Although cases of this sort are primarily concerned with negligent intervening third parties, they incidentally bear on the contributory negligence of the plaintiff. For if the plaintiff has been negligent in securing a capable physician he is prevented from recovering.

The majority rule, therefore, is that where the second injury is caused in part by the negligence or imprudence of the plaintiff there can be no recovery for the second injury. Where there has been no negligence or imprudence recovery may be had. But the question as to what is negligence or imprudence still exists, and must be determined by the facts in each case. In the principal case the plaintiff was definitely imprudent. In the case of *Conner v. City of Nevada*[14] two thoughtful persons might have reached different conclusions as to the prudence of the plaintiff. While in the typical crutch case there is little question that, assuming careful manipulation, the use of crutches is not negligence.

By way of caution it should be added that where the first injury has healed as much as it is going to heal, but has left a permanent affliction, such as a short leg, a subsequent injury resulting in part from the first injury is independent of the first and no damages can be obtained from the first tort feasor.[15] As for example, where a person with a game leg caused by the negligence of the first wrong-doer cannot recover from that person for a subsequent injury by being struck by an automobile because of an inability to dodge quickly.

B. W. T.

TORTS—NEGLIGENCE—ATTRACTIVE NUISANCE DOCTRINE—[Tennessee].—The defendant company owned a town with a drainage culvert and a connecting drainage ditch. During an "unusually heavy rain" the plaintiff's young child, playing near the drainage ditch, stepped off the side, was drawn in by the suction near the mouth of the culvert, and was drowned. Plaintiff maintains that defendant's drainage system at this place was "inadequate, insufficient, unfit and unsafe" and that the construction of the culvert was especially dangerous and attractive to young children. *Held;* even if this were a case of attractive nuisance the defendant would not be liable under the doctrine if the object was of such a character that it would be impractical to guard against it.[1]

This case is in line with the rule adhered to in all jurisdictions following the attractive nuisance doctrine, namely, that if the practicability of the object would be destroyed by the precautions which would be necessary to prevent injury to children attracted by it, the defendant will be relieved of liability.[2] The widely quoted case of *Peters v. Bowman* sums up very clearly

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14. Supra, note 9.

15. Powers v. Kansas City, 18 S. W. (2d) 545 (Mo., 1929); Croak v. Croak 33 S. W. (2d) 998 (Mo., 1931); but see Sec. 460 Restatement, *Torts* (apparently in conflict).

1. McCay v. Du Pont Rayon Co., 96 S. W. (2d) 177 (Tenn., 1936).

2. Missouri has so held in a number of cases. Carey et al. v. Kansas City, 187 Mo. 715, 86 S. W. 438 (1905) (reservoir in park); Overholt v.

the position of these courts.[3] These same courts, however, have taken two very different views of the application of the attractive nuisance doctrine[4] thus causing great confusion as to the proper use of the defense of impracticability in attractive nuisance cases. The older, traditional view has held that if the child was attracted to the object which harmed him only after he had first trespassed on the land, there can be no recovery.[5] It is submitted

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Vieths, 93 Mo. 422, 6 S. W. 74 (1887) (pool in an abandoned quarry) citing and following Klix v. Nieman, 68 Wis. 271, 32 N. W. 223 (1887); Barney v. The H. and St. J. Ry Co., 126 Mo. 372, 28 S. W. 1069 (1894) (railroad cars in motion). Some of the other Missouri cases seemingly decided on impracticability are Buddy v. Union Terminal Ry. Co., 276 Mo. 277, 207 S. W. 821 (1918); Compton v. Mo. Pac. Ry. Co., 147 Mo. App. 414, 126 S. W. 821 (1910); Kelly v. Benas, 217 Mo. 1, 20 L. R. A. (N. S.) 903, 116 S. W. 557 (1909).

See also 45 C. J. Negligence (1928) 769, sec. 169; 20 R. C. L. Negligence (1918) 88, sec. 78. Kansas and Oklahoma are among this group. Wilson v. Atchison, T. and S. F. Ry. Co., 66 Kan. 183, 71 Pac. 282 (1903); Somerfield v. Land and Power Co., 93 Kan. 72, 145 Pac. 893 (1915); and Pennington v. Little Pirate Oil and Gas Co., 106 Kan. 569, 189 Pac. 137 (1920), in which the Kansas courts say that they do not wish to extend the attractive nuisance doctrine; Altus v. Millikin, 98 Okla. 1, 223 Pac. 851 (1924).

