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Article 19

Evidence--Negligence--Violation of City Ordinance--Some Evidence of Negligence--Proximate Cause (Carlock v. Westchester Lighting Company, 268 N.Y. 345 (1935))

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to discharge this debt in lawful currency.[7] After dividends are declared out of surplus, such dividend becomes the property of the stockholders irrespective of the time of payment.[8] If the directors provide in their resolution that the dividend shall be payable to the holders of record on a certain day they may do so to protect the corporation in paying to holders of record when they have no notice of transfer.[9] By this provision title is not affected.[10]

If the preferred stock is part of the capital assets of an estate, it must follow that the common stock received in exchange in addition to the dividend declared thereon before decedent's death must be substituted for the preferred shares, *i. e.*, capital assets.[11]

M. E. McC.

EVIDENCE—NEGLIGENCE—VIOLATION OF CITY ORDINANCE—SOME EVIDENCE OF NEGLIGENCE—PROXIMATE CAUSE.—Plaintiff's intestate, a member of the New York City Fire Department, in responding to an alarm, placed a ladder to the scaffolding on the unfinished side of a burning building. As the plaintiff's intestate stepped from the ladder to the platform of the scaffolding, his foot came in contact with a live wire and he was electrocuted. At the time the defendant company erected its high tension wires the lot was vacant. The wires were so hung that when the building construction began they crossed over the private property and were within the building line. When the walls of the building approached the wires, one of the building employees raised the wires about eight feet above the scaffolding by means of a wooden strut. A rain storm soaked the strut, short-circuited the wires and they fell to the scaffolding. At the trial, the judge excluded evidence of a city ordinance requiring line wires to be at least eight feet from the nearest point

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Cogswell v. Second Nat. Bank, 78 Conn. 75, 60 Atl. 1059 (1905), *aff'd sub nom*, Jerome v. Cogswell, 204 U. S. 1, 27 Sup. Ct. 241 (1906); Green v. Bissell, 79 Conn. 547, 65 Atl. 1056 (1907).

[7] Williams v. Western U. Tel. Co., 93 N. Y. 162 (1883); Grants Pass Hardware Co. v. Calvert, 71 Ore. 103, 142 Pac. 569 (1914).

[8] Brundage v. Brundage, 60 N. Y. 544 (1875); *In re* Kernochan, 104 N. Y. 618, 11 N. E. 149 (1887); Hoffer v. Sage, 112 N. Y. 530, 20 N. E. 350 (1889); Robertson v. De Brulatour, 188 N. Y. 30, 80 N. E. 938 (1907); Hill v. Newichanwanich Co., 8 Hun 459, *aff'd*, 71 N. Y. 593 (1887); Rowe v. White, 112 App. Div. 688, *aff'd*, 189 N. Y. 523, 82 N. E. 1132 (1907); Warner v. Watson & Gibson, 4 Misc. 12, 23 N. Y. Supp. 922 (Sup. Ct. 1893).

[9] Brisbane v. D. L. & W. R. R., 25 Hun 438, 94 N. Y. 204 (1883).

[10] Jones v. Terra Haute *etc.* Ry., 57 N. Y. 196 (1874); Brisbane v. D. L. & W. R. R., 25 Hun 438, 94 N. Y. 204 (1893); Robertson v. De Brulatour, 188 N. Y. 30, 80 N. E. 938 (1907).

[11] *In re* Osborn, 209 N. Y. 450, 103 N. E. 723 (1913); Pratt v. Ladd, 253 N. Y .213, 170 N. E. 895 (1930).

of the building over which they pass. From a judgment in favor of the defendant, plaintiff appeals. *Held,* judgment reversed. The failure to obey the city ordinance [1] for the protection or benefit of individuals is some evidence of negligence, and it was error to exclude the ordinance from the jury. *Carlock* v. *Westchester Lighting Company,* 268 N. Y. 345, 197 N. E. 306 (1935).

It is well settled in New York that where an ordinance for the protection of individuals prohibits the doing of acts, or imposes a duty, the neglect to obey the prohibition or perform the duty is some evidence of negligence.[2] Although there was a break in the chain of events between the violation of the ordinance and the death of the plaintiff's intestate, namely the propping up of the wires and the rain storm, the jury might have found the violation of the statute to be the proximate cause of the death, for several acts may occur to produce one result, one or more of which is the proximate cause.[3] The intervening causes do not breach the chain of causation to such an extent as to relieve the defendant from liability and it was within the province of the jury to determine whether the act of the defendant gave rise to the stream of events which culminated in the accident.[4] An electric light company is reasonably chargeable with knowledge or in the exercise of reasonable prudence, is bound to anticipate that people lawfully come into proximity to its wires and it is under an obligation to keep them in a safe condition.[5]

In the trial of the instant case in the Appellate Division the court in affirming a judgment in favor of the defendant pointed out that at the time of the erection of the wires the lot over which they passed was vacant; that it had remained vacant for some years; that the defendant had had no notice of construction and that under these circumstances the ordinance had no application.[6] Constructive notice was a question of fact for the jury for the defendant offered no evidence to show that it had no knowledge that construction was

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[1] Code of Ordinances of the City of New York, c. 9, art. 3, § 301, subd. b, requires, "Line wires shall be at least eight feet from the nearest point of the building over which they pass, and if attached to roof structures shall be substantially constructed. Wherever feasible, wires crossing over buildings shall be supported on structures which are independent of buildings."

