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Trespassing Children in South Carolina

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TRESPASSING CHILDREN IN SOUTH CAROLINA

A. Introduction[1]

In determining the duty owed by the owner or occupier of land to persons thereon, the law divides the latter into three categories—invitees, licensees, and trespassers.

An invitee is one who enters upon the land by invitation either expressed or implied. A typical example is a customer in a store.[2] The duty of the owner or occupier is to protect invitees not only against dangers of which he knows, but also from those which with reasonable care he might discover.[3]

A licensee is one who is permitted to enter with consent but nothing more. He comes for his own purposes rather than for an interest of the possessor of the land, and generally takes the premises as he finds them. Typical examples are social visitors,[4] those soliciting money for charities,[5] and persons making permissive use of crossings or ways.[6] There the occupier is only under a duty to warn of traps or concealed dangers of which he has knowledge.[7]

A trespasser is one who is neither suffered nor invited to enter. The duty of the possessor of the land is merely to refrain from wilful or wanton injury.[8] He is a wrongdoer who has no right to expect or demand that he be provided with a safe place in which to trespass.[9] However over the years three minor exceptions to this general rule have been recognized.[10] First, when the occupier sees a trespasser heading for a concealed danger, he must at least give a warning.[11] Second, he will be liable to one who deviates either inadvertently[12] or intentionally[13] from a

1. It is beyond the scope of this article to give, except in a most cursory manner, the general law on the subject.

2. See, *e.g.*, Baker v. Clark, 233 S.C. 20, 103 S.E.2d 395 (1958).

3. See generally 38 AM. JUR. *Negligence* §§ 96-103 (1941).

4. Cesario v. Chiapparine, 21 App. Div. 2d 272, 250 N.Y.S.2d 584 (App. Div. 1964).

5. Jones v. Asa G. Candler, Inc., 22 Ga. App. 717, 97 S.E. 112 (1918).

6. Smiley v. Southern Ry., 184 S.C. 130, 191 S.E. 895 (1935).

7. 38 AM. JUR. *Negligence* §§ 104-08 (1941).

8. Refers to malfeasance, or active misconduct.

9. See generally 38 AM. JUR. *Negligence* §§ 109-15 (1941).

10. See Prosser, *Trespassing Children,* 47 CALIF. L. REV. 427, 428-29 (1959).

11. Kershaw Motor Co. v. Southern Ry., 136 S.C. 377, 134 S.E. 377 (1925).

12. Humphries v. Union & Glenn Springs R.R., 84 S.C. 202, 65 S.E. 1051 (1909).

13. Sawicki v. Connecticut Ry. & Lighting Co., 129 Conn. 626, 30 A.2d 556 (1943).

public highway for a purpose connected with travel, and who is injured by a condition which constitutes a foreseeable, unreasonable risk of harm in the event of deviation. Third, a few cases have imposed liability where, with knowledge, there is a frequent trespass upon a small and highly dangerous area of land.[14] Apart from these the adult trespasser takes the land as he finds it.

When the trespasser is a child, one important basis for this general rule may be lacking, that being that the child may be unable to appreciate the danger to which he is subjecting himself when he enters upon premises where there are dangerous conditions. The primary duty for his safety and protection must be borne by his parents. It is, however, "obviously neither customary nor practicable for them to follow him around with a keeper, or chain him to the bedpost."[15] In order to effectuate the admittedly basic public interest in the safety and welfare of children most courts have placed the burden of minimal protection upon the one who can most easily provide it—the one upon whose land he trespasses.

The duty of reasonable care most commonly is applied under the ineptly named[16] "attractive nuisance doctrine".[17] This doctrine is directly opposed to the legitimate interest of the landowner in the free use of his premises for his own purposes. As the most basic point of reference in this area, the cases show a conscious effort on the part of the courts to compromise these conflicting interests, neither allowing the owner to ignore an obvious danger to infants, nor placing him in the position of an insurer.[18]

B. History

The English case of *Lynch v. Nurdin*,[19] where a child was injured while playing with a negligently loaded cart left unattended on a public way, is the first case indicating that there is

14. Cornucopia Gold Miner v. Lacken, 150 F.2d 75 (9th Cir. 1945).

15. PROSSER, TORTS § 59 at 372 (3d ed. 1964).

16. Nuisance generally applies only to injury to persons or land beyond the wrongdoer's borders.

17. Nuisance because it is an unreasonable use under the circumstances by the possessor of land, and attractive because in some early cases it was thought to be necessary that the child be attracted on the land in order to find a basis for the implied invitation fiction. 32 IND. L. J. 75 (1956).

18. BOHEN, TORTS 191-92 (1926).

19. 1 Q.B. 29, 113 Eng. Rep. 1041 (1841).

a special rule for trespassing children. The attractive nuisance doctrine as such cannot be said to have been formalized in Lord Denman's decision which is based primarily on contributory negligence.[20] However, it is the case most frequently cited as the origin of the doctrine.[21]

Another case sometimes cited as the primary English authority is *Townsend v. Wathen.*[22] In this case the plaintiff's dogs were enticed into Wathen's traps by the smell of the bait placed in them. Lord Ellenborough said that everyone must be taken to consider the probable consequences of his acts, and that there was no difference in drawing the animals there by an instinct beyond their control and placing them there by force. However, the use of this case as authority for the doctrine was criticized in *Walker's Adm'r v. Potomac F. & P. R.R.*,[23] the court stating that in the *Townsend* case the defendant's actions were intentional and for a malicious purpose and had nothing whatever to do with negligence.[24]

It is of interest to note that the English courts have never specifically recognized the attractive nuisance doctrine, although some cases show great liberality in finding license or implied invitation.[25]

The leading case in this country in support of the doctrine is *Sioux City & Pac. R.R. v. Stout.*[26] In this case recovery was allowed in the district court to a six-year-old boy who was injured while playing with the defendant's turntable. The Supreme Court affirmed with little relevant discussion. Following this decision were many others by other courts in which trespassing infants were injured while playing with railroad turntables, the cases becoming so common that for a time the tort was called the "turntable doctrine".[27]

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20. Also, while some courts that ordinarily reject the doctrine, apply it to cases where a child is injured in a place where he has a right to be; others accepting it as to trespassers to land, reject it in cases of injury in a public way. Annot., 36 A.L.R. 37, 66 (1925).

