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Liability for Damages Resulting from an Unforeseeable Flood

H. C. J.
West Virginia University College of Law

property rights and power to contract reminds one of a squatter's shack—built of pieces of plank, fragments of driftwood with old tin cans nailed over the most troublesome holes. It would be a relief to the legal profession if these statutes were repealed and some progressive legislation substituted defining the rights and powers of a married woman in understandable terms.

—J. W. S.

LIABILITY FOR DAMAGES RESULTING FROM AN UNFORESEEABLE FLOOD.—Examination of the reports shows a large number of actions brought for damages alleged to have resulted from a flooding of the plaintiff's premises by reason of the defendant's obstructing the flow of a water course. A large proportion of these actions are against railways, but the underlying principles of liability in such cases do not differ from those applied generally. In all cases the first question to answer in determining legal liability is whether the defendant's act in so obstructing or diverting the stream was negligent.[1] This must be settled by applying the ordinary test of negligence, *viz.*, whether a man of ordinary prudence under the circumstances should have foreseen harm to the plaintiff as a result of the defendant's act. The care required is that which a man of ordinary prudence would have exercised under the circumstances.[2] To be free from negligence, the defendant must guard against such floods as are foreseeable,[3] bearing in mind previous known floods at that place,[4] the nature and extent

[1] Schloss-Sheffield Steel & Iron Co. *v.* Wilson, 183 Ala. 411, 62 So. 802 (1913); Berninger *v.* Sunbury R. R. Co., 203 Pa. St. 516, 53 Atl. 361 (1902).

[2] American Locomotive Co. *v.* Hoffman, 108 Va. 363, 370, 61 S. E. 759, 128 Am. St. Rep. 953 (1908).

[3] Southern Ry. *v.* Plott, 131 Ala. 312, 31 So. 33 (1901); Schloss-Sheffield Steel & Iron Co. *v.* Wilson, 183 Ala. 411, 62 So. 802 (1913); Ohio & M. Ry. Co. *v.* Ramey, 139 Ill. 9, 28 N. E. 1087 (1891); Dunn *v.* Chicago, I. & L. Ry. Co., 114 N. E. 888 (Ind. 1917); Atchison, T. & S. R. Ry. Co. *v.* Herman, 74 Kan. 77, 85 Pac. 817 (1906); Madisonville, H. & E. R. Co. *v.* Thomas, 140 Ky. 143, 130 S. W. 143 (1910); Western Md. R. Co. *v.* Martin, 110 Md. 554, 73 Atl. 267 (1909); Dorman *v.* Ames, 12 Minn. 451 (1867); Houston & G. N. R. R. Co. *v.* Parker, 50 Tex. 330, 344 (1878); Lisonbee *v.* Monroe Irr. Co., 18 Utah 343, 54 Pac. 1009, 72 Am. St. Rep. 784 (1898).

[4] Southern Ry. Co. *v.* Weidenbrenner, 109 N. E. 926, 930 (Ind. 1915); Wm. Tackaberry Co. *v.* Simmons Hardware Co., 170 Ia. 203, 212, 152 N. W. 779 (1915); Riddle *v.* Chicago, R. I. & P. Ry. Co., 88 Kan. 248, 128 Pac. 195, 197 (1912); L. & N. R. Co. *v.* Conn, 166 Ky. 327, 330, 179 S. W. 195 (1915); Madisonville, H. & E. R. Co. *v.* Renfro, 127 S. W. 508 (Ky. 1910); South Side Realty Co. *v.* St. Louis & S. F. R. Co., 154 Mo. App. 364, 134 S. W. 1034 (1911); Mayor *v.* Bailey, 2 Denio 433, 441 (N. Y. 1845); Mundy *v.* New York, L. E. & W. R. Co., 75 Hun

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 water course obstructed,[5] and other controlling circumstances. Under these conditions it is necessary for the defendant to guard against such storms, unusual stages of water, and extraordinary floods and freshets as are foreseeable.[6] But the law does not require the defendant to guard against unprecedented and therefore unforeseeable acts of nature constituting what are known as acts of God.[7]

If it be determined that the defendant's conduct in obstructing the water course has not been negligent and is not for any reason illegal *per se*, it would seem that the defendant cannot be held liable for the consequences of an unprecedented and unforeseeable flood even though it would have caused no harm to the plaintiff but for the obstruction which defendant had created.[8] The ab-

479, 27 N. Y. Supp. 469, 472 (1894); Brown *v.* Ry. Co., 183 Pa. St. 38, 52, 38 Atl. 401 (1897); G., C. & S. F. Ry. Co. *v.* Holliday, 65 Tex. 512, 519 (1886); Nitro-Phosphate Co. *v.* London Docks Co., 9 Ch. D. 503, 1 E. R. C. 276 (Eng. 1877).