See also 36 A. L. R. 34—extended annotation; 53 A. L. R. 1336, 1344; 60 A. L. R. 1427, 1428. Some jurisdictions do not recognize the attractive nuisance doctrine at all: Savannah, F. and W. R. Co. v. Beavers, 113 Ga. 398, 39 S. E. 82 (1901); Kidder v. Sadler, 117 Me. 194, 103 Atl. 159 (1918); State v. Machen, 164 Md. 579, 165 Atl. 695 (1933); Ryan v. Tower, 128 Mich. 463, 87 N. W. 644 (1901); Frost v. Eastern R. R. 64 N. H. 220, 9 Atl. 790 (1887); Hochstein v. Congregation Talmud Torah Sons, etc., 144 Misc. Rep. 207, 258 N. Y. S. 479 (1932); Filer v. McNair, 158 Va. 88, 163 S. E. 335 (1932).

3. Peters v. Bowman, 115 Cal. 345, 47 P. 113 (1896, 1897). The following quotation from this case appears in a large number of cases holding that impracticability of guarding against the child's injury may be allowed as a defense but should not be carried to extremes: "Are we to hold that every owner of a pond or reservoir is liable in damages for any child that comes uninvited upon his premises and happens to fall into the water and drown? If so, then upon the same principle must the owner of a fruit tree be held liable for the death or injury of a child who, attracted by the fruit, climbs into the branches and falls out. But this . . . is an absurdity . . . The owner of a thing dangerous and attractive to children is not always and universally liable for an injury to a child tempted by the attraction. His liability bears a relation to the character of the thing, whether natural or common, or artificial and uncommon; to the comparative ease or difficulty of preventing the danger without destroying or impairing the usefulness of the thing; and, in short, to the reasonableness and propriety of his own conduct, in view of all surrounding circumstances and conditions." For another widely quoted case employing very similar and very striking language see Ritz v. Wheeling, 45 W. Va. 262, 43 L. R. A. 148, 31 S. E. 993 (1898). Accord, City of Memphis v. Trice, 13 Tenn. App. 607 (1931), citing at p. 616 Peters v. Bowman; Gillespie v. McGowan, 100 Pa. St. 144 (1882) in which the language of the holding is almost exactly like that of Peters v. Bowman; Loftus v. Dehail et al., 133 Cal. 217, 65 Pac. 379 (1901) employing language very similar to that of Peters v. Bowman.

4. Harper, *On Torts* (1933) sec. 93.

5. United Zinc and Chemical Co. v. Britt, 258 U. S. 268, 66 L. ed. 615, 42 Sup. Ct. 299, 36 A. L. R. 28, Bohlen, *Cases on Torts* (3d ed.), 387 (1921).

that under this view the attractive nuisance doctrine should be used merely to determine the status of the child (trespasser or licensee). The element of his youth should then leave the picture, except as it may be one factor in determining the standard of care to be applied to a child.[6] Thus under this view, as the age of the child is relatively unimportant, the ordinary tort standards of duty of care towards licensees should be applied. Impracticability of guarding against injury should therefore be used as a defense only as it would be used in any case involving licensees, and not as a special defense viewed in the light of a child's natural curiosity.

The newer and more modern view of attractive nuisance cases has held that regardless of whether or not the child is a trespasser on the land, if the possessor of the land might reasonably have anticipated that the child would trespass and thereafter be attracted by the object, there is the duty of using reasonable care to protect such child.[7] As the status of the child is of no importance here, his youth is a vital factor in determining what degree of care should have been exercised by the defendant. Therefore practicability is a proper defense, as more adequate safeguards against a child's curiosity are needed than those required to safeguard against injury to adults. Tennessee is in line with this more modern view.[8]

E. M. F.

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6. "Infant plaintiffs are not held to that degree of care demanded of adult plaintiffs, as a condition to recovery from a negligent defendant." Harper, *On Torts* (1933) sec. 141 and cases cited therein.

7. Restatement, *Torts* (1934) sec. 339; *Harper*, On Torts (1933) sec. 93; Arkansas Power and Light Co. v. Kilpatrick, 185 Ark. 678, 49 S. W. (2d) 353 (1932).

8. In Tenn. it is held that the fact that a child was trespassing when it was injured does not preclude recovery. See Whirley v. Whiteman, 1 Head, 610 (1858) (exposed cogwheels); East Tenn. & W. N. C. R. Co. v. Cargille, 105 Tenn. 628, 59 S. W. 141, 9 Am. Neg. Rep. 200 (1900) (turntable).