railroad; to begin the work under this contract upon five days' notice from the city engineer and complete the same within ninety days from the com-

mencement of said work. The pavement to be laid as aforesaid under this contract to consist of a cement concrete base at least six inches thick, covered with a wearing surface of asphaltum at least two and a half inches thick; the curbing to be of granite; the materials to be of the very best kind obtainable, and the pavement to be laid and all the work to be done thereon in accordance with the plans and specifications prepared by the city engineer, and hereto attached, which plans and specifications are hereby made part of this contract.

"And the city of Harrisburg on its part, will pay to the said the Barber Asphalt Paving Company in accordance with the specifications and out of the assessments made and levied for the purpose, the following prices: For each and every square yard of pavement laid under this contract, the sum of two dollars and seventy-five cents ($2.75), for each and every lineal foot of granite curbing the sum of one dollar and fifty cents, ($1.50), but only upon the measurements of the city engineer, and at such intervals and in such installments as he may determine.

"It is also understood and agreed that the payments aforesaid provided for shall be paid as follows: First, out of the amount of the assessments paid into the city treasury by the property owners, and when that fund is exhausted, then the city of Harrisburg will assign to the said the Barber Asphalt Paving Company, the municipal claims assessed and levied upon the properties abutting on and along the said Market street between the points above mentioned, or mark the same of record to the use of the said company, and also permit the use of the corporate name of the said city in any legal proceedings necessary or proper to enforce the collection of the said assessments.

"It is also understood and agreed that the said company shall accept the said assessments in payment of the amount due it under this contract, and the city shall not be otherwise liable under this contract whether the said assessments are collectible or not."

The plaintiff performed its part of the contract, and received on account $13,470.59, paid from assessments, leaving $21,729.92 of the contract price unsatisfied.

At the date of the contract the defendant had authority to pave its streets, and pay for the same from its treasury. It believed it had authority also to assess the cost of such paving on abutting properties, and transfer the obligations thus created in payment for the work. The plaintiff had no reason to doubt the correctness of this belief. The legislature by an act of May 24, 1887, had provided for such assessments. The supreme court of the state, however, after the work had been completed declared the act invalid. Shoemaker v. Harrisburg, 122 Pa. St. 285, 16 Atl. 366; Berghaus v. Harrisburg, 122 Pa. St. 289, 16 Atl. 365; Ayers' Appeal, 122 Pa. St. 266, 16 Atl. 356. The defendant went through the form of making assessments; and the property holders paid $13,470.59, before the invalidity of the statute was discovered. They refused, however, to pay more; and, the defendant denying liability for the balance due under the contract, this suit was commenced to recover it.

On demurrer filed to the plaintiff's statement the circuit court rendered judgment for the defendant; whereupon the plaintiff appealed, and assigned this action of the court as error.

Is the defendant liable? The suit is on the contract, and the liability must be found in it, if at all.

As we have seen the defendant had power to contract for paving its streets, at the cost of its treasury. It did not however, so contract, in terms. Is it liable to pay from this source in conse-

quence of the terms used and the facts stated? It undertook to pay the price specified by assessments, and the plaintiff agreed to accept these in discharge of its claim, adding that "the city shall not be otherwise liable whether the assessments be collectible or not." Omitting the language just quoted there could be no doubt of the defendant's liability. The case would be identical, in all respects, with Hitchcock v. Galveston, 96 U. S. 341. The language quoted does not however, we think, add anything to the force or effect of that which precedes it. It simply expresses what would be implied in its absence. The agreement to accept the assessments in payment relieved the city from liability to pay otherwise. By it the plaintiff assumed the risk of collecting. If the defendant, in such case, had made and transferred the contemplated assessments, it would have discharged its entire obligation; just as it would in the present case. This, however, it has not done. Its attempt to do it failed; its acts in this respect were a nullity. It is immaterial that the failure resulted from want of authority—as it would be if it resulted from any other cause beyond its control. It undertook, unconditionally, to make and transfer assessments, and its failure is a breach of the contract. To say its obligation is discharged by a vain attempt to make them; that the plaintiff is bound to accept useless forms of assessments, is unreasonable. The parties contemplated valid charges on the property. The term "*assessment*" clearly implies this; nothing short of a lawful assessment—one capable of enforcement, satisfies it. It was such assessments the plaintiff agreed to accept, and assumed the risk of collecting. The parties were mutually mistaken respecting the authority to pay in the special manner designated; but this does not relieve the defendant from its obligation to pay.