21. See, *e.g.*, 84 Vt. 370, 79 Atl. 858 (1911).

22. 9 East 277, 103 Eng. Rep. 579 (1808). See Annot., 36 A.L.R. 34, 49 (1925).

23. 105 Va. 226, 53 S.E. 113 (1906).

24. The analogy is rather obvious however.

25. Prosser, *supra* note 10, at 430.

26. 84 U.S. (17 Wall.) 657 (1873).

27. Smith, *Liability of Landowners To Children Entering Without Permission,* 11 HARV. L. REV. 349, 434 (1898).

In *United Zinc & Chemical Co. v. Britt*,[28] Mr. Justice Holmes, speaking for the majority, held that where two children were killed when they went into clear but poisoned water in the basement of defendant's abandoned building there could be no recovery since they had not been attracted on to the land by the dangerous condition. The case turns on the fact that the Court adopted the implied invitation theory. The invitation is said to come from the condition being attractive to children. It follows that if the condition cannot be apprehended from a place where the children have a right to be, there is no invitation, and the children are thereby in the same position as adult trespassers. This boon to the defense attorney has apparently been overruled by the Supreme Court in *Best v. District of Columbia*[29] and is presently followed only in seven states.[30]

Justification for the special rule for trespassing children on basic tort principles rather than allurement, while not entirely dormant in the early development of the doctrine,[31] was given great impetus in the early twenties by Green[32] and Hudson.[33] The duty imposed upon landowners had as its basis common humanity. The enticement requirement was abandoned, and was given importance only as a factor bearing on foreseeability, as was the fact that the child was a trespasser.

By 1925, of some thirty-four states where the issue had been raised, the cases were about evenly divided between those rejecting and those accepting special consideration for trespassing children.[34] Of the former, the classic denunciation of the policy is in *Ryan v. Towar*.[35] After a thorough analysis of the cases favoring the doctrine, the court concluded that the decisions could not be supported by the common law, and that however "Draconic" the common law rule might be, such a broad change

28. 258 U.S. 268 (1921).

29. 291 U.S. 411 (1934). See Eastburn v. Levin, 113 F.2d 176 (D.C. Cir. 1940).

30. Colorado, Indiana, Louisiana, Mississippi, Missouri, South Carolina, and Tennessee. PROSSER, TORTS § 59 at 374 (3d ed. 1964). The inclusion of South Carolina is doubtful.

31. 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 160-61 (1906).

32. See Green, *Landowner v. Intruder; Intruder v. Landowner: The Basis of Responsibility in Tort*, 21 MICH. L. REV. (1923).

33. Hudson, *The Turntable Doctrine In The Federal Courts*, 36 HARV. L. REV. 826 (1923).

34. See Annot., 36 A.L.R. 34 (1925).

35. 128 Mich. 463, 87 N.W. 644 (1901). The doctrine has since been accepted in Michigan. LeDuc v. Detroit Edison Co., 254 Mich. 86, 235 N.W. 832 (1931).

could only be effectuated by the legislature. At the present time only seven states[36] refuse to recognize any distinction between trespassing children and adult trespassers. Added to these, New York applies it only in exceptional cases,[37] and Virginia and West Virginia have developed their own rule, "dangerous instrumentalities", from which basically the same result follows.[38] It must be noted however that the tendency has been with most courts to narrow its application rather than extend it.[39]

C. General Law

To state that the American decisions which accept the attractive nuisance doctrine are in a state of confusion practically defying rational classification is a vast understatement. Such a result is not surprising, however, when the reasons for such confusion are considered. Besides the obvious dichotomy of interests between the trespassing child and the landowner, the reasons are twofold: first, a strong judicial fear of overly sympathetic juries; and second, the multitude of theories and fictions (and their resulting implications) that are employed to avoid the fact that the child is a trespasser to whom no duty is ordinarily owed.

The first factor can best be exemplified by examining the nature and kind of conditions to which attempts have been made, sometimes with success and sometimes not, to apply the doctrine.[40] Of course, not every object that may prove an object for childhood curiosity amounts to an attractive nuisance. The distinction is generally made between those objects or conditions which are latently or patently dangerous, recovery being allowed for latent dangers only. Latent in this regard means a condition which a child cannot be expected to understand, the question being not whether the child did appreciate the peril but whether he could be expected to by the landowner.[41] Common examples of patent dangers—those which the landowner is free to assume

36. Maine, Maryland, Massachusetts, New Hampshire, Ohio, Rhode Island, and Vermont. Prosser, *Trespassing Children,* 47 CALIF. L. REV. 427, 433 (1959).

37. *Id.* at 433-34.

38. *Id.* at 434-35. See White v. Kanawha City Co., 34 S.E.2d 17, 127 W. Va. 566 (1945).

39. 38 AM. JUR. § 144 at 805 (1941).

40. For an exhaustive treatment from *Abutments* to *Wrecks,* see Annot., 36 A.L.R. 34, 155-292 (1925); supplemented by 39 A.L.R. 486, 487-90 (1925); 45 A.L.R. 982, 987-93 (1926); 53 A.L.R. 1344, 1352-1356 (1928); and 60 A.L.R. 1444, 1451-55 (1929).

41. Prosser, *supra* note 36, at 455-56.

that a child as a matter of law will understand—are bodies of water, fire, heights, moving machinery and vehicles, and excavations.[42] It is also often said that for the doctrine to apply the article must be artificial, uncommon, special, or unusual.[43] These criteria, however, are for the most part very arbitrary, since, for example, the assumption that a three-year-old child will recognize the dangers of a wading pool could certainly not be based upon experience.

