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BANKER v. McLAUGHLIN—A RETURN TO THE
PRINCIPLES OF THE FIRST
“TURNTABLE” CASE

THE Texas Supreme Court, in the case of *Banker v. McLaughlin*,¹ has completed a full circle with respect to the doctrine of “attractive nuisance.” The court started in 1822 by accepting without qualification, in *F. G. Evansich v. Gulf, C. & S. F. Railway Co.*,² the doctrine as laid down by the U. S. Supreme Court in *Railroad Co. v. Stout*.³ Both of these “turntable” cases treated the problem of a landowner’s liability to children injured by dangerous conditions on the premises as one of ordinary negligence, uncomplicated by immunity resulting from the fact that the person injured was technically a trespasser.⁴ The fact that the child was a trespasser was treated as bearing on *foreseeability* as a test for the existence of negligence, to be considered by the jury, rather than as rendering the landowner non-liaible for his negligence as a matter of law. The *Stout* case also emphasized the lack of utility to the defendant in leaving the turntable unsecured, and the slight expense and trouble necessary to secure it. The *Evansich* case was followed in Texas by *Gulf, C. & S. F. Ry. Co. v. McWhirter*⁵ and *Ft. Worth & D. C. Ry. Co. v. Measles*.⁶ None of

¹ ___ Tex. ___, 208 S. W. (2d) 843 (1948).

² 57 Tex. 126 (1882).

³ 17 Wall. 657 (1873).

⁴ This is illustrated by the following excerpts from the cases: “But we conceive the rule to be this: that while a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts.” *Id.* at 661.

“The fact that the turn-table was upon the premises of the appellant does not affect the question, nor relieve it from the duty of exercising, in reference thereto, such care as will render it not a dangerous machine to children who are attracted to it for amusement. 57 Tex. 126, 129 (1882).

⁵ 77 Tex. 356, 14 S. W. 26 (1890).

⁶ 81 Tex. 474, 17 S. W. 124 (1891).

these four cases mention the theory that the attractive dangerous premises constitute an implied invitation to the child to enter. That theory, introduced in Minnesota in the case of *Keffe v. Milwaukee & St. P. Ry. Co.*⁷ and expanded by the U. S. Supreme Court in *United Zinc & Chemical Co. v. Van Britti*⁸ (the poison pool case), first appeared in Texas in the case of *Missouri K. & T. Ry. Co. of Texas vs. Edwards*.⁹ The theory represented an effort to harmonize the new doctrine with the ancient rule that a landowner owed the trespasser no duty to make the premises safe. If he was invited he was not a trespasser. The very next year after the *Edwards* case the Texas Supreme Court, in *Dobbins v. Missouri, K. & T. Ry. Co. of Texas*,¹⁰ apparently rejected altogether the idea that a landowner could be liable for negligent harms inflicted on a trespasser. The opinion stated unequivocally that "in considering the question as to whether a duty exists there is no distinction between a case where an infant is injured and one where the injury is to an adult . . ."¹¹

In *San Antonio & A. P. Ry. Co. v. Morgan*¹² the court returned to the invitation doctrine, but limited it to cases where "the owner maintains upon his premises something which on account of its nature and surroundings is especially and unusually calculated to attract and does attract another . . ."¹³ This ruled out usual and customary uses of land, such as for turntables, ponds, haystacks, etc. In cases of unusual and especial attractiveness, however, invitation will not be implied by law, but the circumstances must be

⁷ 21 Minn. 207, 18 Amer. Rep. 393 (1875). Minnesota abandoned the doctrine, however, in *Gimmestad v. Rose Brothers Co.*, 194 Minn. 531, 261 N. W. 194 (1935).

⁸ 258 U. S. 268 (1922). This was the case in which Mr. Justice Holmes seized upon the misnomer "attractive nuisance" to require that the child be attracted onto the premises by the dangerous condition. Recovery was denied because the poisoned pool was invisible from off the premises and the child had entered for other reasons. This requirement was dropped and the doctrine of the Stout case restored in *Best v. District of Columbia*, 291 U. S. 411 (1934).

⁹ 90 Tex. 65, 36 S. W. 430 (1896).

¹⁰ 91 Tex. 60, 41 S. W. 62 (1897).

¹¹ *Id.* at 62, 41 S. W. 62, 62-63.

¹² 92 Tex. 98, 46 S. W. 28 (1898).

¹³ *Id.* at 103, 46 S. W. 28, 30.

such as to convince the fact finder that in maintaining such condition the defendant actually intended to invite and attract children. This might be called the doctrine of invitation implied in fact, as opposed to the doctrine of invitation implied in law. The rules as laid down in the *Morgan* case in 1898 appear to have been applied by the Texas cases¹⁴ down to 1948. The two outstanding requirements to support recovery appear to have been: (1) the dangerous premises must be so unusually attractive as to indicate an actual intent by the landowner to invite children to enter; and (2) it must be the dangerous condition itself which causes the child to enter.