[5] Dunn *v.* Chicago, I. & L. Ry. Co., 114 N. E. 888 (Ind. 1917); Southern Ry. Co. *v.* Weidenbrenner, 109 N. E. 926, 930 (Ind. 1915); Wm. Tackaberry Co. *v.* Simmons Hardware Co., 170 Ia. 203, 209, 152 N. W. 779 (1915); Union Trust Co. *v.* Cuppy, 26 Kan. 754, 762 (1882); Pittsburg, F. W. & C. Ry. Co. *v.* Gilleland, 56 Pa. St. 445, 452 (1867); Jones *v.* Seaboard Air Line Ry. Co., 67 S. C. 181, 45 S. E. 188, 194 (1903); Gulf, C. & S. F. Ry. Co. *v.* Holliday, 65 Tex. 512, 520 (1886).

[6] Ohio & M. Ry. Co. *v.* Ramey, 139 Ill. 9, 28 N. E. 1087 (1891); Dunn *v.* Chicago, I. & L. Ry. Co., 114 N. E. 888, 889 (Ind. 1917); Southern Ry. Co. *v.* Weidenbrenner, 109 N. E. 926, 930 (Ind. 1915); Boughtaling *v.* Chicago, G. W. Ry. Co., 117 Ia. 540, 91 N. W. 811 (1902); Blunck *v.* Chicago & N. W. Ry. Co., 115 N. W. 1013, 1016 (Ia. 1908); Riddle *v.* Chicago, R. I. & P. Ry. Co., 88 Kan. 248, 128 Pac. 195, 197 (1912) ("The test of liability, however, is not whether the rainfall was unusual or extraordinary, but whether it was such as might have been reasonably foreseen"); Gray *v.* Harris, 107 Mass. 492 (1871); Allen *v.* Thornapple Electric Co., 144 Mich. 370, 108 N. W. 79, 115 Am. St. Rep. 453 (1906); South Side Realty Co. *v.* St. Louis & S. F. R. Co., 154 Mo. App. 364, 134 S. W. 1034 (1911); Mayor *v.* Bailey, 2 Denio 433, 441 (N. Y. 1845); Jones *v.* Seaboard Air Line Ry. Co., 67 S. C. 181, 45 S. E. 188, 194 (1903); Texas & P. Ry. Co. *v.* Whitaker, 36 Tex. Civ. App. 571, 82 S. W. 1051 (1904); Dahlgran *v.* Chicago, M. & P. Ry. Co., 85 Wash. 395, 148 Pac. 567, 571 (1915).

[7] Central Trust Co. *v.* Wabash, St. & P. Ry. Co., 57 Fed. 441, 446, 448 (1893); Southern Ry. Co. *v.* Plott, 131 Ala. 312, 31 So. 33 (1901); City of Bridgeport *v.* Bridgeport Hydraulic Co., 81 Conn. 84, 70 Atl. 650 (1908); Wm. Tackaberry Co. *v.* Simmons Hardware Co., 170 Ia. 203, 219, 152 N. W. 779 (1915); L. & N. R. Co. *v.* Conn, 166 Ky. 327, 332, 179 S. W. 195 (1915); Coleman *v.* K. C., St. J. & C. B. Ry., 36 Mo. App. 476, 493 (1889); South Side Realty Co. *v.* St. Louis & S. F. R. Co., 154 Mo. App. 364, 134 S. W. 1034 (1911); Chicago, R. I. & P. Ry. Co. *v.* Buel, 76 Neb. 420, 107 N. W. 590 (1906); American Locomotive Co. *v.* Hoffman, 105 Va. 343, 353, 52 S. E. 25, 6 L. R. A. (N. S.) 252 (1906) *(dictum)*; Nicholls *v.* Marsland, 2 Ex. D. 1 (Eng. 1876).