If anything is wanting to render this construction clearer, it may be found in the fact that the language involved is taken, word for word, from the statute, and must necessarily signify here what it does there. There the term "assessment" signifies, and can only signify a proceeding which creates a charge on the property specified. The statute first provides for this proceeding and charge, and then for its transfer to the contractor. It is *this charge* which is to be transferred, and which the contractor is to assume the risk of collecting. There is always some risk attending such collections. Prior liens, or other causes, may render the property insufficient to pay. And this only is the risk the statute, and the contract made under it, contemplated.

The defendant having failed to make the required assessments is in default upon its contract, and must make reparation by paying the consequent loss. There is no hardship in it, and if there was it would afford no justification or excuse for shifting it to the plaintiff. The defendant has received full value for what he is required to pay; and if the contract admitted of another construction we would strongly incline to the one adopted, because it is not only consistent with the intention of the parties, but avoids the great injustice of allowing the defendant to hold and enjoy the plaintiff's property without paying for it.

There is abundant authority for this construction. Hitchcock v. Galveston, 96 U. S. 341, is in point. The city contracted with Hitchcock to do certain work upon its streets, for which he was to accept its bonds in payment. It had, however, no authority to issue the bonds, and, discovering this while the work was in progress, stopped it and declined to pay for what was done, on the ground that the contractor had bound himself to depend upon this source of payment alone. The court, deciding that the contract contemplated and required valid bonds, and that the city had failed to furnish such, held the contract broken, and the city liable to pay from its treasury. In principle this case is not distinguishable from the one before us. The court says:

"It is enough that the city council had power to enter into the contract for the improvement, that such a contract was made, that the plaintiff has proceeded to furnish materials and do the work, as well as assume liabilities, that the city has received and now enjoys the benefit of what he has done and furnished; that for these things the city promises to pay; and that after having received the benefit of the contract the city has broken its promise. It matters not that the promise was to pay in a manner not authorized by law. If the payment cannot be made in bonds because their issue is ultra vires it would be sanctioning rank injustice to hold that payment need not be made at all."

White v. Snell, 5 Pick. 425; Hussey v. Sibley, 66 Me. 192; Miller v. Milwaukee, 14 Wis. 705; Bill v. City of Denver, 29 Fed. 344,—involved the same question, and were similarly decided. In Chicago v. People, 56 Ill. 327; Maher v. Chicago, 38 Ill. 272; Louisville v. Hyatt, 5 B. Mon. 200; Fisher v. St. Louis, 44 Mo. 482; and Scofield v. City of Council Bluffs, 68 Iowa, 695, 28 N. W. 20,—the contractor distinctly agreed to look to assessments alone for payment; and yet the municipalities, having no authority to make them, were held liable to pay otherwise.

The numerous authorities cited by the defendant are not inconsistent with this construction. Peake v. New Orleans, 139 U. S. 342, 11 Sup. Ct. 541, is based upon an essentially different state of facts. The city was not a party to the contract sued on, and in no wise responsible for it. The work was done under a scheme devised by the state legislature, and under a contract with officers designated by it, for the drainage of swamp lands, (a part only of which was within the city limits) for the benefit, primarily, of its owners. A careful examination of this case will show that it rests exclusively on these facts—though the last paragraph of the syllabus, read alone, would justify a different conclusion.

Horter v. Philadelphia, 13 Wkly. Notes Cas. 40, and Dickinson v. Philadelphia, 14 Wkly. Notes Cas. 367, as we understand them, rest on the same principle. In the first the improvement was made under the state statute of 1855, which provides that the cost of such work shall be borne by adjoining property holders. There was no authority, as it seems, to put it on the city. While the opinion of the court, and report of the case, are very brief, the decision appears to rest on this ground. If it were otherwise the case would be in direct conflict with Chicago v. People, 56 Ill. 327. In Dickinson v. Philadelphia, 14 Wkly. Notes Cas. 367, the city appears to have had no connec-

tion whatever with the work. The statute under which it was done designated an officer to do it, empowering him to make contracts and collect money to pay the cost. That he held the office of city commissioner of highways is immaterial; he was the agent of the state in discharging his duties under the statute. Here again the opinion of the court is very brief, and the report of the case so meager, that it was necessary to examine the records to understand what was decided—which we found to be no more than just stated.

