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agreement was the placing on deposit of \$5,000 out of which the defendant bank could have indemnified itself if the correspondent bank had withdrawn some of the \$5,000 advanced to it to cover a loss from a change in the rate of exchange. Therefore, if the bank was holding the money for its own benefit there was no trust and consequently no possibility of a preference.²⁴ If the defendant bank had been holding the money for the purpose of forwarding it to the correspondent bank and thus for the benefit of the correspondent bank, the creation of a trust would have been possible.

FRANK T. ROSENQUIST.

THE TORT LIABILITY OF USERS OF ABANDONED PROPERTY

A question which from the standpoint of decisions is seemingly unique was raised in the case of *Locke v. Pacific Telephone & Telegraph Co. et al*, 78 Wash. Dec. 40, 33 Pac. (2d) 1077 (1934), concerning the liability of users of abandoned property. The city of Seattle erected a pole in 1905 on a parking strip bordering one of its streets, for the purpose of carrying the wires of the city's light plant. In 1926 the city removed all of its wires from the pole, and shortly thereafter the defendant telephone company placed a single drop wire on the pole which ran from their main line to the house of a subscriber in front of which the pole stood. This single wire remained on the pole until 1932 when the pole, because of its old and decayed condition, fell across the street and was struck by the plaintiff's auto without any fault on his part. The telephone company was a mere trespasser on the pole, and its drop wire was not a cause of the accident. In an action brought by the plaintiff for personal injuries against the city of Seattle and the telephone company a jury verdict was given in favor of the plaintiff against both defendants, judgment was entered against the city, and a motion for a judgment notwithstanding the verdict was granted in favor of the telephone company. Both the plaintiff and the city appeal from the granting of this motion in favor of the telephone company. It was held that the defendant telephone company did not have such control over the pole as to create the affirmative duty to inspect and repair running to the public, and that in fact they had no legal right to repair or to remove the pole, and hence were not liable. There is a vigorous dissent by Chief Justice Beals in whose opinion the control exercised by the telephone company was sufficient to create such a duty.

It seems conceded that control over the property in question is the basis of the duty to inspect and repair, and the *fact* of the sufficiency of the control exercised in this case is the point upon which the court splits. However, the second reason advanced by the majority for their decision is entirely inconsistent with a mere

²⁴Restatement of the Law of Trusts, sec. 111 (5) provides that the sole trustee of a trust cannot be the sole beneficiary of the trust.

trespasser ever exercising sufficient control to create such a duty because it would be impossible for a trespasser to attain the *right* to repair. Thus in the case of wrongful control there are but two alternatives. Either such control may never be sufficient to create a duty to inspect and repair because of the absence of the right to repair, which right is absent solely because the control exercised is wrongful, or that control is the sole basis of the duty, and, since the absence of the right to repair is due only to the wrongful way in which the control was gained, it is no defence for the non-performance of the duty. This, of course, raises the question as to what is the real basis of the duty and the liability for its breach. In the case of lawful control over property where the control is sufficient to create the duty to repair, the right to repair is also always present *because it arises from the nature of the control which creates the duty*. In the case of a trespasser, however, it is obvious that no such right can arise from his control, if any he has, because the control exercised by him is itself wrongful. Thus it appears that the right to make the repairs is only a constant derivative of the *lawful* control which creates the duty to make the repairs—the duty being determined solely by the sufficiency of that control, and that for this reason the right, in cases where the control is unlawful, should not be controlling because its absence is due only to the unlawful character of the control and not to the sufficiency thereof.

Assuming, then, that control is the sole basis of the duty to inspect and repair, it still appears that, in the view of the majority of the court, a trespasser could never attain sufficient control over property to create liability for inherent defects or for any accident arising from the property that did not spring from its use, for it is difficult to see how the control of a mere trespasser could be more complete than it is in this case.

That complete control over property when such control is legally gained will be sufficient to create a duty even when it is not coupled with an interest in the property itself, is demonstrated by the liability of agents to injured parties for failure to inspect and repair when the agent is in complete control. In *Lough v. John Davis & Co.*, 30 Wash. 204, 70 Pac. 491 (1902), the defendant as agent for the owner of a certain building was given absolute and complete control over the building by the owner. The plaintiff fell from the veranda of this building because of the negligence of the defendant in *not* repairing it when it became rotten from old age. The defendant was held liable directly to the plaintiff without joining the owner in the suit. It was contended by the defendant that his only duty was one of contract to the owner, and that as he had no interest in the building, he had no duty running to the public who were not privy to the contract, but the court said.

“ the obligation, whether for misfeasance or nonfeasance, does not rest in contract at all, but is a common-law obligation devolving upon every responsible person to so use that which he controls as not to injure another, whether he is in the operation of his own property as

principal or in the operation of the property of another as agent.”

Of the two cases cited in the opinion of the *Locke* case (which the court admits is the extent of the authority on the point) only one of them concerns the liability of a trespasser. In that case the defendant power company placed a beam in the forks of a tree standing on the property of the plaintiff to which they attached a guy wire for the purpose of supporting one of the poles in their power line. Later a dead branch much higher up in the tree fell and injured the plaintiff. It was conceded that the beam and guy wire had nothing to do with causing the branch to fall, but that the branch died for some unknown reason and fell from its own weight. The court held that the defendant power company was not liable and had no duty to inspect and make safe. The theory of the plaintiff that the defendant had incorporated the tree in its system of poles was entirely discarded by the court which held substantially the same as the *Locke* case, saying that the defendant had no such control over the tree as to create a duty running to the plaintiff, and that in fact they had no right to repair the tree. *Piculjan v. Union Electric Light & Power Co.*, 207 Mo. App. 331, 234 S. W. 1006 (1921)

In this case no importance was attached to the fact that the plaintiff owned the tree. A hypothetical case was put by the court in their opinion. Suppose a politician was running for office and nailed some posters on the side of an abandoned barn, and that later the barn fell and injured a passer-by because of some inherent defect in its construction. Would the politician be liable? The answer is of course in the negative.

