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Recent Decision

Francis M. Marley

In order that the record of an instrument shall operate as a constructive notice to subsequent purchasers, the form of the instrument must be such that its record is authorized; if it is not duly executed, its record does not operate as constructive notice to subsequent purchasers.[16] In those jurisdictions where the act of the mortgagor in filing a mortgage for record without the knowledge of the mortgagee does not constitute a valid execution because of the absence of acceptance on the part of the mortgagee, its record would not operate either to preserve a position of advantage or as constructive notice to a subsequent purchaser. But in the states, where such constitutes a valid execution of the instrument, the subsequent purchaser would by bound by the record, and, therefore, he would take subject to the outstanding mortgage. If the subsequent purchaser actually sees the record of a prior instrument, although it was not entitled to be recorded because not duly executed, the prevailing view is that he takes subject to the mortgage.[17] However, there is a contrary view to the effect that the purchaser may entirely ignore the record in such case.[18] This latter view is against the weight of authority.[19] Although the decisions are not numerous, it has been held in most cases involving the question that if one actually reads the record of an instrument concerning property in which he is about to become interested, he will thereby become charged with actual notice of the existence of the instrument, which should put him on inquiry, notwithstanding the fact that the instrument in question was not entitled to be recorded.

Arthur Duffy.

RECENT DECISION

NEGLIGENCE—ATTRACTIVE NUISANCES.—Plaintiff was injured by the explosion of a dynamite cap caused by his driving a nail into it. A box of dynamite caps had been left on the banks of a slush pit near defendant's gas well, which was in a field held under lease by Mr. Bradshaw, and cultivated by him close to the pit. There was a path near the pit and children frequently crossed the nearby field. Mr. Bradshaw's small boy found the caps and showed them to his father who allowed him to keep them, thinking that they had been discharged. The Bradshaw boy later gave the caps to the plaintiff, aged five, who was injured by one of them. *Held,* that for the doctrine of "attractive nuisances" to apply it is not necessary that the child be attracted from without the premises, if there is reasonable cause to know that he will be there for some other reason and might be attracted after he is already on the premises; that the negligence of

prevail to the prejudice of persons who have acquired title to, or interest in, or a lien upon the property before the date of the actual acceptance."

16 See Tiffany, *op. cit. supra* note 6, at § 567(c).

17 Parkside Realty Co. v. MacDonald, 137 Pac. 21 (Cal. 1913).

18 Nordman v. Rau, 86 Kan. 19, 38 L. R. A. (N. S.) 400 (1911).

19 See cases cited in Parkside Realty Co. v. MacDonald, *op. cit. supra* note 17.

defendant was the proximate cause of the injury and that if there was negligence on the part of Bradshaw, it was made possible by defendant's negligence, and that the acts of Bradshaw were not independent intervening acts; that one in possession of dangerous explosives is bound to exercise a high degree of care in their keeping if there is any likelihood of their getting into the possession of children, even if such children are trespassers, and such likelihood is known or should be known to the possessor. *Lone Star Gas Co. v. Parsons,* 14 Pac. (2d) 369 (Okla. 1932).

"Negligent conduct may be either: (a) an act which the actor as a reasonable man should realize as involving an unreasonable risk of causing an invasion of an interest of another, or (b) a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do." Restatement of the Law of Torts, Tentative Draft No. 4, § 169.

For the purpose of determining whether the *actor* should recognize that his conduct involves a risk, he is assumed to know, *inter alia,* the peculiar habits, traits and tendencies which are known to be characteristic of certain well-defined classes of human beings. He should realize that the inexperience and immaturity of young children may lead then to innocently act in a way which an adult would recognize as culpably careless, and that older children are peculiarly prone to conduct which they themselves recognize as careless or even reckless. Restatement of the Law of Torts, Tentative Draft No. 4, p. 53.

Conduct is not negligent unless the magnitude of the risk involved therein so outweighs its utility as to make the risk unreasonable. Restatement of the Law of Torts, Tenative Draft No. 4, p. 58. The important factor in determining the utility of the actor's conduct is the value which the law attaches to the interest which the conduct is intended and appropriate to advance or protect. Restatement of the Law of Torts, Tentative Draft No. 4, p. 60. For instance, the operation of railways and other public utilities, no matter how carefully carried on, produces accidents which kill or injure many people, but the risk involved in the operation is more than counterbalanced by the service which they render the public. Restatement of the Law of Torts, Tentative Draft No. 4, p. 61.

As a general rule, one person is not under a duty to act for the protection of others, but the law has made the possessor of land subject to liability to certain classes of persons who come upon the land, for the condition and use of the land. As a general rule, "a possessor of land is not subject to liability for bodily harm caused to trespassers by his failure to use reasonable care: (a) to put the land in a condition reasonably safe for their reception, or (b) to carry on his activities so as not to endanger them." Restatement of the Law of Torts, Tentative Draft No. 4, § 203. But certain rules of liability, for bodily harm to young children trespassing upon the land caused by a structure or other artificial condition which the possessor maintains upon the land, have been developed at common law and embodied in what is known as the "attractive nuisance" doctrine.

