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Recent Cases

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ADOPTION—DESCENT AND DISTRIBUTION—RIGHT OF ADOPTED CHILD TO TAKE FROM NATURAL PARENT UNDER PERTERMITTED HEIR STATUTE

Wailes v. Curators of Central College: In Re Furnish's Will[1]

Can an adopted child in Missouri take by intestate descent from his natural parents?[2] The *Revised Statutes* provide as follows:

> "453.090. Consequences of Adoption—1. When a child is adopted in accordance with the provisions of this chapter, *all legal relations and all rights and duties* between such child and his natural parents (other than a natural parent who joins in the petition for adoption as provided in Section 435.010) *shall cease and determine.* Said child shall thereafter be deemed and held to be for *every purpose* the child of his parents or parents by adoption, as fully as though born to them in lawful wedlock. . . .
> 4. Said adopted child shall be capable of inheriting from and taking through his parent or parents by adoption property limited expressly to heirs of the body of such parent or parents by adoption." (Emphasis added)[3]

Furnish and his wife willed the bulk of their estate to Central College. Their natural grandchildren had been legally adopted by other couples under the provisions of Section 453. These grandchildren, being omitted from the will of their natural grandfather, claimed shares as pretermitted heirs.[4] The circuit court held against the College and in favor of the grandchildren,[5] but the Supreme Court of Missouri *en banc*, with but one dissent, reversed the circuit court and held that the statute meant what it said and would be literally construed. This decision settled a question that has been uncertain in Missouri for some time, and particularly so for the last eight years.

In 1933, the Supreme Court of Missouri in *Shepherd v. Murphy*[6] held that the statute rendered natural parents incapable of inheriting from the adopted child. Although the court did not specifically pass upon the reverse situation of an adopted child inheriting from his natural parents, the court did state that the statute cut all

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1. 254 S.W. 2d 645 (Mo. 1953).
2. An adopted child "continues to inherit from all blood relatives in the absence of a statute to the contrary, although he may be denied the right to inherit in a dual capacity where the adoptive parent is a blood relative." 2 C.J.S., *Adoption of Children*, § 63, p. 454.
3. MO. REV. STAT. § 453.090 (1949).
4. MO. REV. STAT. § 468.290 (1949), provides the right to an intestate share to a child not named or provided for in the testator's will. It has been held that the present statute places the adopted child in line of descent from his adopted father so that he may take from the adopted father as a pretermitted heir under this section. Robertson v. Cornett, 359 Mo. 1156, 225 S.W. 2d 780 (1949).
5. There is an apparent error on page 654 of the Southwestern Reporter headnote to this case: "The circuit court . . . entered judgment adverse to defendants who were grandchildren of deceased, and those defendants appealed." Actually, judgment in the circuit court was in favor of the natural grandchildren. The adverse judgment probably intended to refer to Central College which was joined as a defendant.
6. 332 Mo. 1176, 61 S.W. 2d 746 (1933).

ties between the adopted child and its natural parents "for every purpose." The language of part of the decision is not unlike that of the principal case.

In 1945, however, in *St. Louis Union Trust Co. v. Kaltenbach*,[7] the court allowed the "adopted" child to inherit from his natural parent, the decision being based upon a finding that the adoption was defective and illegal in that no notice of adoption was served upon the natural parent, nor any guardian *ad litem* appointed to represent the child. Based upon such a finding, the decision would not seem to contradict the *Shepherd* case; however, the court added the following dictum: ". . . it [the adoption statute] does not say that the adopted child is rendered incapable of inheriting from its natural parents."[8]

Five years later, in *Mississippi Valley Trust Co. v. Palms*,[9] the court allowed three of testator's natural children, who had been adopted under the statute, to take under a *will* creating seven equal parts of a residuary estate for each of his seven children. The present statute does not, of course, bar leaving property to natural children by will; but the court added this statement: ". . . in Missouri the legislature has not said that one who has been adopted by another shall not inherit from his natural parents."

There is, moreover, a background of early cases evidencing the court's natural and understandable reluctance to sever the last bond between natural parent and child. *Clarkson v. Hatton*,[10] for example, supported inheritance from both natural and adopted parents. This case, however, as well as all other pre-1917 cases are of little significance today since they were decided before the establishment in 1917 of a comprehensive statutory scheme of adoption.[11]

Despite the background of these early cases and the possibly misleading dictum of the later cases, the court in the principal case found the language of the legislature too plain to allow exception. The court refused, in effect, to construe "all rights" to mean "all but one."[12] Adoption is purely statutory,[13] as is the law of descent,[14] and there is no absolute or natural right to inherit from one's natural parents. There is no reason, therefore, to alter the clear wording of the statute by judicial construction.

