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Negligence--Distinction Between Proximate Cause and Condition

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that there are other methods of contesting attachments. *B* should have informed the bank of the true ownership of the money and then the bank could have defended against the garnishment or could have interpleaded *A* and *X*.

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NEGLIGENCE—DISTINCTION BETWEEN PROXIMATE CAUSE AND CONDITION.—Action by house owners against heating contractors for fire damage allegedly resulting from improper installation of coal furnace in house. Evidence revealed that one of owners had built a fire in the furnace, knowing that thermostats controlling the drafts were not working. Trial court set aside verdict for plaintiffs, ordered new trial, and plaintiffs brought error. *Held,* reversing judgment, that plaintiffs' act was only a remote cause of the fire and merely created a condition under which the fire which destroyed the house was started. *Reese v. Lowry,* 86 S.E.2d 391 (W. Va. 1955).

In primary support of this holding in the principal case, the court cited *Webb. v. Sessler,* 135 W. Va. 341, 63 S.E.2d 65 (1950). That case was an action for injuries received as a result of an automobile being struck by a negligently operated airplane which was attempting to land on an airport which, in violation of Civil Aeronautics Authority regulations, was situated too closely to the highway upon which the automobile was parked. In that case the court also distinguished between the proximate cause of an injury and the condition or occasion of the injury and found the antecedent negligence of the owners, lessees, and operators of the airport to constitute the condition upon which the intervening or postcedent negligence of the airplane operator acted to proximately cause the injury for which only the airplane operator was liable. However, in the principal case ". . . . . notwithstanding no injury would have occurred if it had not happened . . . .", the postcedent or intervening act of the plaintiff was held to be the condition. In both the *Webb* case, *supra,* and the principal case the court made the statement that there is a clear distinction in West Virginia beween the proximate cause of an injury and the condition or occasion of the injury.

In *Snyder v. Philadelphia Co.,* 54 W. Va. 149, 46 S.E. 366 (1903), a teamster's horses became frightened by the negligent blowing off of a gas well, and in the teamster's attempt to control them, a line broke, as a result of which he fell from his wagon, and was injured. The court, in affirming judgment for the plaintiff, held that the weak condition of the line could not be regarded as the cause of

the injury, even conceding that the fall was the result of the breaking of the line. In that case the blowing off of the well was held to be the superior or controlling agency and the proximate cause as contradistinguished from those causes which were merely incidental or subsidiary to such controlling cause. The court said, "Where the alleged intervening cause is in reality only a condition upon or through which the negligent act operated to produce the injuries complained of, the defendant will be held liable." *Id.* at 158, 46 S.E. at 469. It is seen here, as in the *Webb* case, *supra,* that the condition was one *existing* at the time of defendant's negligence; a more or less *occasion* for injury or mishap; a condition or situation involving some danger within itself. And, although occupying a different position in the sequence of events as to the time of occurrence from that in the principal case, the condition was one resulting from the plaintiff's own acts.

However, when a defendant railroad pushed a coal car upon a siding which was in an unsafe condition and the coal car rolled through the siding and into a river, destroying plaintiff's barge, the court, in affirming judgment for plaintiff in an action to recover damages for the loss of the barge, held that the neglect of the owners of the siding in failing to keep it in safe condition was not an intervening act of a responsible party and did not break the causal connection of defendant's antecedent negligence. Further, the fact that such antecedent negligence might have been the remote cause of the loss was ". . . altogether immaterial." *Fawcett v. Railway Co.,* 24 W. Va. 755 (1884). And in a later case, in a situation substantially the same as the *Fawcett* case, *supra,* the court said, "While the negligent act of one person may, as a natural consequence, cause injury to another; yet if before the injury results, the negligent act of a third person intervenes and produces the injury, the latter alone is responsible therefor, though but for the first negligent act the injury could not have occurred." *Anderson v. Baltimore & Ohio R.R.,* 74 W. Va. 17, 21, 81 S.E. 579, 581 (1914). In those two cases, the court speaks in terms of "intervening acts" as either breaking or failing to break the causal connection between the injury and the antecedent negligent act rather than using the term "condition", which, in view of the situations, could easily have been applied and would have resulted in the same decision.

