during times when rights may be curtailed.[24] It is submitted that the relative worth of informing the people of matters in which they have an interest as citizens, as compared to the personal right of the individual not to have his public acts freely commented on, should be considered in deciding whether, in times of national unrest especially, the privilege of fair comment is to be preserved.[25]

E. S. D.

TORTS—PROXIMATE CAUSE—CITY'S FAILURE TO MAINTAIN SIDEWALK—[Missouri].—The defendant city failed to maintain a sidewalk, as a result of which the plaintiff, a child, decided to cross the street to the sidewalk on the opposite side. In crossing, she was struck by an automobile negligently driven by a third party. *Held*, that the alleged negligence of the city was the remote, and not the proximate cause of the injury. *Smith v. Mabrey*.[1]

In order to attach liability for a negligent act, the act must be the proximate cause of the injury.[2] There are two accepted tests for deter-

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24. In a case holding that to say a politician was a member of the Communist party was not defamatory per se, the court said: "To deprive our citizens of the right freely to debate political issues or to allude to the political affiliations of others, is to make a breach in the dike which protects our cherished institutions. Far better is it to preserve that right unhampered—even with the abuses which frequently attend its exercise in the heat of political passion—than to limit it at the possible loss of our constitutional liberties." Garriga v. Richfield (1940) 174 Misc. 315, 320, 20 N. Y. S. (2d) 544, 549.

25. "To make the critic's protection depend not only upon the sincerity of his criticism but also upon its being such as a reasonable man might make would tend to prevent the public from knowing much essential criticism. The advantages gained by the freedom of discussion stated in this Section are therefore sufficient to outweigh the danger that the reputation of public officers or candidates may suffer thereby." Restatement, *Torts* (1938) §607, comment c.

1. (Mo. 1941) 154 S. W. (2d) 770.

2. Scheffer v. R. R. Co. (1881) 105 U. S. 249; Setter's Adm'r v. City of Maysville (1902) 114 Ky. 60, 69 S. W. 1074; Eaton v. Wallace (Mo. 1926) 287 S. W. 614, 48 A. L. R. 1291; Madden v. Red Line Service (Mo. 1934) 76 S. W. (2d) 435 (Mere occurrence of the negligence does not create liability, but the negligence must be the proximate cause of the injury.) Hull v. Thomson Transfer Co. (1909) 135 Mo. App. 119, 115 S. W. 1054; Grace v. Metropolitan Street Ry. Co. (1912) 167 Mo. 109, 150 S. W. 1092; Jacquith v. Fayette R. Plumb. Inc. (Mo. 1923) 254 S. W. 89; Kennedy v. Independent Quarry and Const. Co. (1926) 316 Mo. 782, 291 S. W. 475; George v. Kansas City Southern Ry. Co. (Mo. App. 1926) 286 S. W. 130; Stokes v. Springfield Wagon Co. (Mo. App. 1927) 289 S. W. 987; Cregger v. City of St. Charles (1928) 224 Mo. App. 232, 11 S. W. (2d) 750; Evans v. Massman Const. Co. (1938) 343 Mo. 632, 122 S. W. (2d) 924 (Reversing 232 Mo. App. 1105, 115 S. W. (2d) 163). (Proximate cause of the injury or event is that which in the natural and continuous sequence, unbroken by any event and without which injury or event would not have occurred.) Butz v. Cavanaugh (1897) 133 Mo. 503, 38 S. W. 1104, 59 Am. St. Rep. 504; Yongue v. St. Louis & S. F. R. Co. (1908) 133 Mo. App. 141, 112

mining when a negligent act is the proximate cause of the injury: whether the injury that resulted could have been foreseen by a reasonably prudent man,[3] and whether the resultant injury was the natural and probable result of the negligent act.[4] Missouri, following the general tendency, has abandoned the foresight test in most cases and has accepted the hindsight rule as being most satisfactory.[5] This has been the accepted rule in determining proximate cause in England since the case of *Smith v. London S. W. Ry. Co.*, decided in 1870.[6] Both tests are frequently applied in determining when an intervening act of a third person breaks the chain of legal causation between the original negligent act and the injury.[7]

In the instant case, liability could have been decided without any reference to the issue of proximate cause, inasmuch as the court found that the defendant city was not negligent with respect to the failure to build the sidewalk. The issue was discussed only because the court, apparently not too sure of its ground on the negligence question, was willing to assume that the city was negligent. With such an assumption, the case reduces itself to a pattern of facts that bear comparison with a group of prior Missouri cases in which the same issue of causation was decided in favor of the plaintiff. The court was thus driven to distinguish those cases from the present. In those cases, the plaintiffs, who had been forced to walk in the street by reason of an obstruction on the sidewalk, were struck by a negligently driven car. The obstruction had been placed on the sidewalk, in violation of an ordinance, during the construction of a building. The

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S. W. 985; Jackson v. Butler (1913) 249 Mo. 342, 155 S. W. 1071; State ex rel. National Newspaper's Ass'n v. Ellison (Mo. 1915) 176 S. W. 11 (Only such acts that bear such a causal connection to the injury or event are actionable.)

