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The Liability of Owners of Premises to Trespassing Children

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STUDENT NOTES AND RECENT CASES

THE LIABILITY OF OWNERS OF PREMISES TO TRESPASSING CHILDREN.—While the recent case of *Martino* v. *Rotondi* can be rested solely upon the proposition that the proximate cause of the injury complained of was the intervention of an independent, outside agency, yet it raises the additional question of the liability of a property owner towards a trespassing child.[1] This question, upon which there are two irreconcilable lines of decisions, was first brought prominently to the attention of the profession in the case of *Sioux City, etc., R. Co.,* v. *Stout,* 17 Wall. 657, decided by the Supreme Court in 1873. Since this case many of the states have had occasion to decide the same question with the result that some have approved it in its broadest sense;[2] others have flatly repudiated it;[3] while some few have limited its application expressly to railroad turntables.[4]

Some of the courts rest their opinions upon a constructive invitation. It is said that the land owner by building or maintaining a machine, implement, or structure on his premises which by its very nature is bound to allure or entice children must be regarded as having invited them to come upon the premises, and that consequently the duty ordinarily owed to invitees attaches[5]. That is, that there is a constructive invitation based upon the legal presumption that "every man *intends* the probable consequences of his acts." The trouble with this argument is that this presumption

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[1] Martino *v.* Rotondi, 113 S. E. 760 (W. Va. 1922).
[2] Ala. G. S. R. Co. *v.* Crocker, 131 Ala. 584, 31 So. 561 (1901); Barrett *v.* So. Pac. Co., 191 Cal. 296, 27 Pac. 666, 25 Am. St. Rep. 186 (1891); Ferguson *v.* Columbus & Rome Ry., 77 Ga. 102 (1886); Chicago & E. R. Co. *v.* Fox (2nd App.) 70 N. E. 81 (1904); Brown *v.* C. & O. Ry Co., 135 Ky. 798, 123 S. W. 298, 25 L. R. A. (N. S.) 717 (1909); Keffe *v.* M. & St. P. R. Co., 21 Minn. 207, 18 Am. Rep. 393 (1875); Mazel *v.* Mo. R. R. Co., 75 Mo. 653, 42 Am. Rep. 418 (1882); Ilwaco R. & Nav. Co. *v.* Hedrick, 1 Wash. 446, 25 Pac. 335, 22 Am. St. Rep. 169 (1890); Ft. W. & D. C. R. Co. *v.* Robertson, 16 S. W. 1093, 14 L. R. A. 781 (Tex. 1891).
[3] Wilmot *v.* McPadden, 75 Conn. 367, 65 Atl. 157, 19 L. R. A. (N. S.) 1101 (1906); Daniels *v.* N. Y. & M. E. R. Co., 154 Mass. 349, 28 N. E. 283, 26 Am. St. Rep. 253 (1891); Ryan *v.* Towar, 128 Mich. 463, 87 N. W. 644, 55 L. R. A. 310, 92 Am. St. Rep. 481 (1901); Frost *v.* Eastern R. R., 64 N. H. 220, 9 Atl. 790, 10 Am. St. Rep. 396 (1887); Walsh *v.* Fitchburg R. R. Co., 145 N. Y. 301, 39 N. E. 1068, 27 L. R. A. 724, 45 Am. St. Rep. 615 (1895); Wheeling & L. E. R. Co. *v.* Hanly 77 Ohio St. 235, 83 N. E. 66, 19 L. R. A. (N. S.) 1136 (1907); Thompson *v.* B. & O. R. Co., 218 Pa. 444, 67 Atl. 768, 19 L. R. A. (N. S.) 1162, 120 Am. St. Rep. 897 (1907); Walker's Admr. *v.* Potomac etc. R. Co. 105 Va. 226, 53 S. E. 113, 4 L. R. A. (N. S.) 80, 115 Am. St. Rep. 871 (1906); Ritz *v.* Wheeling, 45 W. Va. 262, 31 S. E. 993, 43 L. R. A. 148 (1898).
[4] Emerson *v.* Petler, 35 Minn. 481, 29 N. W. 311 (1886).
[5] Chicago etc. R. Co. *v.* Fox, 38 Ind. App. 268 (1906).

