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Torts--Landowner's Liability to Child Trespassers

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court in the former suit, would the holding of the principal case, making these issues res judicata in a collateral proceeding, plus the language of W. VA. CODE c. 11A, art. 4, § 33, to the effect that procedural irregularities shall not invalidate the title transferred, operate to give the purchaser a good title? While a definite answer must depend upon the course of future decisions, the principal case is such as to encourage greater reliance on the validity of land titles transferred under W. VA. CODE c. 11A, art. 4 (Michie 1955).

L. L. P.

TORTS—LANDOWNER'S LIABILITY TO CHILD TRESPASSERS.—Action on the case was brought by *P*, a ten year old lad, who was injured following an explosion of a mixture contained in a can or filter found by the boy on or near a playground located on *D* coal company's leasehold. *D* and other coal companies customarily dumped rubbish and refuse on or near the playground area. Judgment for *P*. On appeal, *held*, reversed and new trial ordered. Although *D*, in the absence of the exercise of ordinary care, would be liable for injuries sustained by a foreseeable child trespasser who is injured by a dangerous instrumentality *D* maintains on his land, *P* here failed to prove by substantial evidence that *D* had dumped the can or filter on or near the playground. *Justice v. Amherst Coal Co.*, 101 S.E.2d 860 (W. Va. 1958).

At early common law no duty of care, other than to refrain from inflicting willful and wanton injury, was owed the trespasser, whether he be a child or adult. PROSSER, TORTS § 76 (2d ed. 1955).

As society became more highly industrialized and urbanized it became apparent that the harsh effects resulting from the strict common law rule invited modification of the rule itself, particularly in respect to child trespassers, since the value of the child to the community was quite as important as the private right of the landowner to the unfettered use of his land. See James, *Tort Liability of Occupiers of Land: Duties Owed to Trespassers*, 63 YALE L.J. 144, 161 (1953).

An affirmative duty of care was first imposed upon the landowner in *Sioux City & Pac. R.R. v. Stout*, 84 U.S. (17 Wall.) 657 (1873). Here the child trespasser, coming upon the land to play, was injured by *D*'s unlocked unguarded turntable. The *Stout* case,

though not immediately adopted by other jurisdictions, has served as a basis for the development of the attractive nuisance or turntable doctrine of liability. See Green, *Landowners' Responsibility to Children*, 27 TEX. L. REV. 1 (1948).

As the doctrine was originally conceived, the element of allurement or attractiveness was a key feature in finding the landowner liable. That is, the child must have been attracted to the property by a visible instrumentality thereon, dangerous in nature, such as an unlocked turntable. *United Zinc & Chemical Co. v. Britt*, 258 U.S. 268 (1922); *Gotcher v. City of Farmersville*, 137 Tex. 12, 151 S.W.2d 565 (1941). However, allurement is no longer a material element in the great majority of jurisdictions, and in that respect at least, the doctrine is certainly misnamed. See *e.g.*, *Bartleson v. Glen Alden Coal Co.*, 361 Pa. 519, 64 A.2d 846 (1949); *Standard Oil Co. v. Dumas*, 183 Ark. 616, 38 S.W.2d 17 (1931).

The modern attractive nuisance doctrine would impose a duty of care upon a landowner who maintains a dangerous instrumentality on his property if (1) it is foreseeable that children will trespass, (2) that injury to them is probable, (3) that they are too young to realize the risk involved, and (4) the utility of maintaining the condition is slight as compared to the risk to young children involved thereon. RESTATEMENT, TORTS § 339 (1934); PROSSER, TORTS § 76 (2d ed. 1955).

The modified Restatement version of the doctrine has been adopted and applied by the majority of American jurisdictions. See Annot., 60 A.L.R. 1444 (1929); 53 A.L.R. 1344 (1928); 45 A.L.R. 982 (1926); 36 A.L.R. 34 (1925). A minority of states have flatly rejected the doctrine, see *e.g.*, *Bottum's Adm'r v. Potomac F. & P. Ry.*, 105 Va. 226, 53 S.E. 113 (1906); *Ryan v. Towar*, 128 Mich. 463, 87 N.W. 644 (1901), while Oklahoma appears to have rejected it in part. *Shell Petroleum Corp. v. Beers*, 185 Okla. 331, 91 P.2d 777 (1938). Other jurisdictions, while not adopting the doctrine by name, have apparently applied it in principle. *Mayer v. Temple Properties Inc.*, 307 N.Y. 559, 122 N.E.2d 909 (1954); *Strang v. South New Jersey Broadcasting Co.*, 10 N.J. Super. 486, 77 A.2d 502 (1950).