As to the second reason there are some six theories which have been recognized as a basis for liability:[44]

(1). It has been suggested, based on the case of *Townsend v. Wathen*,[45] that the owner will be considered to have intended the injury to the trespassing child on the theory that one will be held to have intended the proximate consequences of his acts. This reasoning blurs the distinction between negligence and intentional misconduct. Also the Oklahoma court in *Shawnee v. Cheek*[46] said that it is absurd to imply such intent where clearly it does not exist.

(2). The Oklahoma decisions, in an attempt to reconcile the special rule toward child trespassers with settled law, hold that failure to take reasonable precautions for the safety of children whose presence may be anticipated amounts to wantonness.[47] It does seem odd that this court, while rejecting an unreasonable extention of implied intent, finds no hindrance in doing just that to the normal conception of what constitutes wanton conduct.

(3). A theory sometimes applied is that the doctrine is an exception to the rule that the owner of property owes no duty to keep his property safe for trespassers, where he maintains something in the nature of a trap or concealed danger known to him and as to which he gave no warning to others.[48]

(4). In some cases the doctrine has been based on the maxim *sic utere tuo ut alienum non laedas*—one must use his property

42. Prosser, *supra* note 36, at 456-57.

43. 38 AM. JUR. § 150 (1941).

44. See Annot., 36 A.L.R. 34, 109-22 (1925); supplemented by 45 A.L.R. 982, 985-86 (1926). 53 A.L.R. 1344, 1349 (1928); and 60 A.L.R. 1444, 1448 (1929). The following is a brief summation with comments.

45. 9 East 277, 103 Eng. Rep. 579 (1808).

46. 41 Okla. 227, 137 Pac. 724 (1913).

47. *Ibid.*

48. See Taylor v. Great Eastern Quick-Silver Mining Co., 45 Cal. App. 194, 187 Pac. 101 (Dist. Ct. App. 1919).

so as not to harm others.[49] This theory, however, offers little in the way of an explanation of the doctrine or criteria for its application. For example, why under this theory should the landowner be liable to children and not to adults?

(5). A far more commonly accepted theory is that the attractiveness of the dangerous condition is to be considered as an implied invitation which takes the child out of the category of trespassers and places him in the category of invitees. As to the latter category the landowner owes the duty of ordinary care.[50] This theory of implied invitation is criticized mainly for the reason that logically it could bemade to apply to any attractive condition, thereby ignoring the distinction between temptation and invitation, and further that it is at best a mere fiction at variance with the owner's actual intent.[51] Also, stressing attractiveness and the necessity for invitation often leads to arbitrary results. For example, it is unjust for a land owner to be free of duty merely because a dangerous condition which he maintains may be hidden from view at the borders of his property and at the same time to impose liability on another landowner whose property is far less likely to be trespassed upon but where the dangerous condition is more easily apprehended.

(6). Because of his tender years, a child is not a trespasser, and the landowner must use reasonable care for his protection.[52] Of course, merely holding that a child is not a trespasser logically does nothing toward developing any standard for the doctrine.

The majority of courts now reject or avoid attempts at technical clarification, preferring to base the doctrine on public policy and to impose a duty when the basis of all tort liability is present—foreseeability of harm. In what Dean Prosser has called "perhaps its most effective single section,"[53] the *Restatement of Torts*[54] is the best available statement of the rule as presently applied:

> A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or artificial condition which he maintains upon the land, if

49. See Bjork v. Tacoma, 76 Wash. 225, 135 Pac. 1005 (1913).
50. See, *e.g.*, Price v. Atchinson Water Co., 58 Kan. 551, 50 Pac. 450 (1897).
51. Turess v. New York S. & W. R.R., 61 N.J.L. 314, 40 Atl. 614 (Sup. Ct. 1898).
52. Hardy v. Missouri & Pac. R.R., 266 Fed. 860 (8th Cir. 1920).
53. Prosser, *Trespassing Children*, 47 CALIF. L. REV. 427, 435 (1959). This article contains an excellent analysis and criticism of the *Restatement* position.
54. RESTATEMENT, TORTS § 339 (1934).

(a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and

(b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and

(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and

(d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children therein.

D. South Carolina Cases[55]

The case of *Bridger v. Asheville and Spartanburg R.R.*[56] is the first case in South Carolina indicating that there is a special rule for infant trespassers. The court based its decision purely on negligence, and the only reference made to the fact that the child was a trespasser was the holding that the trial judge properly charged the jury that, if the defendant's turntable was located in a place where persons were not likely to go, it was not bound to take precautions against possible injury to trespassers. There was evidence that the turntable was dangerous, located in an exposed place, easily accessible, unfenced, unguarded, and unlocked. As an eleven year old child the plaintiff was of an age where he could not understand that the turntable was dangerous and that he had no right to meddle with it. Therefore there was sufficient evidence of negligence for the jury.

The court correctly stated the general rule concerning the weight which should be given to evidence of custom: the mere fact that others throughout the country in the same position as the defendant exercise no higher degree of care did not as a matter of law shield him from the duty to exercise reasonable

55. The application of the doctrine to municipal corporations is beyond the scope of this article. See Williams v. City of Sumter, 149 S.C. 375, 147 S.E. 321 (1927); Morris v. Langley Mills, 121 S.C. 200, 113 S.E. 632 (1920); Haithcock v. City of Columbia, 115 S.C. 29, 104 S.E. 335 (1919); Stone v. City of Florence, 94 S.C. 375, 78 S.E. 23 (1913); and Irvine v. Town of Greenwood, 89 S.C. 511, 72 S.E. 228 (1911). See generally 38 AM. JUR. MUNICIPAL CORPORATIONS § 588 (1941).