The numerous other cases cited are equally inapplicable. In Belleview v. Hohn, 82 Ky. 1, the municipality was without authority to pay except by assessments on adjoining properties. Saxton v. St. Josephs, 60 Mo. 153, rests on the city's want of power to contract as it did. Casey v. Leavenworth, 17 Kan. 198, was decided on the fact that the city had kept its contract, by collecting and applying the assessments named, with reasonable vigilance. Newman v. Sylvester, 42 Ind. 106, was a suit against individuals, and is inapplicable to the facts involved here. Other cases cited may be distinguished as easily.

The judgment is therefor reversed, and the case remanded to the circuit court for further proceedings.

WESTERN UNION TEL. CO. v. THORN.

(Circuit Court of Appeals, Third Circuit. November 22, 1894.)

1. TELEGRAPH COMPANIES—INJURIES BY BROKEN WIRE IN CONTACT WITH ELECTRIC WIRE—EVIDENCE.
   In an action against a telegraph company for injuries to a boy 10 years old, it appeared that the boy took hold of a broken call wire hanging from the crossbar on one of defendant's poles, and received a severe electric shock; that there was an electric light wire on the pole, below the crossbar; that the electric light plant was not owned by defendant; and that soon after the accident the broken wire was repaired. *Held*, that evidence was admissible that nine months after the accident there was no guard or dead wire between the call wire and the electric light wire, as was usual in such cases, and that the call wire was then defective by reason of long use and rust.
2. SAME—NEGLIGENCE—PROXIMATE CAUSE.
   There was evidence that the call wire had become weakened by long exposure, and that it had been mended and patched in several places, so that it was liable to be broken from any slight cause, and that there was no guard or dead wire to prevent its falling across the electric wire and becoming dangerously charged. *Held*, that the questions of negligence and of proximate cause were properly left to the jury.
3. SAME.
   Where it was certain that plaintiff's injuries were the result of the contact of the call wire and the electric wire, it was immaterial whether the contact was at the place of the accident or elsewhere, if such contact was caused by defendant's negligence.
4. APPEAL—REVIEW—OBJECTIONS WAIVED.
   Objection to the denial of defendant's motion for nonsuit, made at the close of plaintiff's evidence, is waived by the subsequent introduction of evidence by defendant.

In Error to the Circuit Court of the United States for the District of New Jersey.

Action by Merritt Thorn, Jr., by his next friend, Merritt Thorn, Sr., against the Western Union Telegraph Company, for personal injuries caused by defendant's negligence. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Rush Taggart and Edw. H. Duryee, for plaintiff in error.
John W. Westcott, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and WALES, District Judge.

WALES, District Judge. This was an action by Merritt Thorn, Jr., by his next friend, Merritt Thorn, Sr., against the Western Union Telegraph Company, to recover damages for injuries received by the plaintiff, and alleged to have been caused by the negligence of the defendant. The action was originally brought in a court of New Jersey, and was removed by the defendant to the United States circuit court. The evidence was that on the 17th day of November, 1891, at about 4 p. m., the plaintiff, then aged between 10 and 11 years, was walking along Delaware avenue, in Camden, N. J., carrying a bundle of slats, and, seeing a telegraph wire hanging down between two poles, attempted to break off a piece for the purpose of tying the slats together, when he received a strong electric shock, which threw him to the ground. Being unable to relax his hold on the wire, his cries for help brought to his aid—First, Mr. Eckenrode, who, in endeavoring to release the boy, received a shock which "drew" him against a fence some seven or eight feet distant; and, second, Mr. Hatch, who, almost at the same time, came running from the opposite side of the street with an axe, and, cutting the wire, released the boy from his perilous situation. In the few seconds which had elapsed from the boy's first touching the wire, it had burned deeply into his hand. The plaintiff was seriously, if not permanently, injured by the result of the accident, before which he had been a healthy, strong, and unusually bright lad. His right hand is now badly, and perhaps incurably, crippled, his hearing and memory are impaired, and there is a general loss of nervous power. Thus far the plaintiff's testimony was uncontradicted, and the controversy between the jury was confined to two questions of fact: First, as to the ownership and control of the wire by the defendant; second, whether the defendant had been guilty of negligence. To support the affirmative of these issues, the witnesses produced for the plaintiff were Mr. Eckenrode and Mr. Duke; and from their testimony it appeared that the broken wire hung from the outer end of the top crossbar of the telegraph pole, and that below the under crossbar there ran an electric light wire supported by a bracket on the pole. There is an electric plant and power house in Camden, located a very short distance from the place where the plaintiff was hurt, but that wire was not the property nor under the control of the defendant. The broken wire was a messenger call wire, and the inference was that it had fallen across the electric wire, and, becoming strongly charged with electricity, caused the injuries complained of. That portion of the call wire which had been cut off by Mr.