This doctrine was first expressed in *Lynch v. Nurdin,* 1 Q. B. 29 (1841), where the plaintiff, who, with other children, had been playing on a cart left in the street by the defendant's servant, was injured when one of the other children caused the horse to move forward as plaintiff was getting down from the cart. The court, after considering that plaintiff's wrongful act in getting on the cart contributed to the injury, said: "The most blamable carelessness of his (the defendant's) servant having tempted the child, he ought not to reproach the child with yielding to that temptation." This statement is the essence of the doctrine, that if the instrument is alluring to youth, appealing to childish instincts of curiosity and amusement, situated in a place open to and frequented by children, easily accessible to children, and constituting a peril not to be appreciated by them, and if the owner of the instrument had knowledge, actual or implied, of the presence of the injured child and knew, or should have known, that the child would make use of the instrumentality and provided no protection from it although

he might reasonably have done so, the owner of the instrument cannot set up that the child was a trespasser when he was hurt. Negligence, 20 R. C. L. 89.

The case of *Stout v. Sioux City & P. Ry. Co.*, 17 Wall. 657, 21 L. Ed. 745 (1874), appears to be the first to adopt the "attractive nuisance" doctrine in this country. In this case the plaintiff, a child six years old, was injured by a turntable in a remote place not far from a public road by getting its foot caught between the ends of the rails and it was held that if the defendant had reason to anticipate that children would resort to the turntable or that, if they did resort to it, they would be injured because the turntable was left unlocked, the defendant was negligent in leaving it unlocked and would be liable to the infant trespasser who was injured thereon.

Not all of the state courts have followed the *Stout* case. See 4 L. R. A. (N. S.) 80, and 11 Ann. Cas. 901, for lists of the states that follow this decision and those that do not. And those that did, followed the implication in the *Stout* case that turntables were in a class by themselves and at first limited the application of the doctrine to "turntable cases" exclusively. But gradually the theory underlying the "turntable cases" was extended, in some states, until it included almost everything that might injure children. See Negligence, 20 R. C. L. p. 89, and Note, 19 L. R. A. (N. S.) 1101, for cases extending the doctrine.

The doctrine is rejected in some states for the following reasons: (1) It is founded on sympathy rather than any sound principle of law (*Nelson v. Burnham & Morrill Co.*, 114 Me. 213, 95 Atl. 1029 (1915); *Ryan v. Towar et al.*, 128 Mich. 463, 87 N. W. 644, 92 Am. St. Rep. 481, 55 L. R. A. 310 (1901)); (2) It is an unjustified restraint upon the right of an owner to conduct his business as he sees fit (*Nelson v. Burnham & Morrill Co., supra; Gunn v. Delaware & A. Tel. Co.*, 72 N. J. Law, 276, 278, 62 Atl. 412, 111 Am. St. Rep. 668, 3 L. R. A. (N. S.) 988 (1905)); (3) It imposes a much greater burden and a higher duty for the protection of children upon every member of the community than is imposed on the child's parents (*Hannan v. Ehrlich*, 102 Oh. St. 176, 131 N. E. 504 (1921)); (4) If carried to its logical conclusion, it would amount to practical insurance of children (*Hannan v. Ehrlich, supra; Bottum's Adm'r v. Hawks*, 84 Vt. 370, 386, 79 Atl. 858, 35 L. R. A. (N. S.) 440, Ann. Cas. 1913A. 1025 (1911)); (5) If carried to its logical conclusion, it would make the ownership of property unduly unsafe, if not intolerable (*Bottum's Adm'r v. Hawks, supra*); (6) It would amount to a wide and dangerous extension of the liability attendant upon the ownership of property (*Thompson v. Baltimore & Ohio Ry. Co.*, 218 Pa. 444, 67 Atl. 768, 120 Am. St. Rep. 897, 19 L. R. A. (N. S.) 1162, 11 Ann. Cas. 894 (1907)). In other states the doctrine is followed because: (1) The attractiveness of the instrumentality amounts to an implied invitation to the infant trespasser (*Heller v. New York, H. H. & H. Ry Co.*, 265 Fed. 192, 17 A. L. R. 823 (1920); *Lewis v. Cleveland, C. C. & St. L. Ry. Co.*, 42 Ind. App. 337, 84 N. E. 23 (1908); *Brown v. Salt Lake City*, 33 Utah 222, 93 Pac. 570, 126 Am. St. Rep. 828, 14 L. R. A. (N. S.) 619, 14 Ann. Cas. 1004 (1908)); (2) The owner of the instrumentality is under a duty to anticipate that children will come on the land if attracted (*St Louis & S. F. Ry. Co. v. Underwood*, 194 Fed. 363, 114 C. C. A. 323 (1912); *Cahill v. E. B. & A. L. Stone & Co. et al.*, 153 Cal. 571, 96 Pac. 84, 19 L. R. A. (N. S.) 1094 (1908)); (3) An attractive nuisance is in the nature of a trap for children too young to appreciate its danger (*Taylor v. Great Eastern Quicksilver Mining Co.*, 45 Cal. App. 194, 187 Pac. 101 (1919); *Erickson v. Minneapolis, St. P. & S. S. M. Ry. Co. et al.*, 165 Minn. 106, 205 N. W. 889, 45 A. L. R. 973 (1925)); (4) A person must use his land so as not to injure others, and the keeping of attractive nuisances is such as to injure others unless the trespassing infants are protected from the danger (*Ramsey v. Tuthill Building Material Co.*, 295 Ill. 395, 129 N. E. 127, 36 A. L. R. 23 (1920); *Eddington v. Burlington, C. R. & N. Ry. Co.*, 116 Ia. 410, 90 N. W. 95, 57 L. R. A. 561 (1902); (5) The humanity of the doctrine furnishes a sound legal

