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TORTS

THE ATTRACTIVE NUISANCE DOCTRINE

PROBABLY the most noteworthy decision rendered by the Texas Supreme Court in 1948 in the field of torts is to be found in the case of *Banker v. McLaughlin.*[1] The *McLaughlin* case involved the doctrine of attractive nuisance as applied to child trespassers, and the decision of the majority applied the ordinary principles of negligence in holding the landowner liable for an injury to a child arising from "dangerous conditions" existing on his premises. The court's holding was quite in line with the first Texas Supreme Court ruling on the doctrine of attractive nuisance, found in the case of *F. G. Evansich v. Gulf, C. & S. F. Railway Co.*,[2] which accepted without qualification the doctrine as established by the U. S. Supreme Court in *Railroad Co. v. Stout.*[3] Interest in the decision is stimulated not by its originality in Texas tort law, but by the fact that it represents a *return* to principles from which the Texas courts had tended to veer in the years intervening between the decisions in the *Evansich* case and the *McLaughlin* case.[4]

In the *McLaughlin* case the defendant, owner of a 60-acre subdivision near Orange, Texas, was improving streets therein, and

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[1]146 Tex. 434, 208 S. W. (2d) 843 (1948).

[2]57 Tex 126 (1882).

[3]17 Wall. 657 (1873).

[4]In 1896, in *Missouri K. & T. Ry. Co. of Texas v. Edwards*, 90 Tex. 65, 36 S. W. 430, the court followed the theory that the attractive, dangerous premises constitute an implied invitation to the child to enter in an effort to harmonize the attractive nuisance doctrine with the rule that a landowner owed no duty to a trespasser to keep the premises safe. A year later, in *Dobbins v. Missouri, K. & T. Ry. Co.*, 91 Tex. 60, 41 S. W. 62 (1897), the court appeared to hold that no landowner could be liable for negligent harms inflicted on a trespasser, even when the trespasser was a child. Then in 1898 in the case of *San Antonio & A. P. Ry. Co. v. Morgan*, 92 Tex. 98. 46 S. W. 28, the court, though returning to the invitation doctrine, limited its application to cases where the child was attracted to the premises by something there maintained by the landowner which was calculated to attract another. The *Morgan* case rule had not been questioned until the court decided the *McLaughlin* case.

developing homesites for sale. On one of these homesites, an excavation had been left unattended and had filled with rain water. It was five to eight feet deep at its most shallow point. The plaintiff had already purchased and occupied a homesite in the tract some 300 to 350 yards from the excavation. In this water hole plaintiff's minor son drowned. The water-filled excavation was not visible from the nearest street, which was largely untraveled. The defendant himself testified to the effect that the cost of drainage of the pit was negligible, and its utility value, if any, was speculative only. Some 50 families already lived in the subdivision within a radius of a few hundred yards of the pit, and some 40 of these families had small children. Plaintiff's son was just under six years of age. In decisions since the *Evansich* case, Texas courts had considered the fact that a child was a trespasser, or that he was not actually attracted to the premises by the dangerous condition, as defenses available to a defendant as a matter of law.[5] In the *McLaughlin* case, the court treated the fact of trespassing and the fact that the child was not attracted to the premises in the first instance by the dangerous condition merely as evidence which the jury might consider in determining the issue of whether the defendant had acted as a "reasonably prudent man" would have acted under like or similar circumstances.

The court stressed the negligible utility of the water-filled excavation to the defendant, the trivial expense to be incurred in draining it, and the grave, foreseeable—and now actual—danger which the continued existence of the water hole produced.[6]

CONTRIBUTORY NEGLIGENCE—A JURY QUESTION

Another case of considerable interest is that of *Lang v. Henderson*,[7] in which the Supreme Court reaffirmed the doctrine that

[5]See note 4 *supra*.

[6]Williams, *Banker v. McLaughlin—A Return to the Principles of the First "Turntable" Case*, 3 SOUTHWESTERN L. J. 78 (1949) is a more elaborate comment on the *McLaughlin* case.

[7]..... Tex. ....., 215 S. W. (2d) 585 (1948).

contributory negligence is a jury question when the facts of the case will admit of more than one conclusion.[8] Furthermore, the court applied the rule that when a landlord has leased premises to several tenants, retaining possession or control of a part for their common use, he becomes liable to a tenant who suffers injury due to the defective condition of that portion.[9] The rule is not new, having first been laid down in Texas in the case of *O'Connor v. Andrews*[10] in 1891, but its application to the facts of the *Lang* case is unique.