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7. 353 Mo. 1114, 186 S.W. 2d 578 (1945).

8. This dictum is criticized by Cook and Eppenberger in *The New Adoption Act*, 4 J. Mo. BAR 228, 231 (Sept. 1948). "In our opinion Section 9614, both new and old, clearly destroys all inheritance rights of the adopted child as to its natural parents, and the dictum of the court to the contrary was unfortunate and certainly unnecessary to the decision. Our Missouri Adoption Code purports to change the blood stream of the adopted child; certainly inheritance from 2 sets of parents should not be countenanced."

9. 360 Mo. 610, 229 S.W. 2d 675 (1950).

10. 143 Mo. 47, 44 S.W. 761, 39 L.R.A. 748 (1898).

11. Prior to 1917, a child could be adopted by deed in a manner similar to the conveyance of real estate. All the existing laws on adoption were repealed in 1917, and a statutory system set up which has continued to the present day with minor amendments in 1941, 1943, and 1945.

12. Incidentally, House Bill 120, § 10 (1947), which would have given adopted children a right to inherit from natural parents, failed to pass.

13. Beach v. Bryan, 155 Mo. App. 33, 133 S.W. 635 (1911); Lamb v. Freehan, 276 S.W. 71 (1925); *In re* Watson's Adoption, 238 Mo. App. 1104, 195 S.W. 2d 331 (1946).

14. Irving Trust Co. v. Day, 314 U.S. 556, 62 Sup. Ct. 398, 86 L.Ed. 542, 137 A.L.R. 1093 (1942); Robertson v. Cornett, 359 Mo. 1156, 225 S.W. 2d 780 (784-5) (1949).

Moreover, the court declared the public policy of the state to be against dual inheritance from both the natural and the adoptive parents. This seems sound when one realizes that the purpose of the adoption is to give the adopted child the same status as other children, and not a special status involving an additional inheritance. The procedure provided by the Missouri statute appears adequate to prevent the use of adoption to fraudulently deprive the child of the natural inheritance, a fear which has been the basis of some of the arguments against complete severance.

The decision is welcomed for two reasons—it settles the question raised by the cases cited, and it places Missouri among the increasing number of modern courts that view adoption as a real transplanting of the child from the bloodstream of the natural parents to that of the adoptive parents, a concept that has found favor in other fields than law.

RAYMOND C. LEWIS, JR.

CONTRACTS—CONDITIONAL ACCEPTANCE OF ANTICIPATORY REPUDIATION

United States v. Seacoast Gas Co.[1]

The defendant, Seacoast Gas Company, was supplying gas to a federal housing project under a contract with the plaintiff, the United States, running from April 15, 1947, to June 15, 1948. On October 7, 1947, defendant notified plaintiff of its intention to cancel the contract as of November 15, 1947. Immediately plaintiff notified defendant that it would advertise for bids to complete the contract. On November 6, 1947, plaintiff received a low bid from Trion Company and notified defendant that unless they received a written withdrawal of the cancellation notice within three days, the bid would be accepted. Defendant did not respond, and the bid was accepted on November 10 and contract negotiations begun. Thereafter, on November 13, defendant retracted its notice of cancellation. The formal contract between Trion and plaintiff was signed November 17. Plaintiff sued to collect the price in excess of the original contract. On the ground that the defendant had withdrawn its notice of cancellation prior to the rendering of the contract with Trion, the United States District Court for the Southern District of Georgia gave judgment for the defendant.

The Court of Appeals in the present case reversed the judgment stating that "In fact and in law, when the government took bids and notified Seacoast that unless it retracted within three days it would proceed to accept the Trion bid and award the contract to it, the *locus poenitentiae* ended with these three days." Hence, the court reasoned, defendant's retraction of its cancellation notice came too late.

The court added "All that is required to close the door to repentance is definite action indicating that the anticipatory breach has been accepted as final, and this requisite can be supplied either by the filing of a suit or a firm declaration, as here, that unless within a fixed time the breach is repudiated, it will be accepted."[2]

The doctrine of anticipatory breach of contract, as first recorded in the English

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1. 204 F. 2d 709 (5th Cir. 1953).

2. An alternative ground for the decision in the principal case was that the acceptance by the plaintiff of the bid of Trion company on November 10 was a sufficient change of position to prevent repentance by defendant on November 13.

case of *Hochster v. De La Tour*,[3] has been accepted almost unanimously in the United States following *Roehm v. Horst*,[4] decided in 1900 by the Supreme Court.

