

not be filed, he cannot be adjudicated without his consent. After adjudication, the normal course of bankruptcy administration is followed.⁶³

It is finally necessary to consider the constitutionality of the new statute. It is settled that the power of Congress over the subject of bankruptcy is not limited to the classes which might become bankrupt under the law as it stood at the time the Constitution was framed.⁶⁴ A person may be allowed to file as a voluntary bankrupt even though he is not insolvent as the term is used in the Act of 1898.⁶⁵ Indeed, the great popular clamor against the Act of 1867 was that it allowed any person who could not pay his debts in full as they matured to be forced into bankruptcy.⁶⁶ The plan for extensions is closely analogous in basic principle to the composition agreements sanctioned by the Act of 1898.⁶⁷ It is true that secured debtors are now affected by the extension but it would seem that if Congress can force a dissenting minority of unsecured creditors to be bound by a composition agreement that it has power to do the same as to secure creditors. Under the Act of 1898 the liens of such secured creditors may be set aside in many instances.⁶⁸

It would seem to present writer that the new amendment is capable of providing considerable relief to the hard-pressed individual debtor. Perhaps it is the confused drafting of the statute which has prevented more frequent resort to its provisions. Certainly a series of clarifying amendments are desirable.

GEORGE W. SIMPKINS, '33.

LIMITATIONS AND DEVELOPMENT OF THE ATTRACTIVE NUISANCE DOCTRINE

Even since 1841, when Lord Denham, Chief Justice of the Queen's Bench, laid down the controlling principles of what subsequently has been known as the "attractive nuisance doctrine", there have been divergent interpretations, limitations, and extensions of this rule. *Lynch v. Nurdin*¹ has itself been regarded by some courts as overruled or, at least, seriously impaired by later

⁶³ Sec. 74 (m).

⁶⁴ *Hanover Nat. Bank v. Moyses* (1902) 186 U. S. 181.

⁶⁵ Note 7 above.

⁶⁶ *Remington on Bankruptcy* (2nd ed.) p. 14.

⁶⁷ *Matter of Reiman* (D. C. S. D. N. Y. 1874) Fed. Cas. No. 11,673; In *Re Reiman* (C. C. S. D. N. Y. 1875) Fed. Cas. No. 11,675.

⁶⁸ Sec. 67.

¹ (1841) 1 Q. B. 29, 113 Eng. Rep. 1041.

English decisions.² An earlier English case sometimes cited as authority for the doctrine, *Townsend v. Wathen*,³ is not strictly in point, and may be distinguished from the "turntable cases", in which no element of wilful injury is involved.⁴

The leading American case of *Sioux City & Pacific R. R. Co. v. Stout*⁵ first applied the attractive nuisance doctrine to railroad turntables. This case has been criticized and questioned by many courts who have not felt free openly to repudiate the principles therein enunciated.⁶ The next important case on the subject to come before the Supreme Court of the United States, *Union Pacific R. Co. v. McDonald*,⁷ likewise has been open to various attacks.⁸ In fact, examination of annotations of this subject readily discloses that from the very first there have been many courts which have refused to admit that there is any logical basis for the rule and have preferred the concept of inviolability of private property from trespass and onerous burdens.⁹

Any discussion of the conditions of liability in any particular case must be interpreted in the light of a clear understanding of the basis upon which liability should rest in this class of cases. Thus, if liability under the attractive nuisance doctrine is put on the basis of intentional or wilful injury,¹⁰ or wantonness,¹¹ all attempts to measure and delimit the liability by reference to the age or capacity of the child or to the effect of warning must prove

² *Hughes v. Macfie* (1863) 2 Hurlst. & C. 744, 159 Eng. Rep. 308; *Manjan v. Atterton* (1866) L. R. 1 Ex. 239.

³ (1808) 9 East 277, 103 Eng. Rep. 579.

⁴ In *Townsend v. Wathen* poisoned baits were set in traps near the plaintiff's land, so that the plaintiff's dogs might scent the bait and be drawn into a trespass and subsequent injury. A landowner has always been responsible for wilful torts to trespassers. See *Walker v. Potomac, F. & P. R. Co.* (1906) 105 Va. 226, 53 S. E. 113, and *Wheeling & L. E. R. Co. v. Harvey* (1907) 77 Ohio St. 235, 83 N. E. 16 for distinctions.

⁵ (1874) 17 Wall. 657.

⁶ *Daniels v. N. Y. & N. E. R. Co.* (1891) 154 Mass. 349, 28 N. E. 283; *Bot-tum v. Hawks* (1911) 84 Vt. 370, 79 Atl. 858; *Walsb v. Fitchburg R. Co.* (1895) 145 N. Y. 301, 39 N. E. 1068; *Dobbins v. M. K. & T. R. Co.* (1897) 91 Tex. 63, 41 S. W. 63.