Hatch was examined by Mr. Eckenrode immediately after being removed from the boy's hand, and found to be so rotten that it could be easily broken, exposing the center or core of the wire, which was about as thick as a pin, the rest of it being rusted through. After the break in the wire had been repaired, it was traced through various call boxes, some of which belonged to or were operated by the defendant, to the defendant's office in Camden, and intermediately it was found to be patched in a good many places. The call wire was not traced into the defendant's office, but only to the pole outside, from which it was looped into the office. This call wire is very slightly charged with electricity, and of itself is entirely harmless, but, when in contact with an electric light wire sufficiently charged to carry the lights of a city or propel a trolley car, will transmit a severe, dangerous, and possibly fatal current to whoever takes hold of it. There was no proof of the ownership of the electric light wire, nor of the precise point at which the broken wire had come into contact with it. Mr. Duke, who had had practical experience in the superintendence of telegraph wires, said that a call wire, such as the one described, exposed to the weather, would last six or seven years.

At the conclusion of the plaintiff's testimony the defendant's counsel moved for a nonsuit, because—First, there was no testimony legitimately tending to show that the wire which was broken was the property of the defendant, or that it was in its custody or control; second, the testimony of the plaintiff did not establish that the breaking of this wire was the result of any negligence on the part of the defendant; third, there was no testimony to show how the broken wire was charged with the electric current causing the injury, or that the defendant was in any way responsible for the transmission of such current. The motion for a nonsuit was refused by the court, and thereupon the defendant produced one witness, Louis Sharp, a lineman of the Delaware & Atlantic Telephone Company, who testified that the heavy wire spoken of by Messrs. Eckenrode and Duke was not run over the Delaware avenue poles until some time in the summer of 1893, and was used as a ground wire to form a metallic circuit, and not for electric light or car currents, and was entirely harmless. This witness had charge of the lines on Delaware avenue, and was familiar with their respective positions on the crossbar. On cross-examination he said:

"Q. Do you know where the Western Union lines are,—any of them? A. In the city? Q. Yes. A. Yes; I know where some of them are. Q. Do you know where any of them are on Delaware avenue? A. I know where they are on that line of poles. I know the wire. That is all I know about it,—that one wire. Q. Where is that one wire? A. It is the top wire on the fourth pin on the east side of the line. Q. That is the Western Union wire? A. Yes, sir."

This witness, before the close of his examination, said that he did not know who was the owner of the call wire. The plaintiff had a verdict, and the defendant excepted to the charge of the court. There are nine assignments of error, of which the first two are to the admission of evidence, and as they relate to the same matter may be

considered together. The witness Duke, being examined as to the number of wires on the crossbars, was asked, "Was there an electrical wire there?" replied:

"There was an electrical wire under the bottom crossbar, on a bracket. Q. Was there anything between this outside wire on the top row and the electrical wire beneath? A. Nothing that I seen at that time; no, sir. Q. What is usual, in the business, to protect an ordinary telegraph wire from coming in contact with an electrical wire on the same pole?"

The objection to this question having been overruled, the witness answered:

"All the wires that ever I supervised in having run were always provided with a guard wire when they crossed an electrical wire of any kind."