[8] Columbus & W. Ry. Co. *v.* Bridges, 86 Ala. 448, 5 So. 864, 866 (1889); Wm. Tackaberry Co. *v.* Simmons Hardware Co., 170 Ia. 203, 220, 152 N. W. 779 (1915); L. & N. R. Co. *v.* Conn, 166 Ky. 327, 332, 179 S. W. 195 (1915); Coleman *v.* K. C., St. J. & C. B. Ry. Co., 36 Mo. App. 476, 494 (1889); Chicago, R. I. & P. Ry. Co.

sence of culpable conduct on defendant's part clearly frees him from liability and makes the plaintiff's damage an accidental harm resulting from an act of God.[9]

Where the defendant's negligence combines with a flood of no more than foreseeable proportions in causing plaintiff's injury, there is no difficulty in holding the defendant liable, but problems of greater difficulty arise where a flood of unforeseeable proportions combines with defendant's culpable conduct in causing the plaintiff's damage. The problem here presented appears in two general forms. First, where the unforeseeable act of God in the form of a flood would have caused either *all*, or at least a *part* of the damage suffered, whether the defendant had been negligent or not. Second, where, although the unforeseeable flood of itself alone would not have damaged plaintiff, yet combined with the defendant's negligence it produces either the same harm, or greater harm than the foreseeable flood would have produced.

In the first situation the plaintiff would have suffered at least some harm even if the defendant had not been negligent. In other words, the flood alone as an act of God, without defendant's negligence in obstructing the water course, would have caused either all or a part of the damage plaintiff suffered. Where the flood alone, irrespective of defendant's negligent act, would have caused to plaintiff *all* of the damage he suffered, the American cases seem to be uniform in holding that the defendant is not liable.[14] The leading case is *Baltimore & Ohio R. R. Co.* v. *Sulphur Spring*

v. Buel, 76 Neb. 420, 107 N. W. 590 (1906); Mulligan *v.* Pennsylvania R. R. Co., 225 Pa. St. 76, 73 Atl. 1058 (1909); Nichols *v.* Marsland, 2 Ex. D. 1 (Eng. 1876).

[9] See cases cited in note 7, *supra.*

[10] Columbus & W. R. Co. *v.* Bridges, 86 Ala. 448, 5 So. 864 (1889); Kansas City, P. & G. R. Co. *v.* Williams, 3 Ind. Terr. 352, 58 S. W. 570 (1900); Vyse *v.* Chicago, B. & Q. Ry. Co., 126 Ia. 90, 101 N. W. 736, 738 (1904) *(dictum);* Wm. Tackaberry Co. *v.* Simmons Hardware Co., 170 Ia. 203, 152 N. W. 779 (1915) *(dictum);* Madisonville, H. & E. R. Co. *v.* Renfro, 127 S. W. 508 (Ky. 1910); Haney *v.* City of Kansas, 94 Mo. 334, 7 S. W. 417 (1888); Coleman *v.* Ry., 36 Mo. App. 476, 491 (1889); James *v.* Ry., 69 Mo. App. 431, 437, 439 (1896); Kenney *v.* R. R. Co., 74 Mo. App. 301, 308 (1898) *(dictum);* Lyon *v.* C. M. & St. P. Ry. Co., 45 Mont 33, 121 Pac. 886, 888 (1912); B. & O. R. R. Co. *v.* Sulphur Spring School District, 96 Pa. St. 65, 42 Am. Rep. 529; Helbling *v.* Alleghany Cemetery Co., 201 Pa. St. 171, 174 (1902) ("The injury should be attributed wholly to the act of God, if the extraordinary rainfall would have caused it notwithstanding the negligence of the cemetery company"); Taylor *v.* Canton Township, 30 Pa. Super. Ct. 305, 318 (1906); Siegfried *v.* So. Bethlehem Borough, 27 Pa. Super. Ct. 456, 463 (1905); Rife *v.* Middletown, 32 Pa. Super. Ct. 68, 77 (1906); Texas & N. O. R. Co. *v.* Anderson, 61 S. W. 424, 426 (Tex. 1901) ("If the damage was caused by the act of God, appellant would not be liable therefor, notwithstanding it may have been negligent in not keeping its ditch free from obstruction"); International & G. N. R. Co. *v.* Walker, 97 S. W. 1081, 1083 (Tex. 1906); Scott *v.* Northern Texas Traction Co., 190 S. W.

