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THE ATTRACTIVE NUISANCE DOCTRINE

By Robert E. More of the Denver Bar

ALTHOUGH there are earlier cases bearing on the "Attractive Nuisance" Doctrine, there was little direct discussion of it before 1870, and it is probable that the general interest of the profession in the question was first excited by the decision of the United States Supreme Court in 1873 in *Sioux City, etc.,* R. R. Co. v. Stout.[1]

In other countries the question has not received as much judicial discussion as in the United States. Various English cases have been cited in the American courts, but none of them appears to be a direct decision. Thus *Lynch v. Nurdin*[2] is often referred to as being in support of the doctrine of the Stout case. In the English case, a man left his horse and cart unattended in a *public street.* A child got upon the cart in play and was hurt. The owner was held liable. There the alleged "attractive" chattels were left in a *public* place where the plaintiff and the defendant "had an equal right to be." This, of course, is very different from the case where the owner leaves the chattel on his *own* land, where the child has no right to come. The distinction is clearly pointed out by Mr. Justice Peckham in a leading New York case.[3] The English authorities are in confusion.[4]

The point has been considered in the Scotch courts, but the law there does not seem decisively settled.[5]

In Australia the court of New South Wales favors the land owner.[6]

The Doctrine is, therefore, not only typically American, but is chiefly developed in the American cases. The *Stout*

1—17 Wall. 657.
2—(1841) 1 Q.B. 29.
3—*Walsh v. Fitchburg R.R. Co.,* 145 N. Y. 301 at 311, 312.
4—See *Clerk and Lindsell on Torts,* 2nd Ed. 436; *Beven on Negligence,* 2nd Ed. 183-190.
5—See *Clegg on Reparation,* 231-232; and Guthrie Smith on Damages, 144-147.
6—See *Patterson v. Borough of Woollahra,* 16 New South Wales Law Reports—Cases of Law, 229; also *Slade v. Victorian Railway,* 15 Victorian Law Reports, 190.

case, as is well known, was one where a turntable owned by a railroad was left unlocked and unguarded, although it was so located that children could be attracted to it from places where they might lawfully be, and although the railroad had actual knowledge that children had been in the habit of playing upon it in the past.

Following the *Stout* case, the Supreme Court of Minnesota in the famous case of *Keffe v. Milwaukee and St. Paul R. Co.*[7] fortified the Federal decision and laid down, it is submitted, sounder principles for the future application of the doctrine.

Since that time, many courts have had occasion to accept or reject in whole or in part the "attractive nuisance" doctrine. Courts of New Hampshire, Tennessee, Massachusetts and New York have flatly refused to follow the *Stout* case, even in the case of a turntable. In cases of alleged "dangerous attractions" other than turntables, decisions favorable to the land owner have been rendered in Arkansas, California, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, Pennsylvania, and Texas.

A very eminent authority upon the law of Torts has argued at length that the doctrine is unsound and should never be applied.[8]

From the welter of decisions on this subject, it is somewhat difficult to state definitely just what the law is. It is believed, however, that the four general principles to be developed hereinafter are supported not only by the numerical weight of authority, but also by sound legal principles. What, then, are the essential elements of the Attractive Nuisance Doctrine as laid down in decisions by courts which support this theory of a landowner's liability to children?

1. *There is no general legal duty, either to children or adults who enter defendant's property without invitation, express or implied, to keep dangerous things from one's land or to use care about them.*

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[7]—(1875) 21 Minn. 207.

[8]—See article by Jeremiah Smith in 11 *Harvard Law Review*, at pages 349 and 434. This article reviews all the cases that had been decided up to the time the article was published and authorities in support of statements heretofore made may be found at the end of Judge Smith's discussion. See also an article by Manley O. Hudson in 36 *H.L.R.* 836.

It is elementary that no duty is owed to trespassers, other than the duty not to injure them wilfully. Accordingly, where a trespasser has been injured, it is immaterial whether or not defendant has failed to exercise due care. There being no duty, the question of due care is never reached. Of course defendant cannot injure plaintiff intentionally. Traps and spring guns are within this latter category.