The witness described the guard wire as a dead wire running between wires of lighter and heavier currents, to prevent the latter two from coming into contact with each other. The same witness, on being asked what was the condition of the call wire at a place about two squares distant from the place of the accident, answered: "In pretty fair condition at that place; better than at the other place." This was also admitted against the defendant's objection. The exception in each case was that it was attempted to prove by the witness the condition of the wire, not at the time of the accident, but some nine months afterwards. The broken wire was repaired soon after the accident by the insertion of a new piece, and replaced on the crossbar. Eckenrode described its brittle condition at that time, and Duke, who saw the call wire some months later, testified that it had been patched in other places as well. The objection to this testimony, therefore, has no other foundation than the lapse of time between November 17, 1891, and September 1892; and the question arises whether a substance like this wire, exposed to the atmosphere and used as it was, would, within that period, have undergone such marked deterioration as to warrant the exclusion of the plaintiff's evidence. It is not necessary that evidence should be conclusive, to render it admissible. It had already been proved that the wire was patched in 1891, and the evidence objected to was corroborative, and to show that it was in the same condition in 1892. The absence of a guard wire, in 1892, was admitted to show, by inference, that it had not been employed in the previous year, and that if it had been in use on November 17, 1891, the accident would not have happened. It shifted the burden of proving the contrary on the defendant. These objections were untenable.

The third assignment is to the refusal of the court to grant the motion for a nonsuit, but exception to this refusal was waived by the subsequent introduction of evidence for the defense. This, however, did not preclude the defendant's counsel, at the close of the evidence on both sides, from presenting the same questions which were raised on the motion for a nonsuit, in his requests for instructions to the jury. In Railroad Co. v. Hawthorne, 144 U. S. 206, 12 Sup. Ct. 591, Mr. Justice Gray, speaking for the court, said:

"The question of the sufficiency of the evidence for the plaintiff to support his action cannot be considered by this court. It has repeatedly been de-

cided that a request for a ruling that, upon the evidence introduced, the plaintiff is not entitled to recover, cannot be made by the defendant, as a matter of right, unless at the close of the whole evidence; and that if the defendant, at the close of the plaintiff's evidence, and without resting his own case, requests and is refused such a ruling, the refusal cannot be assigned for error."

See, also, Railroad Co. v. Mares, 123 U. S. 713, 8 Sup. Ct. 321; Robertson v. Perkins, 129 U. S. 236, 9 Sup. Ct. 279; Insurance Co. v. Crandal, 120 U. S. 527, 7 Sup. Ct. 685; Railroad Co. v. Daniels, 152 U. S. 687, 14 Sup. Ct. 756; Runkle v. Burnham, 153 U. S. 222, 14 Sup. Ct. 837.

The fourth and fifth assignments are to the refusal of the court to charge the jury that the plaintiff failed to prove negligence on the part of the defendant, or that, if the defendant was negligent, its negligence was the direct and proximate cause of the injuries complained of. The court, on these points, instructed the jury as follows:

"A telegraph company is bound to see that its wires are in such condition and of such character that the free and uninterrupted and safe use of the highway shall not in the least degree be disturbed. It is not bound and does not insure the absolute strength and the absolute permanency of its plant, or its poles or its wires. But it is bound to take such care of them as a prudent, careful person would take of property of similar character, exposed to the effect of the atmosphere and of the weather, and in constant use, as those wires and poles were. Now, it is for you to apply this rule of care to the circumstances of this case, and to say whether the plaintiff has proved negligent conduct on the part of the defendant in this respect. And I charge you, as a matter of law, that the mere fact that a telegraph wire is broken does not, of itself, imply negligence. * * * There must be something beyond that in order to convict them. Now, the plaintiff relies upon the actual, physical condition of the wire itself, at the time the accident occurred, as evidence of negligence. * * * The only witness who speaks of it is Mr. Eckenrode, who says that at the time of the accident he picked up a piece of the wire cut off about twenty feet long; that it was rusty and considerably eaten into; the thickness of the wire undiminished in strength was about as thick as a common knitting needle. * * * Now, the question for you is, is it negligence to permit a wire having the thickness and tenacity of a knitting needle to be stretched over a space as large as that between two telegraph poles which support it? Is that negligence? It may have been a much thicker wire when it was first stretched there, but if it had left in it, at the time of the accident, a sufficient strength and tenacity to maintain its position between two poles the distance apart usually taken for telegraph poles, was it an act of negligence to permit it to stay there? Understand that the mere breaking of it is not negligence, unless you find that the breaking was caused by the actual condition of the wire. But is there any evidence of that? Whatever we might personally think about it, the question is, what has been proved to you about that wire? And it is in that evidence it is for you to say whether that wire, in that condition, having it up between the poles, the thickness of a knitting needle, is an act of negligence or not."