School District.[11] There it was found as a fact that the plaintiff's school house would have been destroyed by the unprecedented flood which washed it away, even though there had been no negligence on the part of the railway in permitting its culverts to become so clogged as to be incapable of carrying off even a foreseeable flood. The court states the basis of its decision thus (p. 70):

> "If the act of God in this particular case was of such an overwhelming and destructive character, as by its own force, and independently of the particular negligence alleged or shown, produced the injury, there would be no liability, though there were some negligence in the maintenance of the particular structure. To create liability it must have required the combined effect of the act of God and the concurring negligence to produce the injury."

The Missouri Court of Appeals in *Coleman* v. *Railway, supra,* in reaching the same result, in a case having similar essential facts, applies the same principle though using a different test. It says (p. 491):

> "When the act of God is the cause of a loss, it is not enough, under this rule of law, to show that defendant has been guilty of negligence, the case must go further and show that such negligence was an active agent in bringing about the loss, without which agency, the loss would not have occurred."[12]

The Pennsylvania Supreme Court in *Baltimore & Ohio R. R. Co. v. Sulphur Spring School District, supra,* uses the same test when it says (p. 70) that the defendant's negligence

> "must be such as is in itself a real producing cause of the injury, and not a merely fanciful or speculative or microscopic negligence which may not have been in the least degree the cause of the injury."[13]

The conclusion reached by these cases is that, since the plaintiff would have been injured in like nature and degree whether the defendant had been negligent or not, therefore the defendant's negligence was merely a condition which should not create liability.

209, 211 (Tex. 1916); International & G. N. R. Co. *v.* Jackson, 47 Tex. Civ. App. 26, 103 S. W. 709 (1907).

[11] 96 Pa. St. 65, 69, 70, 42 Am. Rep. 529 (1880).

[12] Vyse *v.* Chicago, B. & Q. Ry. Co., 126 Ia. 90, 101 N. W. 736, 738 (1904).

[13] Haney *v.* City of Kansas, 94 Mo. 334, 7 S. W. 417 (1886); Missouri, K. & T. Ry. Co. *v.* Johnson, 34 Okla. 582, 126 Pac. 567, 569 (1912); Pahlka *v.* Chicago, R. I. & P. Ry. Co., 161 Pac. 544, 550 (Okla. 1916); Chicago, R. I. & P. Ry. Co. *v.* Morton, 157 Pac. 917, 919 (Okla. 1916).

Against these uniform American decisions, the English Court of Appeal appears to have taken a contrary view in *Nitro-Phosphate Co.* v. *London Docks Co.*, 9 Ch. D. 503, 519, 526 (1878). In that case the defendant dock company was required by law to maintain its wall on the river Thames four feet higher than Trinity high-water mark on London Bridge. Its wall was several inches lower than four feet in several places when an unforeseeable tide, which rose to 4 ft. 5 in. above Trinity high-water mark and was much higher than had ever been known before, carried an immense amount of water over the walls of defendant's dock and caused considerable damage to plaintiff's works beneath. When sued, defendant interposed the defense that, even if it had maintained its dock wall at four feet, still this unprecedented tide of 4 ft. 5 in. would have damaged plaintiff the same nevertheless. Fry, J., in the Chancery Division seems to agree in principle with the American authorities when he says (p. 519):

> "I am clear that a defendant cannot avail himself of the act of God as an excuse when he has not done his own duty, *except in cases in which he can make it apparent and plain to the court that, if he had done his duty, damage would still have followed to the plaintiffs.* Now that burthen the defenddants have, in my opinion, not discharged in the present case." (Italics ours).

The decision for the plaintiff in the Chancery Division must be based on lack of proof and not on a difference in view from the American decisions.

Judgment having been entered for plaintiff for all the damage sustained, the case was taken to the Court of Appeal, where although the court does not profess to differ from the opinion of Fry, J., on this point, still the opinion, rendered by James, L. J., does seem inconsistent. He says (pp. 526-27):

> "Suppose that the same damage would have been done by the excess of height of tide if the wall had been of due height, as has been done; yet, if the damage has been done by reason of the wall not being of due height, the defendants are liable for that damage arising from that cause, and are not excused because they would not have been liable for similar damage if it had been the result solely of some other cause. And, moreover, long before the tide rose even to 4 feet, it began to flow over towards and into plaintiffs' works; and, of course, *the defendants cannot escape their liability for the damage so occasioned because the tide afterwards went on swelling*

and swelling, even if it could be shewn that the same damage would have been occasioned by that additional height of water if the banks of the defendants had been in proper condition. They had been guilty of neglect, and had done damage before that extra height had been reached, and their liability to the plaintiffs was complete when the damage was done." (Italics ours).