The Supreme Court of the United States held in a recent decision, which modified the earlier holding in the *Stout* case to a considerable degree, that *"infants have no greater right to go upon other people's land than adults, and the mere fact that they are infants imposes no duty upon land owners to expect them and prepare for them."*[9]

This fundamental principle was recognized by the Colorado Supreme Court in the case of *Hayko v. Coal Company.*[10] There plaintiff, a boy ten years old, entered an open rough board shack on defendant's premises and abstracted therefrom a box of dynamite caps. Plaintiff tried to pick out the contents of one of the caps with a pin; it exploded and blew off parts of several fingers. The plaintiff contended that the shack and caps were an attractive nuisance and that in any event defendant was negligent in keeping the caps where children could get them. On this second proposition the Court said:

"We know of no general legal duty either to children or adults who enter without invitation, express or implied, to keep dangerous things from one's land or to use care about them, and yet plaintiff's argument premises such a duty. It may be conceded, as far as this point is concerned, that I may not wilfully set a trap, e.g., a spring gun, that I owe a duty of care so as not to entrap one whom I have impliedly invited, as by a walk and steps built up to my front door, or a child whom I have tempted to trespass, and that what would not be a trap to an older person would be to a very young one, but these points do not reach the plaintiff's proposition and we do not assent to it."

2. *The doctrine is inapplicable unless defendant knowingly keeps upon his premises in an unguarded condition an instrumentality that is "unusually" alluring to children.*

The Federal Supreme Court said in the *United Zinc Case supra:*

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[9]—United Zinc & Chemical Co. v. Van Britt (decided March 27, 1922) 258 U. S. 268; 42 Sup. Ct. Rep. 299; 66 Law Ed. 615 at 617.
[10]—77 Colorado, 143.

"On the other hand, the duty of one who invites another upon his land, not to lead him into a trap, is well settled, and *while it is very plain that temptation is not invitation,* it may be held that *knowingly* to establish and expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is *certain* to attract them, has the legal effect of an invitation to them, although not to an adult. *But the principle, if accepted, must be very cautiously applied.*"

A few courts have failed to heed the admonition of the Federal Supreme Court that the doctrine "must be cautiously applied". The majority of jurisdictions, however, have recognized that the doctrine must be narrowly limited and that great injustice will result unless the Federal Supreme Court's admonition is heeded.

This is the law in Colorado. In the *Hayko* case Judge Denison said:

"Courts have said and held that it is negligent to maintain on one's own premises any agency that is dangerous and attractive to children. This proposition has been condemned by some courts and even ridiculed. * * * It leads to such absurdities that it is easy to ridicule it; for example, an apple tree bearing green apples is such an agency. It will not do to say that every attractive thing is sufficient to charge a defendant with negligence in enticing children to trespass, because there is nothing that can be said not to be attractive to a child. * * * The attraction must be *unusual* * * * and we think that, as a matter of law, a shack in a mining camp is not an *unusual* attraction."

3. *The doctrine is not applicable unless the instrumentality in question is so located that children can be attracted to it without first committing a trespass.*

It is obvious that this exceptional doctrine can have no applicability unless the attractive, dangerous instrumentality is so situated that children may be attracted by it when acting within their rights. *If the child must first become a trespasser before he can even see the dangerous instrumentality in question, then the doctrine cannot be availed of by him.*