The questions of negligence and of proximate cause were properly left to the jury to decide on the whole evidence. The defendant's counsel assumes that there was not sufficient evidence to require the submission of the case to the jury, but in this he is mistaken. The question of negligence, like any other disputed fact, is to be passed upon by the jury, except when the undisputed evidence is so conclusive that the court would be compelled to set aside a ver-

dict returned in opposition to it. Ordinarily, where there is any testimony tending to show negligence, it is a question for the jury. Elliott v. Railroad Co., 150 U. S. 246, 14 Sup. Ct. 85; Railroad Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. 569; Railroad Co. v. Stout, 17 Wall. 657. And the like rule applies to the question of proximate cause, and is thus stated in Railway Co. v. Kellogg, 94 U. S. 469, by Mr. Justice Strong:

"The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. 2 W. Bl. 892. The question always is, was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen, in the light of the attending circumstances."

Injuries arising from the accidental contact of live wires with the dead wires or with gas pipes, etc., are of frequent occurrence, and in most instances might have been provided against by ordinary care and vigilance. The broken wire was the primary cause of the injuries to the plaintiff. If it had become weakened by long use and exposure, to such a degree as to part by its own weight, or from a slight motion produced by the wind, it was a fair question for the jury to decide whether the defendant had not failed in its duty to the public by allowing its wire to get into such a condition that it would easily break, and in breaking would be likely to fall across the electric light wire, and become dangerously charged. It was not incumbent on the plaintiff to prove more under this head.

The sixth assignment is to the refusal of the court to charge that, although the defendant might be guilty of negligence as to the broken wire, yet if the evidence satisfied the jury that there was a current sent from an electric light wire over this broken wire from some other locality than this (the place of the accident), as the result of some unexplained cause, in that event the defendant was not liable. In refusing this request the court said:

"I decline to charge that, because it admits the negligence of the defendant, and it was responsible for all the acts that might arise from that negligence. The negligence in this case would be, if at all, the breaking of the wire in such a way that it fell across a wire from which the electric shock could be given."

The defendant's counsel admits that perhaps he was not entitled to the request, in the form in which it was made, but contends that the language used by the court in refusing it was misleading to the jury, in that they would understand that, in case they found the wire broken, then they might proceed to treat the injury as the re-

sult of negligence, and hold the defendant liable. The argument goes back to the evidence of proximate cause. There is no reason why the plaintiff should have been compelled to prove the particular spot where the two wires came into contact. It is certain that the injury to the plaintiff was the result of the contact of these two wires. It can be accounted for in no other way. It would seem, therefore, to make very little difference, if any, in the liability of the defendant, whether that contact was at the place of the accident, or a hundred or more feet distant from it, provided that the coming into contact of the wires was caused by the defendant's negligence, for there can be no doubt that the broken wire conveyed the electric shock to the plaintiff's body. In all probability, the point of contact was somewhere between the two poles, and not far from where the boy was stricken down.

The eighth assignment is to the refusal of the court to charge that the plaintiff had not proved that the negligence of the defendant was the direct and proximate cause of the injuries complained of, and that, therefore, the verdict of the jury should be for the defendant. In refusing to so charge, the court said:

"I have very grave doubts upon that part of the case, but for the purpose of this case I have decided to leave the fact to you, the jury; and therefore I decline to charge, under the circumstances."

The question of proximate cause was thus brought prominently and specially to the attention of the jury, and was properly left to them for decision. The jury could not have misunderstood the instructions of the court, the whole tenor of which was to impress on their minds that the liability of the defendant must be directly consequent upon its negligence. The ninth assignment presents the same question of proximate cause, and requires no special notice.

The conclusion is that, on a careful review of the whole record, no reversible error has been found. The judgment of the circuit court is therefore affirmed.

CHICAGO, ST. P. & K. C. RY. CO. v. PIERCE.

(Circuit Court of Appeals, Seventh Circuit. November 27, 1894.)

No. 192.

RELEASE AND DISCHARGE—RATIFICATION—INSTRUCTIONS.

Where, in action for personal injuries, it appears that plaintiff had received $1,600 from defendant in settlement of damages, and that she waited two years before offering to return the money, and there is evidence tending to show that plaintiff was perfectly able to understand all about the settlement within ten days after it was made, and that she after that spent the money, it is error to leave to the jury, without definition, the question whether plaintiff disaffirmed the settlement within a reasonable time, and to refuse to instruct them that her expenditure of the money with knowledge of the settlement would ratify the settlement, and that such a ratification, once made, would be final and binding.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.