The *McLaughlin*¹⁵ case abandoned both these requirements, returning to the doctrine of the *Stout*¹⁶ and *Evansich*¹⁷ cases. The problem was treated as one of simple negligence, i.e., whether a reasonably prudent man would have foreseen injury to children as a result of the conduct in question.¹⁸ The facts of the case were that the defendant owned a 60-acre sub-division near the City of

¹⁴ North Texas Construction Co. v. Bostick, 98 Tex. 239, 83 S. W. 12 (1904); Flippen-Prather Realty Co. v. Mather, 207 S. W. 121 (Tex. Civ. App. 1918) *writ of error ref'd*; Bustillos v. Cement Co., 211 S. W. 929 (Tex. Comm. App. 1919); McCoy v. Texas P. & L. Co., 239 S. W. 1105 (Tex. Comm. App. 1922); Maruska v. Ry. Co., 10 S. W. (2d) 211 (Tex. Civ. App. 1928) *writ of error ref'd*; Texas-Louisiana Power Co. v. Bihl, 66 S. W. (2d) 672 (Tex. Comm. App. 1933); Texas Public Service Co. v. Laughead, 73 S. W. (2d) 925 (Tex. Civ. App. 1934) *writ of error ref'd*; Gulf Production Co. v. Quisenberry, 128 Tex. 347, 97 S. W. (2d) 166 (Tex. Comm. App. 1936); Montgomery Ward & Co. v. Ramirez, 127 S. W. (2d) 1034 (Tex. Civ. App. 1939) *writ of error dism. judgm. cor.*; Gotcher v. City of Farmersville, 137 Tex. 12, 151 S. W. (2d) 565 (1941).

Not all of these were decided on the basis of attractive nuisance. In the Bustillos case the child was held a business invitee because he brought lunch to his father, an employee of the defendant cement company. In the Quisenberry case the injured child lived on the premises, so that it was not necessary to invoke the fiction of "invitation" to keep him from being a trespasser. But none of the cases appear inconsistent with the rules of the *Morgan* case.

¹⁵ ___ Tex. ___, 208 S. W. (2d) 843 (1948).

¹⁶ 17 Wall. 657 (1873).

¹⁷ 57 Tex. 126 (1882).

¹⁸ This is made clear by the following quotation from the majority opinion, 208 S. W. (2d) 843, 846-47 (1948): "While there was substantial proof of the inherent attractiveness of the place we, under our view of the case as properly one of negligence, are concerned primarily with the dangerous condition created by petitioner on his open premises [emphasis by the court] and the fact that the dangerous features of the condition could have been eliminated at small expense without interfering with the owner's marketing

Orange. He was engaged in the business of developing and marketing the tract as homesites. In the course of development, he had scooped out a considerable quantity of earth from one of the lots, to be used in improving the streets of the subdivision. The excavation thus formed was five to eight feet deep at its shallowest point. It soon filled with water and remained so for eight or nine months prior to the time in question. The plaintiff owned a home on the subdivision, some 300 to 350 yards from the pit. The plaintiff's minor son (just under six years of old) was found drowned in the pit. The water hole was not visible from the nearest street, and the nearest street was largely untraveled. The plaintiff recovered judgment in the trial court for \$15,200, which was affirmed by the Court of Civil Appeals subject to remittitur reducing the recovery to \$6,000. The defendant, Banker, appealed by writ of error.

In affirming the plaintiff's recovery, the court emphasized the negligible utility of the water hole to the defendant and the trivial expense necessary to drain it, on the one hand, as compared to the gravity of the foreseeable danger on the other. The defendant had no need of the hole as a source of water for either livestock or irrigation purposes. There was testimony to the effect that the defendant thought the pool might be useful for irrigation purposes to persons who might subsequently purchase adjoining lots, but the jury might well have regarded such utility as speculative. There was also testimony that some of the residents watered their stock there, although it did not appear that such use was in any

of the homesites. *The element of attraction is important only in so far as it may mean that the presence of children was to be anticipated.*" (Italics supplied.)

Also the following (*Id.* at 849): "It is of course immaterial also whether the dangerous condition be in close proximity to a path or highway, as is held in some cases, since that fact merely bears on whether the presence there of members of the public is reasonably to be anticipated. Whether the dangerous condition is an 'attractive nuisance' is also merely a circumstance bearing on the same question."