The reason for this rule is apparent. We have the basic principle that no duty is owed to a trespasser save to refrain from injuring him wilfully or by traps. Even though a defendant carelessly maintains upon his premises a dangerous instrumentality he is not liable to a trespasser for the very obvious reason that he owes no duty to one who is trespassing. Children are considered as invitees rather than trespassers, IF defendant has maintained upon his premises something

that is so *"unusually"* attractive that they are drawn to it "as mechanically as a fish is drawn to a bait." But it is obvious that the trespass is never excused nor the invitation implied unless the child is *in fact* attracted by the alluring nuisance. To put a clear case, if a ten-year-old boy climbs over the high board fence surrounding the plant of the General Chemical Company near Valverde, Colorado, and then while wandering around is attracted to a stationary ladder on a vat of sulphuric acid, climbs up and falls in it, it would be entirely immaterial that this ladder and vat were the most attractive things in the world, to children. The child was a trespasser when he climbed over the fence. *The ladder and vat were not visible to him until AFTER he became a trespasser.* His trespass is not excused therefore by the attractive nuisance, as the vat and ladder were not visible to the child when he was at any place where he had a right to be. No implied invitation was extended to him to climb up the ladder. The child was not following the figurative bait but was wilfully trespassing upon another's property.

The Supreme Court of Illinois[11] first announced this qualification of the general doctrine. In the case just cited the dangerous instrumentality was a hoist used by defendant to elevate bricks and mortar in a building under construction. Plaintiff went into the building without being attracted by the hoist, and having thus trespassed saw the hoist, put his hand upon it and was injured. In holding for the defendant the Court said, at page 170:

> "It is a necessary element of the liability that the thing which causes the injury is tempting to children, and constitutes a means of attracting them upon the premises, which the owner should anticipate. The dangerous thing must be so located so as to attract them from the street or some public place where they may be expected to be. An owner would not be liable if he maintained something for his own use which might be dangerous, but which would only be found by the children going upon his premises as trespassers."

In the *United Zinc Case, Supra,* the Federal Supreme Court adopted the Illinois rule.

This same distinction has been made by the Colorado Supreme Court in the *Hayko Case, Supra.* The Court first held that the shack itself was not "unusually attractive"; then

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[11]—*McDermott v. Burke,* 256 *Ill.* 401; 100 N. E. 168.

in answer to plaintiff's contention that dynamite caps constituted an attractive nuisance, the Court pointed out that "plaintiff could not see the box of caps till he had trespassed, therefore, the caps cannot be classed as the attraction."

4. *The doctrine is not applicable unless children have been attracted by the nuisance before and defendant knows of this fact.*

In the *United Zinc Case, Supra,* Mr. Justice Holmes was considering a poisonous body of water that looked clear and attractive. This body of water had not been frequented by children prior to this time and in holding for defendant, Mr. Justice Holmes said at page 617:

"It does not appear that children were in the habit of going to the place, so that foundation also fails."

In *Hardy vs. Missouri Pac. R. R. Co.*[12] defendant maintained a concrete conduit, seven hundred feet long, covering a shallow stream. The ends were open. At times defendant discharged hot water from its boilers through this conduit. A boy twelve years old attempted to walk through this conduit and was killed by a discharge of steam and hot water. The evidence established that children had walked through this conduit on at least three instances prior to the accident in question, *but there was no evidence that defendant knew this fact.* The lower court directed a verdict for defendant, and the case was heard on appeal by Judges Sanborn, Stone and Munger. In affirming the decision of the lower court, Judge Stone says:[13]

"Nothing approaching knowledge by defendant of any passage through the conduit of boys at any time was shown, and such knowledge cannot be inferred nor imputed from the three trips in the course of four years shown in the evidence. Such knowledge cannot be founded upon the circumstances that children played about the openings of the conduit. There is no limit, except physical ability, to what a child may do."

No attempt has been made to cover many of the numerous fascinating branches of this doctrine. The few principles outlined above being sponsored by the Colorado Supreme Court, the Circuit Court of Appeals of the 8th Circuit or the Federal

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[12]—266 Fed. 860 (C. C. A. 8th Circuit).
[13]—At page 861.

Supreme Court are of interest to Colorado lawyers and controlling in this state until these respective tribunals take a different view of the matter. It is believed that these fundamentals will furnish a basis for deciding most attractive nuisance cases and are based upon sound legal principles. May it be hoped, therefore, that in this jurisdiction the courts will continue to adhere to this humane, logical and well supported group of rules.