56. 25 S.C. 24 (1885). See also Bridger v. Asheville & Spartanburg R.R., 27 S.C. 456, 3 S.E. 860 (1887) (action by father for his damages).

prudence under the circumstances.[57] Also it was held that as the child was only eleven years of age, the trial judge could not charge as a matter of law that he was *sui juris*. The question of whether or not he was of sufficient age, intelligence, and discretion to be brought within the rule of contributory negligence was for the jury.

In *Franks v. Southern Cotton Oil Co.*[58] the issue before the court was whether or not the principles expressed in the *Bridger* case[59] were applicable to things other than turntables. The court held that recovery could be allowed for the death of a nine-year-old boy who drowned in an unguarded reservoir which was maintained for business purposes in an open field near the streets and residences of the city, and where, with the knowledge of the defendant, children often played. Mr. Justice Gary did not discuss directly the specific issue in the case; but rather his opinion contains a number of quotations from authorities who, while accepting the view that there should be a special exception made for trespassing children, do so for different reasons, among them are the following:

> (1) The owners and occupiers of real property are held by the law in some respects to a different standard of liability, in case of injuries to children, coming upon their premises, from that under which they stand with respect to adult persons. It is believed that the following propositions may safely be stated to be the law: (1) The owner or occupier of real property stands under the same duty to children, who are expressly or impliedly *invited* to come upon his premises, in respect of keeping such premises safe, to the end that they will not be injured in so coming, under which he stands to adult persons. (2) As a general rule, he is not bound to keep his premises safe, or in particular condition, for the benefit of the *trespassing children* of his neighbors, or for the benefit of children who occupy no more favorable position than that of *bare licensees*. (3) A well-grounded *exception* to the foregoing principles, is that one who artifically brings or creates upon his own premises, any dangerous thing which from its nature has a tendency *to attract the childish instincts of children* to play with it is bound, as a mere matter

57. See Annot., 68 A.L.R. 1400, 1408-09 (1930).

58. 78 S.C. 10, 58 S.E. 960 (1907).

59. 25 S.C. 24 (1885). The United States Supreme Court had extended the doctrine in Union Pac. Ry. v. McDonald, 152 U.S. 262 (1894).

of social duty, to take such reasonable precautions as the circumstances admit of, to the end that they may be protected from injury while so playing with it, or coming in its vicinity.[60]

(2) We now come to a class of decisions which hold the landowner liable in damages in the case of children injured by dangerous things suffered to exist unguarded on his premises, where they are accustomed to come with or without license. These decisions proceed on one or the other of two grounds: (1) That where the owner or occupier of grounds *brings* or *artificially creates* something thereon which from its nature is especially *attractive to children*, and which at the same time is dangerous to them, he is bound, in the exercise of social duty and the ordinary offices of humanity, to take reasonable pains to see that such dangerous things are so guarded that children will not be injured by coming in contact with them. (2) That although the dangerous thing may not be what is termed an *attractive nuisance*—that is to say, may not have especial attraction for children by reason of their childish instincts—yet where it is so *left exposed* that they are likely to come in contact with it, and where their coming in contact with it is obviously dangerous to them, the person so exposing the dangerous thing should reasonably anticipate the injury that is likely to happen to them from its being so exposed, and is bound to take reasonable pains to guard it, so as to prevent injury to them.[61]

(3) Liability in the turntable cases is strictly put upon the ground of implied invitation to children to come upon the premises in order to play there, the invitation being supposed to arise from the attractive nature of these dangerous engines. This hypothesis is hatched up to evade the obstacle which arises from the fact that the plaintiff is a trespasser. But it is unnecessary, as it is inadequate and artificial. Liability is to be ascribed to the simple fact that the defendant, in maintaining a dangerous agent from which harm may, under peculiar conditions, be expected to come, has the primary risk, and must answer in damages, unless a counter

60. 78 S.C. 10, 14-15, 58 S.E. 960, 961 (1907); quoting from 1 THOMPSON, NEGLIGENCE § 1024 (1901).

61. *Id.* at 15, 58 S.E. at 961; quoting from 1 THOMPSON, NEGLIGENCE § 1030 (1901).

assumption of risk can be imposed on those who go there to play.[62]

(4) In the case of young children, and other persons not *sui juris*, an implied license might sometimes arise, when it would not in behalf of others. Thus, leaving a tempting thing to play with exposed where they would be likely to gather for that purpose may be equivalent to an invitation to them to make use of it.[63]

After this exercise in legal research, Mr. Justice Gary held that the court preferred "to follow the doctrine based upon humanity and the wholesome maxim, '*Sic utere tuo ut non alienum laedas.*' "[64] It appears that he concluded that the maxim expressed the basic assumption behind the reasoning in the quotations given above.

In the cases that follow the *Franks* decision there is an underlying current of confusion as to just what this case held, especially whether or not implied invitation was necessary for liability to be imposed.

In *Hayes v. Southern Power Co.*[65] recovery was allowed to a nine-year-old boy who was injured when he reached into an open window and came in contact with electric wires. The building in question was on property which the child had permission to enter in order to attend school, but he had been warned not to go near the building. It was stated that whether or not the open window was an attractive nuisance was for the jury in view of the fact that there was evidence that the child had been told if he would reach inside and take hold of the wires, he would see interesting things. The quotations in the *Frank* case[66] from Cooley[67] in reference to maintaining an enticing condition as tantamount to an expressed invitation and Thompson[68] criticising the view that a trespassing child can only recover if the injury was wantonly inflicted were contended to be dictum by Southern. The Court rejected Southern's contention and cited the quotations with approval.

62. *Id.* at 15-16, 58 S.E. at 961; quoting from 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 160-61 (1906).

63. *Id.* at 16, 58 S.E. at 961-62; quoting from COOLEY, TORTS, p. 624 [*sic*] COOLEY, TORTS 356 (2d ed. 1888).

