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The "But for" Rule in Washington

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purchase price within two years, with $15 per month as compensation for the loan. The parents made improvements on the property and paid interest on the loan, and sought specific performance on payment of the purchase price. Appellant contended that the oral agreement was void as not to be performed within one year. The case was affirmed on the ground that the trust relation existing and part performance defeated the claim that the agreement was oral and therefore void as not to be performed within a year. The agreement could have been performed within a year, since by its terms payment of the $1,800 could have been made at any time within two years and so was outside of the statute, but the Court did not decide that question. In this case respondents paid interest, entered upon the premises and made improvements thereon. It is a stronger case of part performance than the *Hendry case, supra.* But, nevertheless, in so far as the decision in the *Borrow* case, *supra,* is based on part performance, it would seem to be overruled by the *Hendry* case. It is to be noted, however, that no mention of the *Borrow* decision was made by the Court in deciding the *Hendry* case.

The case of *Maze v. Feuchtwanger* [10] dealt with an agreement to pay a commission on a sale of goods in consideration of the agent's release of an option permitting a sale to another. The Court held that the agreement was not within the statute of frauds, since performance was possible within a year because no time was fixed, especially where it was fully executed on the part of the promisee. The Court's contention of part performance is mere *dicta,* and the *dicta* would seem, at first sight, overruled by the *Hendry* case, *supra.* However, it is to be noted that in the *Hendry* case neither party could have or did perform his part of the contract within a year; while in the *Maze* case, *supra,* assuming that the commission was not to be paid within a year, the promisee could have and did fully perform within the year.

In conclusion, it is to be repeated that the case of *Hendry v. Bird, supra,* is a clear and convincing decision, to the effect that where an oral agreement, contract or promise is void by reason of the fact that it may not by its terms be performed within one year from the making thereof, part performance will not take it outside of the statute.

J. Orrin Vining.

THE "BUT FOR" RULE IN WASHINGTON—The question of proximate cause is one which is of vital importance in determining where the liability for an act or omission shall fall. For this reason certain attempts have been made to set forth rules which should determine whether an act was the proximate cause of a particular result. The so-called "But For" rule for determining proximate cause is an outgrowth of this class of litigation and has been the cause of several interesting and apparently none too well reasoned cases, of which the famous "Bear Case" or *Gilman v. Noyes*[1] is perhaps the best known.

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[10] 106 Wash. 327, 179 Pac. 850 (1919).

[1] *Gilman v. Noyes,* 57 N. H. 627 (1876).

The true "But For" rule is simply this: the defendant's tort is the legal cause of the plaintiff's damage if, but for the commission of the defendant's tort, the damage would not have happened. It seems that the limitations of this rule have not always been understood.

In the recent Washington case of *Ross v. Smith & Bloxom*[2] the Court purported to decide the case upon the basis of the "But For" rule and cited several Washington cases[3] in support of its position. The decision does not in fact, however, sustain the true "But For" rule and each of the Washington cases cited as sustaining it was correctly decided upon other grounds than that which the Court infers.

The statement which has caused the case of *Ross v. Smith & Bloxom* to be cited as sustaining the "But For" rule is as follows:

"The act, to be the proximate cause of the injury must have been such that without it the injury would not have happened. 29 Cyc. 489."

No fault can be found with this statement of the law but this statement is not authority for the usually accepted "But For" rule defined above. It is only by using inverse reasoning that such a statement can lend color to the view that when a thing would not have happened but for a certain act or omission, that act or omission must have been the proximate cause of the consequence. The statement as quoted in the case, *supra,* is merely an abstract statement that one of the things necessary to a proximate cause is that the act must have contributed in some way to the consequence.

One might suppose from the extract quoted from SEDGWICK ON DAMAGES[4] that this great writer supported the "But For" rule. The extract quoted is as follows:

"The defendant may have suffered injury and a causal connection between the two may have been proved, but obviously this is not enough, for there are other causes which have contributed to produce the loss or damage. The essential point in law is that the connection must be proved to be necessary; the negligence must be a cause *but for which* the injury would not have been suffered. "

This statement, if construed, is to the effect that it is essential to proximate cause that the result would not have happened but for the negligence of the defendant, but it gives this as a negative test, and not as a positive test of what is proximate, and what is not proximate cause.

The Court fails to quote the rest of the paragraph from SEDGWICK which reads:

"This 'But For' rule, which is frequently mistaken for a decisive test may be expressed as follows:' The proximate cause to which legal liability attaches must be a cause but for which the loss or damage would not have arisen. But the causal chain is a legal conception, abstracted from the infinite web of cause and effect, as it appears and vanishes in nature, formed for the purpose of attaching

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[2] *Ross v. Smith & Bloxom,* 107 Wash. 493, 182 Pac. 582 (1919).