And compare *Carrico v. West Virginia Cent. & P. Ry.,* 39 W. Va. 86, 19 S.E. 571 (1894). There, plaintiff, a passenger of defendant railroad, was injured by collision of the coach in which he was rid-

ing against a pile of rocks negligently left too near the track by defendant, while plaintiff was riding with his arm either protruding from a window, resting on the sill, or entirely inside the coach. The court there intimated that plaintiff could not have recovered had he been proven negligent. But in the principal case the court admits the injury would not have occurred in the absence of plaintiff's acts. So, despite an absolutely causal character, plaintiff's acts still do not preclude recovery.

A review of these cases would seem to suggest that our court uses the word "condition" in two ways: First, to describe an act which is intervening in the literal sense only, in that it is an act which despite its occurrence between an antecedent negligent act and the injury, does not become the "proximate", "efficient", or "immediate" cause thereof. Given *legal* interpretation the word "intervening" as used by our court seems to mean "superseding", in that when an act is determined to be intervening it supersedes the original negligence and becomes the proximate cause of an injury. See *Webb v. Sessler, supra; Snyder v. Philadelphia Co., supra; Wilson v. Edwards,* 77 S.E.2d 164 (W. Va. 1953); *Hartley v. Crede,* 82 S.E.2d 672 (W. Va. 1954). Conversely, when the intervening force or act is of such nature as constitutes the "proximate", "efficient", or "immediate" cause of the injury, the antecedent negligent act is merely a condition or occasion. The doctrine of intervening efficient cause where applicable, eliminates the prior act of negligence as a proximate cause and establishes it in the nature of an occasion or condition. *Steward v. Minneapolis St. Ry.,* 222 Minn. 454, 25 N.W.2d 221 (1946). Second: The use of the words "condition" or "occasion" by our court would appear also to describe conduct of a contributorily negligent, or at least questionable, character, which, despite such character, is not the "proximate" cause of plaintiff's injury. And when used in these two ways, it also appears to be of little consequence whether the condition or occasion was an act or situation which was antecedent to, and upon which the intervening or postcedent negligence acted to proximately cause the injury, or vice versa. Similarly it would seem to be immaterial whether the condition or occasion results from the acts, or is the act, of either the plaintiff, the defendant, or an independent third person.

All this is not to quarrel with the result reached by the court in the principal case, but an attempt to ascertain its value as precedent. Certainly there is a distinction in this jurisdiction between a condition or occasion for an injury and the proximate

cause of an injury. But the distinction is that of result or legal liability. The thought suggested by a review of the cases and particularly the principal case is that perhaps the problem of distinction is one of undue emphasis, resulting from explaining acts which although definitely of a causative nature, when viewed together with *all the facts,* are not the proximate cause of an injury. This thought is strengthened by the fact that a problem, and apparently confusion, also exists in other jurisdictions as to the importance of a condition or occasion of an injury. *Stewart v. Minneapolis St. Ry., supra,* shows how the Minnesota court is approaching the problem and at least one other court is even more definite.

In *Kinderavich v. Palmer,* 127 Conn. 85, 15 A.2d 83 (1940), the court rather tersely remarked that a statement that an act or omission is a "condition" and not a cause of an injury means no more than that it is not a "proximate cause" of that injury.

C. S. McG.

PLEADING AND PRACTICE—WRIT OF ERROR—SPECIAL BILL OF EXCEPTIONS—SPECIFICATION OF ERROR.—During a homicide trial *D* was asked and required to answer a question on cross examination over the objection of *D*'s counsel. A motion for mistrial was overruled by the trial court and an exception taken. A writ of error to the circuit court was refused on the basis that the alleged error had not been specifically made a ground in support of *D*'s motion for a new trial or incorporated in a special bill of exceptions. *Held,* that the court may and should consider alleged errors arising on the rulings of a trial court in the admission or rejection of evidence objected to, where alleged errors in the admission or rejection of evidence, to which objection has been made in the trial court, are specifically set forth as ground of a motion to set aside a verdict and grant a new trial; or incorporated in a special bill of exceptions; or are incorporated in the assignments of errors contained in the petition for writ of error; or set forth in the brief of counsel; or otherwise specifically brought to the attention of the trial court. *State v. Bragg,* 87 S.E.2d 689 (W. Va. 1955) (3-2 decision).

The court has been confronted with two conflicting lines of decision on the question of consideration of error arising on rulings of the trial court. One line of reasoning is that found in *Gregory's Adm'r v. Ohio River R.R.,* 37 W. Va. 606, 16 S.E. 819 (1893), that, "objections and exceptions to the admission or rejection of