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Negligence--Turntable Doctrine--Explosives

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NEGLIGENCE — TURNTABLE DOCTRINE — EXPLOSIVES. — Plaintiff's decedent, a child nine years of age, was playing with other children on the lands of the defendant, where the children had played frequently over a period of years without objection by the defendant, who had knowledge thereof. Close by, on the lands of the defendant was a small outbuilding in which, about one year before, cans of powder had been placed; and although the door had been barred at first, yet for the latter half of the year preceding the door had stood open most of the time. Plaintiff's decedent, with other children, went to this outhouse to get a whip left there earlier in the day, and found one of the cans of powder open. Taking some of the powder from the open can, plaintiff's decedent placed some of it in his pocket, and placed some in a small can. A short distance from the outbuilding, an ignited match was applied to the powder in the small can, and as nothing happened immediately, the children gathered closely about the can, when the powder in the can exploded, igniting the powder in the pockets of the plaintiff's decedent, causing burns from which he died. *Held*, whether the death of plaintiff's decedent was the result of negligence in the storing of blasting powder in place accessible to children is a question for the jury. *Colebank v. Nellie Coal & Coke Company*, 145 S. E. 748 (W. Va. 1929).

In a recent issue of this periodical a case very similar to the principal case was commented upon. 35 W. VA. L. QUAR. 91. In that comment it was submitted that the decision in the former case was not an adoption of the attractive nuisance doctrine, and hence not a reversal of the previous West Virginia cases repudiating that doctrine, *Ritz v. City of Wheeling*, 45 W. Va. 262, 31 S. E. 993; *Uthermohlen v. Bogg's Run Company*, 50 W. Va. 457, 40 S. E. 410, but rather that the decision was based upon a mere question of negligence and proximate cause, which questions were left to the jury. And the jury having found contrary to the contention of the defendant, the court found no reason to disturb the verdict. *Wellman v. Fordson Coal Company*, 143 S. E. 160 (W. Va. 1928).

The principal case seems to proceed upon the same ground, *i. e.*, 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. And the question as to whether there was such negligence was left for the jury to decide, in the principal case, just as it was in the previous case. Obviously, the question of foreseeability or probability of injury is affected by the facts that children were involved in both cases, and the in-

herently dangerous potentialities of explosives, but the case is not an adoption of the turntable or attractive nuisance doctrine.

While the case cites with approval certain quotations taken from decisions whose distinct tendency is to accept the turntable doctrine in appropriate cases, it has also utilized quotations from opinions of courts whose trend of decisions apparently repudiate the doctrine. See 36 A. L. R. 69, 106 for alignment of courts on this question. Consequently it is submitted that the principal case is entirely in accord with the previous West Virginia cases which repudiate this doctrine, and is an express approval and affirmation of the doctrine laid down in *Wellman v. Fordson Coal Company, supra*. This doctrine is not an innovation upon the law of this state, but rather it will, in consonancy with previous decisions, allow recovery in appropriate cases, without the adoption of a doctrine which our court has deemed undesirable.

—LESTER C. HESS.

AGENCY—WORKMEN'S COMPENSATION ACT.—The defendant, a manufacturer of lumber, who was subject to the Workmen's Compensation Act and who had failed to comply therewith used an unguarded circular saw in his business. The plaintiff, an employee of the defendant, was injured while using this saw and seeks to recover damages, basing his claim on a violation of section 59 of chapter 15H of BARNES' CODE which is in part as follows:

“All power driven machinery, including all saws, * * * shall be so located, whenever possible, as not to be dangerous to employees, or where possible, be properly inclosed, fenced or otherwise protected.”

The defense was contributory negligence on the part of the plaintiff. The court held that the defendant was liable, under this statute, and the court said, among other things, that the duty of a principal to guard a power driven saw (if possible to do so) is absolute, and that disregard of a statutory duty is *prima facie* negligence when it is the natural and proximate cause of the injury. *Tarr v. Keller Lumber & Construction Company*, 144 S. E. 881 (W. Va. 1928).

The decision of the case presents two questions; first, whether the plaintiff's injury resulted from a breach of duty owed him by