The rule states that if an absolute and unequivocal renunciation of a contract is made by a promisor, before the time for full performance has arrived, the promisee may elect to (1) rescind the contract, with the consequence that he would thereafter be limited to the remedy of an action for restitution, or (2) ignore the repudiation entirely, or (3) treat the renunciation as an immediate breach of the contract with all the consequences that ensue from that situation.[5] The repudiation standing alone does not constitute a breach of the contract, but becomes so only when and if the promisee in a proper manner recognizes the repudiation as a breach.[6]

However, the repudiator may repent and withdraw his notice of repudiation under certain circumstances, thus restoring the contract to its former status. The *Restatement of Contracts* states "The effect of repudiation is nullified (a) where statements constituting such a repudiation are withdrawn by information to that effect given by the repudiator to the injured party before he has brought an action on the breach, or has otherwise materially changed his position in reliance on them. . . ."[7] However, many jurisdictions follow a "termination theory", under which, in addition to the two methods of barring retraction permitted by the *Restatement*, a promisee may end the *locus poenitentiae* merely by stating that he has accepted the repudiation as a breach, without bringing an action or changing his position. The repudiation is recognized as an "offer to terminate" and the promisee accepts this offer by treating the renunciation as a breach.[8]

In addition to the above methods recognized by the courts following the "termination theory", the principal case presents a fourth possibility, what may be called termination by a "conditional acceptance" of an anticipatory repudiation. The promisee states that the renunciation by the promisor will be accepted as a breach if the promisor fails to retract his declaration within the time specified for that purpose by the promisee. The expiration of the specified time without more, presumably, bars retraction. The court in the instant case advanced the "conditional acceptance"

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3. 2 El. & Bl. 678, 118 Eng. Rep. 922 (Q.B. 1853).

4. 178 U.S. 1, 44 L.Ed. 953 (1900).

5. Frost v. Knight, L.R. 7 Ex. 111 (1872); Hochster v. De La Tour, *supra*.

6. WILLISTON ON CONTRACTS § 1322 at p. 3722 (1937). The fact that the promisee has requested continued performance after the repudiation does not affect his right at a later date to sue for the breach. Bu-Vi-Bar Petroleum Corp. v. Krow, 40 F. 2d 488 (8th Cir. 1930); 69 A.L.R. 1295, 1304 (1930); RESTATEMENT, CONTRACTS § 320 (1932).

7. RESTATEMENT, CONTRACTS § 319 (1932). See Vold, *Withdrawal of Repudiation After Anticipatory Breach of Contract*, 5 TEX. L. REV. 9 (1926). Decisions following are Alderson v. Houston, 154 Cal. 1, 96 Pac. 884 (1908); Clover Mfg. Co. v. Austin, 101 Conn. 208, 125 Atl. 646 (1924); Alvey-Ferguson Co. v. Tosetti Co., 178 Ill. App. 536 (1913); Perkins v. Frazer, 107 La. 390, 31 So. 773 (1901); Bernstein v. Meech, 130 N.Y. 354, 29 N.E. 255 (1891); Clavan v. Hermann, 285 Pa. 120, 131 Atl. 705 (1926).

8. Mutual Loan Society v. Stowe, 15 Ala. App. 293, 73 So. 202 (1916); Quarton v. American Law Book Co., 143 Ia. 517, 528, 121 N.W. 1009, 1013 (1909); Paducah Cooperage Co. v. Arkansas Stove Co., 193 Ky. 774, 237 S.W. 413 (1922); Louisville Packing Co. v. Craine, 141 Ky. 379, 132 S.W. 575 (1910); Haddaway v. Smith, 277 S.W. 728 (Tex. 1925); Swiger v. Hayman, 56 W. Va. 123, 48 S.E. 839 (1904). See Rothschild, *Anticipatory Contract Repudiation and Nullification—State and Federal Courts*, 31 IA. L. REV. 383 (1946).

possibility when it stated that the *locus poenitentiae* for the defendant ended with the three days mentioned by the plaintiff.

In *Louisville Packing Co. v. Craine*,[9] the plaintiff had repudiated his contract with the defendant. Defendant then wrote that unless plaintiff withdrew the renunciation in the "next few days", the claim would be put in the hands of a lawyer. Three months later, and before the claim was assigned for collection, plaintiff retracted. Retraction was disallowed, although following the repudiation defendant had not changed his position, nor brought suit, nor declared an unconditional termination of his obligation. In so holding, the court permitted defendant's "conditional acceptance" take effect upon the expiration of the time specified (*i.e.*, "next few days").

In opposition to the principal case and *Louisville Packing Co. v. Craine*, is *Southern Sawmill Co. v. Herzfeld*,[10] decided by the Georgia court in 1926. The vendee of a lumber contract anticipatorily breached his agreement, whereupon vendor wrote that unless vendee sent shipping instructions in three days, other offers for the lumber would be accepted and vendee held liable for damages. Suit was brought by vendor a month and a half later. Facts showing that vendee withdrew his renunciation before suit was brought are not present in the report, but language used in the decision indicates that they were inadvertently omitted.