⁷ (1894) 152 U. S. 262.

⁸ *McCabe v. American Woolen Co.* (1903) 124 Fed. 283; *Bottum v. Hawks*, note 6, above.

⁹ Exhaustive annotations may be found in (1909) 19 L. R. A. (NS) 1095; (1911) 32 L. R. A. (NS) 559; (1914) 47 L. R. A. (NS) 1101; (1925) 36 A. L. R. 34; (1925) 39 A. L. R. 486; (1928) 53 A. L. R. 1344; (1929) 60 A. L. R. 1444.

¹⁰ *Townsend v. Wathen*, above, criticized by Judge Jeremiah Smith, "Liability of Landowners to Children Entering Without Permission," 11 Harv. L. Rev. 349.

¹¹ *City of Shawnee v. Cheek* (1913) 41 Okla. 227, 137 Pac. 724; *Altus v. Milliken* (1924) 98 Okla. 1, 233 P. 851.

futile. Likewise, if the theory of a trap or concealed danger is used to sustain liability, there is the additional issue of whether or not the nuisance was concealed to the particular party injured.¹² The trap theory probably owes its origin either to *Townsend v. Wathen*, or to the confusion of the attractive nuisance cases with those dealing with the degree of care required toward licensees, i. e. freedom from traps.¹³ Undoubtedly, the frequently reiterated limitation of the doctrine to latent dangers has grown out of the same misconception.¹⁴

Considering the consequences of adopting any particular basis of liability, it will be seen, further, that any court proceeding upon the misguided assumption that the maxim, "*sic utere tuo ut alienum non laedas*", offers a sufficient judicial explanation of the attractive nuisance doctrine must later find itself seeking to draw the reins on wild horses; for the doctrine then "goes to the limit of the law",¹⁵ and should logically apply to all alike, with no distinction in favor of children.¹⁶

It might be observed also that acceptance by the majority of the courts of the implied invitation theory of the basis of the doctrine has resulted in such extended criticism that either the doctrine itself has been expressly rejected in such jurisdictions, or the courts have taken occasion to carry the theory to its logical conclusion, and have so restricted the application of the doctrine as to render it almost ineffectual. Assaults upon the implied invitation theory have been made from two angles: first, the *in terrorem* argument based on the dangers of imposing so harsh a liability on property owners; second, the practical and common sense insistence that such implication of invitation is usually at variance with the owner's actual intent. The courts of Massachusetts, Michigan, Missouri, New Jersey, North Carolina, Ohio, Oklahoma, and Vermont have, at various times, pointed out the fallacies of this theory.¹⁷

Perhaps the best theoretical basis for liability here is the general principle that "one who has reason to anticipate injury to another from conditions for which he is responsible, and which he can readily avert, is under a duty, based upon considerations of humanity to take reasonable precautions against such injury."¹⁸

¹² *Cooke v. Midland Great Western R. Co.* (1909) A. C. 229.

¹³ *Consolidated Lead & Zinc Co. v. Corcoran* (C. C. A. 1930) 37 Fed. (2d) 296; *Indianapolis Motor Speedway Co. v. Shoup* (1929) 88 Ind. App. 572, 165 N. E. 246.

¹⁴ *Salt River Valley Water Users' Ass'n v. Compton* (Ariz. 1932) 8 Pac. (2d) 249; *Union Pac. R. Co. v. McDonald* (1894) 152 U. S. 262.

¹⁵ *Bishop v. Union R. Co.* (1884) 14 R. I. 314, 51 Am. Rep. 386; *M., K. & T. R. Co. v. Edwards* (1896) 90 Tex. 65, 36 S. W. 430.

¹⁶ *Bottum v. Hawks*, note 6, above; *Ratte v. Dawson* (1892) 50 Minn. 450, 52 N. W. 965.

¹⁷ Refer to (1925) 36 A. L. R. 116 for collection of the cases.

¹⁸ Refer to (1925) 36 A. L. R. 119.

By so resting the reason for the rule one can, with some degree of certainty, predict the result in any given set-up of facts, which is just what the property owner wishes to know when he is considering what precautions he should take in safeguarding his property.