And this excerpt from PROSSER ON TORTS (1941) (quoted with approval by the court at *Ibid.*, p. 849): "*The better authorities now agree that the element of 'attraction' is important only in so far as it may mean that the trespass is to be anticipated, and that the basis of liability is merely the foreseeability of harm to the child. * * *.*" [Emphasis by the court.]

degree necessary or that it benefitted the defendant. As to the expense of drainage, the defendant himself testified that it could be drained through a nearby ditch by removing a few shovels full of dirt. The foreseeability of the danger could be found by the jury from evidence that at the time of the drowning some 50 families lived on the subdivision within a radius of a few hundred yards, 40 of such families had small children, and the common knowledge that such water holes are attractive to children as places to swim.

It is believed that these elements will prevent the rule of the case from being extended to conditions having actual utility, such as stock or fish ponds, haystacks, etc. Where the correction of relatively non-useful dangerous conditions would entail unreasonable expense, suitable warnings or fences will no doubt discharge the landowner's duty of due care.

Near the end of the majority opinion appears this statement:

"It is obvious from what has been said that no new rule of liability on the part of occupants of real property is announced here, and that such occupants in constructing or maintaining tanks, ponds, water reservoirs, or devices of any kind, for use on their lands, are under no greater burden with respect to creating dangerous conditions thereon than has heretofore rested upon them."¹⁹

If this means that the court is laying down no new rule of liability in the sense that the rule has existed before in Texas and in other jurisdictions, no exception can be taken to the statement. If the court means that its decision is in accord with the Texas cases subsequent to the *Morgan* case,²⁰ it is submitted that those cases are all clearly distinguishable. The one most nearly in point, and which the majority opinion cites as controlling in the principle case, is *Flippen-Prather Realty Co. v. Mather*.²¹ That case was distinguished in the dissenting opinion²² by Mr. Justice

¹⁹ 208 S. W. (2d) 843, 850 (1948).

²⁰ See notes 12 and 14, *supra*.

²¹ 207 S. W. 121 (Tex. Civ. App. 1918) *writ of error ref'd*.

²² 208 S. W. (2d) 843, 860-61 (1948).

Folley (Mr. Justice Smedley concurring), the principal distinction being that in the *Mather* case the child was drowned in an abandoned well (clearly unusual and useless), surrounded by open, developed, paved streets, and located near a public school on a route used regularly by children in going to and from school, and on a lot which was regularly used as a playground. In the principal case, the child was drowned in a barrow pit in a wooded section, containing many ponds and pools (hence not unusual) not near to or visible from any frequently traveled way, and not regularly used as a playground. There was also in the *Mather* case the additional fact that the defendant had recognized the danger and at one time had begun filling the well up, but had abandoned the project.

Certainly the decision in the principal case is not in accord with the last preceding expression by the court on attractive nuisance, contained in the case of *Gotcher v City of Farmersville*,²³ where Chief Justice Alexander clearly stated that the doctrine does not apply to remove the child from the trespasser category unless "the thing or condition alleged to have constituted the attractive nuisance [was] so situated as to entice the child onto the premises, and it is not sufficient that it attracted him after he became a trespasser."²⁴

It seems clear that Texas has returned, in the *McLaughlin* case, to the doctrine of the original turntable cases (the *Stout* and *Evansich* cases). With respect to a landowner's liability for injuries, at least to children, arising from dangerous conditions on his premises, the ordinary principles of negligence again apply. The fact that the child was a trespasser, or that he was not attracted by the dangerous condition until after he entered the premises, are no longer defenses as a matter of law. Such facts are merely part of the "circumstances" to be considered by the jury in determining whether the defendant acted as a reasonably

²³ 137 Tex. 12, 151 S. W. (2d) 565 (1941).

²⁴ *Id.* at 15, 151 S. W. (2d) 566.

prudent man would have acted under the same or similar circumstances. At least so far as injuries to children are concerned, the negligent landowner now stands on the same footing as the negligent driver of a car or any other negligent person. It is worthy of note that such a rule was approved by Judge Townes in his excellent article in the first issue of the *Texas Law Review*.²⁵ After all, is there any good reason why the negligent landowner should enjoy a legal position superior to any other negligent person? Does not the special position of the landowner derive from now outmoded feudal considerations, when the "breaking of the close" actually portended hostile action? As a matter of policy, is not the protection of our children of greater importance to society than the protection of technical rights against trespassers? It should be noted in considering this last question that no substantial property rights are abrogated by the decision. The landowner can still recover damages for trespass, or enjoin the trespasser. Where the trespass is under a claim of right, he still has his action of trespass to try title. The only right lost to the landowner is the right to immunity from the consequences of his own negligence where the person damaged is a child "trespasser."

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²⁵ Townes, John C., *Liability Arising from Dangerous Premises*, 1 TEX. L. REV. 1, cont. at 389 (1923).