64. *Id.* at 19, 58 S.E. at 963.

65. 95 S.C. 230, 78 S.E. 956 (1913).

66. Franks v. Southern Cotton Oil Co., 78 S.C. 10, 58 S.E. 960 (1907).

67. COOLEY, *op. cit. supra* note 63.

68. 1 THOMPSON, *op. cit. supra* note 61, § 1026.

The *Tucker v. Clinton Cotton Mills* decision[69] is not at all clear. In this case, Roy Tucker, a fourteen year old employee of the mill, drowned in the mill pond which was filled at the time with scalding water either while playing with his younger brother or attempting to save the latter after he fell in the pond. While not mentioned as such the plaintiff's action seems to be based on attractive nuisance. The mill defended on the ground of contributory negligence and assumption of the risk, both as to Roy and his mother, the plaintiff. While conceding that there was some evidence to support the defendant's allegation, the court without elaboration held that there was sufficient counter evidence to go to the jury.

In *McLendon v. Hampton Cotton Mills*[70] the plaintiff's son, a child six years of age, was drowned while wading in the mill pond. The issue was the extent of care owed by the landowners. Mr. Justice Hydrick, speaking for the majority, held that where the pond was fenced, the child had been warned of the danger by his father, and the company watchmen drove out all who were seen within the enclosure, the mill had performed its duty.

> He stated that the rule adopted in the *Franks* case[71] was based upon the just and humane principal that one who creates upon his own premises a thing which is naturally attractive to children and at the same time dangerous to them, or which, although it may not be especially attractive to them, yet if left exposed where they are likely to come in contact with it, and their doing so is frought with obvious danger to them, should anticipate their childish proclivities and exercise reasonable care to safeguard them from injury that otherwise would probably result.[72]

He stated, however, that the rule only placed a reasonable burden on the landowner. The purpose of the special exception is to safeguard the child of normal instincts and training, and that, therefore, the possessor of land is not required to erect a barrier which no child can overcome. To rule otherwise would be an unreasonable burden on the landowner and would in effect place

69. 95 S.C. 302, 78 S.E. 890 (1912). See also Tucker v. Clinton Cotton Mills, 96 S.C. 466, 81 S.E. 182 (1914) (recovery for death of other brother allowed).

70. 109 S.C. 238, 95 S.E. 78 (1917) (3-to-2 decision).

71. Franks v. Southern Cotton Oil Co., 78 S.C. 10, 58 S.E. 960 (1907).

72. McLendon v. Hampton Cotton Mills, 109 S.C. 238, 242, 95 S.E. 781, 782 (1917).

him in the category of an insurer.[73] The fact in this case that the fence was broken in some areas, while indicative of some negligence, was not the proximate cause of the injury for the reason that the child climbed over a section in good repair.

Mr. Justice Gage, dissenting, expressed the opinion that a child of six was incapable of contributory negligence and of observing danger. To him an easily climbed fence was more of an invitation than a hindrance. He stated that although the fence complied with the letter of the law, it was not in accord with its spirit, and that therefore the case should have gone to the jury to determine whether or not the pond was reasonably safe.

Sexton v. Noll Constr. Co.[74] is the most confusing decision on this topic. In this case an infant under seven was burned when the spout on an asphalt boiler fell out as he was walking by on his way to play in a sand pile some one hundred feet away. The court restated again the view that a dangerous object need not be attractive, but that a duty also arose where a condition was so exposed that children were likely to come in contact with it, and such contact would be obviously dangerous.[75] The court, however, held that a verdict should have been directed for the defendant even though the company may have been negligent to some degree in not properly maintaining the spout, because such negligence was not the proximate cause[76] of the injury. The court reasoned that the defendant was only required to anticipate and safeguard against dangers which related to contact by children while pursuing their youthful amusement.[77] The plaintiff, however, was not playing with, or influenced by, the boiler in any way, but was merely passing by it. While it was true that but for the defective spout the injury would not have occurred, it was not an obvious danger from which harm was reasonably foreseeable.

It could be said from the wording of this opinion that the court is adopting the implied invitation theory to deny liability. The case does not so hold. From where would the invitation come if the condition were not attractive? It is, however, diffi-

73. See generally 38 AM. JUR. *Negligence* § 147 (1941). There is no duty to take precautions which would be impracticable, unreasonable, or intolerable. No matter what the degree of foreseeability of harm, there would be no duty to surround Lake Murray with a fence.

74. 108 S.C. 516, 95 S.E. 129 (1918).

75. It should be noted that "obvious" modifies dangerous, while "likely" modifies contact.

76. See generally 38 AM. JUR. *Negligence* § 152 (1941).

77. See generally 38 AM. JUR. *Negligence* § 146 (1941).

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cult to follow the court's conclusion that injury was unforeseeable under the dangerous contact criteria. There was no requirement expressed in the *Franks* case[78] that a child be influenced by a dangerous condition but merely that harmful contact was likely. Because of the nature of the condition in issue in this case, and especially its close proximity to where a number of children found amusement, the case should have gone to the jury.

In *Renno v. Seaboard Air Line Ry.*,[79] a boy nine years of age was drowned in a pool of water on the railroad's right-of-way which was created during periods of heavy rain by water rushing out of a small culvert. During such periods the "wash hole" was some fifty by twenty-two feet and about six feet in depth. During normal weather conditions the "wash" was much smaller and at times was filled with sand. Mr. Chief Justice Gary, speaking for the majority, stated that the only difference in this situation and that in the *Franks* case[80] was that in the latter the reservoir was used by the defendant; but here it had no use, and the pond was not dangerous at all times. Again *Thompson*[81] was cited, but more important the *Street*[82] quotation criticizing the implied invitation fiction was repeated. The court, however, did not discuss the latter.