A few cases illustrative of this method of laying the foundation of liability should be helpful. In *Christiansen v. Los Angeles & St. L. R. Co.*,¹⁹ the plaintiff was injured after rescuing his son from a runaway freight car. The court held that an ordinary freight car was not an attractive nuisance, but that since the defendant knew or should have known of the frequent resort of children to the yards as a playground, it was under a duty to use reasonable care to keep its freight cars from running away. In *Morse v. Douglas*²⁰ the facts were that a two-wheeled vehicle, supporting a vat of hot tar, had been left in the street with its tongue supported on a pile of sand. A seven year old child stepped upon the back platform of the vehicle to stir the tar; his weight overturned the vehicle, and he was burned to death. Recovery was allowed under the attractive nuisance doctrine, but the rationalization of the defendant's liability on the ground of what he should have anticipated brought it within the ordinary rules of negligence. *Adams v. Virginian Gasolene & Oil Co.*²¹ is significant in that although the attractive nuisance doctrine has been expressly repudiated in Virginia,²² it was there held that where a six year old trespasser was actually known to be present and in danger of asphyxiation from freed gasolene fumes, reasonable care must be used by the owner to avoid injury. Other cases seem to have arrived at just results through similar application of the broad principle of anticipated injury.²³

In reality, almost all developments of the attractive nuisance doctrine might be grouped under two heads: *first*, the affixing or removal of conditions upon liability; and, *second*, the extension or limitation of the doctrine in its application to a particular attraction or cause of injury.

It is an elementary proposition, at the outset, that the rule does not make of the property owner an insurer of the safety of children, but only renders him liable for want of reasonable precautions to prevent an injury. In fact, the doctrine itself has been negatively stated as rendering inapplicable those rules limiting a liability to trespassers. The child is placed in the class of invitees, but all the rules of general tort liability thereafter apply.²⁴

¹⁹ (1930) 77 Utah 85, 291 Pac. 926.

²⁰ (1930) 107 Cal. App. 196, 290 Pac. 465.

²¹ (1930) 109 W. Va. 631, 156 S. E. 63.

²² *Martino v. Rotondi* (1922) 91 W. Va. 482, 113 S. E. 760.

²³ *Hall's Adm'x v. City of Greenburg* (1931) 241 Ky. 279, 43 S. W. (2d) 660; *Collinger v. Philadelphia Electric Co.* (1930) 301 Pa. 87, 151 Atl. 599.

²⁴ *Hall's Adm'x v. City of Greenburg*, above, note 23; *Jefferson v. Birmingham*

It has been held, however, that the degree of care necessary must be commensurate with the danger,²⁵ and is greater or more exacting with young children, being proportioned to their lack of judgment.²⁶

But there is no duty to go to a greater expense in providing safeguards or to assume precautions which might prove so burdensome as to be impractical.²⁷ Nor need the owner make the trespass impossible or his property "child proof."²⁸ Thus, where the defendant maintained an electric substation, nine feet high, thirty-one feet long, and ten feet wide, constructed wholly of smooth sheet-iron but open at the top and containing electric transformers, no liability attached where a child obtained a ladder and climbed into the enclosure with a resulting injury.²⁹

Just how much of a guard is necessary, it is difficult to determine. In the case of *Arkansas Power & Light Co. v. Kilpatrick*,³⁰ a seven year old boy climbed over, through, or under a ten foot fence of mesh and barbed wire in order to reach a certain "attraction" near the defendant's substation. The defendant was held liable. In *McDonald v. Southwestern Gas & Electric Co.*,³¹ it appeared from the opinion that a seven year old boy had climbed over a five foot mesh fence, surmounted with two feet and three inches of barbed wire into an enclosure containing a power substation and tower. The court held that the child "was allured by the strikingly odd and attractive looking tower", and that such a fence as described was no obstacle to a boy acting under a stimulus of such an allurements. A case, almost to the opposite extreme as to adequacy of guard, *Le Duc v. Detroit Edison Co.*,³² held that one

ham R. Co. (1897) 116 Ala. 294, 22 So. 546; *Sexton v. Noll Construction Co.* (1918) 108 S. C. 516, 95 S. E. 129; *Kemp v. Doe Run Lead Co.* (Mo. App. 1933) 57 S. W. (2d) 758; *McDermott v. Burke* (1912) 256 Ill. 401, 100 N. E. 168.

²⁵ *Union Light, Heat & Power Co. v. Dunsford* (1920) 189 Ky. 785, 225 S. W. 741; *Matteson v. Minn. & N. W. R. Co.* (1905) 96 Minn. 477, 104 N. W. 443.

²⁶ *Barrett v. So. Pac. Co.* (1891) 91 Cal. 296, 27 Pac. 666; *Penso v. McCormick* (1890) 125 Ind. 116, 25 N. E. 156.

²⁷ *Peters v. Bowman* (1896) 115 Cal. 349, 47 Pac. 113; *Chicago & E. R. Co. v. Fox* (1904) 38 Ind. App. 268, 70 N. E. 81; *Brown v. Salt Lake City* (1908) 33 Utah 222, 93 Pac. 570; *Wilson v. A., T. & S. F. R. Co.* (1903) 66 Kans. 183, 71 Pac. 282; *Overholt v. Vieths* (1887) 93 Mo. 422, 6 S. W. 74.

