

accurately define the status of a gangster, when as an individual or as a member of a gang he participates in any labor dispute.

Our Court of Errors and Appeals also quoted Webster's *New International Dictionary* as defining the word "gang" to be, "any company of persons who go about together or act in concert (in modern use mainly for criminal purposes)." The statute likewise refers to a gang as consisting of two or more persons, and therefore if an entire gang is rounded up while carrying deadly weapons, without a permit, the members of such a gang may not be tried under the statute if they happen to be participants in any labor dispute.

No one will deny that the terms of this statute are explicit insofar as it excepts a person (with full statutory qualifications as a gangster) from its penalties if such gangster is apprehended while participating in any labor dispute, but certainly men cannot be fairly charged with a lack of common intelligence if they differ on the proposition that thereby this statute operates without discrimination on all persons and classes of persons similarly situated.

NEGLIGENCE—ATTRACTIVE NUISANCE DOCTRINE—EFFECT THEREON OF *Erie RR. v. Tompkins*.—In *Swift v. Tyson*¹ the United States Supreme Court ruled that the federal courts are not bound by decisions of state courts on matters of general or commercial law. The court, in determining whether the Judiciary Act of 1789² compelled them to follow the laws of the several states, expressed a doubt that the decisions of local tribunals constituted "laws" within the meaning of the act in view of the fact that such decisions were constantly being reviewed, modified and reversed and held that the language of the act

1. 16 Pet. 1, 10 L. Ed. 865 (1842).

2. "The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." (Act Sept. 24, 1789, c. 20, sec. 34; Rev. St., sec. 721; 28 U. S. C. A., sec. 725.)

was directed to decisions of state forums in matters which were purely local and it was never within the legislative intendment to confer power on these forums to bind federal courts on matters of a general nature.³

In *Railroad v. Stout*⁴ the question of the "turn-table doctrine" was presented to the Court and it was therein decided that the theory of "attractive nuisance" was a part of the common or general law. The Court refused to consider the defendants contention that the injured infant was a trespasser and therefore was injured by reason of his own conduct. The court cited precedent for the doctrine that there is a duty of care owed to an infant "trespasser" under certain conditions.⁵ After a review of the factual situation of the case, the Court held that the negligence of the defendant in his conduct toward the infant was a question for the jury.⁶

New Jersey has expressly repudiated the doctrine of *Railroad v. Stout*.⁷ On an identical set of facts in *D. L. & W Railroad v. Reich*,⁸ the Court of Errors and Appeals held that the general rule was against the liability of a landowner for negligent conduct toward an infant making use of an attractive nuisance on the landowner's property. The Court said, "The suggestion contained in the line of cases first adverted to,⁹ viz., that the duty of protection is cast upon the landowner solely

3. See *American Bar Assoc. Journal*, Aug. 1938, vol. XXIV No. 8; *The Rise and Fall of Swift v. Tyson*, by Hon. Robert H. Jackson. Also see Warren, *New Light on the Federal Judiciary Act of 1789*, 37 HARVARD L. REV. 49, *et seq* for an interesting discussion on the Judiciary Act and motivation of Mr. Justice Story's decision of *Swift v. Tyson*.

4. 17 Wall. 657, 21 L. Ed. 745 (1874).

5. *Lynch v. Nurdin*, 1 Ad. & El. (N.Z.) 29 where infant was trespasser on a cart; *Binge v. Gardiner*, 19 Conn. 507; *Daley v. R.R. Co.*, 26 Conn. 591; *Bird v. Holbrook*, 4 Bing. 628.

6. Also see leading case of *United Zinc & Chem. Co. v. Britt*, 264 Fed. 785, cert. granted (1920) 41 S. Ct. 64, 254 U.S. 627, 65 L. Ed. 446, jud. rev. 42 S. Ct. 299, 258 U.S. 268, 66 L. Ed. 615.

7. *D. L. & W. R.R. Co. v. Reich*, 61 N.J.L. 639, 645.

8. *Supra*, note 7.

9. *Railroad v. Stout*, 84 U.S. 657, *Kiffe v. Milwaukee and St. Paul Ry Co.*, 21 Minn. 207; *Koons v. St. Louis, etc., R.R. Co.* 65 Mo. 592; *Kansas Central Ry Co. v. Fitzsimmons*, 22 Kan. 686; *Ferguson v. Columbus, etc., Ry.*

by reason of the inability of the child to care for its own safety, seems . . . unsound in principle. Primarily the duty of affording protection to the child rests upon the parent, who is responsible for its being."

In the subsequent case of *Turess v. Railroad*,¹⁰ the court reasoned that the "attractive nuisance" doctrine was based on the infant's lack of maturity and sufficient intelligence to appreciate the dangers of a trespass, that the relationship of implied invitation is only created when one enters upon another's land and makes use of it believing that such use was intended by the owner, and that such use can only be justified when the acts or conduct of the owner are such as to cause one to believe that such use was intended by the owner. The Court concluded that the doctrine of implied invitation can never extend to turn table cases because a turn table can never be deemed to have been erected for the use which the child makes of it.

