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Negligence—Liability to Infants—Attractive Nuisances

operates to transfer the legal title" is a point to be considered. The cases referred to above were decided in jurisdictions where the common law doctrine that a mortgage is a transfer of a legal estate to the mortgagee was in force. Such is not the case in all jurisdictions today. In some twenty-six states today a mortgage is regarded as a mere lien, and no estate passes to the mortgagee, at least not till default and foreclosure; in seventeen states the common law rule that a legal estate passes to the mortgagee applies; while in three others, Missouri, Delaware and Mississippi, a mortgage is regarded as a mere lien till default when an estate and right of entry vest in the mortgagee, *Thompson Real Prop.* 4367. In Illinois, a legal estate vests in the mortgagee when the mortgage is executed, 4 *Scammon* 69, 69 Ill. 632, 124 Ill. 32, 186 Ill. 570. That Illinois rule is probably the underlying basis on which the court in *Hardin v. Wolf, supra,* stated that the execution of the mortgage severed the tenancy, and an influence which had bearing on the decision in *Lawler v. Byrne,* 252 Ill. 194, 96 N. E. 892, an earlier decision in which the Illinois court decided that a mortgage severed the jointure. What ruling the courts would make in states where the mortgage is regarded as a mere lien is somewhat a matter of conjecture. The modern aversion and statutes against joint tenancy and its incidents has caused a dearth of litigation on that question. However, it seems unreasonable to believe that in states where a mortgage is a mere lien that the execution of a mortgage could be a severance of the joint tenancy, at least before foreclosure.

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Davoren et al. v. Kansas City, 273 S. W. 401.

NEGLIGENCE—LIABILITY TO INFANTS—ATTRACTIVE NUISANCES. In the recent case of *Davoren et al. v. Kansas City,* 273 S. W. 401, we have again the question of liability for injury to an infant who is upon premises because he was attracted by a condition of the premises. The original suit was instituted in the Circuit Court of Jackson County by Davoren and his wife to recover damages for alleged negligence in the drowning of their minor son. The facts as developed at the trial were as follows: Some twenty years before the fatal drowning occurred, the city constructed a high fill or dam across a ravine for the purpose of building a street. The city did not build a culvert or any outlet for the release of surface water

which might collect back of the dam. The result was that the depression rapidly filled with surface water, and for some years a pond had covered an area of several blocks in a populous part of the city. The pond was not located on city property, nor was it so close to the street as to be dangerous to persons using the street. At the time of the fatal accident the pond was covered with ice, and the little boy and his brother were playing on the ice when it gave way and both the boys were drowned. The jury in the lower court had returned a verdict for the plaintiff. The Supreme Court affirmed the decision of the lower court (except as to the amount of damages). The Supreme Court in affirming the decision was divided, four for affirmance and three for reversal. The dissent was on the theory that the plaintiff's evidence showed no liability upon the part of the defendant. The majority of the court affirmed the decision of the lower court on the basis that the pond was "attractive and dangerous" to children of immature age, and that the city officials should have known this fact, or by the use of ordinary care should have known that this was attractive and dangerous to children and therefore their failure to drain the pond amounted to negligence toward the child of immature age for which the city would be liable in case of injury or death.

The counsel for the city in this case contended that in order to support the action the plaintiffs were relying upon the doctrine of the turntable cases and applying it to facts such as that doctrine had never been extended to in this state. Speaking for the majority of the court, Judge Woodson distinctly denies and repudiates the idea that the case falls within the doctrine of the turntable cases. He further says that such an opinion is a "clear misconception of the case." However, Judge Graves, speaking for the dissenting judges, points out that both the plaintiff's petition and the instructions of the judge of the trial court clearly invoke the doctrine of the turntable cases.

In order to best understand how this case compares with the general current of authority we shall consider some cases in other jurisdictions as well as other Missouri cases. In *Klix, Administrator, v. Nieman,* 68 Wis. 271, it was held that an owner of a city lot was not bound to fence or guard an evacuation or pond situated on his land, when the pond was not so near the street as to be dangerous to persons passing.