[2] Massoth v. Delaware and Hudson Canal Co., 64 N. Y. 524 (1876); Willy v. Mulledy, 78 N. Y. 346 (1879); Racine v. Morris, 201 N. Y. 240, 94 N. E. 864 (1911); Schumer v. Caplin, 241 N. Y. 346, 150 N. E. 139 (1925); Newhall v. McCann, 267 N. Y. 394, 196 N. E. 302 (1935).

[3] Ring v. City of Cohoes, 77 N. Y. 83 (1879); Ivory v. Town of Deerpark, 116 N. Y. 476, 22 N. E. 1080 (1889); O'Neill v. City of Port Jervis, 253 N. Y. 423, 171 N. E. 694 (1930).

[4] Donnelly v. Pierce Contracting Co., 222 N. Y. 210, 118 N. E. 605 (1918); Williams v. Koehler and Co., 41 App. Div. 426, 58 N. Y. Supp. 863 (2d Dept. 1899); Brand v. Borden's Condensed Milk Co., 89 App. Div. 188 (2d Dept. 1903).

[5] Braun v. Buffalo General Electric Co., 200 N. Y. 484, 94 N. E. 206 (1911).

[6] Carlock v. Westchester Lighting Co., 242 App. Div. 778, 274 N. Y. Supp. 580 (2d Dept. 1934).

going on. If constructive notice is sufficient it places on electric light companies an unreasonable burden which requires a constant lookout over all vacant property or building operations which is too strict a rule to apply.[7] But apparently the burden has been placed on electric light companies operating under conditions similar to the defendant.

G. H. M.

NEGLIGENCE—FOOD—FOREIGN SUBSTANCE—AGRICULTURE AND MARKETS LAW.—A servant living with his master was injured by swallowing broken pieces of glass about the size of beans, apparently contained in an unchipped bottle of cream delivered to the master's house. There was evidence to show that glass was in the bottle after some of the cream had been used and that the cereal did not contain any broken glass. The dairy introduced evidence respecting the customary safety tests surrounding the bottling of the cream.

The court charged the jury that there was an implied warranty that the cream contained no deleterious substance harmful to the person *who used it.* Upon appeal, after verdict for plaintiff, the Appellate Division recognizing that such an implied warranty applies only to the benefit of the purchaser,[1] affirmed the verdict because it felt that the error did not affect the result since there was negligence present as a matter of law, being inferred on the theory that Section 50 of the Agriculture and Markets Law applies to the facts here.

Upon appeal to the Court of Appeals, *held,* that the Agriculture

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[7] Carlock v. Westchester Lighting Co., 268 N. Y. 345, dissenting opinion of Crane, C. J.

[1] Giminez v. The Great Atlantic & Pacific Tea Co., 264 N. Y. 390, 191 N. E. 27 (1934).

There are many jurisdictions which hold that an implied warranty follows through the dealer to the purchaser or ultimate consumer, Dothan Chero-Cola Bottling Co. v. Weeks, 16 Ala. App. 639, 80 So. 734 (1918); Watson v. Augusta Brewing Co., 124 Ga. 121, 52 S. E. 152 (1905); Parks v. C. C. Yost Pie Co., 93 Kan. 334, 144 Pac. 202 (1914); Ward v. Morehead City Sea Food Co., 171 N. C. 33, 87 S. E. 958 (1916); Catani v. Swift Co., 251 Pa. 52, 95 Atl. 931 (1915); Madden v. The Great Atlantic & Pacific Tea Co., 106 Pa. Super. Ct. 474, 162 Atl. 687 (1932); Mazeth v. Armour & Co., 75 Wash. 662, 135 Pac. 633 (1913).

Cases holding no warranty except to original purchaser: Birmingham Chero-Cola Bottling Co. v. Clark, 205 Ala. 678, 89 So. 64 (1921); Flacconio v. Eysink, 129 Md. 367, 100 Atl. 510 (1917); Pelletier v. Dupont, 124 Me. 269, 128 Atl. 186 (1925); McCaffrey v. Mossberg and Branville Mfg. Co., 23 R. I. 381, 50 Atl. 651 (1901); Crigger v. Coca Cola Bottling Co., 132 Tenn. 545, 179 S. W. 155 (1915).