> ". . . where, as here, the seller did not elect to act upon such anticipatory breach by bringing suit for such damages as may have accrued and where there is proof indicating that, pending the date set for final performance, the buyer withdrew his renunciation and announced his readiness to accept the goods it became incumbent upon the seller to comply with his own obligations under the contract by tendering the goods. . . .[11]

The court held the defendant vendee not liable. The "conditional acceptance" of the anticipatory repudiation, without more, was inoperative to bar retraction of the repudiation. This case seems to say that a "conditional acceptance" as such will be given no effect; only if the promisee declares anew his acceptance of the repudiation unconditionally will retraction be disallowed.

Under the *Restatement* theory, the problem does not arise, as a mere statement of acceptance of a repudiation, whether conditional or unconditional, will never operate to prevent the wrongdoer from retracting.[12]

A question arises as to whether the Georgia law embraces the *Restatement* view or the "termination theory." A close reading of the *Southern Sawmill* case will show that it cannot be said definitely whether that court is accepting the *Restatement* theory, or the "termination theory" while denying effect to vendor's "conditional acceptance". Other cases from that state shed no light on the question, as some decide

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9. 141 Ky. 379, 132 S.W. 575 (1910).

10. 35 Ga. App. 206, 132 S.E. 264 (1926). The case refers to and includes Herzfeld v. Southern Sawmill Co., 31 Ga. App. 323, 120 S.E. 666 (1923) where the facts are set out.

11. At page 265.

12. Clavan v. Hermann, 285 Pa. 120, 131 Atl. 105 (1926). RESTATEMENT, CONTRACTS § 319 (1932). See WILLISTON ON CONTRACTS § 1323 at 3723.

a mere declaration of acceptance of the repudiation is sufficient,[13] while another requires that something more must be done by the promisee, such as bringing suit or changing his position.[14]

STEPHEN E. STROM

LIBEL AND SLANDER—CALLING ONE A COMMUNIST SLANDER PER SE

Lightfoot v. Jennings[1]

After a public meeting in the court house, the defendant approached the plaintiff who was then talking to a group of people and said, "you are not going to talk here you damned communist." The plaintiff contended in his petition, that those words were slanderous per se in that they meant, and were understood to mean that he was a member of the communist party and, as such, advocated the forceable overthrow of the government, a crime under the laws of the United States.[2] The trial court sustained a motion to dismiss for failure to state a cause of action. Held: reversed and remanded.[3]

The question of calling one a communist has most often arisen in cases of libel. Most of the cases cited in the opinion deal with libel, and the two A.L.R. annotations[4] referred to do not contain a case where calling one a communist was held slanderous per se.[5]. The slander cases cited by the court[6] were disposed of on the ground that such a charge did not injure one in his business or profession. The plaintiff in the instant case did not claim that he had been injured in his business or profession, but contended that he had been charged with the commission of a crime punishable by imprisonment. Otherwise, he would have had to allege special damages to recover for the slander.

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13. Borochoff v. William Muirhead Const. Co., 56 Ga. App. 519, 193 S.E. 118 (1937); Smith v. Georgia Loan, Savings and Banking Co., 113 Ga. 975, 39 S.E. 410 (1901).

14. Byrd Printing Co. v. Whitaker Paper Co., 135 Ga. 865, 70 S.E. 798 (1911).

1. 254 S.W. 2d 596 (Mo. 1953).

2. 18 U.S.C.A. § 2385 (1948).

3. Mo. REV. STAT. § 559.400 (1949), provides that "Every person who shall falsely and maliciously charge . . . any . . . person . . . with any felony, the commission of which would subject such person to disfranchisment and other degrading penalties, shall be deemed guilty of a misdemeanor."

4. 51 A.L.R. 1071 (1927); 171 A.L.R. 709 (1947).

5. However the following cases were cited where it was held slander per se: Devany v. Quill, 187 Misc. 698, 64 N.Y.S. 2d 733 (Sup. Ct. 1946) (to call one "The agent of Fasciasm in America today"); Von Gerichten v. Seitz, 94 App. Div. 130, 87 N.Y. Supp. 968 (4th Dep't 1940) (to say "you are an anarchist"). The following cases were cited where it was held libelous to name one as a Red, Communist, Russian agent, etc.: Wright v. Farm Journal, 158 F. 2d 976 (2nd Cir. 1947); Washington Times Co. v. Murry, 55 App. D. C. 32, 299 Fed. 903 (D.C. 1924); Gallagher v. Chavalas, 48 Cal. App. 2d 52, 119 P. 2d 408 (1941); Kaminsky v. American Newspapers, 283 N.Y. 748, 28 N.E. 2d 971 (1940).