basis (*Eddington v. Burlington, C. R. & N. Ry. Co., supra; Franks v. Southern Cotton Oil Co.*, 78 S. C. 10, 58 S. E. 960, 12 L. R. A. (N. S.) 468 (1907)).

As indicated above, the doctrine was extended until it threatened to become burdensome to landowners as not only mechanical devices and buildings were subject to its application, but the theory was applied to natural features of the land, such as ponds, waterways, *etc.* So that the modern tendency has been to limit the doctrine. Negligence, 45 C. J. p. 784, and cases cited. The first step in this direction was taken in *United Zinc & Chemical Co. v. Britt*, 258 U. S. 268, 66 L. Ed. 615, 42 S. Ct. 299, 264 Fed. 785 (1921), where two small boys died as a result of swimming in the water in an abandoned cellar, the building of which had formerly been used by defendant for storing sulphuric and zinc spelter. The building had been long since torn down and the chemicals, though in the water, were not visible. But the cellar could not be seen outside of the land of the defendant. The court held, in effect, that in order to impose liability under the attractive nuisance doctrine, the infant must have been attracted from the outside, and it is not sufficient that he be attracted after he is already on the premises. See also, Negligence, 45 C. J. p. 767. This view is inconsistent with the general rule as expressed by the Restatement of the Law of Torts, Tentative Draft No. 4, § 209, that the possessor of land is liable if the place where the condition is maintained is one where the possessor knows or should know that children are likely to trespass. But it seems to be consistent with the underlying theories of the doctrine, for if the child has trespassed before he is tempted, he should not plead the temptation in excuse of the trespass, and if the child does not know of the existence of the thing until after he is on the land it is difficult to see how the negligence of the landowner could have extended beyond his land so as to have affected the child and caused his trespass. Some of the state courts follow the rule of *United Zinc & Chemical Co. v. Britt*: *Mindeman v. Sanitary Dist. of Chicago*, 317 Ill. 529, 148 N. E. 304 (1925); and *Ellis v. Ashton Power Co.*, 41 Idaho 106, 238 Pac. 517 (1925). And some do not: *Mattson v. Minnesota Ry. Co.*, 95 Minn. 477, 104 N. W. 443, 70 L. R. A. 503, 111 Am. St. Rep. 483, 5 Ann. Cas. 498 (1905); *Nelson v. McLellan*, 31 Wash. 208, 71 Pac. 747, 60 L. R. A. 793 (1903); *Jaylor v. Great Eastern Quicksilver Mining Co.*, 45 Cal. App. 194, 187 Pac. 101 (1919); *Foster v. Lusk*, 129 Ark. 1, 194 S. W. 855 (1917); *South Bend v. Turner*, 156 Ind. 418, 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. Rep. 200 (1901); *Stark v. Holtzclaw*, 90 Fla. 207, 105 So. 330, 41 A. L. R. 1323 (1925); *Fort Wayne Trac. Co. v. Stark*, 74 Ind. App. 669, 127 N. E. 460 (1920); and *Meyer v. Menominee Trac. Co.*, 151 Wis. 279, 138 N. W. 1008 (1912). It has been suggested that the Federal view is only applicable where the instrumentality is capable of being seen from a distance and not where the instrumentality is attractive and inherently dangerous, but can only be seen at close range. Recent Decisions, 31 Mich. L. Rev. 439.

The principal case does not follow the Federal view that the child must be attracted from without for the possessor of the land to be liable. It is not inconsistent in this for it does not ground liability on the "invitee" theory, but expressly repudiates that theory. It rather places liability on the ground that the defendant should have known that the caps would come into the possession of children because of the fact that children were in the habit of going over the nearby path, and that, caps of this sort being inherently dangerous, the children into whose possession they came would be injured by them. It is the opinion of the court that anyone in possession of explosives should exercise sufficient care to prevent their coming into the hands of children. That the Bradshaw child was a trespasser is admitted, but this fact does not excuse the defendant from liability for he should have been able to foresee that the trespass would take place, and should not have left the dynamite caps lying about.

Francis M. Marley.