[3] *Bullis v. Ball,* 98 Wash. 342, 167 Pac. 942 (1917) *Hellen v. Supply Laundry Co.,* 94 Wash. 683, 163 Pac. 9 (1917).

[4] SEDGWICK ON DAMAGES, § 112, pp. 199, 200.

legal responsibility to a human agent, and in this chain, to say that a cause satisfies the 'But For' rule is not to say that it is the proximate cause since it may easily be a remote cause. Two entirely independent conditions must be satisfied. First, to be the proximate and to entail legal responsibility a cause must be one but for which the result would not have happened. Second, not only must this test be satisfied, *but also* this cause must be active enough in the result for it to be regarded in the law as efficient in responsibility"

From the paragraph as a whole it can readily be seen that SEDGWICK by no means supports the true "But For" rule.

In the last analysis the "But For" rule cannot be called a rule in any true sense of that word, it being nothing more than a limitation in a negative way on what may be the proximate cause of a consequence. *The real test and the thing which must always be decided, is not whether the result would not have happened but for the particular act, but whether that act is close enough in connection and causation to the result to be termed the proximate or efficient cause of the consequence.* When this fact is determined in the affirmative, it must always follow that the "But For" rule will apply to the case. The error, however, arises in supposing that this same rule will apply inversely, so as to say that if a thing would not have happened but for a particular act, then that act must be the proximate cause of the result. The fallacy of this line of reasoning may be seen in the fact that if this were true everything would be traceable back indefinitely as Ladd, J., in the case of *Gilman v. Noyes, supra,* states:

"Obviously the number of events in the history not only of those individual bears, but of their progenitors clear back to the pair that in instinctive obedience to the divine command went in unto Noah in the ark, of which it may be said, but for this the sheep would not have been killed, is simply without limit."

A rule that would lead to such results as this is certainly not to be followed and in fact is not followed in Washington.

Taking up briefly the cases cited by the Supreme Court in the case of *Ross v. Smith & Bloxom, supra,* as sustaining the "But For" rule it may readily be shown that these cases were not decided upon the basis of the "But For" rule.

The case of *Bullis v. Ball*[5] was not decided upon ground of the "But For" rule but upon the ground laid down by the Court as follows:

"Assuming that § 24 of the ordinance, requiring the driver to keep his vehicle as near the right hand curb as possible applies to street intersections, and that the defendant upon the occasion in question failed to observe the ordinance in this respect and hence was guilty of negligence, it seems too plain for argument that there was *absolutely no causal connection* between the act of negligence growing out of the violation of the ordinance and the collision. Clearly this negligence was not the proximate cause of the injury"

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[5] 98 Wash. 342 167 Pac. 942 (1917).

In the case of *Hellen v. Supply Laundry Co.*[6] two drivers, both exceeding the speed limit met at a street intersection and one car suddenly swerving from the instinctive action of the driver in attempting to avoid the accident, hit an innocent third person. The action was by the innocent third person against the drivers of the two machines. One driver, the one who swerved and actually hit the plaintiff having died since the accident, this action was prosecuted against the person who caused him to swerve.

The Court in this case arrived at a very correct and rightly reasoned decision which was worked out on the theory that the defendant had placed the other driver in a position where his instinct came into action and that instinct was the force which turned the car and caused the accident. Therefore there was a direct line of causation between the wrong of the defendant and the injury to the plaintiff. The speed of the defendant placed the other driver in a position where his instinct came into play and the original wrong working through this instinct caused the car to swerve and hit the plaintiff. Consequently the defendant's wrong was the proximate cause of the injury.

Thus by making an analysis of the cases cited by the Court in sustaining the "But For" rule in Washington the conclusion is reached that the Court of this state does not support the "But For" rule but has used it correctly as one of the limitations to determine proximate cause. The important test is always whether there is a causal connection between the act and the result. A good statement of the whole problem is contained in the case of *Crowley v. City of West End et al.*[7] where Anderson, J., gives the following:

"To constitute actionable negligence, there must be not only causal connection between the negligence complained of and the injury suffered, but the connection must be by a natural and unbroken sequence,—without intervening efficient causes, so that, but for the negligence of the defendant, the injury would not have occurred. It must not only be a cause, but it must be the proximate, that is, the direct and immediate, efficient cause of the injury."

The "But For" rule then, is never a positive test of what is the proximate cause and is in no way decisive on the question of proximate cause, but is merely a limitation in a negative way of what may be the proximate cause. If used in this way this so called "rule" is harmless.

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[6] *Hellen v. Supply Laundry Co.*, note 3, *supra.*

[7] *Crowley v. City of West End,* 149 Ala. 613, 43 So. 359, 10 L. R. A. (N. S.) 801 (1907).