In *Lomax v. Reisch,* 164 Ill. App. 54, the defendant left an old cellar unguarded on his land. The plaintiff, a girl of six years of age, while playing on the land fell in and was injured. Mr. Justice Frost in delivering the opinion of the court said: "The appellant's liability,

if any, rests upon the doctrine comprehended in the attractive nuisance cases, that is, permitting a dangerous condition to exist, unguarded and easy of access for children, alluring and enticing to the youthful mind." He further went on to say that this principle was unquestionably the doctrine of the turntable cases and that that doctrine had never been applied to the facts such as they were in the case before the court.

In *Savannah, Florida and Western R. R. Co. v. Beavers,* 113 Ga. 398, 39 S. E. 82, 54 L. R. A. 314, it was held that one who makes an evacuation upon his own land is not bound to so guard it as to prevent injury to children who come upon the land without invitation, express or implied, but who are induced to do so merely by the alluring attractiveness of the evacuation and its surroundings. The court clearly states that the case comes under the doctrine of the turntable cases and that that doctrine is not to be extended beyond its original limits.

In *Stendel v. Boyd,* 73 Minn. 53, 75 N. W. 735, 42 L. R. A. 288, 72 A. S. R. 597, the court said that a land owner is not bound to fence or otherwise guard an open evacuation or pond, natural or artificial, on his land, in order to prevent injury to children who come upon the land because of the alluring attractiveness of the evacuation. The Judge pointed out that the case came clearly within the doctrine of the turntable cases. Many cases have held that a pond could not be considered as an attractive nuisance under the doctrine of the turntable cases. *Smith v. Jackob Dold Packing Co.,* 82 Mo. App. 9; *Peters v. Bowman,* 115 Cal. 349, 47 Pac. 113, 598, 56 A. S. R. 106; *Sullivan v. Huikekoper,* 27 App. D. C. 154, 5 L. R. A. (n. s.) 263; *Sthauf v. Paducah,* 106 Ky. 228, 50 S. W. 42, 90 A. S. R. 220; *Overholt v. Vieths,* 93 Mo. 422, 3 A. S. R. 557, 6 S. W. 74; *Moran v. Pullman Palace Car Co.,* 134 Mo. 651, 33 L. R. A. 755, 56 A. S. R. 548, 36 S. W. 659; *Omaha v. Bowman,* 52 Nebr. 293, 72 N. W. 316; *Greene v. Linton,* 27 N. Y. Supp. 891; *Peninsular Trust Co. v. Grand Rapids,* 131 Mich. 572; *Dobbins v. M. K. and T. R. R.,* 91 Tex. 63; *Thompson v. Illinois Central R. R.,* 63 So. 185, 105 Miss. 636, 47 L. R. A. (n. s.) 1101; *Emond v. Kimberly-Clark Co.,* 159 Wis. 83, 149 N. W. 760.

The foregoing cases are all cases with facts similar to the principal case under discussion. They decide that there is no liability upon the part of a land owner who fails to fenec a pond on his land to prevent accidents to children who come upon his land merely because they are lured there by the attractiveness of the pond. There are, however, a few cases which have held otherwise. In *Price v. Atchison Water Co.,* 58 Kan. 551, 50 Pac. 450, 62 A. S. R. 625, it was held that a landlord who maintained upon his premises a reservoir filled with

water to which children are attracted for the purpose of fishing or other sports, and who knows they frequent the reservoir for such purposes, and who takes no special means to warn or exclude the children, is guilty of negligence under the doctrine of the turntable cases, and hence is answerable for the death of a child drowned in the reservoir. *Pekin v. McMahon,* 154 Ill. 141, 27 L. R. A. 206, 45 A. S. R. 114, 39 N. E. 484, was a case of a lot in a populous city filled with water and floating logs. This was held, under the doctrine of the turntabel cases, to be an attractive nuisance to little children, rendering the city liable for the death of a boy while playing upon the logs in the pond.