²⁸ *McLendon v. Hampton Cotton Mills* (1917) 109 S. C. 238, 95 S. E. 781; *Taylor v. Minneapolis & St. P. R. Co.* (1917) 180 Ia. 702, 163 N. W. 405; *Grube v. Baltimore* (1918) 132 Ind. 355, 103 Atl. 948; *Holstine v. Director Gen. of R. R.* (1922) 77 Ind. App. 583, 134 N. E. 303.

²⁹ *Collinger v. Philadelphia Elec. Co.* (1930) 301 Pa. 87, 151 Atl. 699.

³⁰ (1932) 185 Ark. 678, 49 S. W. (2d) 353.

³¹ (La. App. 1931) 136 So. 169.

³² (1931) 254 Mich. 86, 235 N. W. 832.

who left a gasoline tank where it was easily accessible to children was not liable for injuries resulting from burning gasoline withdrawn from the tank, because he had provided the tank with a faucet which could be turned with an ordinary water faucet key.

Some cases have reasoned the sole basis for imposing liability is the slight expense of providing adequate protection, and have restricted liability where the cost of adequate safeguard would be so great as to seem impractical. *Bonhomie & H. S. Ry. Co. v. Hinton*³³ grew out of an injury sustained by a six year old boy when a door on which he was sliding back and forth fell off its hinges. The court held that everything attractive and dangerous cannot be held within the doctrine, or litigation would become oppressive and vexatious, and would impose such burdens of care as would impair materially the value of property and cripple business seriously. A similar point of view prevailed in *Stadherr v. City of Sauk Center*.³⁴ The turntable doctrine was there said to rest upon the ease and slight expense of guarding the turntable, and liability was denied partly on the ground that such ease of safeguarding was not therein present.

It has been suggested repeatedly by some courts that the doctrine of attractive nuisance should be confined to attractive and dangerous machinery,³⁵ or to turntable cases.³⁶ Conversely it will not apply to natural conditions,³⁷ or to common objects,³⁸ or to attractions arising from the regular conduct of business.³⁹ In Texas it has been intimated that the attractive object must be unusually attractive,⁴⁰ while other jurisdictions would confine the classes of objects which come under the rule to those uncommon and artificially produced.⁴¹

³³ (1929) 155 Miss. 173, 124 So. 271.

³⁴ (1930) 180 Minn. 492, 231 N. W. 210.

³⁵ *Stendal v. Boyd* (1897) 73 Minn. 53, 73 N. W. 735.

³⁶ *State ex. rel. K. C. L. & P. Co. v. Trimble* (1926) 315 Mo. 32, 285 S. W. 455; *Howard v. St. Joseph Trans. Co.* (1926) 316 Mo. 317, 289 S. W. 455; *Harakas v. Dickie* (1929) 224 Mo. App. 171, 23 S. W. (2d) 651.

³⁷ *Harper v. Topeka* (1914) 92 Kan. 11, 132 Pac. 1018; *Peters v. Bowman* (1895) 115 Cal. 349, 47 Pac. 113; *Salt River Valley Water Users' Ass'n v. Compton*, above, note 14.

³⁸ *Heva v. Seattle School Dist.* (1920) 11 Wash. 668, 188 Pac. 776; *Emond v. Kemberley-Clark Co.* (1914) 158 Wis. 83, 149 N. W. 760; *Stadherr v. City of Sauk Center* (1930) 180 Minn. 492, 231 N. W. 210; *Bonhomie & H. S. R. Co. v. Hinton*, note 33, above.

³⁹ *Nixon v. Montana W. & S. Co.* (1914) 50 Mont. 95, 145 Pac. 8; *Zartner v. George* (1914) 156 Wis. 131, 145 N. W. 971.

⁴⁰ *San Antonio & A. R. Co. v. Morgan* (1898) 92 Tex. 98, 46 S. W. 28.

⁴¹ *Brown v. Salt Lake City* (1908) 33 Utah 222, 93 Pac. 570; *Peters v. Bowman* (1896) 115 Cal. 349, 47 Pac. 113; *Nichol v. Bell Tel. Co.* (1920) 266 Pa. 463, 109 Atl. 649; *McComb City v. Hayman* (1921) 124 Miss. 525, 87 So. 11.