is not a rule of law except where it conforms with common sense, and it is directly contrary to common sense to say that when a land owner places machinery and structures upon his land he intends thereby to invite his neighbors' children to come there.[6] Here, as a practical matter, the fallacy of the argument comes to light, for when one places something upon his premises for the obvious purpose of rendering them more productive, whether it be a merry-go-round, a saw mill, a mowing machine or a turntable, he cannot be said to intend to invite either actually or constructively his neighbor's children to come there. Mr. Justice Holmes has said in *Holbrook v. Aldrich,* 168 Mass. 16, 46 N. E. 115, that, "Temptation is not always invitation." The doctrine of constructive invitation has been rejected by the courts of New Hampshire, New Jersey, New York, Massachusetts, Michigan, and West Virginia.[7]

If, therefore, there is to be no liability on the ground of intentional allurement, the owner of the premises cannot be held liable, unless the trespassing child can establish a legal duty toward himself. Whether there is such a duty is the vital question, and concerning which the decisions are not in accord. One group of decisions, limiting the doctrine of liability to turntables only, is wrong, unless the same doctrine can be applied to other machines and structures equaly attractive to children, for no doctrine is a sound one that cannot be carried to its logical conclusion.[8] How can it be said that a turntable is more attractive to a child than a merry-go-round or a mowing machine? Consequently, this group of cases will not be considered, but our attention is directed to the broad inquiry whether the land owner who places something upon his premises, incidentally attractive to children, owes a duty to trespassing children. Unquestionably the common law imposes no duty upon the land owner to keep his premises safe for adult trespassers, and only to refrain from injury by active intervention.[9] Why should the law be different regarding trespassing children? Some say that the scale should balance in favor of the child because he does not see danger and is incapable of protecting himself, and that consequently a duty should be imposed on the land owner. This contention may have some weight when viewed from the standpoint of the child, but legal problems can't be decided by considering one side of the controversy only. The conflicting in-

[6] 2 STEPHEN, HISTORY OF CRIMINAL LAW OF ENGLAND 111.
[7] 12 VA. L. REG. 239.
[8] Savannah F. & W. R. Co. *v.* Beavers, 113 Ga. 398, 39 S. E. 82 (1901); Richard's Admr. *v.* Connell, 45 Neb. 467, 63 N. W. 915 (1895); Peters *v.* Bowman, 115 Calif. 345, 47 Pac. 113 (1893).
[9] BURDICK, TORTS (2d ed.) 343.

terests must be settled so as to promote public policy, or as is often said, to do the greatest good for the greatest number with the sacrifice of as few interests as possible. This, in the last analysis, is the true solution of the problem. As population becomes denser the public has an increasing interest that the productiveness of each parcel of realty be increased. To impose the burden contended for, namely, make premises "child proof," upon the ownership of realty would directly thwart the public interest.[10] In some cases indeed, it might discourage any improvement. From these considerations of public interest, coupled with the fact that courts have always been reluctant to impose new burdens upon the ownership of reality, we conclude that no such duty is justifiable. Why should the duty be thrust upon the landowner rather than upon the parent or guardian who is undoubtedly in a better position to know the peculiar proclivities of the child. While the numerical weight of authority still supports the Stout Case, the more recent decisions show a tendency in the direction of absolving the landowner from liability. The fact that some of the courts which first adopted the so-called Turntable Doctrine have more recently taken express precautions to limit it specifically to turntables, show that they regard it as an unwarranted transgression upon established common law rules.[11] If, as Judge Denman points out in *Dobbins* v. *Missouri etc. R. Co.*, 91 Tex. 60, 41 S. W. 62, there is a necessity for any such duty in the case of a reservoir, or a turntable, etc., the state legislature should regulate the situation under the broad arm of police power, rather than to require the courts to usurp well founded principles of law. —*M. H. M.*

PRACTICE AND PROCEDURE—INSTRUCTION TO JURIES—CREDIBILITY OF WITNESSES.—The West Virginia decisions would appear to be in some confusion on the subject of instructions to juries regarding credibility of witnesses, or at least it would seem that they are not clear to everyone, such instructions having been the cause of a number of reversals in recent years.

In the recent case of *State* v. *Powers*[1] in a trial for larceny the Court instructed the jury that "they are the sole judges of the

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[10] 11 HARV. L. REV. 349, 363.
[11] 46 AM. L. REV. 282.
[1] 113 S. E. 913 (W. Va. 1922).