6. Pecyk v. Semoncheck, 105 N.E. 2d 61 (Ohio App. 1952); Keefe v. O'Brien, 203 Misc. 113, 116 N.Y.S. 2d 286 (Sup. Ct. 1952).

The distinction between libel and slander is well established.[7] An utterance is slanderous per se when it: (1) imputes some offensive or loathsome disease,[8] (2) imputes a charge of some crime punishable by imprisonment,[9] or (3) tends to injure a person in his trade or business.[10] A fourth classification is sometimes added.[11] A writing is libelous per se if it exposes one to hatred, contempt, or ridicule.[12] The reasons for the difference between the two offenses are, among others, that libel is thought to be more widely disseminated, more permanent of record and more likely to do damage than slander.[13] That this is not true in every case has caused some courts[14] and many students of the law[15] to express displeasure with the policy of

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7. See RESTATEMENT, TORTS § 568 (1938); PROSSER, TORTS § 92 (1941); COOLEY, TORTS § 111 (1907). This distinction seemingly arose in the court of the Star Chamber with the advent of printed material, Fisher, *The History of the Law of Libel*, 10 L.Q. REV. 158 (1894). According to 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, p. 291-2 (1906), the offenses were first distinguished in civil cases in 1670.

8. Sally v. Brown, 220 Ky. 576, 295 S.W. 890 (1927) (said plaintiff was "eat up with the clap"); Goldsmith v. Unity Industrial Life Insurance and Sick Benefit Ass'n, 13 La. App. 448, 128 So. 182 (1930) (charging plaintiff with syphilis); Kirby v. Smith, 54 S. D. 608, 224 N.W. 230 (1929) (charging one with tuberculosis is actionable per se).

9. Tincher v. National Life and Accident Ins. Co., 235 Mo. App. 663, 146 S. W. 2d 663 (1941) (accusing person of practicing medicine without a license); Stidham v. Wachtel, 2 Terry 327, 21 A. 2d 282 (Del. 1941) (called plaintiff " a damned dirty embezzler"). This case also contains a very concise discussion of damages to be awarded in slander cases. Safeway Stores v. Rogers, 186 Ark. 826, 56 S.W. 2d 429 (1933) (plaintiff charged with stealing a can of pineapple); Nardyz v. Fulton Fire Ins. Co., 151 Kan. 907, 101 P. 2d 1045 (1940) (accused of burning up his own barn to defraud insurance company).

10. Randall Dairy Co. v. Pevely Dairy Co., 274 Ill. App. 474 (1934) (alleging dairy sold watered milk); Mulcahy v. Deitrick, 39 Ohio App. 65, 176 N.E. 481 (1931) (averring that teacher plays for dances and then goes to sleep in the schoolroom); Hayner v. Cowden, 27 Ohio St. 292, 22 Am. Rep. 303 (1875) (imputing drunkenness to a clergyman); Krcisuhaar v. Craig La Vin, 181 Misch. 508, 42 N.Y.S. 2d 857 (Sup. Ct. 1943) (statement that attorney was "unethical").

11. In some jurisdictions, although not at common law, alleging unchastity is regarded as slander per se. Biggerstaff v. Zimmerman, 108 Colo. 194, 114 P. 2d 1098 (1941) ("To adopt this common law rule in Colorado would be invoking an anarchronism inconsistent with our social and political concepts as reflected in the laws and constitution of our state. Whether the slanderous words alleged constitute a crime under our laws it is unnecessary to decide."): Ventresca v. Kissner, 105 Conn. 533, 136 Atl. 90 (1927) (claiming plaintiff is "a bad woman"); RESTATEMENT, TORTS § 574 (1939). However calling one a "bastard" does not impute unchastity to her and thus is not actionable. Halliday v. Cienkowski, 333 Pa. 123, 3 A. 2d 372 (1939).

12. Thorley v. Lord Kerry, 4 Taunt. 355, 128 Eng. Rep. 367 (1812); 17 ALBANY L. REV. 305 (1953). In accord is COOLEY, TORTS § 112 (1907) who adds that they include all cases "which would be actionable per se if made orally."

13. Hartmann v. Winchell, 296 N.Y. 296, 73 N.E. 2d 30 (1947); Ostrove v. Lee, 256 N.Y. 36, 175 N.E. 505 (1931) ("Many things that are defamatory may be said with impunity through the medium of speech. Not so, however, when speech is caught upon the wing and transmitted into print. What gives the sting to the writing is its permanence in form."); HOLDSWORTH, HISTORY OF ENGLISH LAW p. 365 (1926); 1 STREET, FOUNDATIONS OF LEGAL LIABILITY pp. 291-5 (1906).