A discussion of some of the recent cases illustrating the view that the principle does not apply to natural conditions should prove profitable. In *Salt River Valley Water Users' Assn. v. Compton*⁴² a thirteen year old boy climbed a pole supporting a high voltage electric power line in order to reach a bird's nest at the top and was severely burned when he came in contact with the wires. The court held that natural objects such as birds' nests do not come within the doctrine of attractive nuisance.⁴³ The better restatement of this rule on rehearing, that the doctrine does not apply to natural objects not placed on the defendant's property by the defendant, would reconcile the famous *Florida Magnolia Blossom Case*.⁴⁴ There the natural object, a magnolia tree in blossom, was by the defendant's own act of stringing its wires through the tree, rendered the medium by which children might be brought into contact with the dangerous instrumentality. For many years, by the overwhelming weight of authority, ponds have not been considered technical attractive nuisances because they were natural conditions and, with nothing more, were not dangerous per se.⁴⁵ This rule has been extended to artificial lakes and ponds also.⁴⁶ The rule and its exception have recently been stated in *Raeside v. Sioux City*.⁴⁷ "Ponds are not attractive nuisances per se, and in the absence of anything indicating something done by the landowner calculated to render the pond attractive to children, something more than water in its natural state, the doctrine of the turntable cases does not apply." Rafts, logs, boats, and planks floating in the pond have generally been conceded to convert the body of water into a dangerous instrumentality.⁴⁸ This leads to strange results. As was said in *Kelly v. First Bank and Trust Co.*,⁴⁹ "A child may see other children catching fish from a pond and may see fish in the pond, and if they undertake to fish and meet with accident there can be no recovery. But if the child sees floating logs in a pond on which other children are playing, a cause of action will arise if such child engages in the sport and loses its life."

⁴² (Ariz. 1932) 8 Pac. (2d) 249; affirmed 11 Pac. (2d) 841.

⁴³ Accord. *Myer v. Union L. H. & P. Co.* (1912) 151 Ky. 332, 151 S. W. 941; *Cox v. Des Moines Co.* (1930) 209 Ia. 931, 229 N. W. 244; N. Y., N. H. & H. R. Co. v. *Truckter* (1922) 260 U. S. 141. But see apparently contra, *Ark. P. & L. Co. v. Kilpatrick* (1932) 185 Ark. 678, 49 S. W. (2d) 353.

⁴⁴ *Stark v. Holtzelaw* (1925) 90 Fla. 207, 105 So. 330.

⁴⁵ *Fiel v. City of Racine* (1930) 203 Wis. 149, 233 N. W. 611; *Mindeman v. Sanitary District* (1925) 317 Ill. 529, 148 N. E. 304; *Raeside v. Sioux City* (1930) 209 Iowa 975, 229 N. W. 216.

⁴⁶ *Fiel v. City of Racine*, note 45, above.

⁴⁷ (1930) 209 Iowa 975, 229 N. W. 216.

⁴⁸ Note (1925) 36 A. L. R. 224.

⁴⁹ (1930) 256 Ill. App. 439.

Courts have hesitated to extend the doctrine to ordinary useful articles and machinery.⁵⁰ In *Hernandez v. Santiago Orange Growers Association*⁵¹ a ten year old child had been killed when a block of ice fell on him from a loading platform. The court refused to apply the attractive nuisance doctrine with the statement that it was never extended to ordinary loading operations. In *McDonald v. Shreveport R. Co.*⁵² electrical equipment operated in the usual manner on private property was not considered an attractive nuisance.⁵³ The same rule has been stated as to elevators.⁵⁴ *May v. Summons*,⁵⁵ at first inspection is apparently contra, in that an endless belt sawdust conveyer running between railroad cars and a plant was held to be an inherently dangerous instrumentality. However the real basis of this decision is that the doctrine was held applicable because the defendant knew that small boys often played and rode on the conveyer.

It is difficult to state the effect of the defendant's knowledge of the trespass upon the application of the doctrine. Many courts seem to stress the factor of actual knowledge.⁵⁶ In one case, strictly applying the doctrine in other regards, knowledge, actual or implied, was considered immaterial.⁵⁷ In *Williams v. Bolding*⁵⁸ the court held that it was necessary to show actual knowledge of at least some use by the injured party or others whenever the "place or appliance cannot be said to possess a quality calculated to attract children generally."

One of the greatest restrictions upon the application of the attractive nuisance doctrine has come through the repeated insistence that the object or attractive thing be so situated as to induce the trespass or be established near something else attractive which induced the trespass. In *Salt River Valley Water Users' Association v. Compton*,⁵⁹ even though the transmission pole to which were attached ladder steps was held to be an attractive nuisance, recovery was denied since the injured child was induced to trespass by a bird's nest on the pole and not by the pole itself.⁶⁰

⁵⁰ *United Zinc & Chem. Co. v. Britt* (1920) 258 U. S. 268.

⁵¹ (1930) 110 Cal. App. 229, 293 Pac. 875.

⁵² (1932) 174 La. 1023, 142 So. 252.

⁵³ See collection of cases cited in the McDonald decision.

⁵⁴ *Crawford v. Rice* (C. C. A. 1929) 36 Fed. (2d) 199; *Haley Motor Co. v. Boynton* (1929) 40 Ga. App. 675, 150 S. W. 862.

⁵⁵ (Fla. 1932) 140 So. 780.

⁵⁶ *May v. Summons*, above, note 55; *Hernandez v. Santiago Orange Growers' Ass'n*, above, note 51; *Miller v. Suburban Power Co.* (1930) 410 Ohio 70, 179 N. E. 202; *Adams v. Virginian Gasoline & Oil Co.* (1930) 109 W. Va. 631, 156 S. W. 63.

