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Negligence--Turntable Doctrine--Explosives

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NEGLIGENCE—TURNTABLE DOCTRINE—EXPLOSIVES. — Plaintiff's decedent, aged eleven years, in company with other boys of like age, while playing on property of the defendants, were requested to bring powder from the storehouse of the defendant to load on cars, this being the duty of the servant of the defendant, R, who made the request. While complying, one of the kegs was bursted, of which fact R was notified, and replied that it was all right; the boys picked up some of the powder, crossed the bridge nearby, to other lands of the defendant, and while throwing the powder on a fire there, plaintiff's decedent received burns from which he died. The court, in imposing liability on the defendant, says, "The law charges one possessing powder with knowledge that it is attractive to immature children, who may be expected to meddle with it; the law imposes on possessor of powder highest degree of care to protect children from injury where powder is accessible to them; failure of possessor of powder to exercise highest degree of care to protect children from injury will impose liability for injury". *Wellman v. Fordson Coal Company et al.*, 143 S. E. 160 (W. Va. 1928).

The language of the case may be misinterpreted as a reversal of earlier cases repudiating the turntable doctrine, *Ritz v. City of Wheeling*, 45 W. Va. 262, 31 S. E. 993; *Utermohlen v. Boggs Run Company*, 50 W. Va. 457, 40 S. E. 410; *Simmons v. Chesapeake & Ohio Railway Company*, 97 W. Va. 104, 124 S. E. 503, 36 A. L. R. 104; but an examination of the case shows that the turntable doctrine is not applicable here, for the following reasons: (1) The turntable doctrine applies to cases where the child, were it not for the invitation implied from the attractiveness of the instrument or agency, would have been a trespasser, 20 R. C. L. 79-81; *United Zinc Company v. Britt*, 258 U. S. 268, 36 A. L. R. 28; while in the principal case the children were invitees. (2) The instrument or agency causing the harm, in the turntable cases, must have its operation on the child before he trespassed. *United Zinc Company v. Britt*, *supra*; *Hayko v. Colorado and Utah Coal Company*, 77 Colo. 143, 235 Pac. 373, 29 Law Notes 154 (1925); *McDermott v. Burke*, 256 Ill. 401, 100 N. E. 168; *St. Louis etc. Railroad Company v. Bell*, 81 Ill. 76; *Hardy v. Pacific Railroad Company*, 266 Fed. 860; *Troglia v. Butts, etc., Company*, 270 Fed. 75. Indeed, the case of *Powers v. Harlow*, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154, quoted by the court in the principal case, being a case like the present where the children were rightfully present by invitation, is not authority in support of the turntable doctrine. 36 A. L. R. 85.

The basis of the decision in the principal case would seem to be negligence, since these children were invitees. Negligence is a

relative term, and implies a non-observance or omission to perform a duty which is prescribed by law, or which arises from the situation of the parties and circumstances which surround the transaction. *Burdick, Law of Torts*, 509; *Sias v. Rochester Railway*, 169 N. Y. 118, 62 N. E. 132, 56 L. R. A. 580; *Dobbins v. Missouri, K. & T. Railway Company*, 91 Tex. 60, 41 S. W. 62, 38 L. R. A. 573, 66 Am. St. Rep. 856. Hence, if the act is one which the actor, as a man of ordinary prudence, could foresee might naturally or probably produce the injury complained of, there is negligence. *Coley v. Statesville*, 121 N. C. 301, 28 S. E. 482; *Fowlkes v. Southern Railway Company*, 96 Va. 742, 32 S. E. 464; *Scheffer v. Railroad Company*, 105 U. S. 249. This rule is supported and followed in cases, like the present, involving explosives. *The Nitro-Glycerine Case*, 15 Wall. (U. S.) 524, 21 L. Ed. 206; 11 R. C. L. 665, 666-667; *Mills v. Central of Georgia Railroad Company*, 140 Ga. 181, 78 S. E. 816, Ann. Cas. 1914C, 1098 and note. Obviously then, the foreseeability of this injury determines the liability of the defendants, and since the test must be applied to each individual case, the only question in the principal case was whether the servant of the defendant, as an ordinary prudent man, could foresee an injury of this character. This question was left to the jury, *Blankenship v. Ethel Coal Company*, 69 W. Va. 74, 70 S. E. 863; 22 R. C. L. 148; and the jury found contrary to the contention of the defendant. The court apparently found no reason to disturb this finding.

—L. C. HESS.

BILLS AND NOTES—EVIDENCE.—Agent signed notes "A, trustee", *Held*, that agent was not liable to payee if he could show that payee knew that he was acting, and executed the instrument, in a representative capacity. Holder, charged with notice, could maintain assumpsit against the principal without joining the agent, and show by parol evidence that debt, as evidenced by the note, was in fact the principal's, and that it was so understood between the agent and payee. *Huntington Finance Company v. Young*, 143 S. E. 102 (W. Va. 1928).

It is well settled law in West Virginia that an agent is not liable to the payee if he can show that the note was in fact that of the principal and it was so understood between the agent and payee. *Clark, Trustee, v. Talbott*, 72 W. Va. 46, 77 S. E. 523. There is a square conflict of authority as to the effect of §20 of the Negotiable Instruments Law. One line of cases holds that the express language of §20 makes the agent personally liable. *Citizens*