City of Indianapolis v. Williams, 58 Ind. 447, 108 N. E. 387, held that where a city negligently constructed a sewer so as to make a deep hole in a stream into which it empties, and children are attracted to the stream and are drowned, the city would be liable under the doctrine of attractive nuisance as set forth under the turntable doctrine.

Other cases in which ponds, streams and the like have been held attractive nuisances under the doctrine of the turntable cases are: *Donk Bros. Coal Co. v. Leavitt,* 109 Ill. App. 385, and *Tucker v. Draper,* 62 Nebr. 66, 54 L. R. A. 321, 86 N. W. 917.

The cases in this latter group, all tending to support the result reached in the principal case of *Davoren v. Kansas City,* were decided on the basis of extending the doctrine of the turntable cases to the facts of the respective cases. It must be borne in mind, however, that Judge Woodson distinctly repudiated the idea that the result in the principal case was reached by an extension of the turntable doctrine.

The doctrine of the turntable cases has been long recognized and affirmed in Missouri. In *Koons. v. St. Louis and Iron Mountain R. R. Co.,* 65 Mo. 592, and *Berry v. St. L. Memphis and S. E. R. R. Co.,* 214 Mo. 593, 114 S. W. 27, recovery was allowed for injury to children which occurred upon turntables that had been left unlocked. In both cases the court allowed the recovery upon the attractive nuisance theory and the doctrine of the turntable cases. The Missouri courts, although definitely recognizing this doctrine in the above cases, have jealously guarded any extension of the doctrine to anything but turntable cases. In *Kelly v. Benas,* 217 Mo. 1, 116 S. W. 557, the court refused to call a high lumber pile an attractive nuisance. In *Buddy v. Union Terminal R. R. Co.,* 276 Mo. 276, 207 S. W. 821, the court refused to apply the doctrine of the turntable cases to railroad cars standing on the siding. The court in this case pointed out that the doc-

trine of the turntable cases had been accepted as well settled law in this state, but the court further pointed out that the doctrine was so attenuated and fragile in its legal logic that it should not be extended. In the case of *Rallo v. Heman Construction Co.*, 236 S. W. (Mo.) 632, it was held that an owner of a vacant lot containing an unguarded pond is not liable to children playing near by.

From a review of all the cases decided under similar facts to the principal cases, it appears that the Missouri court has gone contrary to the general prevailing doctrine in this country, and has certainly swung away from the previous Missouri decisions. However, the most interesting thing is not that the decision seems to be novel within the state, but its interest lies primarily in the reasons assigned for the result. In every case considered in this discussion, with the single exception of the principal case, the decision has rested upon the doctrine of the turntable cases, and the result reached by the various courts has depended upon whether or not the court has been willing to recognize that doctrine and further, whether it has been willing to extend that doctrine to the facts of the particular cases.

Judge Woodson said that the pond in the principal case was attractive to children and that the city should have known of its attractiveness and guarded against the results that might flow therefrom. We cannot see how this case does anything but fall clearly within the rule of the turntable cases. It looks as though Judge Woodson's reason was nothing more than an announcement of the reasons assigned for liability in the turntable cases, and yet in the next breath he says that to apply the doctrine of those cases would be a "clear misconception" of the principal case. We cannot but feel that Judge Graves in his dissent is right in his statement that the case falls clearly within the scope of the turntable cases . From all the cases reviewed, we can see no escape from Judge Graves' reasoning in so far as the case should turn on the doctrine of the turntable cases. All the authorities seem to support him on this point. Whether or not the court wants to accept that doctrine in the wide scope that the facts of this case would necessitate is not the point with which we disagree. That is a matter purely for the determination of that tribunal. But it is hard for us to understand exactly what principle the Supreme Court is attempting to lay down. It distinctly repudiates the idea that it is extending or even applying the turntable doctrine; and yet we cannot see how the result can mean anything except that the Missouri Supreme Court has adopted the turntable doctrine in its widest sense.

H. C. A.