⁵⁷ *Morse v. Douglas*, note 20, above.

⁵⁸ (Ala. 1929) 124 So. 892.

⁵⁹ Note 42, above.

⁶⁰ *Accord. Erie R. Co. v. Hilt* (1917) 247 U. S. 97; *Carr v. Oregon-Wash. R.*

Likewise liability has been denied where the child trespasses and becomes injured by what ordinarily would be an attractive nuisance in order to win a bet or in answer to a dare.⁶¹ The general rule is that if the child once becomes a trespasser he may not invoke the attractive nuisance doctrine if subsequently he discovers the dangerous instrumentality, but several recent cases have disregarded this principle.⁶²

Liability in the view of some courts may hinge upon the question of whether the attracting nature of the lure arose from a static condition or from active operation of the owner, the owner being held responsible in the latter situation.⁶³ In *Arrington v. Town of Pinetops*⁶⁴ a child was killed by contact with wires a few feet above a pit containing machinery at work, and recovery was allowed under the attractive nuisance doctrine. The court in dicta seemed to approve the extension of liability even toward adults.

A warning that will bring home to the child's mind and intelligence that he has no right to interfere with the owner's property right will negative any inference of an invitation,⁶⁵ but it must be more than merely advisory.⁶⁶ If the warning is customarily disregarded, the issue is more closely drawn,⁶⁷ but in any case, the question of the sufficiency and effectiveness of the warning should go to the jury.⁶⁸

It has long been the tendency of many courts to restrict the doctrine to dangers which are latent.⁶⁹ Attractiveness and danger-

Co. (1927) 123 Ore. 258, 261 Pac. 899. Contra, *Zuidersick v. Minn. Utilities Co.* (1923) 155 Minn. 293, 193 N. W. 449.

⁶¹ *Metijeveh v. Dolese & Shepard Co.* (1931) 261 Ill. App. 498; *Burns v. City of Chicago* (1929) 338 Ill. 89, 169 N. E. 811; *State ex rel. v. Trimble* (1926) 315 Mo. 32, 285 S. W. 455.

⁶² *Gerneth v. Galbraith-Foxworth Lumber Co.* (Tex. Comm. App. 1931) 26 S. W. (2d) 191; *Jones-Savage Lumber Co. v. Thompson* (1930) 233 Ky. 198, 25 S. W. (2d) 373; *K. C. ex. rel. Barlow v. Robinson* (1929) 322 Mo. 1050, 17 S. W. (2d) 977; *Empire Gas & Fuel Co. v. Powell* (1931) 150 Okla. 39, 300 Pac. 788.

⁶³ *Ziehm v. Vale* (1918) 98 Ohio St. 306, 120 N. E. 702; *Hannan v. Erlick* (1921) 102 Ohio St. 176, 131 N. E. 504; *Gawronski v. McAdoo* (1920) 226 Pa. 449, 109 Atl. 763.

⁶⁴ (1929) 197 N. C. 433, 149 S. E. 549.

⁶⁵ *New York, N. H. & H. R. Co. v. Truchter* (1922) 260 U. S. 141; *Baltimore v. DePalma* (1920) 137 Md. 179, 112 Atl. 277; *Butz v. Cavanaugh* (1897) 137 Mo. 503, 38 S. W. 1104; *Davis v. Joslen Mfg. Co.* (1900) 29 R. I. 101, 69 Atl. 65; *Clark v. Northern P. R. Co.* (1902) 29 Wash. 139, 69 Pac. 636.

⁶⁶ *Hicks v. Pacific R. Co.* (1877) 64 Mo. 430.

⁶⁷ *Sandberg v. McGilvray-Richmond Granite Co.* (1924) 66 Cal. App. 261, 226 Pac. 28; *Kremposkey v. Mt. Jessup Coal Co.* (1920) 266 Pa. 568, 109 Atl. 766; *Burbridge v. Starr Mfg. Co.*, 54 U. S. 121.

⁶⁸ *Nashville Lumber Co. v. Bushee* (1911) 100 Ark. 76, 139 S. W. 301.

⁶⁹ *Erickson v. Great Northern R. Co.* (1900) 82 Minn. 60, 86 N. W. 462;

ousness alone have not in some states been sufficient.⁷⁰ The reason for this limitation in those states adopting it may lie in the asserted derivation of the attractive nuisance doctrine from those cases holding a landowner liable to a licensee for traps or concealed defects. In *Williams v. Bolding*⁷¹ the rationalization was made that since the doctrine was founded on the defendant's superior knowledge of the peril, the danger must be latent in order to authorize a recovery. It was said in *Stimpson v. Bartax Pipe Line Company*⁷² that the attractive nuisance principle was applicable only where there is a "concealed, hidden, or latent danger" and did not apply where a child climbed trees attached to oil tanks and then, in attempting to slide down a pipe, fell and was injured.

