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Negligence--Attractive Nuisances--Liability to Minor (Parnell v. Holland Furnace Co., 260 N.Y. 604 (1932))

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conduct[16] would excuse the sheriff for a wrongful release. Only the court has the right to change or modify the terms of the order.[17]

In the case at hand, inasmuch as the warrant indicated the reason for the arrest, the sheriff was duty bound to keep Alberti within his custody until the fine imposed was paid. Since he did not so do, he rendered himself liable to the plaintiffs. The wisdom of strict compliance with the law in this case cannot be doubted. Any divergence from such a policy would promote laxity among public officers and tend to make the mandates of the court a nullity.

F. S. H.

NEGLIGENCE—ATTRACTIVE NUISANCES—LIABILITY TO MINOR.—The Holland Furnace Co. and its servant were sued by the plaintiff, a minor of tender years, for personal injuries sustained by him due to the alleged negligence of defendant in permitting its servant to abandon an old automobile, previously used *by him,* to remain on property used jointly by defendant and other tenants of the same landlord. Plaintiff was invited to play by the son of a tenant. One of the children had taken the cap off the tank, which contained some gasoline. While playing near the automobile, plaintiff picked up two stones and struck them together. A spark entered the tank; an explosion occurred and plaintiff was severely burned. A judgment in favor of the plaintiff was appealed to the Court of Appeals, *held,* that the plaintiff was entitled to recover. *Parnell* v. *Holland Furnace Co.,* 260 N. Y. 604, 184 N. E. 112 (1932), *aff'g* 234 App. Div. 567, 256 N. Y. Supp. 199 (4th Dept. 1932).

The theory of attractive nuisances has not been favored by courts in New York.[1] It is settled that where the defendant is the owner of the land he will not be held liable.[2] However, where

[16] People v. Antony, 7 App. Div. 132, 40 N. Y. Supp. 279 (1st Dept. 1896), *aff'd,* 151 N. Y. 620, 45 N. E. 1133 (1896).

[17] *Supra* note 1, §775.

[1] Walsh v. Fitchburgh Ry. Co., 145 N. Y. 301, 39 N. E. 1068 (1895); Mendelowitz v. Neisner, 258 N. Y. 181, 179 N. E. 378 (1932); Flaherty v. Metro Stations, Inc., 202 App. Div. 583, 196 N. Y. Supp. 2 (4th Dept. 1922), *aff'd,* 235 N. Y. 605, 139 N. E. 753 (1923); Jaffy v. N. Y. C. & H. R. R. Co., 118 Misc. 147, 192 N. Y. Supp. 852 (1922); Smith, *Liability of Landowner to Children Entering Without Permission* (1898) 11 HARV. L. REV. 349, 434.

[2] Murphy v. City of Brooklyn, 98 N. Y. 642 (1885); Lamore v. Crown Point Iron Co., 101 N. Y. 391, 4 N. E. 195 (1886); Walsh v. Fitchburgh Ry. Co., *supra* note 1; Johnson v. City of N. Y., 208 N. Y. 77, 101 N. E. 691 (1913); Flaherty v. Metro Stations, Inc., *supra* note 1; Beickert v. G. M. Laboratories, 242 N. Y. 168, 151 N. E. 195 (1926); Mendelowitz v. Neisner, *supra* note 1; De Biase v. Ewart & Lake, Inc., 228 App. Div. 407, 240 N. Y. Supp. 132 (4th Dept. 1930).

the defendant is not the owner of the land on which the infant was injured, the rule seems to be that he is liable on the theory that the object was an attractive nuisance, and he was negligent in maintaining it.[3] But, where the injury is not reasonably foreseeable, the defendant, although not the owner, will not be held liable in negligence.[4] Keeping the above rule in mind,[5] where the minor is rightfully on the land of another whether it be public or private, defendant not the owner thereof, will be held either in nuisance or negligence.[6] Also, where the child and defendant are intruders on the land of another, the courts seem to favor the child.[7] In the instant case, the jury was justified in finding that the plaintiff was rightfully on the land, although not by the invitation of the defendants, and that defendants should have exercised reasonable care toward the plaintiff.[8] The defendants should have foreseen the danger in maintaining the abandoned automobile with gasoline in its tank, where children were accustomed to play.[9]

S. B. S.

PROMISE TO PAY DEBT OF THIRD PARTY—SUFFICIENCY OF MEMORANDUM UNDER STATUTE OF FRAUDS.—Defendant was the president of a recently formed corporation, which had purchased the partnership of which he was a member. The plaintiff not knowing

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[3] Kunz v. City of Troy, 104 N. Y. 344, 10 N. E. 442 (1887); McCloskey v. Buckley, 223 N. Y. 187, 119 N. E. 395 (1918); Earl v. Crouch, 57 Hun 586, 10 N. Y. Supp. 882 (N. Y. 1890); Wells v. City of Brooklyn, 9 App. Div. 61, 41 N. Y. Supp. 143 (2d Dept. 1896); Gumbell v. Clausen-Flanagan Brewery, 119 App. Div. 778, 192 N. Y. Supp. 451 (2d Dept. 1922).

[4] Crane, *J.*, in dissenting opinion, instant case, at 605, 184 N. E. at 112; Hall v. N. Y. Telephone Co., 214 N. Y. 49, 108 N. E. 182 (1915); Perry v. Rochester Lime Co., 219 N. Y. 60, 113 N. E. 529 (1916); Beetz v. City of Brooklyn, 10 App. Div. 382, 41 N. Y. Supp. 1009 (2d Dept. 1896); Saverio-Cella v. Brooklyn Union El. R. Co., 55 App. Div. 66, 66 N. Y. Supp. 1021 (2d Dept. 1900).

[5] *Supra* note 2.

[6] Weitzmann v. A. L. Barber Asphalt Co., 190 N. Y. 452, 83 N. E. 477 (1908); Hogle v. H. H. Franklin Mfg. Co., 199 N. Y. 388, 92 N. E. 794 (1910).

[7] Wittleder v. Citizen Elec. Illuminating Co., 47 App. Div. 410, 62 N. Y. Supp. 297 (2d Dept. 1900); Wilson v. American Bridge Co., 74 App. Div. 596, 77 N. Y. Supp. 820 (4th Dept. 1902); Nenstiehl v. Friedman, 90 Misc. 368, 153 N. Y. Supp. 120 (1915).

[8] Constantino v. Watson Contracting Co., 219 N. Y. 443, 114 N. E. 802 (1916); Kruger v. Hogan, 234 N. Y. 369, 138 N. E. 23 (1922); Wittleder v. Citizen Elec. Illuminating Co., 50 App. Div. 478, 64 N. Y. Supp. 114 (2d Dept. 1900).

[9] Lilly v. N. Y. C. & H. R. R. Co., 107 N. Y. 566, 14 N. E. 503 (1887); Braun v. Buffalo General Elec. Co., 200 N. Y. 484, 94 N. E. 206 (1911); Burrows v. Livingston-Niagara Power Co., 217 App. Div. 206, 216 N. Y. Supp. 516 (4th Dept. 1926), *aff'd*, 244 N. Y. 548, 155 N. E. 892 (1926); Connell v. Berland, 223 App. Div. 234, 228 N. Y. Supp. 20 (1st Dept. 1928), *aff'd*, 248 N. Y. 641, 162 N. E. 557 (1928); De Haem v. Rockwood Sprinkler Co., 258 N. Y. 350, 179 N. E. 764 (1932).