West Virginia, while consistently repudiating the doctrine by name, *Tiller v. Baisden*, 128 W. Va. 126, 35 S.E.2d 728 (1945); *Ritz v. City of Wheeling*, 45 W. Va. 262, 31 S.E. 993 (1898), has adopted

and followed a principle, often termed the dangerous instrumentality rule, which is closely akin to the doctrine. See *Richards v. Hope Construction & Refining Co.*, 121 W. Va. 650, 5 S.E.2d 810 (1939).

The rule, as applied in West Virginia, would hold a landowner who maintains a dangerous instrumentality on his land, liable to a child trespasser who is injured by the instrumentality if (1) the presence of the trespasser is known or foreseeable and (2) the dangerousness of the instrumentality is hidden, concealed, or latent when handled by one unfamiliar with its use. *White v. Kanawha City Co.*, 127 W. Va. 566, 34 S.E.2d 17 (1945); *Adams v. Virginian Gasoline & Oil Co.*, 109 W. Va. 631, 156 S.E. 63 (1930); see Beatty, *The Attractive Nuisance Doctrine in the Virginias*, 10 WASH. & LEE L. REV. 20 (1953).

Applying the rule, the West Virginia court has held powder, gasoline, and electric wires to be dangerous instrumentalities, since their capacity to inflict harm is concealed or latent. *Parsons v. Appalachian Electric Power Co.*, 115 W. Va. 450, 176 S.E. 862 (1934); *Wiseman v. Terry*, 111 W. Va. 620, 163 S.E. 424 (1932). On the other hand, fire, barbed wire, and pools have been held not to constitute dangerous agencies within the rule, the theory being that even a child of tender years can recognize the apparent dangers involved. *Tiller v. Baisden, supra; White v. Kanawha City Co., supra; Beacher v. McFarland,* 183 Va. 1, 31 S.E.2d 279 (1944).

The principal case finds a foreseeable trespasser being injured by a latently dangerous instrumentality, but recovery being denied because *P* was unable to prove by substantial evidence that *D* had in fact placed the dangerous agency on his land. Apparently then, West Virginia would predicate liability on the landowner himself having created or maintained the dangerous agency.

A situation analogous in nature has been lately decided in favor of the trespasser in a jurisdiction which accepts the Restatement modification of the attractive nuisance doctrine. *Simmel v. New Jersey Coop. Co.*, 136 A.2d 301 (N.J. 1957); see *Strang v. South New Jersey Broadcasting Co., supra.* In the *Simmel* case, an infant was injured by a bonfire placed upon the land by another trespasser. Holding the landowner liable, the New Jersey court ruled, that as a logical extension of the Restatement definition, liability may be imposed upon the landowner, even though he neither created nor maintained the dangerous instrument, if he were aware

of its existence or could have been made aware of its existence by an inspection of the land.

The *Simmel* case offers a good example of the trend in some jurisdictions toward imposing a greater burden of care on the landowner in regard to infant trespassers. While such an extension of the landowner's liability may be practical in highly urbanized jurisdictions, it would not seem to be desirable or necessary to impose this additional duty on a landowner in a jurisdiction such as West Virginia, which has few densely populated centers.

Nevertheless, the instant West Virginia case suggests the need for a redefining of the dangerous instrumentality rule. The court, while consistently repudiating the attractive nuisance doctrine, has applied a dangerous instrumentality rule which is in essence little more than a modification of the doctrine itself. This basic anomaly results in uncertainty, not only as to the extent of the landowner's duty of care and liability, but also as to the elements and proof the plaintiff must show in order to recover.

It would seem then, that a modern dangerous instrumentality rule should not only reflect an intention to keep the landowner's liability within reasonable limits, but should also incorporate and set out more definite standards regarding duty of care, liability, and recovery. It is submitted that this two-fold purpose could best be effected by adoption of the rules set out in RESTATEMENT, TORTS § 339 (1934).

D. L. McC.

WILLS—HOLOGRAPHIC CANCELLATION OF LIFE ESTATE ALSO CANCELS REMAINDER.—By holographic will, *T* left a life estate in the sum of twenty thousand dollars to each of five named beneficiaries, and at the death of each, the principal to a charity. Before his death, *T* lined out the names of two of the designated life tenants. *Held*, that inasmuch as the will must be given effect as it appeared at *T*'s death, deletion of the life estates also deleted the dependent remainders. *Sheltering Arms Hospital v. First and Merchants Nat'l Bank*, 100 S.E.2d 721 (Va. 1957).

By nearly identical statutes, holographic wills—those wholly in the handwriting of the testator—are valid in the Virginias. W. VA. CODE c. 41, art. 1, § 3 (Michie 1955); VA. CODE ANN. § 64-51