The case of *Freidman v. Snare & Triest*¹¹ illustrates clearly the disagreement between the state and federal courts. There, the defendants were contractors on a construction job and had piled steel girders in the street adjoining the property on which the construction was taking place. An infant playing on and about the pile was injured by a falling girder. Two actions were started in the state courts; one by the infant by the next friend, and one by the infant's father. Judgment in favor of both the plaintiffs were recovered in the state Supreme Court but the father's case was reversed by the Court of Errors and Appeals on the theory that no duty of care was owed to the infant. The case of the infant was transferred to the Federal District Court,¹² ended in judgment for the plaintiff, and was affirmed by the Circuit Court of Appeals. In disposing of the defendant's contention that the federal courts were bound by the decisions of the upper courts of New Jersey, the Circuit Court held that the federal courts in the instant case were called upon to administer the common law of the state wherein its jurisdiction was exercised, and that in deciding what

Co., 75 Ga. 637; and *Barrett v. Southern Pacific Co.*, 91 Cal. 296.

10. 61 N.J.L. 314 (Sup. Ct. 1898).

11. 71 N.J.L. 605 (E. & A. 1905).

12. *Snare & Triest v. Friedman*, 169 Fed. 1, 94 C.C.A. 369, 40 L.R.A. (N.S.) 367, cert. den. 29 S. Ct. 700, 214 U.S. 518, 53 L. Ed. 1065 (1909).

that common law may be they must resort to the same sources of information as are open to the state courts but that "they may differ from a state court in determining what the common law of the state, thus derived, and applicable to the given case, may be."

The recent case of *Erie R.R. v. Tompkins*,¹³ in overruling *Swift v. Tyson*, has resolved this conflict. The Supreme Court of the United States therein held that except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state, and whether the law of the state shall be declared by the legislature or by its highest court in a decision is not a matter of federal concern.

The justification of the holding of *Swift v. Tyson* is in the desirability for a uniformity of opinion on questions of general or commercial law. Mr. Justice Story felt that the federal court decisions would exert pressure on the local tribunals. The Uniform Acts point toward this desirable end.

Unquestionably, the majority of the states have approved the "attractive nuisance" doctrine.¹⁴ New Jersey represents a small minority¹⁵ and with the decision in *Erie R.R. v. Tompkins* it is safe to assume that the local courts will continue to hold a landowner under no liability for the negligent maintenance of a structure which is inherently attractive to children of an immature intelligence. While the New Jersey courts are sound in holding that a landowner owes no duty of care to a trespasser other than that of not wilfully or wantonly harming him, it is submitted that the more humane view is that an infant who is lured to a landowner's property by reason of the maintenance of machinery which will, in the ordinary course of things, attract the infant, is an implied invitee to whom there is owed a duty of care. It is common knowledge that children will enter upon any unguarded property to play among lumber piles,¹⁶ quarries,¹⁷ sand

13. 58 S. Ct. 817, 82 L. Ed. 787 (1938).

14. See cases collected in 45 CORPUS JURIS. 758, note 19.

15. *Ibidem*, note 29.

16. *St. Louis etc. R. Co v. Underwood*, 194 Fed. 363, 364, 114 C.C.A. 323.

17. *Perry v. Tonopah Mining Co.*, 13 Fed. (2d) 865.

pits,¹⁸ machinery,¹⁹ ponds,²⁰ turn tables²¹ and the like, especially in these days when the motor cars make the streets a continual source of danger to young and old alike.

Implied invitation may be defined to mean the using of one's property by another under the apprehension that such use was either intended or expected by the person in ownership of the property. When, in the case of *Turess v. Railroad*, Chief Justice Magie stated that there could be no implied invitation to children to use a turntable because it could not be deemed to have been erected for such use, he was begging the question. It is not the use for which the structure was planned that should be dispositive of the matter but the use which the child who made use of the structure believed the landowner intended. The Chief Justice in determining the case held that a person becomes an implied invitee when he makes use of property *believing* that such use was intended by the landowner. The question of whether the child was entitled to believe that his use was intended by the landowner should certainly be decided by the jury and not summarily disposed of because the court finds that as a matter of fact such use was never intended. A person's conduct may influence another person to believe many things which are in fact untrue.

When the case of *Delaware, L. & W. R.R. v. Reich* was decided in 1898, the doctrine of "attractive nuisance" had not been accepted by many jurisdictions. This was one of the reasons which influenced the court in deciding against allowing the doctrine in New Jersey. Since the position of the New Jersey courts is now one of subscribing to a minority view it is submitted that a more liberal position on the question should be adopted. Today the language of the court to the effect that the duty of affording protection to the child rests upon the parent, who is responsible for its being would seem to be untenable

18. *Hawley v. Atlantic*, 92 Iowa 172, 60 N.W. 519.

19. See 45 CORPUS JURIS. 774, note 68, for cases and types of machinery generally held to be attractive nuisances (sec. 176).

20. *Thomas v. Anthony*, 261 Ill. 288, 103 N.E. 974 (*rev'd* 179 Ill. A. 463). Also see leading case, *United Zinc & Chem. Co. v. Britt*, *supra*, note 6.

21. *Railroad v. Stout*, *supra*, note 4.

in the face of the well-settled rule of our equity courts that the Chancellor is the general guardian of all infants.²²

22. See *Greenberg v. Greenberg*, 99 N.J.Eq. 461, 133 Atl. 768 (1926). See *Rubin v. Rubin*, 99 N.J.L. 216 (E. & A. 1923), where it was held that the next friend has no authority to compromise or settle a case without approval by the court.