

June 1924

## Negligence–Implied Invitation to use Railway Track as Passageway

C. L. W.

*West Virginia University College of Law*

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Torts Commons](#)

---

### Recommended Citation

C. L. W., *Negligence–Implied Invitation to use Railway Track as Passageway*, 30 W. Va. L. Rev. (1924).  
Available at: <https://researchrepository.wvu.edu/wvlr/vol30/iss4/11>

This Student Notes and Recent Cases is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

West Virginia court on this point. It has since been brought to the attention of the writer that in the case of *G. Elias & Bro. v. Boone Timber Co.*, 85 W. Va. 508, 102 S. E. 488, the court held that a carbon copy was a duplicate original, admissible as primary evidence. In view of this direct decision of the question, the dictum in *Waddell v. Trowbridge* is important only as indicating a possible change in the opinion of the court, and in no sense can it be regarded as of more importance than any other dictum which runs counter to the settled rule as set forth in the case actually deciding the point. The error in the note referred to was due entirely to the fault of the student briefer, and was in no way induced or countenanced by the Editor of the Law Quarterly or any member of the faculty.

—C. L. W.

---

NEGLIGENCE—IMPLIED INVITATION TO USE RAILWAY TRACK AS PASSAGEWAY.—The defendant coal company constructed houses for the use of its miners facing the railway running from its mine to its tipple, with a space of only a few feet between the gate to the front yard and the track. For several years the track was used by the occupants of the houses as a means of ingress and egress, with the tacit acquiescence of the coal company. *Held*, an invitation to the occupants of the houses to use the track will be implied. *Distiollavi v. United Pocahontas Coal Co.*, 122 S. E. 161 (W. Va. 1924).

In this case the action was brought by the daughter of a miner residing in one of the houses abutting on the track, to recover for personal injuries alleged to have been caused by defendant's negligence in operating a car on the track leading to the tipple. The court held that the plaintiff was an invitee, and that therefore the defendant owed her the duty of ordinary care. This decision is based on the fact of the proximity of the houses to the track, the fact that the defendant had built a concrete walk from one of the houses to the track, and to the "Evident expectation that the track would be used in reaching the front entrance." However, the way was not one of necessity, for there was a highway in the rear of the houses, available for use and reasonably convenient. The court relies on a previous case with similar facts as authority for holding plaintiff to be an invitee. *Smith v. Sunday Creek Coal Co.*, 74 W. Va. 606, 82 S. E. 608. But in that case the track

was the only reasonably convenient means of access from the dwelling to an outhouse, while in the principal case there was a highway available. The mere fact that the way was a convenient one does not warrant the implication of an invitation, when another means of access existed that was perfectly safe, easy, and convenient. *Pettyjohn & Sons v. Bosham*, 126 Va. 72, 100 S. E. 813. Many cases stress the point that in order for an invitation to be implied, the entry must be upon some matter of material benefit to the landowner. *Dickinson v. New River Coal Co.*, 76 N. Va. 148, 85 S. E. 71; *Cleveland, etc., Ry Co., v. Powers*, 173 Ind. 105, 88 N. E. 1073. Mere acquiescence gives to the one enjoying the use merely the status of a licensee. *Woolwine v. Railroad Co.*, 36 W. Va. 393; *McVey v. Railroad Co.*, 46 W. Va. Ill. In the principal case the court works out the conclusion of an implied invitation from the continued user, the acquiescence of the defendant, and the act of defendant in building the concrete walk. It would seem that the result is right, and that even the requirement that the use must be of benefit to the landowner can be satisfied, for the occupancy of the houses by the miners was for the mutual benefit of the parties, and the use of the track was in the reasonable enjoyment of that occupancy.

—C. L. W.