14. Devany v. Quill, 187 Misc. 698, 64 N.Y.S. 2d 733 (Sup. Ct. 1946) ("Why written defamation of a candidate for public office should be deemed libel per se and oral defamation should not be regarded as slander per se is not easy to perceive. The natural . . . tendency to harm . . . is the same in both cases.") In Louisiana the distinction has been rejected; and oral defamation is dealt with on the same principles as written defamation. Fellman v. Dreyfour, 47 La. Ann. 907, 17 So. 422 (1895).

15. See PROSSER, TORTS, p. 807-809 (1941).

distinguishing between the two offenses. In Missouri the distinction is well recognized,[16] and although this court refers to and cites many libel cases, there is no thought expressed to merge the two, or attribute to one tort the elements of the other.

In the early common law, imputations of objectionable political principles were considered defamatory.[17] The word "communist" today carries with it a derogatory connotation and can do extensive damage.[18] It is obvious that calling one a communist does not attribute to one a loathsome or contagious disease, or unchastity. Whether or not it injuries him in his business depends on the type of work he is in.[19] The question before the Missouri court was: does it charge him with the commission of an indictable crime? Is being a Communist a crime under the United States Code?[20] Not necessarily. In the case of *United States v. Foster*[21] this question was directly before the court. The defendant was tried for organizing the Communist Party for the purpose of teaching and advocating the forceable overthrow of the Government. He contended that the changes he sought to bring about were by peaceful means. The court said that if the jury found from the evidence "that the defendant organized . . . the Communist Party as a legitimate political party solely with the view of electing candidates to political office by lawful and peaceful means"[22] then he was entitled to a verdict of "not guilty". Since the statute requires that one do the forbidden act "knowingly or willfully" the defendant would not be "guilty merely by reason of the fact that he is a member of the Communist Party of the United States of America, no matter what . . . were the principles and doctrines

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16. Mo. Rev. Stat. §§ 559.400, 559.410 (1949). But see Creekmore v. Rummels, 359 Mo. 1020, 224 S.W. 2d 1007 (1949), 15 Mo. L. Rev. 472 (1950).

17. Lewis v. Coke, Cro. Jac. 424, 79 Eng. Rep. 362 (1617) ("Thou hast committed treason beyond the seas"); Stapleton v. Frier, Cro. Eliz. 251, 78 Eng. Rep. 506 (1591) ("He had consented to the late rebels of the north").

18. In a poll taken, 40.2% of those questioned would prohibit communism as a subject and 40% would prohibit communist speakers. 21 Fortune, Feb. 1940, p. 136. When asked; "Would you say that the communist in America are composed of mostly good and intelligent people, or half good and half bad people, or mostly bad and misguided people?" 55.6% answered "Mostly bad and misguided people". 43.4% recommended "drastic action". "Communist ranked lowest among 22 real and fictitious party names in the order of being "liked" as a term in 22 Pennsylvania counties where 55.5% of those tested were found to have "radical" views. 7 J. Social Psychol. 336, 354 (1936).

19. Such a charge was held to injure one in his business in Levy v. Gelber, 175 Misc. 746, 25 N.Y.S. 2d 148 (Sup. Ct. 1941) (lawyer); *Contra;* Krumbolz v. Raffer, 195 Misc. 788, 91 N.Y.S. 2d 743 (Sup. Ct. 1949) (business manager of a union); Gross v. Mallamud, 200 Misc. 5, 108 N.Y.S. 2d 822 (Sup. Ct. 1951) (statements made at a high school's Parents' Association meeting); Keefe v. O'Brien, 203 Misc. 113, 116 N.Y.S. 2d 286 (Sup. Ct. 1952) (of a union official, "It is far better, therefore, to allow free play of our emotions rather than seal the lips of people who might be frightened into silence and suppression lest use of the word "communism" should per se force them costly litigation.")

20. 18 U.S.C. § 2385 (1948) provided that "whoever knowingly or willfully advocates . . . the . . . propriety of overthrowing or destroying the government of the United States . . . shall be fined not more than $10,000, or imprisoned not more than ten years, or both."

21. 9 F.R.D. 367 (S.D. N.Y. 1949).

22. *Id.* at 381.

which were taught or advocated by that party."[23] He must have the requisite intent. So it would seem that being a Communist may or may not be a crime, depending on the type of Communism the person believes in. Which type of communist was plaintiff in this case charged as being? The court seems to say that this is a question of fact for the jury.