Mr. Justice Gary (Circuit Judge) in a concurring opinion stressed one point mentioned in the *McLendon* case[83] that the locality of the nuisance, whether or not in a populous or sparcely settled area, was only one of many elements bearing on foreseeability.[84]

In a well written dissent, Mr. Justice Cothran stated that this case should be distinguished from the other South Carolina cases mainly on the grounds that the pool was a fortuitous circumstance unrelated to business and was not located in a public place.[85] It is rather obvious from reading his opinion that he felt that the doctrine should not apply to drowning situations at all.

> The attractiveness of the pool: It is but speaking to the common experience of every man who is blessed with the

78. Franks v. Southern Cotton Oil Co., 78 S.C. 10, 58 S.E. 960 (1907).
79. 120 S.C. 7, 112 S.E 439 (1922) (concurring and dissenting opinions).
80. Franks v. Southern Cotton Oil Co., 78 S.C. 10, 58 S.E. 960 (1907).
81. 1 THOMPSON, NEGLIGENCE §§ 1024, 1026 (1901).
82. 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 160-61 (1906).
83. McLendon v. Hampton Cotton Mills, 109 S.C. 238, 95 S.E. 781 (1917).
84. Renno v. Seaboard Air Line Ry., 120 S.C. 7, 31, 112 S.E. 439, 447 (1922).
85. *Id.* at 37, 112 S.E. at 449.

> memories of his youth to recall that nothing in the range of youthful amusements possesses the alurements of the "wash hole" to the small boy, shedding his scant raiment as he runs to plunge into its cooling waters. (It is a strange contradiction of his nature that he suffers from "hydrophobia" as to every other form of ablution). The allurement is so universal and so irresistible, and appeals so strongly to those who remember happier days, that it would be churlish in the extreme to fence in and run the youthful depredators out of every "hole" that chanced to be deeper than the small boy's well-known standard. It surmounts every obstacle of dog, bull, or fence, and would require the presence of guards at every place, whether natural channel or fortuitous creation, on farm or right of way, deep enough to drown a boy.[86]

It should be noted that the majority of courts which accept a special rule toward children refuse to apply it to water hazards, thus agreeing at least in result with Mr. Justice Cothran. While the reasons for this limitation are many and varied they may be summarized by saying that in the absence of some unusual circumstance, such as a hidden trap or some special attracting feature, such hazards are considered patent rather than latent.[87]

With a very brief opinion in *Pigford v. Cherokee Falls Mfg. Co.*,[88] the court held that the circuit court was correct in not directing a verdict in favor of the defendant where there was evidence that the company maintained a reservoir on its premises that was alluring to immature children, known to be dangerous, and insufficiently safeguarded.

Hart v. Union Mfg. & Power Co.[89] is the most informative case in South Carolina on liability for infant trespassers. The court held that where an eight-year-old child was electrocuted when he climbed a transmission tower, whether or not the tower was an attractive nuisance was for the jury. Also it was held that the evidence was sufficient to allow an award for punitive damages. There were a number of factors considered by the court. One, the tower was of a ladder-like construction which could easily be climbed and in fact had been made that way for

86. *Id.* at 36, 112 S.E. at 448-49.

87 See Annot., 8 A.L.R. 2d 1258 (1949).

88. 124 S.C. 389, 117 S.E. 419 (1923) (nine years old).

89. 157 S.C. 174, 154 S.E. 118 (1930) (dissenting opinion by Cothran, J. based on necessity for implied invitation).

easy maintenance. Two, the condition could have easily been abated with an inexpensive wire enclosure; or a regular power pole without climbing fixtures at the bottom could have been used in the first place. And three, the area and the tower itself had been a regular place of amusement for the children of the milltown for many years. Mr. Justice Blease, speaking for the majority, said also that the determining factor in attractive nuisance is not that it be located so that it may be easily reached, but that it is sufficient that it be of such a character as to tempt a normal venturesome child, so that it may be easily put in reach.

The case is most important for its summation of the prior history of attractive nuisance in the state which is actually a composite of the trial judge's charge, but which Mr. Justice Blease said expressed the clearly sanctioned doctrine in this state.

> I. That children, wherever they go, must be expected to act upon childish instincts and impulses, and if any dangerous thing or instrumentality is maintained and exposed to the observation of children by the owner of premises, of such character and in such form as to tempt, appeal to, and attract the normal child in play and amusement, and which they, in their immature judgment, might naturally suppose they were at liberty to handle or play with, such owner should expect such liberty to be taken.
>
> II. That the creation and maintenance upon one's property of such an instrumentality or enticement to the "ignorant and unwary" is tantamount to an invitation to visit, inspect, and enjoy, and under such circumstances the duty to "endeavor to protect from the dangers of the seductive instrument or place follows as justly as though the invitation to the ignorant and unwary had been expressed."
>
> III. That if one artificially brings or creates upon his premises a dangerous place or instrumentality which, from its nature, has a tendency to attract the childish instincts and impulses of normal children for play or amusement, and at the same time is dangerous to them, a *new duty* is imposed upon one maintaining such place or agency, namely, in the exercise of an obvious social duty and the ordinary offices of humanity, to take such reasonable pains, precautions, and ordinary care, without becoming the insurer or guarantor of the safety thereof . . . to see that such places or instrumentalities are so safe-guarded that children be

reasonably protected and not be injured in coming in contact therewith while playing with it or coming in its vicinity.

IV. That although a dangerous place or thing "may not have especial attraction for children by reason of their childish instincts—yet where it is so left exposed that they are likely to come in contact with it, and where their coming in contact with it is obviously dangerous to them, the person so exposing the dangerous thing should reasonably anticipate the injuries that are likely to happen to them. . . .

V. That a child under the age of seven years was conclusively presumed to be incapable of committing contributory negligence, and that there was a prima facie presumption that a child between the ages of seven and fourteen was incapable of committing contributory negligence, but this presumption was rebuttable. . . .

