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TORTS-DANGEROUS INSTRUMENTALITIES -ATTRACTIVE NUISANCE

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TORTS — DANGEROUS INSTRUMENTALITIES — ATTRACTIVE NUISANCE — Defendant society procured an exhibition of fireworks on premises which were under its control and habitually used by children as a playground. The day after the exhibition the plaintiff, playing there with other children, picked up a bomb left by the defendant, and was injured when the bomb exploded. *Held*, defendant had a duty to those playing on the premises to use reasonable care to have the ground clear of dangerous articles after the exhibition. *Spenzierato v. Society*, (N. J. 1934) 169 Atl. 831.

In the great conflict of views and authority in regard to injuries resulting to trespassing children caused by "attractive nuisances," New Jersey is aligned with those States which repudiate the doctrine.¹ The court in the instant case says specifically that if the case rested on invitation² no liability would attach. Instead, the court applied to these facts the rule imposing an obligation on those in charge of dangerous instrumentalities to exercise care in their custody and use.³

¹ 36 A. L. R. 34 at 91 (1925), and cases cited there.

² For criticism of the invitation theory in cases like this, see 31 MICH. L. REV. 439 (1933); 36 A. L. R. 34 at 116 (1925).

³ 3 COOLEY, TORTS, 4th ed., sec. 425 (1932); HARPER, LAW OF TORTS, sec. 94 (1933); *Sandeen v. Tschider*, (C. C. A. 8th, 1913) 205 Fed. 252; *Pittsburgh C. & St. L. Ry. v. Shields*, 47 Ohio St. 387, 24 N. E. 658 (1890).

On this basis of liability (that, in general, a person leaving on his premises an explosive which is discovered by trespassing children is liable for injuries to them resulting from the explosion if he knew or should have known that the children were in the habit of resorting thereto for amusement), the decision is in accord with established authority.⁴ The attractive nuisance doctrine, as based on the theory of invitation, takes the children out of the class of trespassers, and protects them on the theory that it is a breach of duty to leave explosives accessible to children who are lawfully on the premises, having been "invited" by the owner to come thereon.⁵ To attempt to decide this case on the attractive nuisance doctrine would involve the court in the controversy as to whether the doctrine could be applied where the dangerous instrumentality which caused the injury did not of itself attract or allure the child onto the defendant's premises, and therefore whether the child was a trespasser or not.⁶ This question is not material in the application of the dangerous activity rule,⁷ nor is it material whether the instrumentality is such as to come within the usual category of instrumentalities to which the attractive nuisance doctrine is applied.⁸ It is submitted that the decision in the instant case is not only sound, but also that it is attained by the application of the true test of liability, namely negligence, and not by resorting to controverted fictions rather than sound principles of law.⁹

A. H. S.

⁴ See note 3, *supra*. Green, "Basis of Responsibility in Tort," 21 MICH. L. REV. 495 at 514 (1923). See also 60 L. R. A. 793 (1903); L. R. A. 1917A 1295; Spoka v. Halliday, (R. I. 1916) 97 Atl. 965; Barnett v. Cliffside Mills, 167 N. C. 576, 83 S. E. 826 (1914).

⁵ See extensive annotation in 36 A. L. R. 34 (1925).

⁶ United Zinc & Chem. Co. v. Britt, 258 U. S. 268, 42 Sup. Ct. 299 (1922), reviewed and criticized in 36 HARV. L. REV. 113, 350 (1922-3), 31 MICH. L. REV. 439 (1933). *Contra*, Lone Star Gas Co. v. Parsons, 159 Okla. 52, 14 Pac. (2d) 369 (1932); see also 36 A. L. R. 34 at 42 (1925).

⁷ Mattson v. Minn. & N. W. Ry., 95 Minn. 477, 104 N. W. 443 (1905); Nelson v. McLellan, 31 Wash. 208, 71 Pac. 747, 96 Am. St. Rep. 902 (1903); Bianki v. Exposition Co., (Neb. 1902) 92 N. W. 615.

⁸ Lone Star Gas Co. v. Parsons, 159 Okla. 52, 14 Pac. (2d) 369 (1932); 45 C. J. 772-781, and cases cited there; 36 A. L. R. 34 at 37 (1925).

⁹ 31 MICH. L. REV. 439 (1933); Kelly v. Benas, 217 Mo. 1, 116 S. W. 557; 20 L. R. A. (N. S.) 903 (1909).