The English view seems to differ from that of the American cases in this, that it regards the unprecedented, unforseeable flood as preceded by a foreseeable flood and that therefore the defendant should answer for whatever damage a foreseeable flood would have caused even though the unprecedented flood by itself, without defendant's negligent act, would have caused *all* of the plaintiff's damage. The English court holds that when the flood in its progress has reached only a foreseeable height, (4 ft. in the Nitro-Phosphate case), the defendant should be liable for the damage then accomplished, and should not be relieved by the fact that the flood unforeseeably increased so that, without defendant's negligent act, it might have caused *all* of the damage actually suffered. This rule might with equal facility be applied to the American cases which reach a contrary conclusion, but appears not to have been considered in any of them. The only American decision that the writer has discovered which hints at this conclusion is a *dictum* in *International & G. N. Ry. Co.* v. *Jackson*, 47 Tex. Civ. App. 26, 103 S. W. 709 (1907). There a foreseeable flood in May, causing damage for which defendant was liable, was succeeded by an unforeseeable flood in June which in fact would have completely destroyed plaintiff's crops whether there had been any obstruction by defendant or not, and even if there had been no flood in May. The court indicates that defendant is liable for the damage caused by the May flood. Why may not this doctrine be as well applied to a foreseeable flood which grows in a few hours into an unforeseeable flood?

Where the flood was of such proportions that only a *part* of plaintiff's damage would have been caused without regard to whether defendant had been negligent or not, although the American and English cases differ in their view-point, they are in accord in holding that the defendant is not liable to the extent that the damage may be attributed solely to the act of God.[14] The

[14] Madisonville, H. & E. R. Co. *v.* Thomas, 140 Ky. 143, 130 S. W. 975 (1910) ("So far as the loss would have occurred if there had been no embankment, or no

American courts speak of these as cases where the defendant's negligence has increased the damage which would have resulted from the act of God alone, and that the liability is for such increased damage only. The English view is that the act of God has increased the damage which has resulted from the defendant's negligence and therefore the damage attributable to the act of God should be deducted from the total damage suffered. The result is the same. On this point the Court of Appeal says in *Nitro-Phosphate Co. v. London Docks Co., supra,* (p. 527):

> "It was further suggested that the whole damage was not due to defendants' neglect, and that, as there was a tide supposed to be 4 ft. 5 in., that tide might have occasioned, and it is contended by the defendants that it did occasion, a substantial and ascertainable portion of the plaintiffs' damage. No doubt, if the court can see on the whole evidence that there was a substantial and ascertainable portion of the damage fairly to be attributed solely to the excess of the tide above the proper height which it was the duty of the defendants to maintain, occurring after the excess had occurred, and which would have happened if the defendants had done their duty, then there ought to be a proper deduction in that respect."

It is obvious that the difficulty in determining the amount of the damage which may be attributed to defendant's negligence and the unforeseeable act of God respectively is very great. That it was well nigh insuperable in the English case considered, was the view of the Court of Appeal, though that difficulty appears not to be mentioned in American decisions.

The second situation, where the unforeseeable flood would not in itself have caused damage to plaintiff, but does, when combined with defendant's negligence, also presents difficulties. Here no

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defect in it, they should find nothing for the plaintiff"); Albers *v.* San Antonio & A. P. Ry. Co., 36 Tex. Civ. App. 186, 81 S. W. 828 (1904) *(dictum);* Gulf, C. & S. F. Ry. Co. *v.* Harbison, 88 S. W. 452, 453, 456 (1905), 99 Tex. 536, 90 S. W. 1097 (1906) ("The testimony tended to show that . . . . . although appellee's land would have been overflowed, had there been no dam or embankment there, his injuries were greatly increased by reason of the water being caused to stand on his crops longer than it would have otherwise and on account of the water flowing through the culverts more rapidly over his land than it would have in the absence of such embankment and dam, and thereby washing his land and filling up his ditches." Under these facts the jury were instructed that they should "find for plaintiff for such additional damage"); Gulf, C. & S. F. Ry. Co. *v.* Wetherly, 88 S. W. 456 (1905), 99 Tex. 538, 90 S. W. 1098 (1906); Gulf, C. & S. F. Ry. Co. *v.* Oates, 88 S. W. 457 (1905); Standley *v.* Atchison, T. & S. F Ry. Co., 121 Mo. App. 537, 97 S. W. 244 (1906); International & G. N. R. Co. *v.* Jackson, 47 Tex. Civ. App. 26, 103 S. W. 709 (1907); Nitro-Phosphate Co. *v.* London Docks Co., 9 Ch. Div. 503 (Eng. 1878).