3. Brubaker v. Kansas City Electric Co. (1908) 130 Mo. App. 1139, 110 S. W. 12; DeMoss v. Kansas City Ry. Co. (1922) 296 Mo. 246, 246 S. W. 566; Coy v. Dean (1928) 222 Mo. App. 67, 4 S. W. (2d) 835; Cregger v. City of St. Charles (1929) 224 Mo. App. 232, 11 S. W. (2d) 750.

4. Smith v. St. Joseph Ry., Light, Heat, and Power Co. (1925) 310 Mo. App. 467, 276 S. W. 607; Helton v. Hawkins (1927) 221 Mo. App. 93, 290 S. W. 91; Prosser, *Torts* (1941) 318; Green, *Rationale of Proximate Cause* (1927) 177-185 §9; Smith, *Legal Cause in Actions of Tort* (1911) 25 Harv. L. Rev. 103, 114-128.

5. For old Missouri ruling: Saxton v. Missouri Pac. R. Co. (1903) 98 Mo. 92, 72 S. W. 717; McDonald v. Metropolitan Street Ry. Co. (1909) 219 Mo. 468, 118 S. W. 78; Johnson v. Ambusson Hydraulic Const. Co. (1915) 188 Mo. 105, 173 S. W. 1081; State ex rel Lusk v. Ettison (1917) 271 Mo. 463, 196 S. W. 1088. For present Missouri ruling: Holloway v. Barnes Grocer Co. (1929) 223 Mo. App. 1026, 15 S. W. (2d) 917; Scott v. American Mfg. Co. (Mo. 1929) 20 S. W. (2d) 592; Reugsegger v. Chicago, Great Western Ry. Co. (1930) 225 Mo. App. 211, 29 S. W. (2d) 221; Phillips v. Yellow Cab Co. (1931) 225 Mo. App. 1172, 36 S. W. (2d) 419.

6. (1870) 23 L. T. R. 678, 6 C. P. 14, 20, "It may be that they did not anticipate that the plaintiff's cottage would be burned as a result of their negligence, but I think that the law is, * * * defendants are bound to provide against all circumstances which might result from this, and were responsible for the natural consequences of it."

7. Demoss v. Kansas City Rys. Co. (1922) 296 Mo. 526, 246 S. W. 566; Coy v. Dean (1928) 222 Mo. App. 67, 4 S. W. (2d) 835.

court held that the city had notice of the obstruction as it had been there for some time, and that its failure to see that a safe passage was provided for the pedestrians was the proximate cause of the injury.[8]

The court distinguished the previous cases on the ground that in these cases the sidewalk already existed and was negligently maintained, while in the present case no sidewalk was contemplated, and the alleged breach of duty was therefore of a lesser degree. However, since the court assumed negligence in the instant case, and in so doing admitted a breach of duty, it seems somewhat illogical to distinguish the cases on the issue of causation by reopening the issue of negligence.[9]

A better approach to the problem of causation would have been to consider the purpose of the sidewalk, and, in the light of that purpose, the nature of the hazards that might be regarded as falling within the natural and probable consequences of the failure to maintain a sidewalk.[10] Is the sidewalk merely a convenience that is furnished by the city, or is it a safety device to protect the pedestrian? The locale of the sidewalk may be the determining factor, depending upon whether it is in a congested traffic area or along a seldom traveled street. This will determine the "risk of harm," "danger," or "hazard" which will come within the scope of the duty to protect from injury.[11]

It is difficult to understand the grounds upon which the court held the negligence of the city to be too remote from the injury to be, by any possibility, the proximate cause of the injury. In any event there is question raised in the case which reasonable men might answer differently. The decision as to proximate cause should have been left to the jury.[12]

M. O'B. I.

WILLS—HOLOGRAPHS—WHAT CONSTITUTES "ALL IN TESTATOR'S HANDWRITING"—[Tennessee].—An instrument found among testator's valuable papers was offered for probate. It was entirely in the testator's handwriting except for the fact that it contained his wife's signature as well as his own. The judge of the county court held that because of the wife's signature the will was not entirely in the handwriting of the testator as required by the

8. Lindman v. Kansas City (1925) 308 Mo. 161, 271 S. W. 516; Shafir v. Carroll (1925) 309 Mo. 458, 274 S. W. 755; Strother v. Seiben (1926) 220 Mo. App. 1027, 282 S. W. 502; Strother v. Carroll (Mo. 1926) 287 S. W. 810. These cases arose from the same incident mentioned in the text.

Stollhans v. City of St. Louis (1938) 343 Mo. 467, 121 S. W. (2d) 808. (The court imputed liability to the city, though its negligence was incapable of inflicting injury without the intervening negligent act.)

9. Smith v. Mabrey (Mo. 1941) 154 S. W. (2d) 770.

10. Green, *Rationale of Proximate Cause* (1927) 11-13, §3 "The law never gives complete and absolute protection to any interest. The problem therefore is, in any case, whether the particular hazard falls within the radius of protection thrown about the interest."

11. Palsgraf v. Long Island R. Co. (1928) 248 N. Y. 339, 162 N. E. 99, 59 A. L. R. 1253; Harper, *The Law of Torts* (1938) 79-80, §44.

12. Frese v. Wells (Mo. 1931) 40 S. W. (2d) 652; Prosser, *Torts* (1941) 373-374.