Negligence -- Infant Trespassers -- the Attractive Nuisance Doctrine

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rupt, rendering the delayed remedy ineffectual. Thus, whatever happens, one or the other party must lose a valuable right. This dilemma seems unavoidable under the holding of the principal case that no surety relationship arises. In view of this difficulty, and since there is North Carolina authority flatly contra to the principal case, it is suggested that North Carolina should reverse its present position on this point so as to follow the majority view and its own previous holding.

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The plaintiff's eight year old girl wandered onto a cement walk across defendant's bridge and, while dropping rocks from a pile of crushed stone on the bridge into the water below, fell off and was drowned. Several small children lived in a mill settlement nearby. A nonsuit was affirmed on the grounds that infants are as essentially trespassers as adults and may not recover under the attractive nuisance doctrine unless the facts are sufficient to impose the duty of anticipation or prevision.

But in another case decided the same day the court held that the defendant should reasonably have anticipated that small children would be attracted to and injured by his property where the plaintiff's two infant children were drowned in an unguarded, abandoned cistern or reservoir around and in which children had been accustomed to play and fish for a number of years.

The doctrine of attractive nuisance is an exception to the general rule that a landowner is not responsible to a trespasser for a condition however, that the majority view, according to which the mortgagor is released from liability to the mortgagee, goes upon the assumption that by granting the extension of time the mortgagee has put it out of the power of the mortgagor to have the same remedy over he would have had but for such extension. See Mississippi Valley Trust Co. v. Bussey, 49 F. (2d) 881 (C. C. A. 5th, 1931).

1 Hamilton v. Benton, 180 N. C. 79, 104 S. E. 78 (1920) (while a chattel mortgage was involved here, no reason is seen why this should justify a distinction between this and the principal case. However, the result of this case was also placed upon another ground.)

2 This might be effected by a statute somewhat as follows: Whenever any real or personal property incumbered by a mortgage shall be conveyed subject to such mortgage, and in such conveyance there shall be a provision that the grantee shall assume and pay such incumbrance, if the holder of the mortgage thereafter recognizes the liability of the grantee to him, by accepting payments on the mortgage debt or otherwise, then, as against such holder of the mortgage, the grantee shall be considered the principal debtor and the mortgagor or intermediate grantee who may likewise have assumed the mortgage shall be considered a surety.

NOTES AND COMMENTS of the premises. Liability has been based on two theories: (1) general negligence of the landowner where the attractive instrumentality is so dangerous as to impose the duty of anticipating some injury from leaving it unguarded; (2) an invitation to enter the premises implied from the allure.

Several requirements are necessary to establish liability under this latter theory: (a) the object must be unusually attractive to children of tender years; (b) the thing must be on defendant's own land;

The attractive nuisance doctrine was developed essentially to protect children trespassing on the property of another, but the doctrine has, in some cases, been extended to cover any object which might reasonably be expected to lure infants to their injury. See Rataz v. N. Y. Eskimo Pie Corp., 73 F. (2d) 353 (2nd, 1934); Black v. Consolidated Barbwire Co., 60 Kan. 217, 56 Pac. 4 (1899).

Various courts have held that the child must be: (a) below the age of puberty, Central of Ga. R. R. v. Robins, supra; (b) below the age of 14, Lipscomb v. Cincinnati, N. & C. St. R. Co., 238 Ky. 572, 39 S. W. (2d) 465 (1931); (c) of such a tender age as not to appreciate the danger of her acts, Loftus v. Dehail, 133 Cal. 214, 65 Pac. 379 (1901); or that it is a question for the jury to decide whether the doctrine applies to the individual child; Biggs v. Consolidated Barbwire Co., 60 Kan. 217, 56 Pac. 4 (1899).

Kramer v. Southern R. Co., 127 N. C. 328, 37 S. E. 468 (1900); Restatement, Torts (1934) §339. The attractive nuisance doctrine was developed essentially to protect children trespassing on the property of another, but the doctrine has, in some cases, been extended to cover any object which might reasonably be expected to lure infants to their injury. See Rataz v. N. Y. Eskimo Pie Corp., 73 F. (2d) 184 (C. C. A. 3rd, 1934) (playing with dry ice); Kansas City, Ft., S. & M. R. Co. v. Matson, 68 Kan. 815, 75 Pac. 503 (1904); Harper v. Kapp, 24 Ky. Law Rep. 2342, 73 S. W. 1127 (1903); Ramsey v. Nat. Contracting Co., 49
(c) the children must be lured onto the land by the dangerous instrumentality itself; 10 (d) the danger must be latent; 11 (e) it must be practical to guard the thing without great expense or inconvenience to the owner; 12 (f) the condition must be artificial in some jurisdictions, and a few have refused to apply the doctrine to any body of water, whether artificial or not. 13

It seems obvious that the idea of implied invitation is based on a fiction, both of law and of fact, and a fiction which cannot be given its full logical extension. 14 The rule announced by the North Carolina court in the instant cases is sound. If liability of the owner is based on common law principles of negligence, that is, reasonable foreseeability, all the characteristics of the attractive nuisance doctrine are retained 15 with a flexibility which makes it possible to shape the rule to fit the facts of each case, a necessity in the field of torts. 16 That may well be illustrated by the results of the principal cases. In one there was an unguarded reservoir, in the other an unguarded cement walk over a river; in both the owner knew or had reason to know that children would be attracted to his premises, and might reasonably have been expected to anticipate the accident. It is difficult to distinguish the

App. Div. 11, 63 N. Y. S. 286 (1900); Campbell v. Model Steam Laundry, 190 N. C. 649, 130 S. E. 638 (1925).