damage would result from the act of God but for defendant's negligence. If the unforeseeable magnitude of the flood does not cause the damage suffered by the plaintiff to be greater than it would otherwise have been, then it is clear that defendant's liability should cover the entire damage.[15] Where the unforeseeable act of God operates to cause the plaintiff's damage to be greater, it would seem, as in the situation noted previously, that defendant should not be liable to the extent that plaintiff's damage was increased by the unforeseeability of the flood, although the same difficulties exist as to accurately apportioning the damages.[16]

The case of *Williams* v. *Columbus Producing Co.*,[17] recently decided by the West Virginia Supreme Court of Appeals involves the problems considered above. Plaintiff's declaration charged that defendant was negligent in erecting an oil rig and two large oil tanks in the bed of Cabin creek, and that an "extraordinary" flood in Cabin creek, "such as could not reasonably be contemplated," was diverted by these obstructions so as to wash away and destroy plaintiff's residence. The court held that negligence, although stated very generally, was sufficiently alleged in the declaration because the facts stated showed that "the conditions which could reasonably be contemplated were such that damage might be expected to result therefrom." Having thus passed upon the allegations showing negligence, the court then found that defendant's negligence might be a proximate cause of the damage, rather than a mere condition, because "under the allegations of the declaration it cannot be said that the plaintiff's property would have been damaged whether the structures erected by defendant had been erected or not." This may exclude the situation first considered. With due deference, it is suggested that some of the reasons found in the opinion are hardly satisfactory and some of the cases cited are either distinguishable or not in point. The

[15] Columbus & W. Ry. Co. *v.* Bridges, 86 Ala. 448, 5 So. 864, 866 (1889); South Side Realty Co. *v.* St. Louis & S. F. R. Co., 154 Mo. App. 364, 134 S. W. 1034, 1038 (1911) ("If the defendant's negligence concurs with the act of God, in point of time and place, or otherwise so directly contributes to plaintiff's damage that it is reasonably certain that the other cause would not have sufficed to have produced the injury, then the defendant is liable, notwithstanding he may never have anticipated the intervention of superhuman force."); Mundy *v.* New York, L. E. & W. R. Co., 75 Hun 479, 27 N. Y. Supp. 469, 473 (1894); Chicago, R. I. & P. Ry. Co. *v.* Morton, 157 Pac. 917, 919 (Okla. 1916); Jones *v.* Seaboard Air Line Ry. Co., 67 S. C. 181, 45 S. E. 188, 195 (1903).

[16] *Cf.* Brink *v.* Ry., 17 Mo. App. 177, 199, 202-3 (1885); Washburn *v.* Gilman, 64 Me. 163, 171 (1873).

[17] 93 S. E. 809 (W. Va. 1917).

Minnesota case[18] cited seems not in point because the defendant's act in leaving the unguarded ladder in the street, leaning against his building, constituted a public nuisance, and the law is undisputed that one is absolutely liable for the consequences of his illegal act in maintaining a public nuisance whether defendant is negligent or not and whether such consequences are foreseeable or not.[19]. The West Virginia case[20] cited by the court is distinguishable because there the defendant's negligence seems to have been the sole cause of the plaintiff's damage. Under the facts, however, it is submitted that a correct result was reached.

—H. C. J.

[18] Moore *v.* Townsend, 76 Minn. 64, 78 N. W. 880.

[19] Wilson *v.* Phoenix Powder Co., 40 W. Va. 413, 415, 21 S. E. 1035, 52 Am. St. Rep. 890 (1895); see cases collected in 29 Cyc. 1155, n. 23.

[20] Atkinson *v.* Railway Co., 74 W. Va. 633, 82 S. E. 502.