The fact that this is a federal crime, and not a crime under the state laws, is of no significance, since it imputes to one the commission of a crime in Missouri punishable by imprisonment.[24]

The court was careful to point out that the decision reached at the present time might not be a precedent for a later case. What words are actionable per se "depends, among other factors, upon the temper of the times, the current of contempory public opinion, with the result that words, harmless in one age, in one community, may be highly damaging to reputation at another time or in a different place."[25] Thus the fact that calling one a communist now is considered slanderous per se does not mean that the same result will hold true a few years from now. Politics, allies, and prejudices change with the times. It is essential that the law be flexible enough to change also.

THOMAS G. STRONG

TORTS—LIABILITY OF OCCUPIER TO CHILDREN TRESPASSERS FOR DYNAMITE CAPS LEFT "ABANDONED"

Boyer v. Guidicy Marble, Terrazzo & Tile Co.[1]

Defendant owned and operated a rock quarry and, in the operation thereof, possessed and used dynamite caps which were dangerous and so known to defendant. Defendant permitted some of the caps to be left in a "thrown away" or "abandoned" condition on his land near the quarry, and in a place frequented by children. Plaintiff and his companion, 17 and 13 years of age, happened upon the caps while obviously trespassing, took some of them not realizing them to be dangerous, and stuck a nail into one causing it to explode, resulting in serious injuries to the plaintiff. The circuit court dismissed the plaintiff's petition. On plaintiff's appeal, the lower court's decision was reversed and remanded.

The Missouri Supreme Court denied the application of the "attractive nuisance"

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23. Id. at 392. See also United States v. Dennis, 183 F. 2d 201 (2nd Cir. 1950) which is in accord with this case.

24. See Bundy v. Hart, 46 Mo. 460 (1870) (plaintiff was accused of burning a barn in Indiana).

25. Lightfoot v. Jennings, 254 S.W. 2d 596 at 599.

1. 246 S.W. 2d 742 (Mo. 1952).

doctrine as applied in Missouri because of the requirement under our doctrine that the "nuisance" must attract the child before the child becomes a trespasser.[2] The court realized that other jurisdictions giving broader interpretation of the doctrine have considered similar cases within the attractive nuisance doctrine,[3] but our court has been hesitant in expanding the scope of the "turntable doctrine", as have many jurisdictions which have adopted it.[4] However, the court made an exception, other than the attractive nuisance doctrine, to the ordinary duty of an occupier to trespassers, that being: one who uses extremely dangerous explosives is under a duty to use the care that a reasonable, prudent man would use in handling, using, and maintaining them.[5] This duty is imposed especially where children are involved even though they are trespassers. Although the court realized the foundation that foots this exception is similar to that supporting the attractive nuisance doctrine (willingness to give added protection to trespassers to immature years and understanding), it expressly denies that the exception is part of that doctrine.[6] Instead the court applies the analysis of negligence—a duty is imposed to use care in regard to the explosives, to leave them laying about carelessly violates that duty, and therefore an action for common law negligence lies.[7] However unwilling to extend the doctrine of attractive nuisance to include those instances, which are many, where children are trespassing frequently upon an occupier's land and while so trespassing notice articles (here, explosives) which arouse their interest and cause them harm (here by exploding), the court is motivated by the same considerations upon which the attractive nuisance doctrine is grounded. Thus, another inroad has been made into the non-liability of such occupiers to trespassing children by enlarging the ordinary duty of precaution

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2. *Id.* at 745, col. 1. "The fact that the attractive nuisance caused the original trespass is an essential prerequisite to the invocation of the 'attractive nuisance' doctrine in Missouri." Citing: Holifield v. Wigdor, 361 Mo. 636, 641, 235 S.W. 2d 564, 567 (1951); State *ex rel.* W. E. Callahan Const. Co. v. Hughes, 348 Mo. 1209, 1215, 159 S.W. 2d 251, 254 (1941); Hull v. Gillioz, 344 Mo. 1227, 1235, 1236, 130 S.W. 2d 623, 627, 628 (1939).

3. *Id.* at 745, col. 2, citing exhaustive annotation in 10 A.L.R. 2d 22 (1950).

4. 65 C.J.S., *Negligence*, § 29 (14), p. 479 ("Even in jurisdictions where the attractive nuisance doctrine has been accepted, the tendency is to limit rather than extend it, and the doctrine is said to be one which should be applied very cautiously and only when the facts come strictly and fully within the rule.")

5. Boyer v. Guidicy, *supra* at 745, col. 2. See also: Kennedy v. Independent Quarry and Const. Co., 316 Mo. 782, 790, 291 S.W. 475, 477 (1926).