In *Ford v. Planters' Chemical & Oil Company*⁷³ a four year old child was injured by a spiral conveyer of steel and iron on the outside of the defendant's building within fifteen feet of a public highway and near a public playground. Recovery was refused on the ground that the danger was obvious and patent and because the plaintiff did not allege that children habitually resorted to the defendant's property. Anticipating the natural inquiry as to just what dangers are supposed to be obvious and patent to a four year old child the court said: "Common experience shows that a reasonable prudence may trust their avoidance to the universal instinct of self-preservation. As for children so little advanced as to be unable to recognize the most patent dangers, their inefficiency cannot be allowed to shift the care for them from their parents to strangers, or impose upon the owners of property the duty and liability, where otherwise none would exist." It is submitted that the very occurrence of the injury shows that the "instinct of self-preservation" is not strong enough, and that the argument against shifting responsibility for very young children from their parents to the owners of land might apply equally well to latent perils as to those patent.

Where the child is of sufficient age and capacity to appreciate the danger, the doctrine of attractive nuisance does not apply,⁷⁴ and this question ought certainly to be submitted to the jury.⁷⁵

Smith v. I. C. R. Co. (1916) 177 Ia. 243, 158 N. W. 546; *Riggle v. Lens* (1914) 71 Ore. 125, 142 Pac. 346; *Southwest Cotton Co. v. Clements* (1923) 25 Ariz. 124, 213 Pac. 1005.

⁷⁰ *Talardeau v. Malden & Melrose Gas Light Co.* (1931) 275 Mass. 196, 175 N. E. 471; *Ark. Valley Trust Co. v. McIlroy* (1911) 97 Ark. 160, 123 S. W. 816; *Kramer v. So. R. Co.* (1900) 127 N. C. 330, 37 S. W. 468.

⁷¹ (1929) 220 Ala. 328, 124 So. 892.

⁷² (1931) 120 Tex. 232, 36 S. W. (2d) 473.

⁷³ (Ala. 1930) 126 So. 866.

⁷⁴ *Hanna v. Iowa C. R. Co.* (1906) 129 Ill. App. 134.

⁷⁵ *Cahill v. E. B. & A. L. Stine & Co.* (1908) 153 Cal. 571, 96 Pac. 84; *Taylor v. Great Eastern Mining Co.* (1920) 45 Cal. App. 194, 187 Pac. 101.

As to the exact age limit for the application of the doctrine many courts follow the old common law rules which are generally applicable to culpability for crimes and answerability for contributory negligence.⁷⁶ In *Columbus Mining Co. v. Napier's Adm'r*⁷⁷ a fifteen year old boy, asphyxiated while playing in the drift mouth of the defendant's tunnel, was held conclusively to be presumed to be outside the age limit within which children are protected under the attractive nuisances principle.⁷⁸ However, it was held in *Louisville & N. R. Co. v. Hutton*⁷⁹ that a boy fourteen years and seven months old was only prima facie outside the age limit.⁸⁰ The rule is stated that where a person arrives at an age which renders him presumptively outside the class of youthful and indiscreet persons "he is not entitled to the benefits of the doctrine of attractive nuisances unless he shows that on account of his undeveloped mental condition he is entitled to be classed with those for whose benefit the doctrine was created." In *Empire Gas & Fuel Co. v. Powell*⁸¹ the plaintiff, a child under fourteen, entered a closed building and was injured by dynamite caps which he found there. The court held that a child under fourteen is presumed to be capable of nothing more than a technical trespass.⁸² In such a case the issue is generally left to the jury whether or not those between seven and fourteen have reached such an age of discretion as would remove them from the protection of the attractive nuisance doctrine. Here, however, the plaintiff testified that he knew that it was wrong to enter the building, knew that the caps would explode, etc. He thus convicted himself of negligence and knowledge; so that the court was authorized in directing a verdict against him as a matter of law. It has been said that "an examination of most attractive nuisance cases will show that in nearly every instance the child injured was less than ten years old."⁸³ This statement is certainly borne out by recent decisions.⁸⁴

⁷⁶ *Barnhill v. Mt. Morgan Coal Co.* (1910) 215 Fed. 608; *Shaw v. Chicago R. Co.* (Mo. 1922) 184 S. W. 1151.

⁷⁷ (1931) 239 Ky. 642, 40 S. W. (2d) 285.

⁷⁸ *Accord. C. of Ga. R. Co. v. Robins* (1922) 209 Ala. 6, 95 So. 367. Mines themselves have generally been held to be attractive nuisances as to the "damps" or poisonous gases issuing therefrom. *Drew v. Lett* (Ind. 1932) 182 N. E. 547; *Taylor v. Great Eastern Co.* (1920) 45 Cal. App. 194, 187 Pac. 101.

