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Waters and Watercourses--Railway Bridge as Obstructing the Flow--Liability for Damages Resulting from Unusual Flood

statute of limitations, a policy which seeks by the shorter five-year provision to prevent the bringing of actions upon stale claims difficult of proof except by parol evidence. On the other hand, where the implication is not one of oral proof but rather a hard and fast statutory warranty, the longer ten-year period achieves fairness as between the parties without opening the door to fraudulent claims.

WATERS AND WATERCOURSES — RAILWAY BRIDGE AS OBSTRUCTING THE FLOW — LIABILITY FOR DAMAGES RESULTING FROM UNUSUAL FLOOD. — In 1903 a railway company constructed a bridge across a creek, which structure proved insufficient to accommodate the floods of June 28 and July 11, 1932. As a result the lands above the obstruction were overflowed and damaged. Similar floods had occurred in 1861 and 1916. *Held*, that the instruction[1] given was not a basis for reversible error in view of other instructions granted in defendant's behalf clearly defining its duty. *Mitchell v. Virginian Ry. Co.*[2]

Liability for damages resulting from flood waters has become a peculiarly appropriate topic in view of contemporary circumstances. In all cases the first question in determining legal liability for damages resulting from obstructing the flow of a watercourse is whether the defendant was negligent. This is settled by applying the ordinary test of negligence, that is, whether a man of ordinary prudence under the circumstances would have foreseen harm to the plaintiff as a result of the defendant's act. To be free from negligence, the defendant must guard against such

[1] The lower court, in its first instruction, told the jury, in substance, that the railway company had the duty in constructing the bridge "to provide for such unusual or extraordinary floods, as it should have been anticipated occasionally would occur in the future, because such unusual or extraordinary floods *may have* occurred in the past", and if *an* unprecedented flood occurred in 1916, and the bridge "caused such an obstruction that the lands above the same were overflowed by water", the railway company then had the duty to provide for such conditions thus established by said flood; and if "*an* unusual, extraordinary flood" came on June 28, 1932, "which caused the bridge to be obstructed" and the waters to injure the plaintiff's lands, "the duty then arose to meet the new conditions thus established", and if "by reason of past occurrences the flood of July 11, 1932, was in reasonable contemplation and should have been anticipated and guarded against by the Railroad Company, in the exercise of reasonable care and that they had the time and opportunity to do so", then the plaintiffs are entitled to damages sustained by them, *either* from the flood of June 28, 1932, or the flood of July 11, 1932, *or* from *both*.

[2] 183 S. E. 35 (W. Va. 1935).

floods as are foreseeable, bearing in mind previous known floods at that place, the nature and extent of the obstruction created, the physical features of the land, such as the area and contour of the land drained, and the capacity of the watercourse obstructed, and other controlling circumstances. If defendant's conduct has not been negligent and not illegal *per se*, he cannot be held liable for the consequences of an unforeseeable flood even though it would have caused no harm to the plaintiff but for the obstruction which defendant had created. When a foreseeable flood occurs, which causes injury to the plaintiff, because of the defendants obstruction, the defendant is negligent and liable. Where the unforeseeable act of God in the form of a flood would have caused all of the damage suffered, irrespective of defendant's negligent act, the American cases seem to be uniform in holding that the defendant is not liable. Where only a part of the damage would have been caused independent of defendant's negligence, the defendant is not liable to the extent that the damage may be attributed solely to the act of God. Where the unforeseeable flood of itself would not have damaged the plaintiff, yet combined with defendant's obstruction, it produces some harm or greater harm than a foreseeable flood would have produced, if the damages are not greater due to the magnitude of the flood than they would otherwise have been, the defendant is liable for the entire damage. Where the unforeseeable act of God increases the amount of the plaintiff's damages, it seems that defendant, as in the situation previously noted, should not be liable for the increased damages.[3]

It is submitted that the instruction in the principal case would in effect require the railway company to provide for extraordinary floods which are not foreseeable. It is well settled, and admitted in this case, that the railway company's liability does not extend so far. The jury was instructed that if *an* unprecedented flood occurred in 1916, or if *an* unusually extraordinary flood came on June 28, 1932, the duty then arose to meet the new conditions. This apparently ignores the fact that either of these floods may have been so extraordinary as to be classed as an act of God; and if so, it does not seem that the railway company should be required to provide for another flood of the same volume until such floods had become so frequent as to warn those living in the vicinity

[3] Summary of an editorial note wherein the cases supporting these statements may be found: Jones, *Liability for Damages Resulting from an Unforeseeable Flood* (1918) 25 W. VA. L. Q. 139.

that they might occur at any time.[4] Furthermore, the defendant's duty of care should be measured by what has happened in the past and not by what may have happened; nor ought the fact that the flood of July 11, 1932, should have been anticipated entitle the plaintiffs to damages sustained by the flood of June 28, 1932.[5] In these respects it seems that the instruction given was clearly misleading and prejudicial, especially since it was the first instruction given. Even though other instructions were given which clearly defined the defendant's duty, they being in conflict with this one, the verdict should be set aside, for it cannot be told by which instruction the jury was controlled.[6] This duty is very burdensome even under the clearest instructions, so the jury should not be the least confused in reaching a verdict.

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[4] (1920) 27 R. C. L. 1107; Note (1907) 6 L. R. A. (N. S.) 252; RESTATEMENT, TORTS (1934) § 302f.

[5] See the strong dissenting opinion by Kenna, J., concurred in by Hatcher, J., in Mitchell v. Virginian Ry. Co., *supra* n. 2.

[6] BURKS, PLEADING AND PRACTICE (3d ed. 1934) § 263; Note (1906) 2 L. R. A. (N. S.) 309; (1916) 14 R. C. L. 777.