United Zinc & Chemical Co. v. Britt, 258 U. S. 268, 42 Sup. Ct. 299, 66 L. ed. 615 (1922); Salt River Valley Water Users' Ass'n v. Compton, 39 Ariz. 491, 8 P. (2d) 249 (1932); Payne v. Utah-Idaho Sugar Co., 52 Utah 598, 221 Pac. 568 (1923). But see Arkansas Power & Light Co., 185 Ark. 678, 49 S. W. (2d) 353 (1932) (a dangerous situation in close proximity to an attractive situation must be considered together as forming a dangerous and attractive whole).

Loftus v. Dehail, 133 Cal. 214, 65 Pac. 379 (1901); Clark v. Pacific Gas & Electric Co., 118 Cal. App. 344, 5 P. (2d) 58 (1931); McCall v. McCallie, 48 Ga. App. 99, 171 S. E. 843 (1933); Erickson v. Great Northern Ry. Co., 82 Minn. 60, 84 N. W. 462 (1900). In Coleman v. Robert Graves Co., 39 Misc. Rep. 85, 78 N. Y. S. 893 (1902), it was held that the object must be virtually a trap, but ordinarily it seems to be sufficient if the danger is not common and well-known. However, the owner is not bound to anticipate danger from the unusual or improper use of an object safe in itself; Gilmartin v. City of Philadelphia, 201 Pa. 518, 51 Atl. 312 (1902).

See infra note 18.

McCall v. McCallie, 48 Ga. App. 99, 171 S. E. 843 (1916); Atlantic Coast Line R. Co. v. O'Neal, 178 S. E. 451 (Ga. 1934); Gurley v. Southern Power Co., 172 N. C. 690, 90 S. E. 943 (1916), but in this case the court apparently was influenced by the fact that the defendant's agent, secretly and against his instructions, operated a tank on the property as a swimming pool; Fiel v. City of Racine, 203 Wis. 149, 233 N. W. 611 (1930); RESTATEMENT, TORTS (1934) §339.

Wilson, Limitations on the Attractive Nuisance Doctrine (1922) 1 N. C. L. REV. 162.

It has repeatedly been held that adults are bound to anticipate "childish instincts". Howard v. City of Rockford, 270 Ill. App. 155 (1933); Powers v. Harlow, 53 Mich. 507, 19 N. W. 257 (1884); Campbell v. Model Steam Laundry, 190 N. C. 649, 130 S. E. 638 (1925); Whirley v. Whiteman, 38 Tenn. 610 (1858); RESTATEMENT, TORTS (1934) §290.

Wilson, Limitations on the Attractive Nuisance Doctrine (1922) 1 N. C. L. REV. 162.
cases on the facts, yet the court reaches opposite results in each and both are amply supported by authority. However, the cases may be reconciled by a theory which does not appear in the opinions. In the Brannon case, the reservoir was useless and abandoned, and could easily have been made safe for children. In the Boyd case, the property in question served a very useful purpose which might have been wholly or partly destroyed had the decision of the court been any different, since children could hardly be kept off the bridge without a complete barricade of it. At any rate, the safe-guarding of the premises would have been attended with great expense and inconvenience to the owner, and every railroad bridge in North Carolina which is near a small settlement would necessarily have to be altered. Thus the court appears to have invoked public policy in balancing the utility of the object with the danger to trespassing children. It is submitted that the two principal cases, though apparently conflicting, are correctly decided.

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Nonsuit—Waiver of Motion by Cross-Examination of Codefendant.

In a damage suit against the driver of an automobile and the driver’s employer, both defendants moved for nonsuit at the close of the plaintiff’s evidence and entered exceptions to the order overruling their motions. The driver then introduced evidence including his own testimony. The employer cross-examined the driver and witnesses introduced by him, but offered no evidence himself. Plaintiff offered


This was originally a primary consideration. In the Stout case, infra, it was said that the turntable might have been made safe by the addition of a simple and inexpensive lock. The omission of such simple safe-guards is negligent in comparison with the unreasonable risk to children, but where such further safeguards are required as to interfere with the utility of the condition maintained by defendant, then it cannot be said that the defendant is negligent in not rendering the condition safe. See Sioux City S. Pac. R. R. Co. v. Stout, 84 U. S. 657, 21 L. ed. 745 (1873); Peters v. Bowman, 115 Cal. 345, 47 Pac. 113 (1896); Loftus v. Dehail, 133 Cal. 214, 65 Pac. 379 (1901); Brown v. Salt Lake City, 33 Utah 222, 93 Pac. 570 (1908); RESTATEMENT, TORTS (1934) §339 Comment (d) (A landowner is liable for injuries to children trespassing on his land caused by a structure or other artificial condition thereon, if "the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein"); Bauer, The Degree of Danger and the Degree of the Difficulty of Removal of the Danger as Factors in "Attractive Nuisance" Cases (1934) 18 MINN. L. REV. 523.