6. *Ibid.*

7. In other cases cited in the opinion, it is found that the defendant is held liable on this theory of duty and consequent breach. Kansas City *ex rel.* Barlow v. Robinson, 322 Mo. 1050, 1059, 17 S.W. 2d 977, 981, col. 1 (1929) ("It is the general rule of law that to leave exposed and unguarded, on accessible premises, an explosive which is found by trespassing children is negligence"); Diehl v. A. P. Green Fire Brick Co., 299 Mo. 641, 253 S.W. 984 (1923).

owed them. Other jurisdictions have generally allowed recovery in similar cases, but have done so on varying theories.[8]

Therefore, irrespective of the legal theory by which they reach their decisions, courts allow a child-plaintiff to recover even though he is a trespasser, and even though he was not "invited" to trespass by the dangerous instrumentality while he was still in a place where he had a right to be. Both the courts allowing such cases under attractive nuisance, and those allowing it under the exception of a dangerous explosive, proceed upon the same general reasons: that children are readily attracted to and do tamper with explosives, unmindful of the danger; that the occupier could or should have known they would likely be on his land, even though as trespassers, and that he therefore owned them a duty of protection commensurate with the risk involved in his use of the explosives; and that by allowing children to get to and play with such explosives so that harm to them is practically inevitable, he makes himself liable for such consequent injury. ROBERT S. GARDNER

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8. Alligator Co. v. Dutton, 109 F. 2d 900, 904 (8th Cir. 1940), proceeding under Missouri law, in a case involving a child's trespass where the nuisance, a highly inflammable waste product, attracted the child *after* he had become a trespasser, decided that it makes little difference to the outcome whether the case is decided upon attractive nuisance grounds or upon pure negligence grounds, citing a Missouri case in which, it was observed, the court did not discuss the "refinement of legal theory," meaning the difference between the grounds. However, although it may not be too clear, the Missouri case, Kansas City *ex rel.* Barlow v. Robinson, *supra,* note 7, seems to be predicated on ordinary negligence. THE RESTATEMENT, TORTS, § 339, makes no requirement that the child be attracted to the harmful instrument before the trespass begins, and thus would extend the doctrine to include the instant case.

Several jurisdictions, although accepting the doctrine of attractive nuisance, limit recovery on that doctrine if the child was a trespasser before he was attracted by the instrumentality, but allow a recovery because of the increased duty, such as Missouri imposes. Luhman v. Hoover, 100 F. 2d 127 (6th Cir. 1940), under Indiana law; Hayko v. Colorado and Utah Coal Co., 77 Colo. 143, 235 Pac. 373, 39 A.L.R. 482 (1925); Matijevich v. Dolese & Shepard Co., 261 Ill. App. 498 (1931); Le Duc v. Detroit Edison Co., 254 Mich. 86, 235 N.W. 832 (1931); Smith v. Smith-Peterson Co., 56 Nev. 79, 45 P. 2d 785, 100 A.L.R. 440 (1935). However, 38 AM. JUR., *Negligence,* § 153, p. 822, thinks that the fact that the instrumentality is discoverable only after the trespass starts only comes to bear in deciding whether or not children are likely to trespass; therefore, in a case where the occupier knows they frequently trespass, there is no need for that requirement.

A great many jurisdictions simply call similar cases an exception to the ordinary occupier's liability to trespassers, based on added duty to children due to the great risk of harm provided by the explosives. Kingsland v. Erie County Agricultural Soc., 298 N.Y. 409, 84 N.E. 2d 38, 10 A.L.R. 2d 1 (1949); Ramsay v. Tuthill Building Material Co., 295 Ill. 395, 129 N.E. 127, 36 A.L.R. 23 (1920); Powers v. Harlow, 53 Mich. 507, 19 N.W. 257, 51 Am. Rep. 154 (1884); Mattson v. Minnesota & N.W. R.R., 95 Minn. 477, 104 N.W. 443, 70 L.R.A. 503, 111 Am. St. Rep. 483, 5 Ann. Cas. 498 (1905). Often courts, even though they do not accept the attractive nuisance doctrine, realizing the necessity of some increased protection to children-trespassers, allow recovery where occupier is using and maintaining such ultra-hazardous agencies as explosives. Colebank v. Nellie Coal and Coke Co., 106 W. Va. 402, 145 S.E. 748 (1928); Kingsland v. Erie County Agricultural Soc., *supra,* this note; Travell v. Bannerman, 174 N.Y. 47, 66 N.E. 583 (1903).

Finally, some few courts still clinging to the theory that the occupier owes no duty for such dangers to adults or children alike, and refusing the doctrine of attractive nuisance and anything smacking of it, refuse liability entirely. Bruso v. Eastern States Exposition, 269 Mass. 21, 168 N.E. 206 (1929); Kidder v. Sadler, 117 Me. 194, 103 Atl. 159 (1918); Chicoine v. James E. Cashman, Inc., 108 Vt. 133, 183 Atl. 487 (1936).