⁷⁹ (1927) 220 Ky. 277, 295 S. W. 175.

⁸⁰ See cases cited and discussed in the *Hutton* case, above, note 79.

⁸¹ (1931) 150 Okla. 39, 300 Pac. 768.

⁸² *City of Shawnee v. Cheek* (1913) 41 Okla. 227, 137 Pac. 724.

⁸³ *Belt R. Co. v. Charters* (1905) 123 Ill. App. 322.

⁸⁴ *Corder v. Houston Light & Power Co.* (Tex. Civ. App. 1931) 38 S. W. (2d) 606; *Indianapolis Motor Speedway Co. v. Shoup* (1929) 88 Ind. App. 572, 165 N. E. 246; *Wright v. Powers & Sons* (1931) 238 Ky. 572, 38 S. W. (2d) 465; *Huckleberry v. Mo. Pac. R. Co.* (1930) 324 Mo. 1025, 25 S. W. (2d) 980.

It has been held in one remarkable extension of the doctrine that one who creates a condition dangerous to children is liable to a third person who goes to the rescue of the children.⁸⁵ A recent Missouri case seems to ignore this view, however.⁸⁶ No case is immediately at hand as to the liability of one maintaining an attractive nuisance for an injury to an innocent third party through the agency of a child whose age is within the doctrine. In *Lipscomb v. Cincinnati N. & C. St. Ry. Co.*⁸⁷ the plaintiff was injured by a boy who was swinging on a rope left dangling by the defendant over a public sidewalk. There was an allegation of knowledge in the plaintiff's petition. The lower court sustained a demurrer, but this holding was reversed on appeal with the holding that knowledge of such a dangerous use established the plaintiff's case, regardless of the boy's age.⁸⁸ The court did not pass on a case of the absence of such actual knowledge coupled with the fact that the child was within the age limit of the doctrine.

There is a greater inclination to extend liability for dangerous attractions in public highways than those on private premises.⁸⁹ However by the weight of authority moving vehicles upon which children attempt to catch rides are not attractive nuisances, and there is no duty to guard against such trespasses.⁹⁰

Many states have declared themselves in line with the modern tendency to limit the scope of application of the doctrine.⁹¹ It has long been an established rule in Georgia that the principles of the "turntable cases" will not be extended to cases which upon their facts do not come "strictly and fully" within the principles upon which those cases rest.⁹² The decision of the Supreme Court of the United States in *United Zinc & Chemical Co. v. Britt*⁹³ is frequently cited to the effect that this doctrine which is admittedly an exception to the established rules of law must be cautiously applied.

⁸⁵ *Christiansen v. Los Angeles & St. L. R. Co.*, note 19, above.

⁸⁶ *Harakos v. Dickie*, above, note 36.

⁸⁷ (1931) 239 Ky. 587, 39 S. W. (2d) 991.

⁸⁸ Cf. *Harrington v. Border City Mfg. Co.* (1925) 240 Mass. 170, 132 N. E. 721, defendant held liable where plaintiff was hit by a baseball batted from defendant's land by boys whom the defendant knew were playing there.

⁸⁹ *Indianapolis v. Emmelman* (1886) 108 Ind. 530, 9 N. E. 155; *Kressine v. Jamesville Traction Co.* (1921) 175 Wis. 192, 184 N. W. 771; *Zuidersick v. Minn. Utilities Co.* (1923) 155 Minn. 293, 193 N. W. 449; *Doyle v. Chattanooga* (1913) 128 Tenn. 433, 161 S. W. 997.

⁹⁰ See cases cited at (1925) 36 A. L. R. 151 ff.

⁹¹ *United Zinc & Chem. Co. v. Britt* (1920) 258 U. S. 268; *Bonhomie & H. S. Ry. Co. v. Hinton*, above, note 33; *Carr v. Oregon-Wash. R. Co.* (1927) 123 Ore. 259, 261 Pac. 899; *Kelly v. Benos* (1909) 217 Mo. 1, 116 S. W. 557; *Salt River Valley Water Users' Ass'n v. Compton*, above, note 42; *Giannini v. Compodonico* (1917) 176 Cal. 548, 169 Pac. 80.

⁹² *Haley Motor Co. v. Boynton*, above, note 54.

⁹³ (1920) 258 U. S. 268.

It is to be regretted that this review of the recent decisions does not show a greater consistency in the application of the law to the group of specific fact situations which have arisen in connection with this topic. The present uncertainty of judicial reasoning has been and is a temptation to litigation. It is submitted that this unhappy situation will not be remedied until the courts definitely adopt a single legal theory as explaining the attractive nuisance doctrine and determine all future controversies by reference to this fundamental test.

EDWARD HARMAN, '33.