But if the liability is based on control, it could easily be argued that even though the politician had obtained a legal right by license to use the wall of the barn for this purpose, still he would not have had sufficient control over the entire barn to be liable for its falling on the plaintiff. This is shown by the cases where such actual license has been granted. In *Reynolds v. Van Beuren*, 155 N. Y. 120, 49 N. E. 763 (1898), the defendant had acquired the use of a sign board on the roof of a certain building from the tenant of the building. The sign, because of an inherent defect in its construction, fell on the plaintiff as he walked on the street below. The court first construed the license as granting only the use of the sign for a specific purpose vis., to display advertisements, and they further construed a promise in the license to keep the roof in repair as merely applying to the damage that the licensee might do by walking on the roof in the placing of his advertisements. They then held that since the control over the sign was only granted to the defendant for the sole purpose of displaying his advertisements, that all the remaining control was retained by the tenant of the building who was solely liable for the accident if anyone was.

In cases of this kind the control over the property is definitely set out in the instrument which grants it, and thus the duties aris-

ing from the control are definitely established. But in the case of a trespasser it must either be said that he exercises no control whatever, or that his overt acts must be taken to indicate the amount of control which in fact he is exercising—even though such control is entirely wrongful.

Applying this to the politician, it would take a large stretch of imagination to say that the act of posting a sign on the side of a barn would indicate an assumption of control over the entire barn either in fact or by intent. So too the tree might be susceptible to this argument, although it would admittedly be a very close question of fact. When we come, however, to a telephone pole this argument would fail, for such a pole has only one purpose and that is to carry wires, and thus one who places his wires on the pole has exercised almost the extent of the control possible. Even a partial user of the poles and wires of a system has been held to constitute sufficient control to impose the duty of inspection and repair when the use was gained legally. In *Roberts v. Pacific Gas & Electric Co.*, 102 Cal. App. 422, 283 Pac. 353 (1929), the defendant electric company constructed a line for the city which consisted of poles and wires running to and serving the city's park. By the contract of construction the city was to become the sole owner of the line but the defendant reserved the right to use the line for the purpose of serving one golf club with power. A tree fell over the line forcing the wires almost to the ground but not breaking them, and they remained in that condition for about a month. The deceased, not seeing the wires, attempted to cut the tree for fire wood and was electrocuted. It was held that the partial use retained was enough to impose the duty to inspect and repair on the defendant, and that thus it was liable.

And also in *North Arkansas Telephone Co. et al v. Peters*, 103 Ark. 564, 148 S. W. 273 (1912), the defendant telephone company had constructed a line to the city limits. A subscriber, who lived four miles beyond the city limits constructed a line to the city limits where the wires connected with those of the telephone company. Neither the subscriber nor the defendant ever inspected the line, but when it was found to be out of order or it was reported to the subscriber that the wires were down, he would notify the defendant who would send a repairman out at its own convenience to repair the line. The plaintiff was injured due to a sagging wire on the portion of the line owned and constructed by the subscriber. It was held that the defendant *operated* the line and that it was constructed for the joint benefit of the subscriber and the defendant, and that thus the defendant had sufficient control to create a duty to inspect and repair, and for that reason was liable.

In the above cases the amount of control necessary to create the duty to inspect and repair is determined directly from the use, and the only difference between them and the *Locke* case is the difference between legal and illegal use, or in other words the fact that the control was exercised with the consent of the legal owners. For this reason it seems that a trespasser in the view of the *Locke* case is incapable of exercising such control over property tres-

passed on as to create a duty in him to inspect and repair the property. This conclusion is strengthened by the argument of the court that the trespasser had no legal right to repair or remove the pole—for a trespasser could never attain such legal right and still be a trespasser. Thus whether the view is taken that a trespasser cannot be charged with such a duty because more than actual control alone is required to create it, or whether it is accepted that control is the sole basis of the duty but that in the case of a trespasser such duty is always defeated by the absence of the right to perform it, still the fact remains that the only reason for non-liability is the *wrongful* character of the control exercised by the trespasser. In the *Locke* case a trespasser of long standing—who is a wrongdoer—is placed in a vastly better position than the conscientious user of property who obtains the right to use the property from the owner. Thus the trespasser profits from his own wrongful act and escapes liability solely because of it, for had he obtained the right to use the pole from the city before placing his wires upon it, he would have been liable. A better solution of the problem would be to recognize that the actual control exercised is the basis and measure of the duty to inspect and repair regardless of whether such control is legally gained or not.

As has been mentioned above, this is a question on which authority virtually does not exist, and it is submitted that the case should have been decided in view of more fundamental principles than those advanced either by court or counsel. The cases which hold that a person should never be allowed to set up the results of his own wrongful acts as a defence to liability, or that he should not be allowed to profit by virtue of having committed those wrongful acts, are found in numbers in all fields of the law and are far too numerous and well recognized to necessitate mentioning here.

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