VI. That if the death of the child in this case was due to the contributory negligence of the parents in allowing him to go about without proper control and supervision, and such parents are the beneficiaries, their contributory negligence would bar recovery in this action.[90]

The point raised in V[91] merits some discussion. It appears to be now settled that South Carolina has adopted as its test for determining a child's capacity to be guilty of contributory negligence the rule of the common law that a child under seven is conclusively presumed to be incapable of committing a crime.[92] Also, from seven to fourteen there is a presumption that he is incapable of contributory negligence.[93] The standard in this age group being not whether a child acted as an ordinary prudent child would have acted, but whether he acted as a child of his age, capacity, discretion, knowledge, and experience would ordi-

90. *Id.* at 189-91, 154 S.E. at 124.

91. See generally Annot., 107 A.L.R. 4 (1937); supplemented by 174 A.L.R. 1080 (1948).

92. Herring v. Boyd, ___ S.C. ___, 140 S.E.2d 246 (1965); Chitwood v. Chitwood, 159 S.C. 109, 156 S.E. 179 (1930) (dictum); King v. Holliday, 116 S.C. 463, 108 S.E. 186 (1921); Sexton v. Noll Constr. Co., 108 S.C. 516, 95 S.E. 129 (1918) (dictum); Dodd v. Spartanburg R.R., Gas & Electric Co., 95 S.C. 9, 78 S.E. 525 (1913); and Mason v. Southern R.R., 58 S.C. 70, 36 S.E. 440 (1900).

93. Hollman v. Atlantic Coast Line R.R., 201 S.C. 308, 22 S.E.2d 892 (1942); Chitwood v. Chitwood, 159 S.C. 109, 156 S.E. 179 (1930) (dictum); State v. Hanahan, 111 S.C. 58, 96 S.E. 667 (1918); Tucker v. Buffalo Cotton Mills, 76 S.C. 539, 57 S.E. 626 (1907); and Bridges v. Asheville & Spartanburg R.R., 25 S.C. 24 (1886).

narily act under the circumstances.[94] The presumption in this age group is only rebuttable however, and under the proper circumstances a judgment can be directed.[95] Above the age of fourteen in the absence of proof to the contrary, the legal presumption is that the child is *sui juris*, so as to be charged with contributory negligence.[96]

The rule in this state that an infant under seven is incapable of contributory negligence becomes of critical importance when the distinction between patent and latent defects is considered. This distinction is based on the conclusive presumption that the possessor of land may assume that all children know that some conditions, fire, heights, etc., are dangerous. South Carolina accepts this rule at least in regard to fire hazards.[97] Of course, from the mere fact that an infant cannot negligently contribute to his own injury by another, it does not follow that there is a duty on the landowner to protect him,[98] for a duty can only arise when harm is foreseeable. However, it would seem logical that whether or not a dangerous condition was patent would be immaterial in determining foreseeability where the injured child was under seven years of age.[99]

In *Bannister v. Poe Mfg. Co.*,[100] a small boy drowned in a pond used for watering cattle. The pond was some six hundred feet from a playground but was separated from it by a railroad embankment. The pasture itself was fenced with three strands of wire, and the company guards made efforts to keep children out. The court held that the *McLendon*[101] case was directly in point, and that, therefore, a verdict should have been directed for the defendant. Mr. Justice Carter stated that the fence in question was a sufficient exercise of care by the defendant, in that it was adequate to safeguard the average normal child of the mill village from the danger. He concluded that to require the company to drain or fence the pond itself, in the light of its use for watering cattle, or to erect around the pasture an impossible barrier, would be an entirely unreasonable burden.

94. Porter v. United States, 128 F. Supp. 590 (E.D.S.C. 1955); Hollman v. Atlantic Coast Line R.R., 201 S.C. 308, 22 S.E.2d 892 (1942); and Chitwood v. Chitwood, 159 S.C. 109, 156 S.E. 179 (1930) (dictum).

95. *Ibid.*

96. Chitwood v. Chitwood, 159 S.C. 109, 156 S.E. 179 (1930).

97. Hancock v. Aiken Mills, 180 S.C. 93, 185 S.E. 188 (1936).

98. See, *e.g.*, Wilmont v. McPadden, 79 Conn. 367, 65 Atl. 157 (1906).

99. This problem would not arise in the majority of states since they do not assign age limits for contributory negligence. See *supra* note 91.

100. 162 S.C. 1, 160 S.E. 138 (1931).

101. McLendon v. Hampton Cotton Mills, 109 S.C. 238, 95 S.E. 781 (1917).

In a very brief decision in *Davenport v. Piedmont Mfg. Co.*,[102] the court held that the complaint which alleged that Piedmont negligently maintained on its school playgrounds an attractive and dangerous chute and ladder (sliding board) from which a school child of six fell to her injury, stated a cause of action for maintaining an attractive nuisance. The defense that the school was under the exclusive management and control of the school board was for answer, not demurrer.

In *Hancock v. Aiken Mills, Inc.*,[103] a boy of twelve was burned by a fire built on property rented by his parents from the mill. The fire had been built by the defendant's workmen to warm themselves while they repaired a chimney located on an adjoining lot. The court held that the attractive nuisance doctrine did not apply. Mr. Justice Fishburne, speaking for the majority, stated that from a careful analysis of the prior South Carolina cases on the point that in order to recover the child must have gone on to the property by reason of the temptation of the very instrumentality of the attractive nuisance. In this case the boy was at the fire merely at the request of one of the workmen in order to run an errand, and was not in any way drawn to the condition by a childish instinct for play or amusement. Also, the court held that "a fire is *ipso facto* dangerous, and presents a danger that is open, obvious, and not latent."[104] The court concluded that there was no evidence that the plaintiff was mentally deficient or lacking in judgment and that, therefore, as a matter of law he was guilty of contributory negligence.