In the *Lang* case plaintiff and his wife occupied one of eight utility apartments in a house owned by defendant. In plaintiff's apartment was located the gas-operated water heater which furnished hot water to all eight apartments. Defendant had agreed under OPA regulations to furnish all utilities to all apartments, and had reserved a key to plaintiff's apartment in order to be able to maintain the hot water supply. On several occasions, over a period of months, plaintiff reported to defendant that the heater was leaking gas. On each occasion, defendant promised to have the heater repaired. As the fumes became worse, plaintiff and his wife shut the door each night which led from the kitchen to their bedroom, and left the kitchen window open in order that the gas escaping from the heater in the kitchen might pass out of the house. Early one morning, plaintiff and his wife awoke to find the kitchen on fire around the heater, and the evidence showed or tended to show that the heater caused the fire. Plaintiff's wife was injured in the fire, and their personal property in the apartment was damaged. The trial court instructed a verdict for defendant, holding plaintiff guilty of contributory negligence as a matter of law. The Court of Civil Appeals affirmed this decision,

[8]As stated by the court, "The court can withdraw the question of contributory negligence of the plaintiff from the jury and determine it as a question of law only when from the facts in evidence but one rational inference can be drawn . . . contributory negligence is a question of fact for the jury when the evidence shows that the plaintiff, with knowledge of the danger, exercised some care." *Id.* at 587.

[9]*Id.* at 588.

[10]16 S. W. 628 (1891).

stating that the plaintiff, being cognizant of the danger, should have vacated the premises or repaired the heater himself. The Supreme Court reversed the decision of the Court of Civil Appeals and remanded the cause for a new trial.

The court defined *negligence per se*,[11] and held that the fact situation here lay outside the purview of that definition. In short, the court felt that the simple fact that plaintiff remained in the apartment, without himself repairing the leaking boiler, did not make him guilty of contributory negligence as a matter of law. Actually, of course, the plaintiff had done *something*. He had informed the defendant of the existing defect, and he had left the window in the kitchen open in order that the gas might escape from the closed quarters. He had not sat idly by, aware of the existing danger, and yet doing nothing for his own protection. The evidence revealed that plaintiff was a student; his wife was pregnant. As an interesting and applicable sidelight, the court took judicial notice of the acute housing shortage in Dallas as a fact of common knowledge. It was apparently the court's thought that the housing shortage should be weighed by a subsequent jury in deciding as a matter of *fact* whether plaintiff was contributorily negligent, and therefore barred from recovering his damages from the defendant landlord.

The rule of the *O'Connor* case regarding a landlord's liability to his tenants[12] has been applied in holding a landlord liable for damages caused by a leaking roof when the building was leased to several tenants.[13] In *Denson v. Willcox*,[14] decided in 1927, the Commission of Appeals ruled that the doctrine was applicable to a party wall between two leased portions of a building, the de-

[11] "In order that an act shall be deemed *negligent per se*, it must have been done contrary to a statutory duty or *it must appear so opposed to the dictates of common prudence that we can say, without hesitation or doubt, that no careful person would have committed it.*" 215 S. W. (2d) 585, 587 (1948).

[12] See note 9 *supra*.

[13] Clayton D. Brown Co. v. O'Connor, 151 S. W. 339 (Tex. Civ. App. 1912); Archibald v. Fidelity Title & Trust Co., 296 S. W. 680 (Tex. Civ. App. 1927); Medlin v. Havener, 98 S. W. (2d) 863 (Tex. Civ. App. 1936).

[14] 298 S. W. 534 (Tex. Com. App. 1927).

fendant landlord being held liable for damages to a tenant which were suffered when the wall collapsed.

In 1944 the Supreme Court, in *Flynn v. Pan American Hotel Co.*,[15] had qualified the doctrine by stating that the reservation by a lessor of a right to enter the premises to make such repairs and alterations as he may elect is not a reservation of control over a part of the building and that an obligation on the part of the lessor to make repairs does not arise from the reservation of such right. At first glance the holding in the *Flynn* case might appear to be *contra* to that of the *Lang* case, but the two holdings are clearly distinguishable on the facts. In the *Flynn* case the landlord reserved the right to enter the apartments of the various tenants to make such repairs there as he saw fit to make, while in the *Lang* case the landlord reserved the right to enter plaintiff's apartment to maintain adequate hot water service, *which he was bound by his commitments under OPA regulations to furnish to all of the apartments in the building.* The decision in the *Lang* case appears to be clearly in line with previous decisions involving the duty of a landlord to his tenants,[16] but the fact that the part of the premises "not included in the holding of any one tenant" is here actually located in plaintiff's apartment makes the case unique on its facts alone. The repairs in each apartment of the tenants in the *Flynn* case could have benefitted only the individual tenants, while the repair to the gas-operated water heater in the *Lang* case was essential to the well-being of all of defendant's tenants in all of the apartments in the building.

If a subsequent trial court jury finds as a matter of fact that plaintiff was not contributorily negligent in remaining in the apartment, making no repairs himself, and yet being at the time aware of the existing danger, then the Supreme Court has already stated that the boiler, even though located within plantiff's kitchen, is "a part of the premises retained by the landlord for

[15] 143 Tex. 219, 18 S. W. (2d) 446 (1944).

[16] Meeker v. Phillips Petroleum Co., 94 S. W. (2d) 186 (Tex. Civ. App. 1936) Morton v. Benton-Lingo Co., 150 S. W. (2d) 239 (Tex. Com. App. 1941).