This case is the first one in this state in which the issue of the implied invitation theory was squarely raised and answered. The court's conclusion, while unfortunate, is at best dictum. First, the facts in this case were not at all appropriate for an application of the attractive nuisance doctrine for the simple reason that the child was not a trespasser. Of course, elements of the doctrine are helpful in determining negligence in cases where the injured child was not a trespasser as indicating foreseeability, which is apparently what was done in the *Davenport*[105] case; but implied invitation would be irrelevant. Secondly, while it is true that the quotation from *Cooley on Torts*[106]

102. 169 S.C. 165, 168 S.E. 394 (1933).
103. 180 S.C. 93, 185 S.E. 188 (1936) (dissenting opinion by Carter, J.).
104. *Id.* at 107, 185 S.E. at 194.
105. Davenport v. Piedmont Mfg. Co., 169 S.C. 165, 168 S.E. 394 (1933).
106. COOLEY, TORTS 356 (2d ed. 1888).

which based the doctrine on implied invitation had been cited in previous cases, so also had Street's book[107] in which the author attacks the fiction as arbitrary and unjust. Third, it is reasonably impossible to reconcile the often mentioned rule that the special exception applies not only where the dangerous condition is attractive but also where it is so exposed that harmful contact is likely. And finally, the court confused the apparent holding of the *Sexton* case[108]—that the child must be in some way influenced by the dangerous condition in order for injury to have been foreseeable, and that the negligence must be a proximate cause of the injury—by stating that it held that invitation is necessary.

In *Perrin v. Rainwater*,[109] the court held that the complaint stated a cause of action under the attractive nuisance doctrine, when it alleged that a seven year old girl, while attending dancing school, stepped out on a poorly constructed fire escape that was accessible from the dance hall and was killed when she slipped through an opening. The court cited the *Hart*[110] case to the effect that the dangerous condition need not be easily reached, but that it is sufficient if it be of such a nature that it tempt or appeal to the venturesome or curious impulse of the normal child, so that it can be easily put in reach.

It has been held that a fire escape is not an attractive nuisance for the reason that it is impracticable to construct them so that they will serve their purpose and yet be inaccessible to adventuresome children.[111] This reasoning would not apply to this case, however, since the negligence is with a defect in the fire escape, not its mere presence.

The case of *Frye v. Elrod*[112] is primarily concerned with master-servant liability; however, the court held that whether a pile of stacked lumber[113] located near the plaintiff's home was an attractive nuisance was a question for the jury.

The most recent case in this area is *Everett v. White*.[114] A small boy of five was injured when he fell into an excavation filled with water at a house site. The defendant alleged that the

107. 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 160-61 (1906).
108. Sexton v. Noll Constr. Co., 108 S.C. 516, 95 S.E. 129 (1918).
109. 186 S.C. 181, 195 S.E. 283 (1938).
110. Hart v. Union Mfg. & Power Co., 157 S.C. 174, 154 S.E. 118 (1930).
111. Heva v. Seattle School Dist., 110 Wash. 668, 188 Pac. 776 (1920).
112. 187 S.C. 233, 196 S.E. 884 (1938).
113. See generally annot., 28 A.L.R. 1254 (1949).
114. ____ S.C. ____, 140 S.E.2d 582 (1965).

complaint failed to state a cause of action on two grounds: One, the condition was open and obvious and involved no latent peril and two, there were no facts alleging that the plaintiff was attracted to the peril. The court summarily dismissed the defendant's first contention by stating that from the facts the appearance of the hole was that of an ordinary puddle, and therefore it was a hidden danger.

In deciding the appellant's second contention the court finally laid to rest most doubts as to the need for implied invitation in South Carolina. Mr. Justice Brailsford stated that, parallel with the attractive nuisance doctrine, the court had long recognized a right of recovery to children from a dangerous condition, even though it was not attractive, or the child an invitee or business visitor, so long as it was exposed and obviously dangerous. He also stated that the recognition given this latter rule in the *Sexton* case[115] showed that the decision did not rest upon implied invitation. The court concluded by saying that, although the *Hancock* case[116] appeared to support the appellant's contention as to an attractive nuisance, it did not apply to conditions which were not attractive.

E. Conclusion

With the inclusion of the *Everett* case the basic criteria for a landowner's duty to trespassing children is reasonably well settled in South Carolina. The only major bone of contention now is whether the court would require an implied invitation if the dangerous condition where attractive rather than unattractive but so exposed that harmful contact is likely. It is difficult for the writer to conceive of the South Carolina Supreme Court holding such an obviously absurd and contradictory result. Whether the condition can be seen from the borders of the property as well as whether it is attractive is merely one of the factors bearing on the basic issue of foreseeability of injury under all the circumstances.

There is absolutely no reason for there to be two distinct theories upon which recovery is allowed. If a dangerous condition is attractive, or, if not attractive, exposed, the same result follows: injury may be foreseeable, depending upon many other circumstances. While the summation in the *Hart* case[117] is an

115. Sexton v. Noll Constr. Co., 108 S.C. 516, 95 S.E. 129 (1918).
116. Hancock v. Aiken Mills, 180 S.C. 93, 185 S.E. 188 (1936).
117. Hart v. Union Mfg. & Power Co., 157 S.C. 174, 189-91, 154 S.E. 118, 124 (1930).

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excellent presentation of the relevant facts which should be weighed, it is hoped that the court will return to the simple and basic tort doctrine as expressed in the *Bridger* case[118] and be done with such confusing and arbitrary distinctions:

> Whether the instrumentality was itself a dangerous one; [whether it was attractive]; whether, being dangerous and capable of inflicting injury, it was located and left in an exposed place, unguarded and unprotected; and especially whether the party injured was mentally incapable of knowing and appreciating the danger, either from want of age or otherwise, and of the impropriety of his intermeddling with it, would all enter into the general question of negligence. . . .[119]

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118. Bridger v. Asheville & Spartanburg R.R., 25 S.C. 24 (1885).
119. *Id.* at 29.